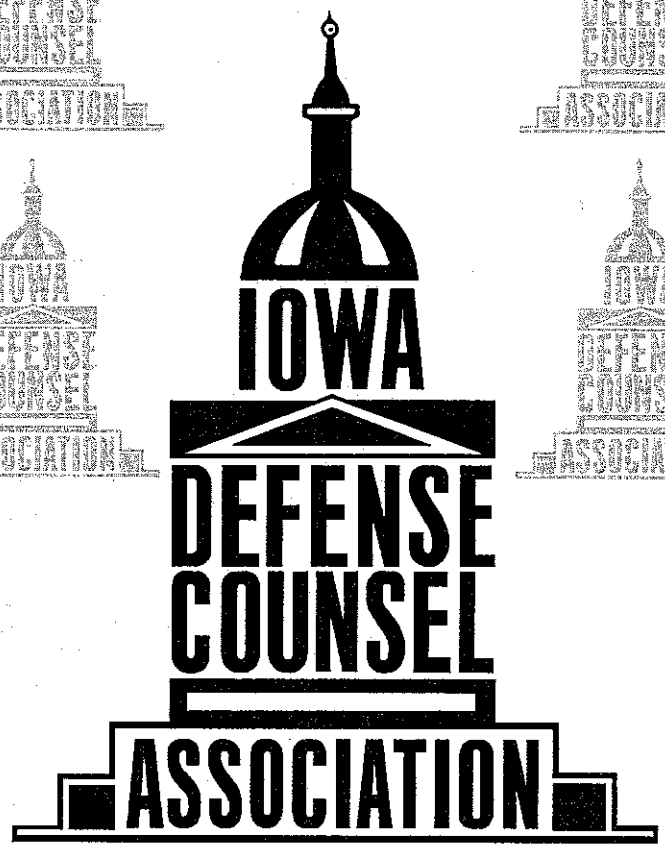
VOLUME I



2000
Annual Meeting & Seminar
September 20, 21 & 22

Embassy Suites Hotel
101 East Locust Street
Des Moines, Iowa 50309

2000 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR SCHEDULE

WEDNESDAY, SEPTEMBER 20, 2000

9:00 a.m. **Registration**

11:00 a.m. **Board of Directors Meeting**

1:00 - 1:15 p.m. **Welcome & Report of Association**
- IDCA President, Robert D. Houghton
  Shuttleworth & Ingersoll, P.C.
  Cedar Rapids, IA

1:15 - 1:35 p.m. **Supreme Court Update**
- Honorable Arthur A. McGiverin
  Chief Justice, Iowa Supreme Court

1:35 - 2:15 p.m. **Better than Shepardizing; The Year in Review of Iowa Supreme Court and Court of Appeals Decisions - Case Law Update I (Employment, Attorneys, Commercial, Constitutional, Contracts, Damages, Government)**
- Anjela A. Shutts, Whitfield & Eddy, P.L.C.
  Des Moines, IA

2:15 - 2:45 p.m. **Offers to Confess: Their Effective Use**
- Chad M. Von Kampen
  Simmons, Perrine, Albright & Ellwood, P.L.C.
  Cedar Rapids, IA

2:45 - 3:15 p.m. **Workers' Compensation Update**
- Honorable Iris J. Post
  Iowa Industrial Commissioner
  Des Moines, IA

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

3:30 - 4:00 p.m. **Defending the Environmental Claim**
- Steven J. Pace
  Shuttleworth & Ingersoll, P.C.
  Cedar Rapids, IA

4:00 - 5:00 p.m. **Defending Insurance Agents**
- Maurice B. Nieland
  Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser
  Sioux City, IA

6:00 - 7:30 p.m. Reception - Embassy Suites

THURSDAY, SEPTEMBER 21, 2000

8:30 - 9:00 a.m. **Ethical Issues for the Iowa Defense Attorney**
- Charles L. Harrington
  Iowa State Bar Association, Des Moines, IA

9:00 - 9:30 a.m. **The Year in Review of Iowa Supreme Court and Court of Appeals Decisions**
Case Law Update II (Negligence, Torts, Indemnity)
- Paul P. Morf
  Simmons, Perrine, Albright & Ellwood, P.L.C.
  Cedar Rapids, IA

9:30 - 10:15 a.m. **Nuts and Bolts of Products Liability: Suggestions on Handling Troublesome Issues for Defense Attorneys in Products Cases**
- Kevin M. Reynolds
  Whitfield & Eddy, P.L.C.
  Des Moines, IA

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

10:30 - 11:15 a.m. **Defense of Trademarks and Trade Names; Internet Abuse of Trade Names and Trademarks**
- Edmund J. Sease
  Zarley, McKee, Thomte, Voorhees & Sease
  Des Moines, IA
- Michael G. Voorhees
  Zarley, McKee, Thomte, Voorhees & Sease
  Des Moines, IA

11:15 - 11:45 a.m. **The Year in Review of Iowa Supreme Court and Court of Appeals Decisions**
Case Law Update III (Appellate Procedure, Civil Procedure, Courts - Jurisdiction and Trial, Evidence, Insurance, Judgment & Limitation of Actions, Workers' Compensation)
- Jason T. Madden
  Bradshaw, Fowler, Proctor & Fairgrave, P.C.
  Des Moines, IA

11:45 - 12:00 p.m. **2000 Legislative Report**
- Robert M. Kreamer
  IDCA Legislative Lobbyist
  Des Moines, IA

12:00 - 12:30 p.m. **LUNCH**

12:30 - 1:00 p.m. **Views from the Bench - Court of Appeals**
- Honorable Michael J. Streit
  Court of Appeals, Des Moines, IA

1:00 - 1:30 p.m. **Subrogation Issues Arising out of the Defense of Personal Injury Cases**
- John B. Grier
  Cartwright, Druker & Ryden
  Marshalltown, Iowa

1:30 - 2:15 p.m. **Recent Developments in Employment Law**
- Gordon R. Fischer
  Bradshaw, Fowler, Proctor & Fairgrave, P.C.
  Des Moines, IA

2:15 - 3:00 p.m. **Defending Punitive Damage Claims**
- Thomas D. Waterman
  Lane & Waterman
  Davenport, IA

3:00 - 3:15 p.m. **BREAK**

3:15 - 4:00 p.m. **New Model Rules of Professional Conduct**
- David L. Phipps
  Whitfield & Eddy, P.L.C.
  Des Moines, IA

4:00 - 5:00 p.m. **New Developments for the Defense Lawyer: The Restatement Third - Compensation or Direction by Third Person: Ethical Issues**
- C. Bradley Price
  DeVries, Price & Davenport, A.P.C.
  Mason City, IA

Recommended Case Handling Guidelines for Insurers and for Law Firms - Where Do We Go Now?
- Wendy N. Munyon
  Grinnell Mutual Resinsurance Company
  Grinnell, Iowa

In the Matter of Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures In the Supreme Court of the State of Montana
- Alanson K. Elgar
  Elgar Law Office
  Mount Pleasant, IA

The ABA Model Rules and Integration of the Same in Your Practice
- Sharon Soorholtz Greer
  Cartwright, Druker & Ryden
  Marshalltown, IA

6:30 - 9:00 p.m. **Reception and Banquet**
Glen Oaks Country Club
6:30 to 7:30 p.m. - Reception
7:30 p.m. - Banquet

FRIDAY SCHEDULE ON NEXT PAGE

FRIDAY, SEPTEMBER 22, 2000

7:00 - 8:30 a.m. **Board of Directors**

8:30 - 8:45 a.m. **Update from the Defense Research Institute**
- Timothy P. Schimberg
  DRI Representative
  Fowler, Schimberg & Flanagan
  Denver, Colorado

8:45 - 9:30 a.m. **New Developments Under the ADA**
- Iris E. Muchmore
  Simmons, Perrine, Albright & Ellwood, P.L.C.
  Cedar Rapids, IA

9:30 - 10:15 a.m. **Good Faith Settlements and the Right to a Defense in Iowa**
- Gregory G. Barnsten
  Smith Peterson Law Firm
  Council Bluffs, IA

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

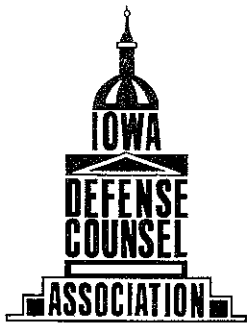
10:30 - 11:15 a.m. **Pretrial Motions**
- Michael J. Coyle
  Fuerste, Carew, Coyle, Jurgens & Sudmeier, P.C.
  Dubuque, IA

11:15 - 12:00 p.m. **Medical Malpractice Defense: The Most Common Mistakes, Observations and Suggestions from Filing Through Verdict**
- Thomas A. Finley
  Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C.
  Des Moines, IA

12:00 - 12:30 p.m. **LUNCH**

12:30 - 1:15 p.m. **Iowa Federal Courts Entering the 21ST Century**
- Honorable Charles R. Wolle,
  Des Moines, IA

1:15 - 2:45 p.m. **Mediation from the Plaintiff, Defense and Mediator's Point of View - A Panel Discussion**
- David S. Wiggins (for the Plaintiff)
  Wiggins & Anderson, P.C.
  West Des Moines, IA
- Neven J. Mulholland (for the Plaintiff)
  Johnson, Erb, Bice, Kramer, Good & Mulholland, P.C.
  Fort Dodge, IA
- John M. French (for the Defense)
  Peters Law Firm, P.C.
  Council Bluffs, IA
- Bruce L. Walker (for the Defense)
  Phelan, Tucker, Mullen, Walker, Tucker & Gelman, L.L.P.
  Iowa City, IA
- Paul C. Thune (Mediator)
  Paul Thune Law Firm
  West Des Moines, IA



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1999 - 2000

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Cedar Rapids, IA 52406

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Marion L Beatty
P O Box 28
Decorah, IA 52101

SECRETARY

Michael W Ellwanger
522 4th St., Suite 300
Sioux City, Iowa 51101

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

BOARD OF DIRECTORS

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Michael W Thrall - 2000
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Sharon Soorholtz Greer - 2001
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Jaki K Samuelson 1997-1998
Mark L Tripp 1998-1999

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* Frank W Davis
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ANNUAL MEETING CHAIRPERSONS

General Program - James A. Pugh
Ginger Plummer

Program Chair - Marion L Beatty

* Deceased

New Members

Please welcome the following new members admitted to the Iowa Defense Counsel Association from September, 1999 through August, 2000.

Darron L. Brawner, Sioux City, Iowa

Christopher L. Bruns, Cedar Rapids, Iowa

John T. Clendenin, Des Moines, Iowa

Debra L. Dalton, Des Moines, Iowa

Michael J. Davenport, Council Bluffs, Iowa

Michele A. Gooding, West Des Moines, Iowa

Matthew J. Haindfield, Des Moines, Iowa

Allison M. Heffern, Cedar Rapids, Iowa

Stephanie L. Hinz, Cedar Rapids, Iowa

E. J. Kelly, Des Moines, Iowa

Stephanie L. Marett, Des Moines, Iowa

Paul P. Morf, Cedar Rapids, Iowa

Vincent A. Purtell, Sioux Falls, South Dakota

Brent R. Ruther, Burlington, Iowa

Sara Sersland, Des Moines, Iowa

Mark A. Teigland, Jewell, Iowa

Jeff W. Wright, Sioux City, Iowa

IOWA DEFENSE COUNSEL ASSOCIATION
STANDING COMMITTEES

COMMITTEE NAME	COMMITTEE CHAIRPERSON
1. AMICUS CURIAE Monitors cases pending in the Iowa Supreme Court and identifies significant cases warranting amicus curiae participation by IDCA. Prepares or supervises preparation of amicus appellate briefs	**Michael W. Thrall** Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C. 700 Walnut Street, Suite 1600 Des Moines, Iowa 50209 Phone: (515) 283-3100 Fax: (515) 283-3108
2. CLE COMMITTEE Assists president-elect in organizing annual meeting events and CLE Programs.	**Marion L. Beatty** Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C. 301 West Broadway, P.O. Box 28 Decorah, Iowa 52101-0028 Phone: (319) 382-4226 Fax: (319) 382-3783 E-mail: millerlaw@salamander.com
3. CLIENT RELATIONS Liaison role with constituent client groups such as insurance companies and businesses. Acts as resource for maintaining and improving satisfactory relations between defense attorneys and clients.	**John T. McCoy** Yagla, McCoy & Riley Lincoln Park Building 327 E. 4th Street, Suite 300 P.O. Box 960 Waterloo, Iowa 50704-0960 Phone: (319) 234-4631 Fax: (319) 234-8346 **Sam D. Waters** Continental Western Insurance Co. P.O. Box 1954 11201 Douglas Des Moines, Iowa 50306 Phone: (515) 278-3000
4. COMMERCIAL LITIGATION Monitor current developments in the area of commercial litigation and act as resource for Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on commercial litigation issues.	**Richard G. Santi** Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C. 100 Court Avenue, Suite 600 Des Moines, Iowa 50309 Phone: (515) 243-7611 Fax: (515) 243-2149

COMMITTEE NAME	COMMITTEE CHAIRPERSON
5. JURY INSTRUCTIONS Monitor activities of ISBA civil jury instructions committee and changes in civil jury instructions, recommend positions of IDCA on proposed instructions and addition to IDCA recommended jury instructions.	**Gregory G. Barnsten** Smith Peterson Law Firm 35 Main Place, Suite 300 P.O. Box 249 Council Bluffs, Iowa 51502-0249 Phone: (712) 328-1833 Fax: (712) 328-8320
6. LAW SCHOOL PROGRAM/ TRIAL ACADEMY Liaison with law school trial advocacy programs and young lawyer training programs.	**Sharon Soorholtz Greer** Cartwright, Druker & Ryden 112 W. Church Street P.O. Box 496 Marshalltown, Iowa 50158 Phone: (515) 752-5467 Fax: (515) 752-4370
7. LEGISLATIVE Monitor legislative activities affecting judicial system; advise Board of Directors on legislative positions concerning issues affecting members and constituent client groups.	**J. Michael Weston** Moyer & Bergman, P.L.C. Commerce Exchange Building 2720 First Avenue N.E. P.O. Box 1943 Cedar Rapids, Iowa 52406-1943 Phone: (319) 366-7331 Fax: (319) 366-3668
8. MEMBERSHIP/DRI STATE REPRESENTATIVE Review and process membership applications and communications with new Association members. Responsible for membership roster. To be held by the current State DRI representative.	**Gregory M. Lederer** Simmons, Perrine, Albright & Ellwood, P.L.C. 115 Third Street S.E., Suite 1200 Cedar Rapids, Iowa 52401 Phone: (319) 366-7641 Fax: (319) 366-1917
9. TORT AND INSURANCE LAW Monitor current developments in the area of tort and insurance law; act as resource for Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on tort and insurance law issues.	**Terry J. Abernathy** Pickens, Barnes & Abernathy 10th Floor American Building Cedar Rapids, Iowa 52401 Phone: (319) 366-7621 Fax: (319) 366-3158

COMMIITTEE NAME	COMMITTE CHAIRPERSON
10. PRODUCT LIABILITY Monitor current development in the area of product liability; act as resource for Board of Directors and membership on commercial litigation issues. Advise and assist in amicus curiae participation on product liability issues.	**Kevin M. Reynolds** Whitfield & Eddy, P.L.C. 317 Sixth Avenue, Suite 1200 Des Moines, Iowa 50309-4110 Phone: (515) 288-6041 Fax: (515) 246-1474 E-mail: reynolds@whitfieldlaw.com
11. RULES Monitor activities of ISBA and supreme court rules committees and monitor changes in Rule of Civil Procedure, recommend positions of IDCA on proposed rule changes.	**Michael W. Thrall** Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C. 700 Walnut Street, Suite 1600 Des Moines, Iowa 50309 Phone: (515) 283-3100 Fax: (515) 283-3108
12. WORKERS' COMPENSATION	**E. J. Kelly** Hopkins & Huebner, P.C. 2700 Grand Avenue, Suite 111 Des Moines, Iowa 50312 Phone: (515) 244-0111 Fax: (515) 244-8935
13. PROFESSIONAL LIABILITY	**Joseph L. Fitzgibbons** Fitzgibbons Law Firm 108 North 7th Street P.O. Box 496 Estherville, Iowa 51334 Phone: (712) 362-7215 Fax: (712) 362-3526
14. EMPLOYMENT LAW	**Gordon R. Fischer** Bradshaw, Fowler, Proctor & Fairgrave, P.C. 801 Grand Avenue, Suite 3700 Des Moines, Iowa 50309-2727 Phone: (515) 243-4191 Fax: (515) 246-5808

2000 ANNUAL MEETING & SEMINAR

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Better than Shepardizing: The Year in Review of Decisions from the Iowa Supreme Court and Court of Appeals

IOWA APPELLATE COURT UPDATE

Employment, Attorneys, Commercial, Constitutional, Contracts, Damages & Government

Anjela A. Shutts
Whitfield & Eddy, P.L.C.
317 Sixth Avenue, Suite 1200
Des Moines, Iowa 50309
(515) 288-0641

A

I. EMPLOYMENT LAW

Schoff v. Combined Insurance Company of America
604 N.W. 2d 43 (Iowa 1999).

Schoff was a sixteen-year employee of MidAmerican Energy. In 1996, Schoff interviewed with Michael Hageman, a district manager of combined insurance. At the time of the interview, Schoff completed a written application for employment, which included a statement that a condition of employment was being able to obtain bonding approval. The application asked about criminal history, which included a question "Have you ever been convicted of a felony?" Schoff answered no, but had been convicted of two serious misdemeanors, however did voluntarily disclose these charges to Hageman during the interview. Hagemen questioned him about the incidents resulting in the convictions and Schoff answered all of Hageman's questions. Hageman never asked whether Schoff had been charged with a felony, and Schoff did not volunteer that the original charges resulting in the misdemeanor convictions were felony charges. Schoff asked Hageman whether this incident would cause any problem with Schoff's potential employment with Combined and Hageman assured Schoff "as long you have no felony convictions, your criminal record will be no problem."

Schoff was offered and accepted a sales position with Combined. Prior to accepting the offer, Schoff again specifically asked Hageman whether his criminal record would have any impact on his employment with Combined. Hageman again assured Schoff that it would not, and stated that only felony convictions were relevant to employment and bonding decisions.

After accepting the position with Combined, Schoff was required to apply for fidelity bond coverage. Hageman completed the enrollment form for Schoff, in Schoff's presence. Hageman did not answer the question "Have you ever been convicted, sentenced or imprisoned?" At that time, he told Schoff again that only felony convictions were relevant. Hageman simply wrote "n/a" after the question.

Schoff later signed an employment contract with Combined, which was a standard agreement form and explicitly stated that the employment was "terminable at will by either party." Schoff began his employment for Combined, however after only three months on the job, was taken off because his application for a fidelity bond had been denied. Schoff was told that the bonding company refused to issue a bond due to his criminal record. Combined officially terminated his employment with the company, basing the decision on Schoff's failure to obtain bonding coverage due to his criminal record and failure to disclose that information.

Schoff filed suit against Combined alleging: 1) promissory estoppel; and 2) Combined was negligent in the training and supervision of its district manager (Hageman) in his performance in interviewing and hiring employees. The district court granted Combined Insurance's Motion for Summary Judgment. Schoff appealed.

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HELD:
For the first time, the Iowa Supreme Court found that promissory estoppel can be a theory of recovery in an employment-at-will situation. "Promissory estoppel is simply another theory by which an employer may be held to his promise." The Iowa Supreme Court held the following are the elements of promissory estoppel in an employment situation:

1) A clear and definite promise;
2) The promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he could not act;
3) The promisee acted to his substantial detriment in reasonable reliance on the promise;
4) Injustice can be avoided only by the enforcement of the promise.

Despite this finding, the Iowa Supreme Court found that as a matter of law, the statements made to Schoff did not constitute a clear and definite promise by Combined that Schoff would not be fired if he failed to qualify for a bond or he would be bonded despite his felony charges or his failure to reveal his criminal record.

The Iowa Supreme Court also upheld the district court's granting of summary judgment on the basis of negligent supervision of hiring because Hageman, the company's district manager, was not in the business of supplying information.

Balmer v. Hawkeye Steel
605 N.W. 2d 639 (Iowa 2000).

Pricilla Balmer was employed by Hawkeye Steel from February 1994 to April 1996. She was an employee-at-will. In July 1996, Balmer sued Hawkeye, alleging that while she was employed with Hawkeye, she was subjected to verbal and mental harassment and abuse and that Hawkeye did nothing to stop the conduct. She further alleged that her employment conditions had become so intolerable that she was forced to quit, resulting in what she claimed was a constructive discharge. Balmer did not allege that Hawkeye breached an employment contract or violated in any state or federal civil rights laws or public policies of Iowa. She alleged only that she had been constructively discharged. The issue was whether constructive discharge, standing alone is an actual tort in the state of Iowa.

HELD:
Constructive discharge standing alone is not an actual tort in Iowa. Instead constructive discharge is actionable only when an express discharge would be actionable in the same circumstances. Something more is needed, such as incoming claim that the discharge was the result of the legal conduct, such as the violation of public policy or statutory law or breach of a contract.

A

Clements v. Gamblers Supply Management Company
610 N.W. 2d 847 (Iowa 200).

Plaintiffs Byron and Mark Clements were employed by Gamblers Supply. Byron was the director of marine operations and Mark was the manager of marine operations. Both were licensed captains. Gamblers Supply operated a casino on the Miss Marquette Riverboat and at the time of the Clements' employments, the riverboat was required to leave the dock a certain number of times per year.

The Clements discovered that their employer was violating various federal laws and regulations regarding the protection and repair of the riverboat. Upon discovery, they confronted the management about the violations. Later on, Byron informed the riverboat management that he would cooperate in the structure modifications that would affect the boat's stability in the absence of express coast guard approval. Both were later terminated.

The district court granted Gamblers Supply's motion for summary judgment on the basis that the plaintiffs were "seamen" and therefore, federal maritime law preempted their state law claims. The plaintiffs appealed.

HELD:
The Supreme Court reversed the trial court's award of summary judgment and remanded the matter to trial on the basis that the state law claim, wrongful termination, was not precluded by federal law. The court found that there is no fundamental tenet of substantive maritime law which is frustrated by the state law of retaliatory district claim that the plaintiffs were making.

Fitzgerald v. Salsbury Chemical Inc.
613 N.W. 275 (Iowa 2000)

Fitzgerald was employed by Salsbury Chemical as a production foreman at its Charles City plant. Fitzgerald was terminated from his employment after an incident involving a production worker named Richard Koresh. Koresh had allegedly failed to properly monitor the temperature and pressure of a tank used to mix a chemical compound. Koresh was terminated; a few hours later, Fitzgerald was terminated. Salsbury alleged Fitzgerald was terminated for failing to properly supervise Koresh. Fitzgerald however asserted he was discharged because he did not support Salsbury's decision to discharge Koresh, and that Salsbury officials feared he would provide testimony in support of Koresh in the course of the threatened legal action by Koresh.

Prior to this occurrence, Koresh gave deposition testimony in a wrongful discharge action brought against Salsbury by a former employee named John Kelly. Kelly was terminated several years earlier, exactly one day prior to his scheduled deposition in a wrongful death action against Salsbury brought by the estate of a former employee. The former employee had died after a chemical compound he was mixing overheated and exploded. Salsbury claimed Kelly was terminated because his unsafe conduct caused the explosion. During his deposition, Koresh contradicted earlier

deposition testimony of two Salsbury management officials concerning the internal investigation of the work practices of Kelly.

After the accident involving Koresh occurred, Fitzgerald told the Salsbury that he did not believe that it was fair to fire Koresh over a single mistake and also indicated that he did not believe Koresh should be fired in light of his long years of service to the company.

Fitzgerald filed a wrongful discharge action against Salsbury, alleging his termination violated a public policy to provide truthful testimony in court proceedings. The trial court dismissed the action following a motion for summary judgment by Salsbury. The trial court found no public policy was implicated.

HELD:
The Supreme Court reversed the trial court's award of summary judgment and remanded for trial. The court recognized the tort for discharge and violation of a public policy to provide truthful testimony and remanded to the trial court for a jury determination if the facts supported such a claim. The court found there was a clear public policy from Iowa statutory law and the Iowa Constitution. The court also relied on the judiciary's interest in maintaining judicial integrity.

II.ATTORNEY

Iowa Supreme Court Board of Professional Ethics and Conduct v. Bisby
601 N.W. 2d 88 (Iowa 1999).

Cora Creamer, an elderly widow contacted the Respondent about financial difficulties she was encountering with the home she owned in Las Vegas, Nevada. Creamer owned the home free of any mortgage, but had no money to pay delinquent taxes and unpaid utilities which had accrued on the home. She offered the Respondent 50% of the equity in the home to clear up those delinquencies. Respondent agreed to do so under those terms.

The Respondent went to Las Vegas, and in one day made the necessary payments and completed the essential paperwork. Sometime thereafter, the home sold for $102,000. The Respondent and Creamer each received $43,000.

The Respondent's law partner learned about the trip from a mutual friend. When questioned by his law partner, the Respondent acknowledged that the total sum of the delinquent property taxes and unpaid utilities amounted to only $7,900. The Respondent also informed his law partner that he had no intension of depositing the $43,000 into their partnership account because in his view, the services performed for Creamer were not legal but financial.

HELD:
The Respondent's law license was suspended for three years for failing to disclose to his client that the proposed financial arrangement was more advantageous for him than for her, failing to advise Creamer to seek another opinion in light that the Respondent's professional judgment was impaired by his personal interest in the transaction, and in failing to cooperate with the board in the investigation of this matter.

The Iowa Supreme Court Board of Professional Ethics and Conduct v. Gonnerman
601 N.W. 2d 34 (Iowa 1999).

Respondent was designated as attorney for an estate which opened in August 1989. At time of the grievance commission hearing in November 1998, the Respondent still had not closed the estate, despite twelve delinquency notices sent by the clerk of court and a public reprimand by the court. On one occasion during the pendency of the estate, the Respondent stated that he would withdraw, but he failed to do even that.

HELD:
The Respondent violated DR6-101(a)(3)(neglect of a legal matter), DR1-101(a)(5) (conduct prejudicial to the administrative justice) and DR1-101(a)(6) (conduct reflecting adversely on fitness to practice law). Respondent's license was suspended for thirty days.

Iowa Board of Professional Ethics and Conduct v. Flemming
602 N.W. 2d 340 (Iowa 1999).

Respondent was named the attorney for two separate, but related estates. After failing to respond to the executor's repeated request for action, the executor sought counsel of another attorney. The new counsel's examination of the probate files found that no action had been taken beyond the filing of the initial report and inventory. Missing was the thirty-day notice to beneficiaries, the oath and qualifications of the replacement executor, letters of appointment for the bank and an amendment to the inventory. Additionally, the Iowa Inheritance Tax Return had not been filed, nor had the taxes been paid. The taxes were delinquent and a 10% late penalty fee and interest were attached. This had occurred on both estates. Additionally, the Respondent had received attorneys fees, despite the fact that there were no court orders issued approving such fees.

HELD:
Respondent was found to have violated DR6-101(a)(3) (lawyer shall not neglect a client's legal matter); DR2-106(a)(lawyer shall not charge or collect an illegal fee); and DR1-101(a)(1)(5)(6). Respondent's law license was suspended for six months, which was also based on his prior public reprimands for collecting excessive fees and for his repeated failure to respond to probate delinquency notices

Iowa Board of Professional Ethics and Conduct v. Leon
602 N.W. 2d 336 (Iowa 1999)

The Respondent was retained in four separate legal matters by four different clients:

1. Recover delinquent child support;
2. Negociate a settlement with the Child Support Recovery Unit;
3. Damages sustained for an alleged false disclosure statement in connection with the purchase of a home;
4. A dissolution action, which included a contempt application to retrieve certain personal items

In all matters, the Respondent hid from his clients that no action had taken place, but instead wrote checks to all four clients from his law firm's trust account, despite the fact that none of the clients had any funds in the trust account to cover those checks. The Respondent also told one of the clients, in connection with the alleged false disclosure, that he had recovered a partial payment on the judgment he had obtained and that she would be receiving more from the Clerk of Court on the judgment. When the client went to the Scott County Clerk's Office and demanded the remainder of the money to which she thought she was entitled, the clerk referred her to the chief judge of the district

The judge talked to the Respondent about his conversation with his client and instead of telling the judge the truth, the Respondent told the judge that all was well between he and his client. It was also

approached by his law partners about the missing trust funds. The Respondent convinced his partners that there was nothing to the allegations.

HELD:
Respondent's law license was revoked for violating DR1-102(a)(3) (lawyer shall not engage in conduct involving moral turpitude), DR1-102(a)(4) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation), DR1-102(a)(5) (lawyer shall not engage in conduct that is prejudicial to the administrative justice), DR1-102(a)(6) (lawyer shall not engage in other conduct that adversely reflects on the fitness to practice law), DR6-101(a)(3)(lawyer shall not neglect the client's legal matter) and DR9-102(a)(lawyer shall maintain client's trust funds and trust account).

Supreme Court Board of Professional Ethics and Conduct v. Freeman
603 N.W. 2d 600 (Iowa 1999).

Respondent was hired to represent a client in connection with a discrimination claim. While the statute of limitations on the client's state claims had run before the Respondent was retained, the statute of limitations on the client's federal claims had not, but was about to expire. The Respondent was not admitted to practice in federal court and did not make the necessary arrangements to be admitted in a timely manner. As a result, the statute of limitations ran on his client's federal claim before he could file suit.

The Respondent was also retained in connection with an estate, and again the Respondent did not perform the necessary work. Two delinquency notices were sent to the Respondent. Additionally, the Respondent failed to return his client's phone calls. When the client contacted the Respondent, asking the Respondent to forward the entire case file, along with withdrawal papers, the Respondent failed to take any action.

HELD:
The Respondent's law license was suspended for three months, despite the ethics commission's recommendation that he be publicly reprimanded. The Supreme Court held that a public reprimand was not an adequate sanction given the Respondent failed to file the suit for the client, and the client is further barred from filing any suit on his claim.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Walters
603 N.W. 2d 772 (Iowa 1999).

Respondent represented Lester and Venola Diegel from 1976 to 1989. In 1991, the Respondent contacted the Diegels and received a personal loan from them in the amount of $10,000. In January 1992, he received another loan of $5,000. The Respondent did execute a promissory note, which provided interest at the rate of ten percent. When he obtained these loans, the Respondent did not advise the Diegels to seek independent counsel, nor did he advise them that his own interest in the transaction may affect his professional judgment on their behalf.

The Respondent failed to make payments on the notes and the Diegels sued him. A settlement agreement was reached and the Respondent agreed to pay a sum to the Diegels per month. The Respondent made the first payment, but the check for the second installment was returned for insufficient funds. The Diegels then obtained a default judgment against the Respondent and also filed an ethical complaint against the Respondent.

The Respondent was also charged with a violation of a conflict of interest when he represented a woman in a dissolution of marriage of action and then later, after the decree was entered, he represented her ex-husband in an involuntary hospitalization proceeding brought by the ex-husband's father. The Respondent later filed an application on behalf of the wife seeking to hold the ex-husband in contempt and enjoin him from contact with the wife and their minor child.

HELD:
The Respondent's law license was suspended for three months for failing to disclose to a client a potential conflict of interest in a business transaction. The Respondent was also cited for representing clients who had conflicts of interest.

An interesting note to this case is that during the representation of the woman in the contempt action, the Respondent advised the district court judge presiding over the contempt matter of the possible conflict of interest. The district court advised the Respondent to continue to represent the wife in the hopes that the parties would work out their disagreements. If they did not, the judge suggested that the Respondent withdraw from representing the wife and advise her to seek other counsel. The Respondent did just that when the parties failed to reconcile their differences. The Supreme Court found "his reliance on inconclusive consultation with the district court judge was ill-advised and does not excuse the ethical violation." "For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of a conflict of interest that is difficult to dispel in the eyes of the late public or even the bench and bar."

Iowa Supreme Court Board of Professional Ethics and Conduct v. Stein
602 N.W. 2d 374 (Iowa 1999).

The Respondent prepared a title opinion preliminary to the purchase of a real estate by a client. The opinion noted the existence of a prior contract for sale, but never indicated the contract had been forfeited. The bank, which financed the real estate, requested the Respondent issue a final title opinion. Despite repeated requests, Respondent failed to do so. The Respondent informed the bank the final title opinion had not been issued because the affidavit of forfeiture of the contract inadvertently did not appear on the abstract. The Respondent however assured the bank that there was no problem because he had "personally" performed the forfeiture requirements and would make sure that the problem was resolved. In fact the Respondent never performed the legal requirements for forfeiture and notice of forfeiture was never given. Respondent continued to stonewall the bank and even sent the bank a fabricated affidavit of publication falsely declaring that he caused notice of forfeiture to be published in a local paper.

HELD:
Respondent's law license is suspended for two years for failing to cooperate with the board, for his neglect and negligence in a legal matter, as well as his repeated dishonesty, fraud, deceit and misrepresentation to the bank. The board also noted that this is not the first time the Respondent has engaged in such conduct.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Erbes
604 N.W. 2d 656 (Iowa 2000).

The Respondent has been cited on a number of occasions for (1) failing to file the required reporting in connection with telephone book advertising, (2) neglect of a client's dissolution modification proceeding and (3) failure to respond to related inquiries from the board. This matter included his failure to file the required annual final reports in one estate, one trust and three guardianships in which the Respondent served as the attorney for the fiduciaries. Delinquency notices had been issued by the clerk of court and Respondent had failed to respond within the required sixty days.

HELD:
The Respondent is subject to a public reprimand for the misconduct. The court did note that the Respondent had finally faced his depression and personal problems which were hampering the Respondent's ability to practice law.

Iowa Board of Professional Ethics and Conduct v. Morris
604 N.W. 2d 653 (Iowa 2000).

The Respondent employed a secretary and receptionist from 1990 to 1994. From December 31, 1990 to January 30, 1994, the Respondent failed to pay withholding taxes on the wages that he paid to his secretary. He also failed to file the required withholding forms. As a result, Respondent was charged in state district court for fraudulent practices and subsequently pleads guilty to fraudulent practice in the fourth degree, receiving a suspended jail sentence and a fine.
HELD:
Respondent is subject to a six-month suspension for failing to pay the withholding taxes, which constitutes illegal conduct involving immoral turpitude, conduct involving dishonesty, fraud, deceit and misrepresentation, conduct prejudicial to the administrative justice and conduct that adversely reflects on the fitness to practice law.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Jay,
606 N.W. 2d 1 (Iowa 2000)

Respondent was appointed executor and attorney for his uncle's estate. In addition to neglecting several deadlines for required filings, Respondent applied for attorney and executor fees. His application stated that the federal tax returns had been filed, but omitted any disclosure regarding the preparation and filing of the Iowa Inheritance Income Tax Return. In fact, the inheritance income tax return was not filed for more than three months after Respondent filed the application and

received the fees.

The order stated that the Respondent was to receive one-half of the attorneys fees now and the remainder when the estate was closed. The Respondent paid himself the remainder of the fees prior to the filing of the final report. When the final report was filed, it had no accounting attached and the Respondent did not furnish some of the beneficiaries copies of the final report for more than one year after it was filed. One of the beneficiaries, upon receiving a copy of the final report, filed an objection to the final report. Included was an objection to the amount of attorneys fees previously allowed by the court order.

The Respondent was subsequently removed as executor and attorney, and ordered to make a full accounting to the successor executor and to deliver all checks, deposit slips and other records of the estate to that person. For more than seventeen months, the Respondent failed to comply with that order. Additionally, upon removal, the Respondent was ordered to refund to the estate all of the attorney fees and executor fees that had been paid to him. No monies were returned despite the order.

HELD: Respondent is subject to a one year suspension based on two considerations:

1) His persistent refusal to obey the court orders to refund the fees and turn over the records; and
2) The fact that Respondent had experienced two prior ethical violations, including failure to file state and federal tax returns for two years and a public reprimand for neglecting a legal matter intrusted to him.

Iowa Supreme Court of Professional Ethics and Conduct v. Jones
606 N.W. 2d 5 (Iowa 2000).

The Respondent has practiced approximately 47 years in the state of Iowa in a general practice consisting of personal injury work, family law, probate and real estate. In 1995, Respondent was contacted by Leon Currie of Waterloo. Currie told the Respondent that he had negotiated a contract with the Nigerian National Petroleum to build an oil pipeline in Nigeria. He told Jones that he needed $25,300 to pay for the risk insurance for the delivery of what was owed to him under his contract with the Nigerian National Petroleum Company. He told Jones that he had obtained most of the money for the premium, but was short $5,000. Currie asked Jones to find a lender to cover this remaining amount and agreed to purchase a two million-dollar annuity for the Respondent if the Respondent was successful in securing the lending and payment of the remaining $5,000. The Respondent did not attempt to independently verify Currie's story but instead accepted Currie's story at face value.

Respondent then contracted Gilbert Jones, who he had represented in a divorce more than twenty years before but was not representing him at the time of this situation. The Respondent told Jones that if Jones lent Currie $5,000 to pay the premium, Currie would repay Jones $15,000 within thirty

days. Respondent described the venture as an opportunity to make some "fast money." Respondent never told Jones that banks and other individuals refused to lend money for the endeavor and thought that the transaction was risky. Nor did the Respondent tell him that if the Respondent secured the $5,000 loan, Currie would purchase a two million-dollar annuity for the Respondent.

Jones borrowed the $5,000 from his credit union. The Respondent signed on Currie's behalf a handwritten thirty-day, promissory note payable to Jones. Not surprisingly, Jones has not received any money from the transaction.

HELD:
The Respondent is subject to a two-month suspension for his failure to recognize and correct a potentially misleading situation, even though he had no intent to deceive Delbert Jones. "We find that under the circumstances, [the Respondent's] statements and omissions went beyond potentially misleading Delbert-they did mislead him and caused him to make the loan."

Iowa Supreme Court Board of Professional Ethics and Conduct v. Lemanski
606 N.W. 2d 11 (Iowa 2000).

Respondent filed a petition with the industrial commissioner seeking workers compensation benefits on behalf of his client. At a hearing, the deputy industrial commissioner excluded the client's witnesses and exhibits because Respondent was late in complying with the hearing assignment order. The deputy industrial commissioner concluded that the client was not entitled to benefits and upon the appeal the industrial commissioner affirmed the deputy's decision.

After a petition for judicial review, the district court reversed the agency's decision and remanded the case with instructions to the industrial commission to award benefits for medical expenses and temporary total disability for the client.

In May 1997, the Respondent received a settlement check from the client's employer concerning the client's claim. There was no indication whether the check covered medical expenses. Despite numerous requests by the client, the Respondent failed for one year to disperse any settlement funds to the client and also failed to render an accounting of those funds to his client.

HELD:
The Respondent is subject to one month suspension. "He made little effort to communicate with his client concerning the status of the workers compensation case and made little effort to determine what the settlement was intended to cover." The Respondent had been previously admonished by the board in connection with the neglect of a lawsuit, which resulted in a default judgment against his client

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Kennedy v. Zimmermann
601 N.W. 2d 61 (Iowa 1999).

Kennedy, an attorney practicing law in Waterloo, represented Thomas Richmond in child custody action. Richmond was an inmate at the Iowa State Penitentiary in Fort Madison at the time, and Kennedy was dating another inmate incarcerated at the penitentiary. At some point, the attorney-client relationship between Kennedy and Thomas Richmond deteriorated. Shortly after Richmond complained to Kennedy about her representation, he was assaulted in the penitentiary by Kennedy's boyfriend.

Kennedy withdrew from representing Richmond and Richmond then filed the lawsuit against Kennedy, alleging she violated her ethical obligation to Kennedy by communicating privileged attorney-client matters to her boyfriend. He also claimed that Kennedy's conduct constituted negligence and resulted in his physical injury. Attorney Richard Zimmerman represented Richmond in the lawsuit.

After the petition was filed, Zimmermann was contacted by a reporter for the Waterloo Courier and in a telephone interview Zimmermann answered questions concerning the lawsuit. The article appeared in the Waterloo Courier and subsequently Kennedy filed a defamation action against Zimmermann based on the statements he made to the reporter during the course of the interview. Zimmermann claimed that he was insulated from liability by the absolute privilege granted to an attorney for statements in the course of judicial proceeding. On that basis, the district court granted Zimmermann's motion for summary judgment. Kennedy appealed.

HELD:
"To fall within the privilege, not only must the content of the communication relate to a judicial proceeding, but the occasion must also be protected." In this case, the Supreme Court found that statements made by an attorney to a newspaper reporter in the course of an interview, related to the allegations of a petition, are not within the scope of the privilege. "The lack of an absolute privilege during an interview with the newspaper reporter will not typically inhibit attorneys from fully investigating their claims or fully and completely presenting them to the court." "Furthermore the occasion is without close judicial control in most instances." The district court granting a summary judgment was reversed and the case was remanded for further proceeding.

In re Inquiry Concerning Stigler
607 N.W. 2d 699 (Iowa 2000).

Attorney Douglas Coonrad filed a petition for dissolution of marriage on the behalf of his client, Brock Staley. Attorney Conrad, upon filing the petition, presented to Judge John Fister, an application for a temporary injunction that alleged that Mr. Staley's wife Angela had left the parties' place of residence and taken the children with her. Pursuant to the application, Judge Fister issued the temporary injunction without notice or hearing, which required Angela to return the children to the family home. Angela retained attorney Jay Roberts and immediately sought to have the

injunction lifted. At issue was the alleged physical abuse by Brock Staley against his wife Angela.

Initially, Roberts sought out Judge Fister about the injunction, but was unable to contact him. He instead approached Judge Stigler and advised Judge Stigler that he intended to challenge the temporary injunction. Upon contact with Roberts, Judge Stigler immediately contacted Coonrad by telephone. Judge Stigler advised that he was setting a hearing for 11:00 a.m. on the following morning on Roberts' oral request to set the temporary injunction aside. Coonrad informed Judge Stigler that he had a trial set for the following morning at 9:00 a.m. and therefore could not prepare or attend an 11:00 a.m. hearing. The judge told Coonrad that he would also be the judge presiding at the scheduled trial and advised him that at 11:00 a.m., he would recess the trial proceedings and would order to hear evidence in the injunction matter. Coonrad prepared for the hearing on the injunction and planned to present evidence at the hearing at 11:00 a.m. the next morning.

Shortly prior to Coonrad's trial, Judge Stigler discovered that a relative of his was to be a witness in the case. He arranged for Judge Thomas Bower to substitute for him as the judge in Coonrad's trial. Attorney Coonrad's trial before Judge Bower did commence that morning as scheduled, and continued until 3:40 that afternoon. During a very brief noon recess, Coonrad spoke with Judge Stigler, who had been waiting since 11:00 a.m. to proceed with the hearing on the injunction matter. Coonrad informed the judge that he believed his trial would wrap up shortly. When that did not occur by 12:50 p.m., Judge Stigler convened the hearing on the injunction matter in Coonrad's absence. Roberts presented evidence on behalf of his client, and Brock Staley, acting as his own attorney, also attempted to present evidence on his own behalf. At one point, Judge Stigler asked Brock Staley to take the stand and proceeded to interrogate him from the bench with leading questions concerning the alleged physical abuse. At the completion of the hearing, Judge Stigler vacated Judge Fister's order for the temporary injunction and entered an order that granted physical placement of the children to Angela, set specific times of visitation and ordered Mr. Staley to pay child support to Angela.

Following two attempts to contact Judge Stigler, Coonrad filed a complaint with the commission with respect to Judge Stigler's handling of the Staley hearing. Following the filing of the complaint, Coonrad appeared before Judge Stigler on a routine order. Judge Stigler advised Coonrad, he did not wish to handle any matters in which Coonrad was involved. Notwithstanding this announcement to Coonrad, Judge Stigler, when serving as a motion judge, considered an application for attorneys fees filed by Roberts in the Staley dissolution matter. Judge Stigler granted Roberts' request, despite Coonrad's resistance to the attorney fee claim.

The final complaint against Judge Stigler arose when he requested that the commission provide to him all letters of complaints and supporting documents that Coonrad had filed with the commission. When he did not receive the requested documents, he prepared and served on Coonrad a subpoena issued by the Clerk of the Iowa District Court for Black Hawk County that required Coonrad to produce the documents. By the time the subpoena was served, the commission had denied the judge's request for production of these documents.

HELD:
Judge Stigler was reprimanded for his actions concerning the Staley dissolution, including holding a hearing after telling Coonrad that he would coordinate the Staley hearing with Coonrad's regularly scheduled trial. The Supreme Court found that his conduct was unbecoming of the judicial officer. Additionally, the court found that Stigler acted in callus disregard of Mr. Staley's rights by calling him to the stand and obtaining admissions of domestic abuse. Finally, the Supreme Court found Judge Stigler violated the ethical cannons when he acted upon a motion in the Staley matter, in light that his impartiality could be reasonably questioned by an impartial observer. Finally, the court found he misused the judicial process by causing the subpoena following the commissions finding that he was not entitled to receive copies of said documents. The Supreme Court also found his conduct at the hearing was disrespectful and improper.

The Supreme Court Board of Professional Ethics and Conduct v. Ackerman
611 N.W. 2d 473 (Iowa 2000).

Respondent practices in Cedar Falls and Waterloo and his practice includes family law and bankruptcy, but emphasizes on criminal law. The Respondent was appointed to represent a criminal defendant on the charge of child endangerment, an aggravated misdemeanor. The Respondent filed a motion to dismiss the prosecution, alleging that the prosecution had failed to obtain an indictment within 45 days of the defendant's arrest. The motion was misleading and in fact the trial information had been filed well within the 45 days of the defendant's arrest. The miscalculation arose when the Respondent's legal assistant misread the date of the crime as the arrest date.

When the order vacating the dismissal was filed, the trial judge sited Respondent for contempt. The contempt hearing was held and at the hearing the county attorney offered proof of two other similar incidents, including when the Respondent secured a release order on behalf of the client who he did not formally represent and presenting an order that incorrectly indicated that it had been approved by the county attorney. The Respondent was found in contempt of court.

HELD:
The Respondent's law license was suspended for one month for presenting the dismissal order ex parte without advising the county attorney. The court also noted that in addition to their Respondent's two prior incidents, the Respondent had been publicly reprimanded for securing a fee from the mother of a criminal defendant for whom he had been court appointed and compensated from public funds.

III. CONSTITUTIONAL LAW

Dolezal v. Boches,
602 N.W. 2d 348 (Iowa 1999).

Dolezal sued Boches Brothers Farms, Inc., Roger Boches, Richard Boches and Robert Boches. Service was performed on all of the defendants and was completed before January 24, 1998, the date the amendment to the Iowa Rule of Civil Procedure 231 went into effect. None of the defendants filed an answer and Dolezal filed a demand for entry of default under Iowa Rule of Civil Procedure 230(a). The district court entered a default against all the defendants and set a hearing on damages. At the hearing on damages, Richard Boches was the only defendant to personally appear, and the district court entered judgment against the defendant corporation and reserved the question of individual liability for a future hearing.

When Dolezal filed his demand for default, he did not give the defendants the required notice pursuant to Iowa Rule of Civil Procedure 231, which requires notice of the intent to seek a default. Additionally, Dolezal's demand for default did not certify that he had given such notice. A hearing was held to determine the liability of the individual defendants and the district court entered judgment in favor of Dolezal against the individual defendants jointly and severally. The defendants appealed, alleging the default judgment was improperly entered due to Dolezal's failure to give them notice as required by Iowa Rule of Civil Procedure 231.

HELD:
Iowa Rule of Civil Procedure 231(b), which requires parties requesting default judgments to file a notice of intent to file a default judgment is procedural and therefore applies to all actions regardless of whether they have been filed prior to or subsequent to the enactment of the amendment. The Supreme Court reversed the trial court's entry of a default judgment and remanded to allow Dolezal to give the required notice pursuant to Iowa Rule of Civil Procedure 231(b)

Simonson v. Iowa State University,
603 N.W.2d 557 (Iowa 1999).

A number of allegations of sexual harassment were made against tenured Professor Michael R. Simonson. The allegations included that Simonson had arrived at a student's house drunk, had sexually harassed several students, and allegedly confronted two students, attempting to find out who was filing sexual harassment complaints against him. Additionally, there were concerns expressed by a student that should she come forward, she would be subject to retaliation by Simonson.

Following several meetings which involved the acting Dean of the College of Education, the Provost of the University and the Director of Affirmative Action, the complaining student and her attorney, the sexual harassment assister and the associate legal counsel for the University, the acting Dean of the College of Education informed Simonson by telephone that a formal complaint of sexual harassment had been made against him and that he was being paid on administrative leave, pending

the outcome of the investigation. Several days later, the acting Dean confirmed, via a written letter, to Simonson that a formal complaint had been filed and he was being placed on paid administrative leave. Simonson was also required to turn in his keys to his office and was advised to have no contact with the students and not to come to campus, unless for approved visit.

A day later, Simonson appeared at the Provost's office with a letter demanding that an appeal of his suspension be heard by 4:00 that day. The Provost denied Simonson's appeal of the decision placing him on administrative leave. Simonson then appealed the Provost's decision to the Faculty Senate. Simonson also filed a Petition for Judicial Review in district court, which sought reinstatement of his teaching duties at Iowa State. Following Simonson's petition, the Faculty Senate Committee met and recommended the reinstatement of Simonson. President Jische rejected the recommendation of the Faculty Senate that Simonson be taken off administrative leave pending the completion of the investigation.

Following President Jische's decision, the district court issued its decision on Simonson's Petition for Judicial Review. The district court concluded that the university had deprived Simonson of protected property and liberty interests without due process of law. The case was then remanded to the university with instructions that the university give Simonson a hearing, with notice of the allegations against him, the right to appear and cross-examine those witnesses complaining against him and the right to present evidence on his own behalf. The district court also ordered that Simonson be reinstated to his rights and duties as a full tenured professor. The university appealed.

The main issue in the matter is whether Simonson was entitled to a hearing before he was placed on paid administrative leave.

HELD:
The Court reversed the trial court's ruling. A government employee is entitled to constitutional procedural due process only when the employee has been deprived of protected property or liberty interest. Because Simonson was not suspended, but was rather placed on paid administrative leave pending the investigation, Simonson was not deprived of protected property interest in the form of an economic benefit or otherwise. The court relied on the Iowa Administrative Code, which includes the Policies, Practices and Procedures set by the State Board of Regents. The Code specifies the term suspension. By that definition, a faculty member who is placed on administrative leave with pay is not suspended according to the university's personnel policies. The procedural rules which apply to situations involving sanctions do not apply to the university's decision to place a professor on paid administrative leave. "The university's actions did not amount to a suspension as contemplated to be by the university's rules because Simonson was not deprived of economic benefits while on administrative leave."

The Court found that Simonson did not have a constitutionally protected property or liberty interest in his continued teaching duties as a professor. Simonson was not entitled to an evidentiary hearing before being placed on administrative paid leave. The University's decision to place on Simonson on paid administrative leave pending the investigation of the sexual harassment complaints was not

in violation of any constitutional or statutory provision.

ACCO Unlimited Corp. v. City of Johnston,
611 N.W.2d 506 (Iowa 2000).

Andrew Christensen owned approximately 18 acres in Johnston, which he leased to ACCO Unlimited, which is solely owned by him. These 18 acres are contained within the 100 year flood plain and the area in question has flooded eight times since 1960.

After the flood of 1993, the Economic Development Administration (EDA) of the United States Department of Commerce made federal flood relief grants available to cities in Polk County to provide funds for construction of public improvements to protect property from future damage by flood waters. Johnston applied for one of these grants. In its application, Johnston was required to verify that it had obtained assurances from the property owners in the flood plain, including Christensen's area, that the property owners would not develop the area inside the flood plain. As a condition to receiving the grant, the EDA required the city to provide evidence it had acquired the Christensen property, obtained restrictive covenants or re-zoned it as a conservation district, in order to assure it would not be developed. Also included in the area at issue are the baseball and softball diamonds owned by the Beaverdale Little League. The Little League supplied assurances that it would not develop the land it owned. However, because Christensen would not provide those assurances to the city, the city began a condemnation proceeding against Christensen.

Christensen attempted to file for a permanent injunction declaratory relief, which was denied. A condemnation commissioner awarded damages for the taking of the land and Christensen sought to have the condemnation nullified as illegal. The District Court found the city had a legitimate public purpose in condemning the Christensen property. Christensen appealed, alleging that the city's taking of his land violated his procedural and substantive due process rights and denied him equal protection of the law.

HELD:
The city's condemnation of the land for flood control purposes was a valid object of condemnation. Because Christensen's alleged rights and fringe were not fundamental, substantive due process demands no more than "a reasonable fit between the government purpose and the means chosen to advance that purpose." The city had a purpose which was legitimate and the means fit that purpose. Finally, Christensen was not able to negate every reasonable basis which supported the alleged disparate treatment, and therefore the City of Johnston did not violate Christensen's equal protection.

Miller v. Board of Medical Examiners,
609 N.W.2d 478 (Iowa 2000)

The Iowa State Board of Medical Examiners charged Dennis D. Miller with substandard treatment of patients under his care. The Board's allegations centered on Miller's prescription practices. Following the initial complaints, a two-member peer review committee was appointed to examine

the medical records of 12 of Miller's patients. The committee expressed four areas of concern including the amount and frequency of scheduled drug prescriptions, antibiotic usage, instructions for tranquilizers and availability of call coverage.

A disciplinary hearing followed and a three-member panel of the Board, following testimony and entry of exhibits, concluded that Miller deviated from the applicable standard of care during early 1989 until at least 1993. Miller then filed a Petition for Judicial Review. The disciplinary board's decision was affirmed by the District Court. Miller appealed, alleging 1) the composition of the disciplinary panel violated the Equal Protection Clauses of the Iowa and United States Constitution, 2) the Board's policy of destroying original investigative materials upon the filing the complaint required reversal as a matter of law, 3) the peer review proceedings employed by the Board violate due process and 4) the doctrine of laches, as well as the lack of patient complaints, deprived the board of jurisdiction to sanction him.

HELD:
The Supreme Court upheld the board's decision. The court found:

1) The State is free to make up the board as it sees fit, and unless Miller was able to show that the law which allows such appointments is patently arbitrary and bears no rational relationship to a legitimate government interest, the state's appointment and composition stands. Miller was unable to do this.

2) While the Court found the board's policy of destroying field files upon filing the formal complaint violated Iowa Code Section 272C.6(4), the board's failure to comply with this section did not entitle Miller to relief as he failed to prove his substantial rights were prejudice by the board's action.

3) The two review proceedings employed by the board do not violate due process.

4) Miller failed to demonstrate that he was prejudiced by the time taken to resolve the inquiry and was unconvinced by his claim that the board lacked authority to discipline him just because no patients had complained about his care.

Seeman v. Iowa Department of Human Services,
604 N.W.2d 53 (Iowa 1999)

Jeffrey and Michelle Seeman sustained severe and permanent injuries when the motorcycle they were riding was hit by an uninsured and insolvent motorist. At the time of the accident, the Seemans were insured by American Family Insurance Company. Their motorcycle policy provided uninsured motorist coverage of $100,000 per insured for "compensatory damages for bodily injury." The Seemans had no health insurance or any other hospitalization insurance. The Department of Human Services paid medical expenses for both Jeffrey and Michelle related to the treatment they received due to the accident.

The Seemans eventually settled with American Family for the full value of their uninsured motorist coverage, $200,000. The Department of Human Services filed a lien for the medical expenses paid on their behalf. The Seemans alleged that their insurance company was not a third party under Iowa Code Section 249A.6. The district court disagreed and found that the language of the statute authorized a lien against the insurance proceeds and rejected the Seemans' claims that this statutory scheme violates the Equal Protection, Due Process, takings and contracts clauses of the United States and Iowa Constitutions. The Seemans appealed.

HELD:

The Supreme Court affirmed the district court findings that the Department of Human Services was entitled to a lien against the amounts paid by American Family to the Seemans. Iowa Code Section 249A.6 makes no distinction between monetary claims settled with an insured's own insurance carrier and the monetary claims recovered against a negligent tortfeasor. The Court also found that the Seemans were treated just like others who received medical assistance under Chapter 249A. "All those who qualify are similarly treated with respect to the lien of Section 249A.6 which applies, not just to uninsured motorist proceeds, but to all monetary claims held by aid recipients against third parties." Additionally, the Court found that the Seemans received equivalent value for medical services in exchange for "the reduction" in their recovered proceeds from American Family and therefore the takings clause was not violated.

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IV. DAMAGES

Hendricks v. Great Plains Supply Company,
609 N.W.2d 486 (Iowa 2000)

The Hendricks built a new home and Great Plains Supply provided materials and labor for some of the construction, including the installation of insulation in the attic. A separate party installed the fireplace and chimney. The home was destroyed by fire approximately four months after the Hendricks moved into the home. An investigation of the fire revealed no radiation shield had been installed to maintain clearance around the chimney flue where it passed into the attic, and insulation, which had been improperly packed in around the flue, had ignited. The Hendricks were insured under their homeowner's policy issued by State Farm Fire and Casualty Company. State Farm paid the Hendricks for their loss and the remnants of the home were demolished several weeks after the fire to make way for the construction of a new home.

Hendricks and State Farm filed a subrogation action against Great Plains. Later on, Colony Plumbing and Heating, the installer of the chimney and fireplace, was brought into the action. The trial court found Great Plains and Colony were each 50% at fault and entered judgment against them for $378,969.21. Both defendants appealed and the Hendricks cross-appealed asserting that the trial court erred in failing to award damages based on the replacement cost of their home. The Hendricks claimed that the cost to rebuild their home was $408,423.00 and the district court should have awarded them damages based on that amount.

HELD:
The party may recover the replacement cost if it does not exceed the value of the property prior to the damage. At trial, the Hendricks supplied evidence that the value of their home was $450,000 prior to the fire. The Hendricks should have been awarded the replacement cost of their home. The case was remanded for entry of a judgment in accordance with the Supreme Court's opinion.

Gordon v. Carey,
603 N.W.2d 588 (Iowa 1999)

Jeanie Gordon filed a suit against Michael Carey, who was operating a car owned by his mother when he struck Gordon's vehicle. The jury awarded Gordon $1,350 for past physical and mental pain and suffering and $1,350 for past loss of function of the body. The jury also assessed Gordon 35% comparatively at fault and the trial court reduced the damages accordingly. Gordon appealed contending the damages awarded were inadequate.

HELD:
Because Gordon made no motion for a new trial based on the alleged inadequacy of damages found in the trial, nor did she seek additur, Gordon failed to preserve this issue for review. The Court noted that however even error had been preserved, there was substantial evidence in the record to support the jury's damage award.

Gabelmann v. NFO Incorporated,
606 N.W.2d 339 (Iowa 2000)

NFO refused to pay an employee a promised housing allowance. In prior litigation, which included a Supreme Court opinion, which affirmed the jury's finding of employer liability, but remanded the case for entry of a reduced judgment in recognition of the two-year statute of limitations for wage payment disputes. The case was returned to the district court for further proceedings on the question of liquidated damages and attorneys fees, which Gabelmann might be entitled under Iowa Code Chapter 91A.

On remand, the parties stipulated that Gabelmann's unpaid wages for the two-year period preceding commencement of the suit were $1,200. The district court rejected Gabelmann's claim for liquidated damages, concluding NFO's conduct was not intentional. The court also pared Gabelmann's attorneys fees from $29,195 to $3,500, finding the requested amount was not appropriate because Gabelmann only was entitled to $1,200 in damages. The trial court also rejected Gabelmann's request to compel production of billing records for NFO's attorneys. Gabelmann appealed and the case was initially transferred to the Court of Appeals. The Court of Appeals found Gablemann entitled to liquidated damages as a matter of law, ruled the billing records of NFO's attorneys were relevant on the question of Gabelmann's attorney fee claim, and remanded the case to district court on the issue of attorneys fees. NFO applied for further review and prior to the appeal being heard, NFO withdrew its contest of the judgment for $1,200 in liquidated damages, but sought reversal of the Court of Appeals' order to divulge its own counsel's billing records and the remand on the question of attorneys fees.

HELD:
The trial court abused no discretion when it refused to compel production of NFO's attorneys fees records and could make a fair determination whether Gablemann's fees were "usual and necessary" without access to NFO's billing records, which is the standard under Iowa Code Chapter 91A. However the trial court, with its arbitrary reduction to Gabelmann's request for fees with no support in the record, was reversed and remanded for another hearing on the question of attorneys fees "A court which places undue emphasis on the size of the judgment, to the exclusion of all other pertinent factors, thereby disregards the public interest underlying this remedial statute."

V. Government

Clymer v. City of Cedar Rapids,
601 N.W.2d 42 (Iowa 1999)

The Cedar Rapids Gazette sought records from the City of Cedar Rapids concerning city employees' sick leave compensation and usage during 1996. The Gazette also sought disclosure of city employees' names, address and telephone numbers. The district court, hearing a declaratory judgment action filed by the Gazette, determined the Gazette was not entitled to individualized sick leave records but could demand access to aggregate data "not attributable to any individual employee." The litigation centered around Iowa's Open Records Act, Iowa Code Section 22.7 (11).

HELD:
"A public employee has a substantial privacy interest in his or her address that outweighs the public's interest in disclosure, unless the information is necessary to open the government's actions to public scrutiny." The court found the district court properly engaged in a balancing test of the competing interests and was correct in observing that there is an obvious relationship between disclosure of leave records and the public's right to know how its money is spent.

However, the Supreme Court found that the trial court's decision to release only aggregate information contravened Iowa Code Chapter 22 and should be reversed. "So long as the information disclosed does not reveal personal medical conditions or professional evaluations, the public has a right to examine it." The Supreme Court remanded that the District Court for an amended Order which permitted the Gazette access to individualized payroll information concerning sick leave pay and other benefits, including dates taken and hours accrued. The court found that the compensation allocated to and used by individual public employees, whether for salaried sick leave or vacation was a matter of legitimate concern to the public.

Kelley v. Story County Sheriff,
611 N.W.2d 475 (Iowa 2000)

Kelley owned a residential real property in Story County and leased the property to Penny Ball. One evening the Story County Sheriff's office appeared at Ball's residence to execute a warrant for the arrest of William James Vary, who was a frequent guest or resident of that property. The officers knocked on the front door, identified themselves and demanded that they be admitted for the purposes of making the arrest. When the door was not answered, the officers used force to enter, causing damages to two front doors in the residence. The officers found Vary in the residence and arrested him.

Kelley, as the owner of the residence, filed a small claims action against Story County and the Story County Sheriff, seeking compensation for the damages caused to the two doors. The district associate court concluded that the officers exercised due care under Iowa Code Section 804.15 and thus the County and Sheriff were immune from liability under Iowa Code Chapter 670. The district

court affirmed and additionally found that the Sheriff, as an officer and employee of Story County, was not liable due to Section 670.12 which removes personal liability against officers and employees of the county for claims which are exempted under 670.4(3). The district court also found that the damage caused to Kelley's property did not constitute a taking of private property under Article I Section 18 of the Iowa Constitution.

HELD:
The associate district court and district court decisions were affirmed. Kelley's property was damaged as a consequence of the County's exercise of police power, and not as a consequence of a county's exercise of its power under eminent domain. Therefore, there was no taking of Kelly's property. Additionally the officers did not use unreasonable force in serving the arrest warrant and were therefore exempt from liability for any damage, pursuant to Iowa Code Section Chapter 670.

Data Documents Incorporated v. Pottawattamie County,
604 N.W.2d 611 (Iowa 2000)

Pottawattamie County is a member of the Iowa County Treasurer's Group Limited, which was formed so county treasurers could purchase in bulk motor vehicle license renewal notices. The committee acting on behalf of the group sought out and obtained a bid from Data Documents for the production of motor vehicle renewal notice forms. The parties agreed to produce 1.2 million notices, at $75 per thousand.

The notices were sent and Data informed the chair of the committee that 862,026 notices had been mailed, but that Data still had 337,974 notices, including envelopes which were unused. Data requested that they be allowed to produce and mail at least 279,000 more renewal notices to deplete its remaining inventory. Data sent an invoice to the committee for $25,350 covering the alleged contract price for the unused notices and envelopes. The committee, via letter, refused to pay the invoice or accept delivery of the remaining notices. The committee informed Data that it should contact Midwest Printing Services, the contract holder for the notices the following year, to see if Midwest would be interested in purchasing the unused envelopes.

Data did contact Midwest Printing Services and offered to sell Midwest the envelopes for $14.70 per thousand and $12.56 per thousand. Midwest Printing did not accept Data's offer. An employee from Midwest Printings later testified that Midwest had purchased outer envelopes in the past at $13.25 per thousand and return envelopes for $10.34 per thousand and that he would have bought the envelopes at that price. However, he testified the Data showed no willingness to lower the price for the envelopes. Data made no other attempt to resell the envelopes.

Data filed a petition against Pottawattamie County. The trial court found that Data was not entitled to recover damages because Data submitted no evidence of lost profits or costs associated with the performance of the contract. The trial court also found that Data failed to make a reasonable effort to resell the goods at reasonable price.

HELD: Trial court decision court affirmed.

City of Hiawatha v. City Development Board,
609 N.W. 2d 496 (Iowa 2000).

The City of Cedar Rapids filed an application for voluntary annexation of approximately 944.63 acres of land. The City of Hiawatha filed an involuntary annexation application, which included territory also contained within the City of Cedar Rapids' voluntary application. The City Development Board approved the voluntary annexation by the City of Cedar Rapids and the City of Hiawatha petitioned for judicial review. The district court affirmed the City Development Board's finding and the City of Hiawatha appealed.

HELD:
The district court's finding was affirmed. The "urbanized area" which must be considered in reviewing the annexation petition is in an area within two miles of the boundaries of the city, but not including land within the city itself and therefore Hiawatha was not a part of the "urbanized area." Additionally the board did not misapply the statutory presumption of validity for voluntary annexation proceedings and a preference for voluntary proceedings, where both voluntary and involuntary proceedings exist.

City of Hiawatha v. City Development Board,
609 N.W. 2d 532 (Iowa 2000)

The City of Robins submitted an application requesting voluntary annexation to Robins. Of the approximately 707 acres involved, owners of all but 91.29 acres voluntarily petitioned for annexation. The City of Hiawatha filed a petition for involuntary annexation, which included land common to Robins' voluntary annexation. The City Development Board divided the area in question between Robins and Hiawatha. Hiawatha sought judicial review, claiming it should have received more territory. The district court affirmed the ruling by the City Development Board. Hiawatha appealed and Robins cross-appealed, without seeking judicial review, that Hiawatha should not have obtained what it did.

HELD:
1) Substantial evidence support the determination that the City of Robins was capable of providing sufficient services, and the annexation would not be contrary to best interest of the citizens of the urbanized area. 2) Any error in failing the delay the ruling until the omissions and the record could be corrected was harmless. 3) Robins' failure to seek judicial review of deletion of territories from application barred review of the issue.

VI. Contracts

Credit Bureau Enterprises Inc. v. Pelo,
608 N.W. 2d 20 (Iowa 2000).

A Hardin County Magistrate found probable cause that Pelo was seriously mentally impaired and likely physically injure himself following Pelo's telephone call to his wife, in which Pelo made threats of self harm. The magistrate entered an emergency hospitalization order and required that Pelo be detained in the custody of the psychiatric unit for examination and care for a period not to exceed forty-eight hours.

During his admission to the hospital, Pelo was given a hospital release form to sign which make either Pelo or his insurance responsible for the hospital bill. Pelo initially refused to sign the form, but eventually read and signed the form. The form stated that Pelo understood that he would be liable for any charges not covered by his insurance.

An evidentiary hearing was held before the judicial hospitalization referee concerning Pelo's commitment status. The hospitalization referee found that while Pelo suffered from mental illness, he lacked the required elements for involuntary hospitalization and that further involuntary hospitalization was not warranted. Pelo was released. Later, Pelo refused to pay the hospital bill or authorize his insurance company to do so. A small claims hearing was held on the outstanding medical bills and Pelo was found to be responsible. The district court judge affirmed and Pelo appealed.

HELD:
While there is liability for a county to pay for costs and expenses associated with the custody, care and commitment at a state hospital, there is no liability of the county to pay for such items at a private hospital, such as the hospital to which Pelo was admitted. The Supreme Court found Pelo liable for payment based on the theory of implied contracts, which states where a person performed services for another, which are known to and accepted by the later, the law implies a promise to pay for those services. Where Pelo's hospitalization was a medical benefit to him and such services were provided to the hospital in good faith and not gratuitously, Pelo would be responsible for payments of said medical bills.

Hartig Drug Company v. Hartig,
602 N.W. 2d 794 (Iowa 1999).

Pursuant to a stock purchase agreement between brothers Richard and Kenneth Hartig, Kenneth acquired ownership of the land and buildings which housed the company drug stores. Kenneth was required under the agreement to lease the buildings to Hartig Drug. Included in the lease was the minimum monthly base rental amount, which could be increased to "2.75% of the growth sales" of the business of the store, if the percentage exceed the amount of the base monthly rent. The lease defined gross sales as "an aggregate of all retail sales of every kind and description and services

performed to the patrons."

The Hartig Drug negotiated a contract with the United States Postal Service to sell stamps and money orders. All postal service sales and services were paid directly to the U.S. Postal Service, however the U.S. Postal Service paid Hartig Drug $5,000 per year to help defer the costs of operating the postal station. Additionally, Hartig Drug contracted with the State of Iowa as a lottery distributor. The state paid the drug company a five percent commission of every ticket sold and also a ten percent bonus for the sale of any $100,000 winning lottery ticket. The stamp sales and the lottery commissions were never paid to Kenneth Hartrig.

Hartig Drug filed a petition for declaratory judgment, seeking to compel Kenneth to make certain repairs and provide the general maintenance for the building. Kenneth Hartig counterclaimed, alleging he was owed unpaid rent based upon the sale of lottery tickets and stamps, according to the lease.

Kenneth Hartig agreed to make the repairs sought by Hartig Drug and the issue whether the lottery and postage sales should be included in the lease amount was brought to trial before the district court. The district court found the rent calculation should have included the total sale of all lottery tickets and stamps sold at the locations.

HELD:
Applying the rules of interpretation and construction, the Supreme Court found the parties intended to exclude transactions such as lottery and stamp sales from the definition of "gross sales." Instead the lease meant that the additional rent should be based on the actual commissions received from the lottery tickets and the actual compensation received from the postal service for the sale of stamps. The district court's find was reversed and remanded for entry of judgment for initial rent based on the above.

EFCO Corporation v. Norman Highway Constructors Inc.
606 N.W. 2d 297 (Iowa 2000).

The parties entered into a written contract, under which EFCO would lease to Norman concrete forming equipment. A dispute arose between the parties with respect on how much Norman owed EFCO under the contract. Norman filed an action against EFCO in Texas court alleging fraud, breach of contract and breach of express and implied warranties. An hour and a half after Norman's suit was filed, EFCO filed an action against Norman in the Polk County District Court to recover for the lease payments allegedly due and unpaid.

The choice of forum clause in the contract between the parties provided that any action between the parties be instituted and litigated in Polk County and that the customer consented to the jurisdiction of such a court. Norman alleged that the contract was a contract of adhesion and that the choice of forum clause was contained in the reverse side of the forum on which no signature line appeared

The district disregarded Norman's allegations and found that the basis for personal jurisdiction was consent.

HELD:
The district court finding was affirmed, as Norman produced no evidence to establish the invalidity of the choice of forum clauses as a matter of law.

Condon Auto Sales and Service Inc. v. Crick
604 N.W. 2d 587 (Iowa 1999).

Condon Auto Sales brought a breach contract and conversion action against its former salesman, Crick, claiming that Crick breached his employment contract and duty of loyalty to the dealership. Additionally, Condon alleged that Crick had converted $700 in buyer incentives, which allegedly belonged to the dealership. Condon also sued Crick's subsequent employer, which was a competing dealership, for intentionally interfering with its employment contract with Crick.

Crick filed a counterclaim against Condon, claiming it withheld wages owed to him in the amount of $5,525, in violation of Iowa § Chapter 91(a). Condon alleged that it was entitled to withhold payment because Crick had a profit-draw deficient which he accumulated when he was employed by Condon. The dealership also alleged that this constituted a "wage dispute" under the act, which gave them the right to withhold the wages until the "dispute" was settled.

The district court granted summary judgment for Crick on the breach of loyalty contract claim and breach of good faith and fair dealing. The district court also granted a directed verdict for the subsequent employer on the intentional interference of contract claim, and a directed verdict for Crick on the breach of loyalty claim. After the jury returned a verdict against Crick on the breach of loyalty contract claim in the sum of $25,000, the trial court subsequently granted Crick's motion for judgment notwithstanding the verdict on the breach of loyalty contract claim, reconsidering its prior ruling and concluding the breach of loyalty was not recognized a cause of action.

HELD:
1) The evidence was sufficient to support the finding that Crick converted buyer incentives.

2) The evidence supported the award of punitive damages against Crick.

3) The punitive damage award was not grossly excessive.

4) The dealer's claim of an excessive draw against the salesman was not a wage dispute under the wage payment collection act, and therefore Crick was entitled to be paid the wages owed to him as well as liquidated damages and attorneys fees. "There is no state or federal law which permits an employer to set-off its claims against an employee's wages, nor was there any wage dispute which could authorize the withholding under Iowa code § 91(a).

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5) Substantial evidence supported the verdict for Crick's excessive draw.

6) Condon's damages were not caused by any breach of duty of loyalty and therefore, it was unnecessary to determine whether a separate cause of action exists for breach of loyalty either in contract or tort because Condon did not submit any evidence that demonstrated it was damaged by Crick's activities.

The case was remanded to the trial court to determine what liquidated damages and attorneys fees Crick was entitled for Condon's failure to pay to him wages owed.

Land O'Lakes v. Hanig
610 N.W. 2d518 (Iowa 2000).

Land O'Lakes commenced a breach of contract action against Hanig to recover damages its sustained when a producer failed to deliver corn in accordance with the parties' hedge to arrive contracts. The district court entered judgment in favor of Hanig and Land O'Lakes appealed.

HELD:
Assurances provided by Hanig to Land O'Lakes were inadequate to assure performance of Hanig's obligations. The trial erred as a matter of law in finding that a letter from Hanig constituted adequate assurance of performance. Therefore, Hanig breached the contract by failing to provide adequate assurances within thirty days of the Land O' Lakes' demand. Hanig's assurances that he would perform if the contracts were determined to be enforceable were inadequate and not within the terms of the contract.

The case was remanded to the trial court for entry of judgment in favor of Land O'Lakes and for determination of the damages to which Land O'Lakes is entitled

Top of Iowa Coop. v. Sime Farms Inc.,
608 N.W. 2d 454 (Iowa 2000).

Top of Iowa brought an action against Sime Farms Inc., seeking damages for Sime's failure to deliver corn under four hedge to arrive contracts. The district court entered judgment in favor of the cooperative and denied Sime's motions for judgment notwithstanding the verdict and for new trial. Sime's appealed.

HELD:
The finding entered by the district court was affirmed in all respects.

1) The hedge to arrive contracts between Top of Iowa and Sime fell within the commodity exchange acts exception for cash forward contracts.

2) Sime Farms failed to preserve error on its objection to the testimony of the cooperative's local

manager, who testified regarding the modifying assurances sought by Top of Iowa in regards to the hedge to arrive contracts.

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VII. COMMERCIAL

Kuehl v. Eckhart,
608 N.W. 2d 475 (Iowa 2000).

Eckhart obtained a judgment against Black Hawk Development Cooperation in a foreclosure action of a real estate contract. At the time, Eckhart's interest in the land was subordinate to the mortgagee and two judgment liens. Later, the mortgagee foreclosed its mortgage and the judgment was rendered for $56,000. An execution sale was held, and all interested parties received notice of the pending sale, except Eckhart. The home was sold for $34,000 and thereafter resold to Kuehl.

The trial court vacated the general execution order and limited Eckhart's lien holder's rights of enforcement to equitable redemption. Eckhart appealed.

HELD:
The order quashing the execution sale did not infringe upon Eckhart's lien holder's interest in property or violate his right to due process.

Ellefson v. Centech Corporation,
606 N.W. 2d 324 (Iowa 2000)

Ellefson obtained a default judgment against Centech Corporation for claims she brought under the Federal Americans with Disabilities Act and similar Iowa employment discrimination statutes. When the judgment went unpaid, Ellefson initiated garnishment proceedings to collect the judgment. Winnebago, an assignee of a security agreement, which allegedly gave the assignor a lien on the funds in the bank accounts held by Centech. Winnebago, asserting its lien had priority to Ellefson, intervened.

The district court held that Winnebago's security interest in the bank accounts were superior to Ellefson's claim and authorized the bank-garnishee to release the funds in the bank accounts to Winnebago. Ellefson appealed.

HELD:
The district court finding was affirmed.

1) Winnebago had a continuing security interest in the proceeds of the bank account.
2) Winnebago's interest was superior to Ellefson's garnishment claim.
3) Two sales of Centech's assets were not an assignment for the benefit of the creditors or any other proceeds intended to liquidate or rehabilitate Centech's estate for the purposes of a statute limiting a parties' security interest.

IOWA
APPELLATE COURT UPDATE

Negligence, Torts, & Indemnity

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I. NEGLIGENCE.

A. Duty

1. Statutory--When Statutes Give Rise to Actionable Duty

Sanford v. Manternach, 601 N.W.2d 300 (Iowa Oct. 13, 1999)

FACTS: Inmate Sanford sued the State under the Iowa Tort Claims Act, Iowa Code Chapter 669. Sanford alleged generally that the State owes a duty to inmates not to negligently impose excessive disciplinary sanctions. The district court granted the State's motion to dismiss, and the Iowa Supreme Court affirmed.

Analysis:

1. The Iowa Tort Claims Act does not create a cause of action, but rather recognizes and provides a remedy for a cause of action already existing which would have otherwise been without remedy because of common law immunity of the sovereign.

2. Even if the statutes cited by Sanford (Chapters 903A and 822) impose such a duty on the State, that does not necessarily mean that Sanford has a cause of action. "The violation of a statutory duty gives rise to a tort claim only when the statute, explicitly or implicitly, provides for such a cause of action." Citing Marcus v. Young, 538 N.W.2d 285, 288 (Iowa 1995). The following four-factor test governs when a statutory duty gives rise to a cause of action:

   (i) Is the plaintiff a member of the class for whose benefit the statute was enacted?

   (ii) Is there any indication of legislative intent, explicit or implicit, to either create or deny such a remedy?

   (iii) Would allowing such a cause of action be consistent with the underlying purpose of the legislation?

   (iv) Would the private cause of action intrude into an area over which the federal government or a state administrative agency holds executive jurisdiction?

(Quoting Marcus, 538 N.W.2d at 288).

3. Applying this four-factor test, the Court found that Plaintiff's cause of action failed the second prong of this test. "The lack of any indication that the legislature intended to create such a cause of action is fatal to plaintiff's case."

NOTE: This case is interesting because it suggests that Factor 2 of the Marcus 4-factor test (an indication of legislative intent to create a cause of action) is not merely a *factor*, but a necessary element without which the Court will never recognize a private cause of action. The Court wrote that because this factor was not satisfied, it need not even examine factors 3 and 4.

2. Premisis Liability

(a) Absent Owner/Lessor's Liability for Injuries Caused to Lessee's Business Invitees by Dangerous Conditions on Land.

Van Essen v. McCormick Enterprises Co., 599 N.W.2d 716 (Sept. 9, 1999).

The Van Essen case involves injuries sustained when a commercial tenant's (McCormick's) business invitee (Van Essen) lost his foot in a corn auger. At issue was whether the absent landlord could be HELD: liable for such injuries. It was undisputed that the allegedly dangerous condition had existed at the time the lease was initiated. Additionally, it was undisputed that the landlord continued to insure the leased property, shared in the costs of repairs, and shared in the profits arising from the land. The plaintiff argued that this was sufficient "retained control" to make the landlord a "possessor" of the land and subject it to liability The Court found these indicia of control insufficient, and affirmed the district court's entry of summary judgment in favor of the landlord.

HOLDING: On the facts of this case, the lessor did not retain control sufficient to subject him to liability for injuries sustained by his tenant's business invitee.

ANALYSIS: 1. Mere ownership will not impose liability on an absent owner for a premises defect.

2. Generally, the tenant alone is liable for injuries arising from dangerous conditions on a leased premises, *regardless of whether the condition existed when the lease was created*.

3. Because the landlord in this case had neither (1) retained *the right to enter the property to cure any deficiency*, or (2) retained *the right to control the entry of persons onto the property to provide safeguards for them*, it could not be considered to have "retained control" sufficient to make it a

"possessor of the land" and subject it to liability. The court's language suggested that one of these two indicia must exist in order for a commercial landlord to be liable as a "possessor of land."

COMMENT: For another recent case involving the importance of "retained control" in this area, see Fouts v. Barker, 592 N.W.2d 33 (Iowa April 28, 1999), covered in last year's outline. But see Tenney v. Atlantic Associates d/b/a Park Towne Apartments, 594 N.W.2d 11 (Iowa April 28, 1999), also covered in last year's outline.

(b) Possessor's Liability for Injuries Caused by Unknown Conditions.

Richardson v. The Commodore Inc., 599 N.W.2d 693 (Sept. 9, 1999), involved a tavern in an eighty-year-old building. Above a false-ceiling was the original plaster ceiling, which dated to 1913. In 1994, the old ceiling split, and a large piece of plaster fell through the false ceiling and severely injured a patron who was playing pool. At issue on appeal was whether the property owner could be held liable for the falling plaster. It was undisputed that the bar owner had no actual knowledge that the ceiling was in disrepair and could not have ascertained this fact without lifting the ceiling and inspecting the plaster with a flashlight.

On a petition for further review, the Supreme Court found sufficient evidence to create a jury question on the premises liability claim, and remanded for a trial on this theory.

HOLDING: A possessor of land has a duty to inspect the premises to discover dangerous conditions or latent defects, and such inspection must be "followed by such repair, safeguards, or warnings as may be reasonably necessary for the invitee's protection under the circumstances." Accordingly, *a possessor of land can be held liable for injuries caused by unknown defects if the jury concludes that he/she should have discovered such latent defects in the course of a reasonable inspection.*

(c) Snow and Ice Removal--Unnatural Accumulations

Hopping v. College Block Partners, 599 N.W.2d 703 (Iowa Sept. 9, 1999).

Bushnell's Turtle was located in the College Block building in the pedestrian mall in Iowa City. The building did not have gutters, because a City Ordinance restricted the use of such devices. The City had entered into a covenant to remove snow and ice from the pedestrian plaza area.

The owner of College Block and of Bushnell's Turtle was aware that six or eight times a winter, melting snow dripping from a parapet on the College Block building would accumulate and refreeze as a patch of ice on the brick sidewalk in front of the building. One winter day, Plaintiff Hopping was hopping down the sidewalk when she slipped and fell. This occurred roughly ninety minutes after Hopping had last hopped by, at which time no ice had been present. Hopping was predictably hopping mad, and she sued both College Block and Bushnell's Turtle.

Defendants raised several defenses. First, they cited several Iowa cases which stated that "a city's duty to remove *natural* accumulations of snow and ice must be based on [a] actual or constructive notice of the dangerous condition and [b] a reasonable period of time within which to remove it." Defendants stated that because they had neither notice of the ice nor a reasonable period to remove it, they should not be held liable. Second, defendants argued that a city ordinance prohibiting gutters on buildings caused the dangerous condition. Third, defendants argued that the City's covenant to remove accumulations of ice and snow in the pedestrian area relieved defendants of liability.

HOLDINGS:

1. The requirements of notice and a reasonable opportunity to remove the hazard which limit liability in situations involving natural accumulations of ice and snow do not extend to situations where the defendant has *control over the condition that caused ice to form*. Because (1) the parapet on defendants' building caused the condition, and (2) defendants were aware of the danger posed by the building runoff, defendants were properly held liable, even though defendants had no notice of any actual accumulation of ice on a particular day.

2. City ordinance barring gutters did not insulate defendants from liability. "Once Bushnell and College Block elected to own property subject to those anti-gutter restrictions, it was incumbent upon them to devise other means by which the runoff could be safely channeled away from the sidewalk below."

3. City's covenant to remove snow and ice did not insulate defendants from liability (nor did it subject the City to liability), because City's obligation was limited to (1) the removal of *natural* accumulations of ice and snow, and (2) and frozen building runoff that was present and observable *when* the city was removing natural

accumulations. "It is unrealistic," wrote the Court, "to interpret the city's undertaking as extending to the removal of isolated building runoff on occasions when its employees were not present for purposes of dealing with fresh wintertime precipitation."

3. Highway Construction Worker – Standard of Care

Kuta v. Newberg, 600 N.W.2d 280 (Iowa Sept. 9, 1999).

Brad Kuta, a twenty-year-old civil engineering student at University of Iowa was killed when struck by a car while working on a survey crew for the IDOT. At the time of the accident, the IDOT was in violation of certain OSHA safety regulations. The decedent's parents, who were also administrators of his estate, brought suit against Newberg, the driver who killed Kuta, on several theories. Newberg relied on both the "sole-proximate-cause" and "comparative fault" defenses. [sole proximate cause defense is discussed elsewhere in this outline]. On the comparative fault defense, he argued that plaintiff's own negligence caused his death. The jury allocated the plaintiff 20% of fault, and the plaintiff's verdict was accordingly reduced from $1,250,000 to $1,000,000.

Plaintiffs raised two challenges to the comparative fault instructions on appeal. As explained below, the Iowa Supreme Court rejected both challenges and affirmed the district court's reduction of the verdict.

1: General Instruction on Construction Worker's Duty of Care.

First, Plaintiffs argued that because Brad Kuta was a construction worker and therefore subject to a reduced standard of care, the district court erred in allowing his negligence to be weighed at all. The instruction regarding Kuta's standard of care was as follows:

> A worker on the highway is required to use ordinary care. A worker on the highway is not charged with the same degree of care as an ordinary pedestrian. Bradley Kuta was required to exercise only such reasonable care and observation for his safety as under the circumstances were called for. The conduct of Bradley Kuta's employer is not chargeable to him.

HOLDING: This instruction accurately conveyed the proper standard of care for construction workers.

2. Improper Instruction Regarding "Pedestrian Crossing a Road"

Second, Plaintiffs argued that the district court improperly instructed the jury that "any pedestrian crossing a road at a point other than a cross walk shall yield the

right to all vehicles on the road. A violation of this law is negligence."

HOLDING: This instruction was improper and potentially confusing, as the instruction refers to an ordinary pedestrian's duty of care and is therefore "inapposite in the case of a highway worker." However, any confusion in the court's instructions was cured in the same instruction, which further provided that "the driver of a vehicle shall yield the right of way to pedestrian workers doing maintenance or construction work on a highway whenever the driver is notified of the presence of such workers by a flagman or a warning sign." When the instructions are considered as a whole (as they must be, see Leaf, 590 N.W.2d at 536), they make it clear that workers on a highway are not charged with the same degree of care as an ordinary pedestrian.

4. Nonfeasance–Duty to Act

Dettmann v. Kruckenberg, 613 N.W.2d 238 (Iowa July 6, 2000).

Driver of beer truck parked at convenience store, left truck unlocked, and went inside for approximately 5 minutes. While he was inside, two youths, including Kruckenberg, stole 36 cans of beer from his truck. The youths subsequently got drunk, went driving, and killed Dettman's wife in an accident. Dettman brought wrongful death action as executor for wife's estate, naming not only Kruckenberg (driver) and the owner of the car Kruckenberg was driving, but also the beer distributor and the beer truck driver, based on a negligent failure to lock the beer truck. At trial, the district court granted the beer truck driver and distributor a directed verdict, holding: (1) that there was no special relationship between the beer truck driver and the victim such that the beer truck driver owed the victim a legal duty; and (2) that even assuming the existence of such a duty, causation was lacking because of various intervening acts, including (a) theft of the beer; (2) possession and consumption of the beer by minors; and (3) driving in a reckless or intoxicated condition. Kruckenberg was stuck with a $640,000 verdict. Dettman appealed.

Analysis & Holding: Duty is a necessary element of negligence, and where nonfeasance (failure to act) is at issue, the law ordinarily requires the existence of a special relationship between the injured party and the alleged negligent party before a legal duty will be found to exist. In this case, there is no evidence that the beer distributor or its driver had ever experienced a theft of beer from a beer truck, or that a theft of this type had ever been reported to enforcement authorities. Nor are there any special

circumstances that create liability in this case. Accordingly, the district court correctly concluded that no special relationship existed between these defendants and the driving public in this factual situation. Affirmed

Note: The more important holding of this case is the Iowa Supreme Court's "first impression" holding that a criminal conviction has preclusive effect in a later civil suit as to issues that were essential to the final judgment of conviction in the criminal case. This holding is beyond the scope of this outline, but should be discussed in detail in one of the other two case law updates.

5. Medical Negligence–Skilled Nursing Facility–Routine Care

Thompson v. Embassy Rehab. & Care Ctr., 604 N.W.2d 643 (Iowa Jan. 20, 2000)

Plaintiff Thompson contends that Rehab. Center, a skilled nursing facility, was negligent in managing a bedsore that developed into a severe coccyx ulcer. He alleges that his caretakers failed to properly position him in a way that would lessen the pressure on the affected area (despite his unwillingness to comply with such repositionings), and that they failed to seek inpatient hospital care and necessary surgery for his condition when the need arose. However, Thompson failed to designate an expert witness regarding the proper standard of care. Based on this omission, district court granted defendants' motion for summary judgment, holding that the standard of care under the circumstances was not obvious or within the common knowledge of a lay jury. Thompson appealed, and the Supreme Court affirmed.

HELD:

(1) Time of the decision to perform surgery required a medical judgment, and even if defendants could be held liable for an erroneous decision in this regard, expert testimony is necessary to establish this element.

(2) Thompson's claim that care facility staff was negligent in not regularly repositioning him properly in response to instructions of attending physician and nurse presents a close question. Ordinarily, no expert testimony is required to establish the standard for ministerial or routine care. However, the record clearly showed that Thompson fought the repositioning, and that the question was really "when is it negligent not to **force** repositioning over the protests of the patient." The answer to this question is not within the common understanding of the jury, and the district court properly held that failure to designate an expert on this issue mandated dismissal.

Defenses

1. Comparative Fault–Burden to Prove Fault of Released Persons

Beyer v. Todd, 601 N.W.2d 35 (Iowa Oct. 13, 1999).

A multi-car accident occurred, and Beyer sued various persons, including Todd. The defendants other than Todd were eventually released, and the case against Todd proceeded to trial. Under Iowa Code § 668.3(2)9b), a percentage of fault is to be attributed to each "released person." Todd requested an instruction that it was plaintiff Beyer's burden to prove the fault of Comer and Gardner (the released persons).

> HELD: The district court did not err by refusing this instruction. Ordinarily, the burden of proof is upon the party who would suffer loss if the issue were not established. See Iowa R. App. P. 14(f)(5). Citing Iowa Code §§ 668.3 and 619.7, the Supreme Court held that because Defendant Todd had the most to lose if no fault were allocated to Comer and Gardner, Defendant Todd carried the burden of proving their fault as part of his defense.

2. Sole Proximate Cause Defense & Comparative Fault

Kuta v. Newberg, 600 N.W.2d 280 (Iowa Sept. 9, 1999).

Brad Kuta, a twenty-year-old civil engineering student at University of Iowa was killed when struck by a car while working on a survey crew for the IDOT. At the time of the accident, the IDOT was in violation of certain OSHA safety regulations. The decedent's parents, who were also administrators of his estate, brought suit against Newberg, the driver who killed Kuta, on several theories. Newberg relied on both the "sole-proximate-cause" and "comparative fault" defenses. With regard to the sole-proximate-cause defense, he argued that the IDOT's violation of OSHA safety regulations was the "sole proximate cause" of Kuta's death. On the comparative fault defense, he argued that plaintiff's own negligence caused his death.

The Judge instructed the jury on the "sole proximate cause" defense, and asked the jury to attribute percentages of fault to each party. The jury returned a verdict attributing 20% fault to the decedent Kuta and 80% fault to Newberg, the driver. The jury did not expressly rule on Newberg's sole proximate cause defense. Newberg appealed, arguing that had he been able to develop the IDOT's violations of OSHA regulations, he would have been entitled to judgment as a matter of law on the sole-proximate-cause defense. Kuta cross-appealed, arguing that because the sole-proximate-cause defense is incompatible with comparative fault, it was error for the trial court to give this instruction.

HELD:

1. Plaintiff is correct that the defendant was not entitled to the submission of the sole-proximate-cause defense, because such defense is incompatible with comparative fault. See Baker v. Ottumwa, 560 N.W.2d 578, 583 (Iowa 1997). However, plaintiff was not prejudiced by this error, as "the jury obviously rejected the defense by assessing fault against both the plaintiff and the defendant."

2. OSHA standards are adopted for the protection of employees and should not be applied to defeat an employee's claim against a third party. See Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 537 (Iowa 1999).

3. Sudden Emergency Doctrine

Beyer v. Todd, 601 N.W.2d 35 (Iowa Oct. 13, 1999).

Facts: A car stopped in traffic at an intersection. Beyer, who was behind, stopped behind it. Todd, who was behind Beyer, failed to stop and crashed into Beyer from behind, causing damage. Todd requested a jury instruction on the sudden emergency doctrine, and the district court refused. The jury found for Beyer, and Todd appealed the refusal of the requested instruction.

HELD: The sudden stop that confronted Todd is more like the everyday hazard of driving through a school parking lot, see Weiss v. Bal, 501 N.W.2d 478, 482 (Iowa 1993), than like a deer bounding into the road at night directly in front of driver, see Mosell v. Estate of Marks, 526 N.W.2d 179, 182 (Iowa App. 1994). A driver should be prepared for a sudden stop in traffic, see Iowa Code § 321.285, and the stop involved in this case should not have been unexpected or unforeseen. Accordingly, the district court properly refused Todd's request for a sudden emergency instruction.

4. Sports Exception Defense

Leonard v. Behrens, 601 N.W.2d 76 (Iowa Oct. 13, 1999).

Facts: Leonard and Behrens were involved in a paint-ball game. Behrens was a regular, Leonard a novice. Behrens lent Leonard safety goggles, which had a tendency to fog up, and told Leonard not to take them off. At some point during the game, the goggles fogged up. Rather than quitting the game, Leonard kept playing with the goggles on his forehead rather than over his eyes. Behrens shot Leonard in the eye. Leonard sued, alleging (1) that Behrens breached a duty when he failed to tell Leonard of the fogging tendency of the glasses, and (2) that Behrens breached a duty when he shot Leonard in the eye. The court directed a verdict for the defense, finding no evidence that Behrens knew Leonard was not wearing the goggles when he shot the paint ball, and substantial evidence that all participants knew the rules of the game including the rule requiring

use of eye goggles. Because Leonard kept playing after the goggles fogged up, the fogging was not a proximate cause of his injuries. Leonard appealed.

HELD:

1. Because Leonard continued playing after the goggles fogged up and with knowledge of this problem, the failure to warn that the goggles would fog up is not a proximate cause of Leonard's injuries. (footnote 1).

2. For the first time, the Iowa Supreme Court formerly adopted the "contact sports exception" to common law negligence. This doctrine recognizes that " a participant in an athletic event assumes certain risks normally associated with the activity. The majority of jurisdictions which have considered this issue conclude that personal injury cases arising out of athletic events must be predicated on "reckless disregard of safety." Thus, sports participants are liable for reckless or intentional infliction of injuries, but not for mere negligence.

3. Reckless disregard means "intentionally doing an act of an unreasonable character in disregard of a known risk or a risk so obvious that the actor must be taken to have been aware of it, and so great as to make it highly probable that harm would follow."

4. Contact Sports exception exists regardless of whether sport was formally organized or coached, and extends to paint-ball. The record shows that "the children were involved in an informal contact game in which each player consented to being shot with the paint balls."

5. Evidence in this case would not support the requisite finding of recklessness, and district court was correct in directing verdict for defendant.

5. Sovereign Immunity

(a) Municipal Immunity for Negligent Execution of Statute by Employee Executing Due Care

Kelley v. Story County Sheriff, 611N.W.2d 475 (June 1, 2000)

This case involved a residence owner's tort claims against officers employed by the county sheriff's office who forcibly entered the residence to execute an arrest warrant. At issue were Iowa Code § 670.4(3), which provides that a municipality or county has no liability for "any claim based upon an act . . . of an officer or employee of the municipality, exercising due care, in the execution of a statute, . . . whether the statute, . . . is valid[,]" and Iowa Code § 670.12, which extends this immunity to officers and employees of municipalities except with regard to punitive

damages where actual malice or willful, wanton, and reckless misconduct is proven.

HELD: A municipality cannot avail itself of the immunity provisions of sections 670.4(3) and 670.12 if the government employees do not exercise due care in executing a statute in the first instance. Thus, the possibility remains that a property owner may be entitled to compensation for damage to property when law enforcement officers fail to use due care in performing their statutory duties. However, in this case, due care was used, and both the Sheriff's office and the individual officers are immune.

(b) Indian Tribes' Immunity and Waiver Thereof

Gross v. Omaha Tribe of Nebraska, 601 N.W.2d 82 (Iowa Oct. 13, 1999)

Facts: Plaintiff was injured in a slip-and-fall at a casino on lands owned by the Omaha Tribe. She sued the tribe for her injuries. Tribe defended claiming sovereign immunity. Plaintiff argued that sovereign immunity was waived by Compact between the Tribe and the State of Iowa over gaming on Indian Lands, and by 25 U.S.C. § 1322, which gives state courts jurisdiction over cases related to gaming on Indian lands.

HELD: Indian tribes possess sovereign immunity, and waiver of such immunity by the tribe may not be implied "but must be unequivocally expressed either by the tribe or by act of Congress." Neither the statute nor the Compact constitutes such unequivocal expression, and the Tribe is immune from this suit.

6. Equitable Estoppel

Hendricks v. Great Plains Supply Co., 609 N.W.2d 486 (Iowa April 26, 2000).

In a building fire case, Plaintiff's insurer's fire investigator stated to Defendant Colony Heating's insurance adjuster that Colony was not responsible for the fire. Colony claims, based on this representation, that Hendrick's claim against Colony was barred by the doctrine of equitable estoppel.

Elements: Elements of equitable estoppel defense are (1) a false representation or concealment of material facts; (2) lack of knowledge of true facts on part of actor; (3) intention that it be acted upon; (4) reliance thereon by the party to whom made to his prejudice and injury.

Agency: This case turned on whether a fire investigator had either actual or apparent authority to bind the insurance company that had retained him.

HELD: While an *adjustor* is clothed with the authority to adjust a loss with an insured and has powers and authority coextensive with the business entrusted to him, see Briney v. Tri-State Mutual Grain Dealers Fire Ins. Co., 117 N.W.2d 889 (1962), the fire *investigator* in this case was "merely hired to investigate the cause of a fire which destroyed property covered under a policy issued by the insurer." The insurer was not bound to accept the investigator's findings or conclusions. The record contained no evidence that the investigator had been given actual authority to make binding representations regarding the liability of potential defendants, nor is there evidence that the insurer knowingly permitted or held the investigator out to possess such authority (apparent authority).

II. SPECIFIC TORTS

A. Bad Faith

Seastrom v. Farm Bureau Life Ins. Co., 601 N.W.2d 339 (Sept. 9, 1999).

Opinion: Justice Snell

Alice Seastrom applied for a life insurance policy from Farm Bureau. Her application was for $400,000. Farm Bureau states that Alice Seastrom and the potential beneficiaries (her two children, the plaintiffs to this case) were provided with a "conditional receipt"—a perforated form located at the bottom of the final page of the life insurance application, which receipt purported to limit Farm Bureau's liability to "no more than $250,000 if an applicant dies prior to the issuance of a life insurance policy." Plaintiffs denied that any such receipt was ever delivered to Mrs. Seastrom or to them. Farm Bureau admits that the terms of this "conditional receipt" were never explained to Mrs. Seastrom.

Alice Seastrom died prior to the issuance of a life insurance policy. Farm Bureau had never before been faced with a situation where an applicant dies before the issuance of a policy, and the face value of the policy was greater than the "conditional receipt amount." After consulting with its legal staff, it determined that it would pay $250,000.

Seastrom's children filed suit, alleging breach of contract and first party bad faith, among other theories. The only tort claim actually submitted was the bad faith claim. Verdict was entered on this claim in favor of the plaintiffs, and Farm Bureau appealed. On appeal, the Iowa Supreme Court reversed.

HELD: An insurance company has the right to challenge claims that are 'fairly debatable' without being

subject to a bad faith tort claim. It is clear Farm Bureau investigated the claim, even if such investigation was not as thorough as plaintiffs would have desired. "In a first-party bad faith claim, "an imperfect investigation, standing alone, is not sufficient cause for recovery if the insurer in fact has an objectively reasonable basis for denying the claim." The existence of the conditional receipt and Brinkman and Lewis's contention that the receipt had been given to Alice created a reasonable basis for denying the claim for $400,000 of coverage. The claim was 'fairly debatable' such that Farm Bureau was entitled to a directed verdict on the bad faith claim. Submission of this claim was error.

NOTE: The Court also held that the district court had properly admitted parol evidence to establish the existence of an oral contract, and that such evidence was sufficient to support the jury's finding of an oral contract for $350,000 in coverage. The Court held that the district court had properly granted Farm Bureau's motion for JNOV and properly vacated the jury's award of punitive damages to plaintiffs.

B. Promissory Estoppel

Schoff v. Combined Insurance Co., 604 N.W.2d 43 (Iowa Dec. 22, 1999).

Facts: Plaintiff told eventual employer at time of hiring that Plaintiff had never been convicted of a felony, and employer assured employee "as long as you have no felony convictions, your criminal record will be no problem." Plaintiff was subsequently fired when he was unable to obtain a fidelity bond because of his criminal record (had been charged with two felonies and failed to disclose this on his application). Plaintiff sued, claiming promissory estoppel against the employee (district manager) who made the representation and negligent training and supervision of such employee against the employer

1. The Supreme Court adds a previously unarticulated element to actions based on Promissory Estoppel. New element requires that there be "a clear understanding by the promisor that the promisee was seeking an assurance upon which he could rely and without which he would not act." This element, says the Court, is consistent with the Restatement's express requirement that "the promisor should reasonably expect the promise to induce action or forbearance on the part of the promisee." Id. at 48 (citing

Restatement (Second) of Contracts § 90, at 242 (1981)).

2. After Schoff, the elements of an action for promissory estoppel are as follows:
(1) a clear and definite promise;
(2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act;
(3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and
(4) injustice can be avoided only by enforcement of the promise.

3. The Supreme Court rejects the defendant employer's theory that the employment-at-will doctrine is incompatible with and thus bars suits for promissory estoppel in the employment-at-will context. The Court held that "because promissory estoppel has not been limited to relationships that are advisory in nature as opposed to adversarial, . . . the rationale for denying relief to an at-will employee under a theory of negligent misrepresentation does not apply to the doctrine of promissory estoppel."

C. Negligent Training and Supervision

Schoff v. Combined Insurance Co., 604 N.W.2d 43 (Iowa Dec. 22, 1999).

Facts: Plaintiff told eventual employer at time of hiring that Plaintiff had never been convicted of a felony, and employer assured employee "as long as you have no felony convictions, your criminal record will be no problem." Plaintiff was subsequently fired when he was unable to obtain a fidelity bond because of his criminal record (had been charged with two felonies and failed to disclose this on his application). Plaintiff sued, claiming promissory estoppel against the employee (district manager) who made the representation and negligent training and supervision of such employee against the employer. As discussed elsewhere in this outline, the promissory estoppel claim failed as a matter of law.

Question: Where Plaintiff's claim that employee's action was tortious fails as a matter of law, can Plaintiff nonetheless maintain an action against employee's employer, based on negligent hiring, supervision, or training?

Answer: No. Because, in this case, Plaintiff failed to show that the employee had acted tortiously, Plaintiff's negligence claim against the employer must fail as well. "The torts of negligent hiring, supervision, or training 'must include as an element an underlying tort or wrongful act committed by the employee.'" Where the conduct that proper supervision and training would have avoided is not actionable against the employee, the employer cannot be sued for negligent supervision or training.

D. Breach of Loyalty

Condon Auto Sales & Serv., Inc. v. Crick, 604 N W.2d 587 (Iowa Dec. 22, 1999).

Condon Auto Sales brought an action against an employee (Crick) for "breach of loyalty " The trial court granted Crick's motion for JNOV, concluding that there can be no independent claim for breach of loyalty against the employee, and in any case, that it was not supported by sufficient evidence On appeal, the Supreme Court flirted with the question of whether such a cause of action exists in Iowa, but decided that it need not answer the question because Condon could not prove that it had suffered any damages, and the JNOV was accordingly correct regardless of whether such a cause of action exists.

NOTES: (a) The Court noted that employer claims for breach of loyalty are generally captioned as breach of fiduciary duty claims, because "a principal-agent relationship gives rise to a fiduciary duty of loyalty, and an employer-employee relationship can be closely associated with a principal-agent relationship."

(b) Some Courts have refused to recognize a separate cause of action by an employer against an employee for breach of loyalty without an underlying fiduciary relationship.

(c) Jurisdictions which have recognized such a cause of action generally hold that the scope of the duty varies depending on the nature of the relationship--more trust implies a higher duty.

(d) Jurisdictions which have allowed such claims have stressed that such an action would be confined to "instances of direct competition, misappropriation of profits, property, or business opportunities, trade secrets, and other confidences, and deliberately performing acts for the benefit of one employer which are adverse to another employer."

(e) Because Condon had failed to prove any damages, the Court need not decide whether such a cause of action exists in Iowa.

Comment: Whether or not this cause of action exists in Iowa probably matters little, in light of the Supreme Court's extension of the concept of "fiduciary duty" to include all relationships involving a "reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other " Kurth v. Van Horn, 380 N W.2d 693, 695-96

(Iowa 1979). If the relationship involves no faith, confidence, or trust, then arguably no loyalty can be expected.

E. Tortious Interference

Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587 (Iowa Dec. 22, 1999)

The 1998-1999 year (covered in last year's outline) saw several important tortious interference decisions, most notably Compiano v. Hawkeye Bank & Trust, 588 N.W.2d 462 (Iowa January 21, 1999), and Financial Marketing Services, Inc. v. Hawkeye Bank & Trust of Des Moines, in which the Iowa Supreme Court clarified the difference between claims for interference with contract and claims for interference with prospective business relationship. See also Corcoran v. Land O' Lakes, Inc., 39 F. Supp.2d 1139 (N.D. Iowa 1999) (Judge Bennett's explanation of Compiano and Financial Marketing Services). The main thrust of these decisions is that tortious interference with an existing contract requires only "intentional and improper" interference," while tortious interference with prospective business relationship requires that the plaintiff prove by *substantial evidence* that the defendant's *predominate or sole motive for interfering* was *to injure or financially destroy* the plaintiff. Where a contract is terminable at will, only the latter tort is available, and a plaintiff must meet this much higher standard.

Compiano and Financial Marketing Services suggested that it will be very difficult to get to a jury on a tortious interference claim where a contract is terminable at will. Condon Auto Sales is further evidence supporting this conclusion. There, the Court summarily disposed of Plaintiff's appeal from the district court's grant of summary judgment on Plaintiff's tortious interference claims. In two paragraphs at the very end of this multi-part decision, the Court stated simply that there was "insufficient evidence to establish any predominate or sole motive by Wisner's to damage Condon." Condon, 604 N.W.2d at 601.

F. Defamation

Kennedy v. Zimmermann, 601 N.W.2d 91 (Iowa Oct. 13, 1999)

Facts: Attorney Kennedy allegedly violated the attorney-client confidence of Richmond, an inmate, and such alleged violation allegedly caused the inmate to suffer physical injuries. (Note my care not to republish any defamatory statements). Richmond's attorney answered questions posed by a reporter of the Waterloo *Courier* regarding the lawsuit. The *Courier* ran an article stating that Richard Zimmerman, an Iowa City attorney who is representing Richmond, said Kennedy's alleged actions were a 'breach of her ethical duties and negligent.'" Kennedy saw this article, and sued Zimmerman for defamation. The district court

granted Zimmerman's motion for summary judgment, holding that the statement fell within Zimmerman's absolute privilege as an attorney "to publish defamatory matters concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." Restatement (Second) of Torts § 586. On appeal, the Iowa Supreme Court reversed, finding the privilege inapplicable.

Analysis:

"When the occasion giving rise to a communication by a lawyer is not connected to a judicial proceeding, the need for unbridled advocacy is diminished, and the need to protect the intrusion upon a person's reputation is enhanced. Thus, communications by attorneys during occasions beyond a judicial proceeding are outside the protection of the absolute privilege."

"The duties and actions of a lawyer in representing a client are not confined to judicial proceedings. Thus, depending on the occasion and the content of the communication, the privilege may or may not apply. The question we face in this case is whether statements made by an attorney to a newspaper reporter in the course of an interview conducted by the newspaper reporter, essentially restating the allegations of a petition filed with the court, are within the scope of the privilege."

HELD:

1. To fall within the absolute privilege accorded attorneys, not only must content of communication relate to a judicial proceeding, but the occasion must also be protected.

2. Even republication outside a judicial proceeding of protected communications previously made in an action (i.e., allegations in petition) is generally not privileged.

3. Here, the statement by an attorney to a media representative that another attorney's actions were "a breach of her ethical duties and negligent" fell outside the absolute privilege, even though these allegations merely mirrored the allegations in the malpractice petition

<u>Considerations motivating Holding</u>:

1. Court's conclusions that excluding statements made by attorneys to media from

absolute privilege will not inhibit attorneys from fully investigating their claims or from fully and completely presenting them to the court.

2. Absence of close judicial control over statements made to media shows the attenuated nature of relationship to court proceedings. ("Absolute immunity, it seems, should be confined to cases where there is supervision and control by other authorities, such as courts of justice . . . .").

3. Limited nature of ethical constraints placed on lawyers concerning public statements about litigation.

4. Fear that allowing privilege to become too broad will interfere with interests in protecting person's good reputation.

5. Similar treatment of issue in other jurisdictions.

G. Conversion

State v. Hollinrake, 608 N.W.2d 806 (Iowa App. Jan. 12, 2000).

This is a criminal case, but it involves a discussion of the civil tort of conversion, citing the Restatement (Second) of Torts §§ 221(b), 222A(1), & 228 (1964) and several Iowa cases. Legal Discussion: Conversion is an unusual tort because it does not contemplate the actor's motivation, but rather requires only intentional exercise of control over property "which so seriously interferes with the right of another to control it that the actor may justly be required to pay . . . the full value of the chattel." Conversion may be committed by obtaining the chattel through fraud or by using a chattel, properly within one's control, in an unauthorized manner. In conversion cases, "the reasonable and necessary expenses incurred in recovering the property are a proper element of damage."

Application: Sheriff Hollinrake's falsification of public documents and abuse of his authorization as sheriff permanently dispossessed tax dollars from the people of Monroe County, and such dispossession constituted conversion even though the Sheriff's motives were not to benefit himself but to spend these funds to fight crime in unauthorized ways. The resulting audit was a necessary expense incurred to recover the converted property, and in a conversion action, the cost of the audit would be recoverable as damages.

H. Nuisance

Perkins v. Madison County Livestock & Fair Assoc., 613 N.W.2d 264 (Iowa July 6, 2000)

Neighboring property owners sued owners/operators of county fairgrounds based on nuisance. At issue was an auto racetrack that generated noise, dust, and exhaust. The district court held that the racetrack was not a nuisance because its interference with the plaintiffs' use and enjoyment of their property seven times a year was not sufficiently continuous to be "unreasonable" and thus qualify as a nuisance.

Law: "If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying, or intolerable, then the invasion is significant enough to constitute a nuisance." Citing Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996). Relevant to this analysis are the reasonableness of the (1) manner, (2) place, and (3) circumstances in which the offensive business activity in undertaken.

HELD:
(1) although Plaintiffs moved in next to the fairgrounds, they did so before racetrack was completed, and therefore did not "move to the nuisance" in this respect. Therefore, plaintiffs have priority of location.
(2) The character of the neighborhood is not one in which figure-eight racetracks would typically be found, so this factor weighs in favor of plaintiffs.
(3) District Court erred in holding that because races occur only seven times a year, they are not a nuisance to Debra Perkins, the track's closest neighbor, who has dirt clods thrown onto her yard from the racetrack, fumes entering her living room, and engine revving so loud that she can't hear the television. Although the other Plaintiffs' complaints do not rise to the level of nuisance, Ms. Perkins' complaints do.

The Court cited 58 Am.Jur.2d Nuisances § 96, at 746 (1989) for the proposition that while the frequency of annoyance caused by an alleged nuisance is relevant, it is only one factor, and even infrequent annoyances, if severe, can constitute a nuisance.

I. False Arrest and Extortion

Zohn v. Menard, Inc., 598 N.W.2d 323 (Iowa App. 1999)

Various Patrons of Menards were detained, questioned, and searched by private security guards on grounds that they were suspected of shoplifting. They sued store and security company, alleging false imprisonment. Store defended based on statutory immunity from false imprisonment claims where search or detention is based on reasonable belief that person had concealed property.

False Arrest

A

Summary of Law: False imprisonment is the unlawful restraint of an individual's personal liberty or freedom of locomotion. The essential elements of this tort are "(1) detention and restraint against one's will and (2) the unlawfulness of such detention or restraint. Detention or restraint against one's will does not need to be accomplished by physical force or threats of physical force. The requisite confinement can also result from submission to asserted legal authority. It is the fact of detention rather than its length that is relevant--there is no "de minimus" exception.

A merchant or employee is immune from an action for false imprisonment where search or detention is based on a reasonable belief that the detainee had concealed property, and is for a reasonable length of time and conducted in a reasonable manner by a person of the same sex. See Iowa Code § 808.12. While "reasonableness" is usually a question for the jury, where the relevant facts are undisputed, this issue can sometimes be decided as a matter of law.

The facts surrounding each patron were different, and so, therefore, is the analysis:

1. Patron Foster submitted when employee told him that "new store policy" required that his bag be searched even though there was no grounds to suspect him of anything. HELD: On these facts, there was no evidence of "reasonable grounds of suspicion" that would give rise to immunity, and the store was accordingly not immune. Also, this search constituted detention even though no force was used, as it was done under the employee's asserted authority.

2. Patron Rice was subjected to search based on report that someone had seen Patron place a can of glue in his pocket. Search showed no glue, and Patron had not been near the glue section. HELD: Patron Rice had created genuine dispute of material fact as to reasonableness of grounds of suspicion, and case should proceed to jury.

3. Patron Newton was detained when employee observed him leaving store with two cans of paint not labeled with a "paid" sticker verifying payment. When payment was verified, Newton was allowed to leave. HELD: On these undisputed facts, defendants established reasonable grounds for detention as a matter of law, and district court properly granted summary judgment for Store on Newton's claims.

3. Patron Prangler detained after employee saw him place a drill bit into a paper folder and leave the store without paying for it. His vehicle was stopped and searched. When he failed to produce a receipt, he was escorted to private office, detained, and questioned for two hours regarding this and earlier theft allegations against him. He was told no criminal charges would be filed if he signed a written confession and release. Prangler signed and was allowed to leave.
HELD: Although initial detention was supported by reasonable grounds, there was

no showing of reasonable grounds supporting the earlier theft allegations that would support his continued detention and questioning regarding these earlier matters. Accordingly, the district court's dismissal of Prangler's claim was in error and is reversed.

4. Patrons Hayes & Harris were detained and their cars were searched. Menard relies on prominently displayed sign at entrance of lumber yard announcing that all departing vehicles were subject to search. Both Patrons deny having seen the sign or otherwise having consented to detention or search. HELD: Because the Store has not put forth any reasonable grounds supporting the detention and search, it is not immune from Hayes and Harris's claims, and there is at least a fact issue as to these Patrons' consent, as they deny seeing the signs. The district court erred in dismissing these claim.

C. Patron Wright also went into the fenced lumber yard, but Wright exchanged something purchased inside the building and then drove around a line of standing cars to exit the yard. HELD: Wright's drive around the line of waiting cars to exit provided reasonable grounds as a matter of law for his detention and subsequent search of his car. District Court's dismissal of Wright's claim is affirmed.

Extortion

Prangler and Sales were both detained and questioned. Each was told that no criminal charges would be filed if they signed written confessions, restitution agreements, and a waiver of rights form absolving Menards from civil liability. Both signed as requested. Each subsequently received a letter demanding restitution. Each sued Menards for extortion. At issue was whether Menards had acted to "obtain[] something of value" as required to recover in a civil extortion action.

HELD: Iowa Code § 711.4 makes it extortion to threaten to accuse another of a public offense in order to obtain for oneself or another anything of value, tangible or intangible. The word "value" as used in § 711.4 means "relative worth, utility, or importance"– a broad definition. Menards required Patrons to sign a document securing restitution, and did so upon threat of criminal prosecution. A document securing restitution is a "thing of value" and the district court accordingly erred in granting summary judgment to the defendants on the extortion claims.

J. Derivative Actions–Parents of Adult Child Cannot Claim Loss of Consortium

Kuta v. Newberg, 600 N.W 2d 280 (Iowa Sept. 9, 1999).

Twenty-year-old civil engineering student at University of Iowa was killed when struck by a car while working on a survey crew for the IDOT. His parents sued the driver for loss of consortium.

The district court granted defendant's motion for summary judgment on the loss of consortium claim, citing Iowa Rule of Civil Procedure 8 and Iowa Code § 613.15, which do not allow loss of consortium claims for the loss of adult children. The parents appealed, claiming that Rule 8 and section 613.15 violate the equal protection clauses of the Iowa and U.S. Constitutions.

HOLDING: Both I.R.C.P. 8 and Iowa Code § 613.15 are constitutional, and neither allows for a loss of consortium claim brought by parents of an adult child. Under Iowa law, no such claim exists.

NOTE: See also Johnston v. Ball, filed the same day, where the Supreme Court denied a similar loss-of-consortium claim in a two-page decision, citing Kuta.

K Spoliation of Evidence–No Tort in Iowa–Other Remedies

Gamerdinger v. Schaeffer, 603 N.W.2d 590 (Iowa Dec. 22 1999).

In April of 1999, the Iowa Supreme Court decided in Meyn v. State, 594 N.W.2d 31, 34 (Iowa 1999), that no cause of action exists for negligent spoliation of evidence by a stranger to the litigation. The Meyn case involved the disposal of a broken prosthesis by the University of Iowa Hospitals, which was not a party to any lawsuit and had no potential economic stake regarding Meyn's underlying claim, which was against the manufacturer. Because Meyn's case against the manufacturer failed in the absence of the prosthesis, Meyn sued the hospital for negligent spoliation. In refusing to recognize a cause of action for spoliation on these facts, the Supreme Court relied on the fact that "other remedies are available." Id. at 34. "Iowa remedies for spoliation of evidence," the court explained, "include discovery sanctions, barring duplicate evidence where fraud or intentional destruction is indicated and instructing on an unfavorable inference to be drawn from the fact that evidence was destroyed." Meyn v. State of Iowa, 594 N.W.2d 31, 34 (Iowa 1999).

The Gamerdinger decision is the first case to deal with what those other remedies may be. That case involved Deere & Co.'s destruction of photographs Deere employees had taken of the forklift that had collided with a cart driven by Plaintiff Gamerdinger, causing her injuries. Plaintiff argued that these photos would have been relevant to show the serious nature of the collision and requested an instruction regarding the inference that should be taken from Deere's failure to produce these photos. The district court refused to give the requested instruction. On appeal, the Supreme Court reversed and remanded for new trial.

HELD: The district court committed reversible error in refusing to give the requested spoliation instruction. "Where relevant evidence is within the control of a party whose interests would naturally call for its production, and such party fails to

do so without satisfactory explanation, it may be inferred such evidence would be unfavorable to him." Id. at 594. "Spoilation of evidence raises a presumption against the spoliator." Id. at 595.

Hendricks v. Great Plains Supply Co., 609 N.W.2d 486 (Iowa April 26, 2000).

This case deals briefly with what must be shown before sanctions will be imposed for spoliation of evidence in civil cases. The Court discussed but declined to resolve the questions of whether bad faith need be shown before sanctions may be imposed for spoliation in a civil case (as in a criminal case), or whether a lesser standard applies–suggesting that this is an open question. The Court held that Plaintiffs in a building fire case were not required to preserve the fire scene indefinitely, and that destruction of the charred remains seven weeks after the fire did not constitute spoliation of evidence, at least where photographs had been taken and all parties were aware of fire and would have had time to come out and investigate. The Court withheld the question of "whether under different circumstances a plaintiff might be obligated to notify potential defendants of possible claims and give them a reasonable opportunity to examine a fire scene before its destruction."

L. Constructive Discharge–Not an Independent Tort

Balmer v. Hawkeye Steel, 604 N.W.2d 639 (Iowa Jan. 20, 2000)

At-will employee Balmer brought wrongful termination action against employer, alleging that she was constructively discharged, i.e., subjected to verbal and mental harassment and abuse rendering her employment conditions so intolerable that she had to quit. However, she did not allege that her employer breached an employment contract or violated any state or federal civil rights laws or public policies of the state. The district court granted defendant's motion for a directed verdict, holding that constructive discharge, standing alone, is not a tort. Balmer appealed, and the Supreme Court affirmed.

HELD: The "Constructive Discharge" Doctrine does not create a tort–rather, it merely treats a resignation as a firing where the employer effectively forced the resignation by making the employment conditions intolerable. Accordingly, a constructive discharge is actionable only when an express discharge would be actionable in the same circumstances. Balmer, an at-will employee, failed to show that her termination violated any public policy or statutory law, or that her employer breached any unilateral contract. She simply claims that she was forced to quit. This, standing alone, is not actionable.

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M. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

Wright v. American Cyanamid Co., 599 N.W.2d 668 (Iowa Sept. 9, 1999).

American Cyanamid manufactures Pursuit, Prowl, and Select, used by Plaintiff Orville Wright on his Harrison County farm. The Pursuit label stated that it would kill tall waterhemp. Unkilled Waterhemp in Wright's fields adversely affected Wright's yield & necessitated additional costs. Wright sued American Cyanamid Co., alleging products liability, negligence, and breach of warranty (express & implied). American Cyanamid moved for summary judgment, arguing that all claims against it were preempted under FIFRA or not supported by the evidence. The district court granted American Cyanamid's motion, and Wright appealed.

HOLDING: *The Supreme Court affirmed the entry of summary judgment for American Cyanamid on all counts, explaining that Plaintiff's only real gripe was with the accuracy of the product's label (stating that it was effective against Tall Waterhemp), and that all of his claims were therefore preempted by FIFRA.*

ANALYSIS:

1. FIFRA does not deprive state courts of jurisdiction over claims involving federal preemption; rather, it simply limits the authority of states to impose additional or different labeling or packaging requirements on herbicides and pesticides in addition to those imposed by the EPA.

2. FIFRA preempts any state negligence claim against the manufacturer of herbicides and pesticides which "challenge[s] the information contained in a product's label." In other words, it preempts all state causes of action which rest on "an alleged failure to warn or communicate information about a product through its labeling."

3. A review of the court's past FIFRA decisions (Clubine, Schuver, and most recently Ackerman) shows that the line between label-based claims and non-label based claims is as follows: "[A] claim based on negligent or inadequate testing will not be considered a disguised label-based challenge if adequate testing would have caused the manufacturer to alter the *product itself* [as opposed to the label]. Conversely, the rule is that if defendant could remedy any problems with its product . . . by altering the product's *label* rather than by changing the *product*, then any challenge concerning negligent testing is preempting." (emphasis added).

4. District Court properly granted American Cyanamid's motion for summary judgment on Wright's claim for "defective manufacture and/or defective application instructions." Plaintiff presented no evidence to support his claim that defendant defectively manufactured Pursuit. Accordingly, all that remained of this claim was that defendant's application instructions were defective and that Pursuit did not control tall waterhemp as stated in the label. The district court correctly found that this claim was preempted by FIFRA.

5. The district court correctly granted American Cyanamid summary judgment on Wright's implied claim for negligent testing. This claim was clearly without merit, and was not pled in the petition. No testimony was presented regarding American Cyanamid's testing procedures, nor was there testimony that additional testing would have led to a change in the product itself rather than in the label. Plaintiff's own expert testified that "the simplest way to resolve the problem [of Pursuit's performance] was not to make [a] claim for that weed species" on the label," and in fact, American Cyanamid *has* changed the *label* to omit any reference to Tall Waterhemp. Based on these facts, this is clearly a disguised label-based claim and is preempted by FIFRA.

6. Regardless of whether Plaintiff's false advertising claim is generally preempted by FIFRA, summary judgment was appropriate, because plaintiff has no evidence in the record of any Pursuit *advertisements* that he relied upon in connection with the 1994 application of Pursuit to his fields. His reliance is exclusively on the *label*, and FIFRA clearly does preempt all claims alleging defects in the *label* itself.

7. Plaintiff's breach of express & implied warrantee claims are entirely label-based and as such are preempted by FIFRA. The statement at issue in the Pursuit label was required by federal law and approved by the EPA.

8. Plaintiff's products liability claims are all based on the position that "the label should have warned that Pursuit was not effective against tall waterhemp." This is a challenge to the adequacy of the label, and plaintiff's strict liability claims are preempted by FIFRA.

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N. Jones Act Claims

Schmidt v. Blackhawk Fleet, Inc., 601 N.W.2d 91 (Iowa Oct. 13, 1999).

The Jones Act, 46 U.S.C. § 688, grants certain individuals employed as "seamen" the right to bring certain personal injury actions. A seaman is an employee whose duties "contribute to the function of the vessel or to the accomplishment of its mission," and who "have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature." Chandris, Inc. v. Latsis, 515 U.S. 347 (U.S. 1995).

In Schmidt, the Iowa Court held that an individual who does janitorial "cleaning" of barges intended for hauling cargo on the Mississippi River is not a "seaman" within the meaning of this Act, and has no "seaman's" action under the Jones Act.

O. Negligent Misrepresentation

Hendricks v. Great Plains Supply Co., 609 N.W.2d 486 (Iowa April 26, 2000).

This case contains a brief application of Iowa's negligent misrepresentation standard, but does not merit any discussion.

III. INDEMNITY, SUBROGATION, AND MISCELLANEOUS MATTERS

A. Subrogation and the Bank/Depositer Relationship

Heritage Bank v. Lovett, No. 59/98-0917 (Iowa, en banc, June 1, 2000)

Bennett, an Employee of Culligan Water Conditioning of Ida Grove (Owned by Lovett) stole ATM card of Culligan's customer Buell while in Buell's home performing services on behalf of Culligan, and Bennett used this ATM Card to make unauthorized withdrawals totaling $10,000 from Buell's account at Heritage Bank. Pursuant to applicable law, Buell was only liable for first $50 of unauthorized withdrawals–the bank was responsible for the rest.

The bank, wanting to recover the $10,000, and needing a deep pocket, sued Culligan and its owners based on (1) negligent hiring, and (2) respondeat superior. The district court granted defendants summary judgment, holding (1) that because Bennett's activities were beyond the scope of his employment, respondeat superior did not apply; (2) that the loss for which Heritage sought recovery was a direct loss of Heritage's and not a loss suffered by the Buells to which Heritage is now equitably subrogated; and (3) that Culligan owed no duty to Heritage to protect it from Bennett's criminal acts. Plaintiffs appealed on the negligent hiring claim, arguing that the loss first fell to the Buells by way of diminution of their account and that Heritage became subrogated to the

Buells' rights against Culligan by restoring all but fifty dollars of this loss (and that Culligan did owe the Buells a duty).

> HELD: The loss occasioned by Bennett's criminal acts was from its inception entirely that of the bank. Deposited funds belong to the bank that receives them, and the depositor is a "creditor" of the bank, which owns the funds and holds the risk of loss. Because of this legal arrangement, and because of 15 U.S.C. § 1693(g), which protects depositors from loss of their deposits (beyond $50) through unauthorized ATM withdrawals, the Buells never suffered any loss apart from the fifty dollars that was debited to their account. Rather, the bank was the victim from the beginning. "A subrogee may acquire no claim, security, or remedy that the subrogor does not have," and Heritage Bank accordingly has no subrogation rights through the Buells. "A bank does not become subrogated to the rights of another by payments made to its own direct detriment."
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> Note: Clearly, the Bank had a cause of action against the bad actor–Bennett–but apparently, Bennett was judgment proof. Accordingly, the Bank went after Bennett's employer. Plaintiff's subrogation argument, which was a loser, was necessary because of the Court's determination that Culligan owed "no duty" to protect a bank from theft by Culligan employees.
>
> The opinion does not show whether the "negligent hiring" claim had a strong factual basis. Had the Bank's negligent hiring claim against Culligan been supported (for example) by clear evidence that Culligan knew that Bennett had a history of making unauthorized ATM withdrawals, Culligan would have been knowingly empowering a bank robber to commit future bank robberies. On those facts, a different result might have been appropriate on the "no duty" question.

B. Indemnity

Martin v. Hudson Constr. Servs., Inc., 602 N.W.2d 805 (Iowa Nov. 17, 1999)

Pugh, a construction worker employed by Hudson Construction Services, Inc., which provided drywall and acoustical tile services on a construction project at Upper Iowa University in Fayette, suffered severe injuries when he stepped on a panel of unsupported gypsum sheathing and fell seventeen feet to a concrete floor. Pugh sued the project's general contractor (negligent supervision),and the two architectural firms retained as consultants (defective architectural design). When Pugh settled his suit with these defendants, the architects asserted indemnity against the general contractor and subcontractor, arguing that Pugh's negligence should be imputed to subcontractor (Pugh's employer) and, in turn, from subcontractor to General Contractor, pursuant to language in the contracts

In the indemnity action, the judge submitted an interrogatory to the jury asking for an allocation of

fault. The jury returned a verdict finding Pugh (the worker) to have been 100% at fault. Nonetheless, the district court refused indemnity, holding that Pugh's fault could not be imputed to either the subcontractor (Hudson) or the general contractor (Prairie Constr. Co.).

The Architects appealed, and the Supreme Court affirmed.

HELD: **Worker's contributory negligence cannot be imputed to his employer for indemnification purposes.**

1. Where a worker's carelessness causes injury to himself and not to others, such carelessness does not constitute "negligence" that can be imputed to his employer for indemnity purposes. Imputable negligence constitutes "a breach of duty to another" – "not *carelessness*, but behavior which should be recognized as involving an unreasonable danger to *others*." Id. at 807. Negligence is a *tort*, and a *one can only commit a tort against another*. Although carelessness causing injury to oneself is considered "contributory negligence" under Iowa's comparative fault statute, strictly speaking, it is not "negligence" and will not be imputed to the injured worker's employer for purposes of indemnification.

2. The Court rejected the Architect's claim that the indemnification provision in the construction contract between the owner and general contractor mandates a different result. While indemnifying agreements will be enforced according to their terms, an indemnity contract is strictly construed against the drafter, and a party will not be indemnified for its own negligence "unless the agreement provides for it in 'clear and unequivocal' language." Id. at 809. The Supreme Court held that the contract at issue did not "clearly and unequivocally" grant indemnification rights with regard to the scenario at issue in this case.

C. Compensability of Economic Loss in Tort

Determan v. Johnson, 613 N.W.2d 259 (Iowa July 6, 2000)

Home purchaser filed negligence action against home seller (individuals who had hired carpenter to build house for them), seeking recovery of costs to repair significant structural problems discovered after purchase, along with compensation for loss of use, inconvenience, emotional distress, and mental pain and suffering. District Court dismissed, holding that sellers owed buyer no duty that is actionable in tort. Affirmed.

Analysis: The Court engaged in a long narrative, summarizing the development of the economic loss doctrine in Iowa, and citing the major cases in this line. The case given the most attention was Nelson v. Todd's Ltd., 426 N.W.2d 120 (Iowa 1988), which held that "The line between tort and contract must be drawn by analyzing interrelated factors such as

the nature of the defect, the typ of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim."

HELD: The defects at issue involve the quality of the home purchased by the plaintiff. Although these defects present *a genuine safety hazard* to persons and property, that risk has not come to pass. Thus, the injury at present, and the one for which recovery is sought, is limited to repair of the defective construction. The plaintiff is not seeking to recover damages from any sudden or dangerous occurrence, but rather from deterioration of the house itself due to its poor construction. Based on a weighing of all the factors described in Nelson, the claim is one of "unfulfilled expectations" with regard to the house and accordingly lies in contract rather than in tort.

D. The Remedy of Replevin

Roush v. Mahaska State Bank, 605 N.W.2d 6 (Iowa Jan. 20, 2000)

Replevin is a specialized statutory remedy with a narrow purpose designed to restore possession of property to the party entitled to possession. At issue was whether replevin is available when the Plaintiff is in actual possession of the property subject to the replevin, but a defendant continues to interfere with such possession (here through possession of a security agreement).

HELD: Although some states permit an action for replevin based upon "constructive possession, even these states do not allow a Plaintiff to sue where he himself has possession of the property. The facts of this case would not support an action based on constructive possession, even if Iowa were to recognize such an action.

E. Effect of Restitution Order in Criminal Case on Victim's Right to Relitigate Damages in Later Civil Action.

Teggatz v. Ringleb, 610 N.W.2d 527 (Iowa Apr. 26, 2000).

HELD: The amount of restitution ordered in a criminal case does not preclude victim from relitigating, in later civil case, the amount of damages victim sustained as result of defendant's criminal conduct.

Reasoning: The Court first engaged in a strict, textual reading of Iowa Code § 910.8, governing criminal restitution and its effect on subsequent civil actions. The Court then went to logical and policy arguments, such as: (1)because the victim is

not a party to the criminal action and can neither influence the proceedings nor appeal the restitution award, it is fair to assume that the victim's rights may not be properly represented in the criminal action; (2) no interest on a restitution award; (3) restitution awards are influenced by ability to pay and rehabilitation. Finally, the set-off provision of § 910.8 ensures that there will be no double recovery.

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APPELLATE COURT UPDATE

Appellate and Civil Procedure
Courts, Jurisdiction and Trial Evidence
Insurance, Judgement and Limitation of Actions
Workers' Compensation

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The author would like to thank Michael L. Mock, a fellow associate at Bradshaw for preparing the Workers;' Compensation portion of this outline

APPELLATE AND CIVIL PROCEDURE

State v. Diacide Distributors, Inc.
596 N.W.2d 532 (Iowa 1999)

Appeal and Error - doctrine of the law of the case

FACTS: This decision stemmed from the second appeal brought by the State in connection with a securities fraud case filed by the State on behalf of investors seeking restitution and disgorgement of profits. In the underlying claim, the district court had dismissed claims against defendant Sam McHose, an alleged aider and abettor and the State appealed. The supreme court reversed and remanded holding that McHose aided and abetted a securities fraud violation. On remand, the district court reconsidered McHose's knowledge of a fraudulent scheme and did not hold McHose jointly and severally liable for the full amount of $1,457,135 which was lost by investors. Rather, the court entered judgment for disgorgement in the amount of $102,283 in favor of the State against McHose for investors' funds fraudulently used by McHose. The State appealed this decision. The State's basis for contention was that the district court's only remedy upon remand was to enter judgment against McHose holding him jointly and severely liable for the judgment entered against the other defendants. The State contended that the district court was prohibited from reconsidering the issue of McHose's knowledge of the fraudulent scheme.

ISSUE: Did the district court err in reconsidering the issue of McHose's knowledge of the fraudulent scheme?

HELD: The supreme court concluded that the district court erred in reconsidering the knowledge element because of the law of the case doctrine. "The doctrine of the law case represents the practice of courts to refuse to reconsider what has once been decided." *State v. Grosvenor*, 402 N.W.2d 402, 405 (Iowa 1987). Pursuant to this rule, legal principles announced and the views expressed by a reviewing court in an opinion, right or wrong, are binding throughout further progress of the case upon the litigants, the trial court and this court in later appeals. The law of the case doctrine does not apply to dictum, or if the facts before the court upon the second trial are materially different than those present in the first case. Additionally, the doctrine applies only to so much of an opinion by an appellate court in a former decision in the same case as was essential to the determination required of the court. In this instance, the court believed that its discussion in the initial appellate decision concerning an aider and abettor's liability for securities fraud clearly established the rule that joint and several liability existed for any proven violation of the securities act. This rule therefore became the law of the case and was binding on the district court on remand.

The court reiterated these principles in the subsequent decision of *United Fire and Ca. Co. v. Iowa Dist. Crt. For Sioux Cty.*, 612 N.W.2d 101 (Iowa 2000). In that opinion, the court also noted that the law of the case doctrine will not apply when the applicable law has been changed by legislative enactment or when the controlling law has been clarified by judicial decisions following remand

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Martin v. B.F. Goodrich Company
602 N.W.2d 343 (Iowa 1999)

Appeal and Error - erroneous interpretation of discovery rule

Pretrial Procedure - discovery of documents under theory of constructive control

FACTS: In October of 1993, plaintiff requested that a used 16-inch B.F. Goodrich tire be mounted onto what he mistakenly believed to be a 16-inch wheel. The diameter of the wheel was actually 16.5 inches and the tire exploded during inflation. Plaintiff was injured in what is commonly referred to as a 16/16.5-inch mismatch tire explosion. Plaintiff and his wife brought an action to recover damages against B.F. Goodrich, alleging the design of the tire was defective and unreasonably dangerous.

The tire in question was manufactured in 1984. In August of 1986, B.F. Goodrich sold its tire business to two wholly-owned subsidiaries, which in turn formed a partnership with the UniRoyal Tire Company. The resulting organization, called the UniRoyal-Goodrich Tire Company, a New York partnership, retained the name, equipment, facilities and employees of the B.F. Goodrich Tire Division. Pursuant to the sale, the New York partnership signed an indemnity agreement under which it assumed all liabilities and obligations arising from claims for personal injury relating to the manufacture, sale, handling, distribution or use of any product currently or formerly manufactured, sold or otherwise dealt with by B.F. Goodrich. The agreement also stipulated that the partnership would either litigate claims on B.F. Goodrich's behalf or reimburse it for claims it handled on its own.

In 1990, Michelin formed a subsidiary known as the UniRoyal-Goodrich Tire Co., Inc., a Delaware corporation through which it acquired the assets and liabilities of the New York partnership. In 1995, Michelin merged the Delaware corporation into Michelin North America (MNA). Tires continued to be manufactured under the B.F. Goodrich name, using the same plants and equipment B.F. Goodrich originally owned.

Plaintiffs initially tried to file a cause of action against UniRoyal-Goodrich, Delaware, but service was refused by UniRoyal's national counsel and by its agents in Iowa and South Carolina. By chance, plaintiffs learned of the merger and served notice on MNA. MNA filed a motion to dismiss, claiming that service was untimely and that the statute of limitations had expired. Despite plaintiffs' diligent efforts, the district court held there was insufficient evidence to ascertain MNA's interest in the suit or UniRoyal's status as an independent entity. MNA was therefore declared a non-party.

Throughout the pre-trial period, plaintiffs sought discovery of information related to the design, testing and modification of the Goodrich tire, as well as data regarding prior lawsuits in which similar claims were defended. All of B.F. Goodrich's records were in the custody of MNA. While MNA had granted access to documents originated prior to August 1, 1986, the

date B.F. Goodrich sold its tire business, it had not authorized the release of any documents subsequent to that date, documents B.F. Goodrich never created, possessed or owned.

Plaintiffs filed a motion to compel, arguing that MNA was the real party in interest, that it was, in fact, controlling the litigation for B.F. Goodrich, and that it must indemnify B.F. Goodrich for any judgment against it. Plaintiffs further requested answers to interrogatories concerning payment for studies conducted by Standard Testing Laboratory (STL). BFG experts evidently relied on statistics advanced by STL for their testimony. Although reports of the studies had been delivered, the plaintiffs were seeking to establish that MNA commissioned the tests for the purpose of litigating past claims.

In response, BFG responded that it had no duty to produce records subsequent to August 1, 1986, records which, by definition, were generated or compiled by unrelated corporations. BFG's defense on this basis was that MNA and STL were not parties to the suit and that it was only obligated to disclose materials in its possession, custody or control, and that it could not compel MNA or STL to turn over information in which BFG never had a claim or interest.

The district court issued an order directing BFG to relinquish post-1986 documents held by MNA and to respond to the interrogatories pertaining to STL testing. The court based its ruling on the fact that MNA would ultimately be responsible for a judgment against BFG, that it was the real party in interest, and that basic fairness required it to turn over the information sought. BFG filed an appeal.

ISSUE: On appeal, the court considered whether or not BFG had sufficient control over post-1986 documents in MNA's possession to compel discovery.

HELD: Iowa Rule of Civil Procedure 129 provides that a party must produce only those documents or other information which are in the possession, custody or control of the party upon whom the request is served. The court accepted BFG's argument that the test for determining control was whether it had a legal right to obtain or demand materials held by MNA. BFG's assertion was based primarily on interpretations of Federal Rule of Civil Procedure 34, the counterpart to Iowa Rule of Civil Procedure 129.

BFG had requested and was denied access to post-1986 documents and information held or created by MNA and STL. Despite plaintiffs' claim that "constructive control" between parent, sister and subsidiary corporations existed, the court was not willing to compel discovery.

The court noted that much of the information plaintiffs sought was readily ascertainable through skillful examination of witnesses. Accordingly, the post-1986 documents held by MNA, those which BFG neither created, possessed or owned, were beyond the scope of discovery. Likewise, the information needed to answer the interrogatories regarding payment for the tests conducted by STL, information that was in the possession, custody or control of

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MNA or STL, was also beyond the scope of discovery. Accordingly, the order of the district court was reversed and the matter was remanded.

Brandenburg v. Feterl MFG. Co.
603 N.W.2d 580 (Iowa 1999)

Appeal and Error - review of decision denying motion to set aside default judgment

FACTS: Survivors of a decedent killed while using a grain auger sued the auger's manufacture, Feterl, for negligence. Feterl is a South Dakota corporation and is a subsidiary of Core Industries, Inc., a Michigan corporation. Several days after the accident, one Ronald Feterl (a former Feterl employee) read a newspaper article about the accident. A copy of the article was sent to Feterl sales representative Don Jensen. Jensen immediately forwarded the newspaper article to Darrell Streff, the President of Feterl. Upon receipt, Streff immediately contacted Tony Krull who was the manager of insurance and employee benefits at the parent corporation, Core. Krull faxed this information to Core's insurance brokerage firm, Willis Corroon. Krull's fax requested the brokerage firm to notify Core's primary and excess liability carriers of the accident, even though Feterl had not itself been formally notified of it. Accordingly, Willis Corroon contacted Travelers, Core's primary liability carrier about the accident. Thereafter, Travelers sent a letter to Krull advising him that Travelers had been notified of the accident and requesting further contact if a lawsuit was filed.

In April of 1997, the Plaintiffs filed a lawsuit against Feterl alleging that it had negligently caused decedent's death. On April 28, 1997, a deputy sheriff of McCook County, South Dakota served a copy of the original notice and petition on Feterl by serving Feterl President Darrell Streff. Streff immediately faxed copies of the documents to Krull and asked that Feterl's insurance carriers be notified. Krull called Streff to acknowledge he received the fax and told Streff he would notify the brokerage firm Willis Corroon.

On April 29, 1997, Krull mailed the suit papers along with a cover letter to the brokerage firm in which Krull asked that the suit papers be forwarded to Feterl's insurance carriers. The representative of the brokerage firm never received the letter. A copy of the letter and its contents were also mailed to Frank Brochert, who was a products liability specialist who had worked in the past with Core on various claims and settlements. Core had hired Brochert to review suit papers, answer Krull's questions, and to act as a buffer between Core and the carriers and the lawyer the carriers select. Brochert and Krull subsequently spoke by phone and Krull asked Brochert to review the suit papers and file them for future reference. No one asked Brochert to hire defense counsel for the lawsuit or to answer the petition. Brochert did not contact the insurance brokerage firm or Travelers to see if the lawsuit was being handled. Nor did he contact anyone at Core to discuss the lawsuit after his initial conversation with Krull.

By May 7, 1997, Streff had not yet heard from the claims manager for Willis Corroon. On that date, per Krull's previous direction, Streff contacted the claims manager for Willis Corroon who indicated that he had not taken any action on the lawsuit because he had not yet received suit papers from another representative of the insurance brokerage firm. During the

conversation, Streff told the claims representative that an answer had to be filed by May 18th to avoid a default. Streff also told him he would fax Krull a recommendation for an attorney for this case. Thereafter, Streff faxed such a recommendation to Krull, and Krull received the fax. Apparently, there was little subsequent communication among the various individuals about the lawsuit.

On May 29, 1997, the district court held a hearing on plaintiffs' motion for default and default judgment. Feterl was not notified of the hearing. Neither Feterl nor anyone appearing for it attended the hearing. Consequently the district court entered a default judgment against Feterl for $1,130,215. The clerk of court mailed a copy of the default judgment to Feterl on June 30, 1997. On July 1, Streff faxed copies of the default judgment to Krull and the claims representative. Thereafter, the claims representative called Streff, apologized for the default, and said he had forgotten about the lawsuit.

On July 8, 1997, Feterl filed a motion to set aside the default pursuant to Iowa Rule of Civil Procedure 236 (which provides that court may set aside a default or default judgment for good cause shown on the grounds of mistake, inadvertence, surprise, and excusable neglect, or unavoidable casualty). The court first found there was no basis to set aside the default judgment for mistake, surprise or unavoidable casualty – three of the five grounds for setting aside the default judgment under Rule 236. The trial court concluded that inadvertence and excusable neglect – the remaining two grounds – were barely distinguishable and considered them together. The court then denied Feterl's motion to set aside the default judgment. Feterl appealed, contending, among other things, that the district court abused its discretion in refusing to set aside the default and default judgment pursuant to rule 236.

ISSUE: Whether the district court abused its discretion in refusing to set aside the default and default judgment?

HELD: The supreme court held that the district court had in fact abused its discretion in finding that the defendant had willfully ignored and defied the rules of procedure in failing to defend in a timely manner. The supreme court concluded that the district court abused its discretion in concluding that there was no excusable neglect constituting good cause to set aside the default judgment. While broad discretion exists with the district court in ruling on a motion to set aside a default, substantial evidence existed in the case that the default occurred as a result of a mistake. In this instance, the evidence of mistake was inconsistent with conduct that willfully ignores or defied the rules of procedure. Finally, the court held that the evidence did not support a conclusion that Feterl had willfully ignored or defied the rules of procedure. In this instance, inaction by parties other than the defendant could not be imputed to Feterl. The focus should have been on whether the default resulted from a mistake or from Feterl's willfully ignoring the rules of procedure. In this instance, the failure to respond was obviously one of mistake.

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Gorden v. Carey
603 N.W.2d 588 (Iowa 1999).

Appeal and Error - review of jury verdict awarding damages

FACTS: Jeanie Gorden brought an action in negligence against Mitchell Carey based on injuries suffered in an automobile accident. Following a jury trial, Gorden was awarded $1,350 for past physical pain and suffering and $1,350 for past loss of function. The jury assessed Gorden 35% comparative fault and the court reduced the damages accordingly. Gorden appealed contending generally the damages awarded were inadequate.

ISSUE: On appeal, the court acknowledged that plaintiff's issues for appeal were not preserved pursuant to a motion for new trial. Nevertheless, the court considered the issue of whether the damages awarded were adequate.

HELD: Under Iowa Rule of Civil Procedure 244, the proper method for challenging the adequacy of damages is through a motion for new trial. Nevertheless, even if error had been preserved, there was substantial evidence in the record to support the jury's damage award. The amount of damages awarded is peculiarly a jury, not a court, function. A jury verdict should not be set aside or altered unless the plaintiff proves the verdict: (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice or other ulterior motive; or (4) is lacking in evidential support.

The principles were also set forth in the case of *Fisher v. Davis*, 601 N.W.2d 54 (Iowa 1999). In that case, the court sustained a decision granting new trial where the jury awarded damages for medical expenses but no amounts for pain and suffering. Every jury verdict awarding only damages for medical expenses will not be deemed inadequate as a matter of law. *See also Cowan v. Flannery*, 461 N.W.2d 155 (Iowa 1990). However, where the evidence is inconsistent with the resulting verdict, the aggrieved party should be raise the issue pursuant to a motion for new trial under Iowa R. Civ. P. 244. jury

Gamerdinger v. Schaefer
603 N.W.2d 590 (Iowa 1999)

Evidence - admissibility of habit and custom evidence

Appeal and Error - review of trial court decision on admissibility of evidence

FACTS: Gamerdinger filed suit against defendants Patrick Schaefer and Deere & Company for damages the Gamerdingers sustained as the result of a collision at Deere's plant between a motorized cart driven by Gamerdinger and a forklift truck driven by Schaefer. Gamerdinger claimed she sustained personal injuries as a result of the accident. Following a

jury trial, a verdict was returned in which 50% of the fault for the accident was attributed to Gamerdinger, 20% to Schaefer and 30% to Deere. The jury awarded Gamerdinger $10,766.04 for past medical expenses and $20,000 for those expected to be incurred in the future. The amount were reduced by her percentage of fault. No other damages were granted.

Gamerdinger moved for a new trial, arguing that the jury verdict was inconsistent in that it awarded medical expenses but failed to confer corresponding amounts for pain and suffering and loss of function. The district court agreed and suggested additur of $40,000, both parties objected to the amount proposed so the court sustained the motion for a new trial.

ISSUES: On appeal, the defendants claimed the verdict was not inconsistent and that a new trial should not have been granted. The defendants further asserted plaintiffs waived error by not requesting a jury instruction on the issue, and by not objecting to the verdict before the jury was dismissed.

On cross-appeal, plaintiffs raised two separate evidentiary issues. The first concerned exclusion of evidence of Schaefer's habit of being negligent in operating the forklift. Plaintiffs also contended that error occurred when the court failed to include an instruction on spoliation of evidence.

HELD: The court held that the two evidentiary issues raised by the plaintiffs were dispositive of the case and justified the trial court's order granting a new trial.

First, with respect to the issue of Schaefer's prior negligent conduct, plaintiffs offered testimony from two retired Deere workers who testified as to Schaefer's custom of not looking to see if there were any pedestrians prior to backing the forklift. Both individuals had talked to Schaefer's supervisor about his inattentiveness on various occasions. The court noted that evidence of former accidents at a place is admissible to show its dangerous character and knowledge thereof if conditions are substantially similar or comparable and they are not too remote. The determination of similarity of conditions and timeliness involves relevancy and its view in the trial court's discretion. The witnesses offered by the plaintiff provided testimony on the question of knowledge on the part of Schaefer's employer, Deere. In addition, the evidence of Schaefer's past habits and conduct related to actions occurring in the same work environment as that in which the accident occurred with the plaintiff. The court noted that evidence of prior existence on the same premises is relevant to show the owner's knowledge of the dangerous conditions. See, *Greyhound Lines, Inc. v. Miller*, 402 F 2d 134 (8th Cir 1968) In this instance, the evidence was relevant and probative as to the likelihood of Schaefer's being negligent in operating his forklift truck. Accordingly, the supreme court held that the trial court erred in not so ruling on the admissibility of the evidence proffered at trial.

Second, witnesses testified that security personnel of Deere were called to the accident scene and took photographs of the damage caused to the motorized cart driven by the plaintiff At some point, the photographs were lost by Deere. Accordingly, plaintiffs requested an instruction on spoliation of evidence. Plaintiffs contended pictures revealing the damage caused by the forklift truck were relevant for the jury's assessment of plaintiff's injuries

sustained from the accident. The court noted its prior decisions and held that it "stands without argument that where relevant evidence is within the control of a party whose interest would naturally call for its production, and he fails to do so without satisfactory explanation, it may be inferred such evidence would be unfavorable to him." *Id.* at 595; quoting *Quint-Cities Petroleum Co. v. Maas*, 259 Iowa 122, 127, 143 N.W.2d 345, 348 (1966). In this instance, the trial court erred in not giving the requested instruction based on Deere's failure to produce the photographs of the damaged motorized cart.

Roush v. Mahaska State Bank
605 N.W.2d 6 (Iowa 2000)

Pleading - remedy for misjoinder

Pleading - no requirement to identify specific theories of recovery in petition

FACTS: Plaintiff owned a 1979 General Motors half ton truck. On May 31, 1995, the Mahaska State Bank took possession of the truck pursuant to a writ of replevin issued by the district court in an action against Howard Roush. The Bank maintained a security interest in the business inventory of Howard, who apparently represented to the Bank that the truck was part of the business inventory. Plaintiff was not a party to the action, and subsequently made repeated requests to the Bank for the truck. The Bank eventually released the truck to plaintiff on August 11, 1996.

On May, 1997, plaintiff commenced an action against the Bank and its agent based upon their alleged wrongful conduct in taking possession of the truck. The petition was captioned "Petition in Replevin", but plaintiff acknowledged the Bank had released possession of the truck. The Bank and its agent filed a cross-claim against Howard Roush for indemnity, and subsequently moved for judgment on the pleadings against plaintiff. They claimed an action in replevin could not be instituted as a matter of law since plaintiff had possession of the property at the time the action was commenced. Plaintiff claimed possession did not affect his right to institute a replevin action for damages resulting from past detention. The district court granted the motion for judgment on the pleadings and dismissed the Petition. It concluded damages for wrongful detention were not available in a replevin action when the petitioner held possession of the property at the time the action was commenced. Plaintiff appealed the decision.

ISSUE: Did the district court properly grant judgment on the pleadings?

HELD: The Court recognized that a judgment on the pleadings is authorized by Iowa Rule of Civil Procedure 222. The proper function of a motion for a judgment on the pleadings is to test the sufficiency of the pleadings to present appropriate issues for trial. The motion is only appropriate when the pleadings, taken alone, entitle the party to judgment. The supreme court noted that replevin is a specialized statutory remedy with a narrow purpose designed to restore possession of property to the party entitled to possession. While damages are available to the successful party in a replevin action, replevin is not an action for damages. See Iowa Code § 643.17 (1997). While plaintiff acknowledged physical possession of the truck, he

claimed replevin was still available because the Bank maintained constructive possession of the truck. The court noted that some states permit an action for replevin based upon constructive possession. In such actions, however, neither the plaintiff or defendant have possession of the property. Instead, the property is possessed by a third party and the defendant has the ability to direct the third party to deliver possession of the property to the plaintiff. The court concluded that the facts of this case did not support an action based on constructive possession. Accordingly, it was unnecessary to determine whether such a cause of action was recognized in Iowa.

Nevertheless, other legal principles were to be considered in resolving the appeal. After reviewing Iowa law with respect to the proper way to read a petition, the court noted that it was apparent plaintiff did not file his action to regain possession of the truck, but sought damages for the wrongful detention of his property. Although replevin was not available because plaintiff had possession of the truck, his resistance to the motion for judgment on the pleadings showed he alternatively asserted "the theories of conversion, negligence, breach of contact ... and tortious interference" to support the claim for damages. Thus, under notice pleading, the petition combined a claim for damages and a claim for replevin. While a replevin action may not be joined with other claims for recovery, the remedy for mis-joinder is not to dismiss the action, but to docket the mis-joined action separately or strike those parts which should be stricken, always retaining at least one cause docketed in the original case. See Iowa Rule of Civil Procedure 27(b). In this case, the Bank chose not to seek the remedy for mis-joinder but elected to obtain judgment on the pleadings. However, only the replevin action was subject to dismissal on the pleadings. In this case, the district court properly granted judgment on the claim for replevin, however, the petition did state viable claims for damages supported by other legal theories. Those claims must survive the judgment on the pleadings and were not subject to dismissal for a mis-joinder. Accordingly, the district court erred by dismissing the case.

COURTS, JURISDICTION and TRIAL

Cascade Lumber Company v. Edward Rose Building Company
596 N.W.2d 90 (Iowa 1999)

Jurisdiction - minimum contacts test applicable to non-resident seller

FACTS: Plaintiff was an Iowa corporation located in Dubuque County. Defendant was a Michigan corporation that constructed and managed apartment complexes throughout the country, though not in Iowa. On the basis of phone conversations, plaintiff agreed to supply trusses for a project of the defendant located in Peoria, Illinois. Three sets of trusses were to be constructed at plaintiff's place of business in Iowa, to defendant's specifications, and delivered to the site in Peoria. A written agreement, prepared in Michigan by defendant incorporated most of the terms covered by the telephone conversations. A dispute arose from plaintiff's refusal to deliver trusses in 1997 in accordance with 1996 prices.

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Plaintiff filed a suit to declare the rights and obligations of the parties under the agreement. Following a motion to dismiss filed by the defendant, the district court held that defendant's contact with Iowa was insufficient for the exercise of personal jurisdiction. plaintiff appealed the decision and the supreme court reversed.

ISSUE: Whether or not sufficient contacts existed for the exercise of personal jurisdiction over defendant?

HELD: In reversing the decision, the Court noted that it had recognized a stronger interest in seeing jurisdiction extended to nonresident sellers than to nonresident purchasers. In testing minimum contacts the Court considers (1) whether the subject of the contract substantially impacts on Iowa; (2) our interest in protecting citizens of our state; and (3) a seller is more often the "aggressor" and "receives not only a profit but the benefit and protection of the forum state's laws." See *Al-Jon, Inc. v. Garden St. Iron & Metal, Inc.*, 301 N.W.2d at 709, 713-14 (Iowa 1991). In this instance, the court noted that the third consideration does not preclude extension of Iowa jurisdiction in cases involving nonresident purchasers who may be characterized as "active" in contrast with "passive" purchasers, that is, the court perceives a difference between a nonresident who aggressively seeks purchase from a resident seller as contrasted with one who merely responds to solicitation by a resident seller. After reviewing the factors to be considered in determining sufficient minimum contacts and U.S. Supreme Court decisions concerning the same, the court noted that a contract alone cannot automatically establish sufficient contact. A contract is ordinarily an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of a business transaction. The simplicity – or the complexity – of a contract should not narrow, neither should it expand, the test in determining minimal contacts. The fact that the agreement in controversy could be easily surmised did not necessarily affect its relationship with Iowa.

While defendant would characterize negotiations as a simple placement of an order, plaintiff's affidavit showed four months of making arrangements, through multiple phone conversations, for the construction in Iowa of made-to-order trusses. Plaintiff's affidavit further asserted that defendant made a number of contacts to facilitate the agreement. Whatever was done under the agreement, either as contemplated or as the construction proceeded, was to take place at Cascade's place of business in Iowa. Negotiations were to take place in the office of both parties, but the construction of the trusses was to take place only in Iowa. Except for possibly mishandling the trusses on the date of delivery to Peoria, the only way plaintiff could have breached the agreement would be in connection with its manufacture of the trusses in Iowa. The most likely way defendant could breach the agreement was by failure to pay plaintiff here in Iowa. Delivery in Illinois was a factor militating against Iowa jurisdiction, but the agreed payment for the trusses in Iowa favored it. In conclusion, the court held that the quantity, nature and quality of contacts contend for Iowa jurisdiction. The suit related mainly to construction activity in Iowa and Iowa's interest in the dispute was at least equal to that of Illinois or Michigan and Iowa provided as convenient a forum as any of the other three states. Accordingly, the decision of the district court was reversed and the matter was remanded.

EFCO Corp. v. Norman Highway Constructors, Inc.
606 N.W.2d 297 (Iowa 2000)

Jurisdiction -choice of forum clause upheld

FACTS: On November 16, 1995, defendant entered into a written contract with Plaintiff for the lease of concrete forming equipment. Defendant agreed to pay a certain sum as rent and, pursuant to the written agreement, those payments were to be made to plaintiff in the State of Iowa. A dispute later arose between plaintiff and defendant with respect to how much defendant owed plaintiff under the contract. On April 3, 1997, defendant commenced an action against the plaintiff in a Texas court alleging fraud, breach of contract, and breach of express and implied warranties by plaintiff. One and a half hours after defendant's suit was filed, plaintiff filed an action against defendant in the Iowa district court to recover for lease payments allegedly due and unpaid.

Defendant moved to dismiss plaintiff's action on the basis that the Iowa court lacked in personam jurisdiction over defendant as a foreign corporation. It also sought, as an alternative remedy, an order of the Iowa court abating the Iowa action in deference to defendant's pursuit of its action in Texas. The district court upheld in personam jurisdiction of Iowa's state courts based on a choice-of-forum agreement contained in the contract. In addition, it refused to abate the Iowa action until the Texas suit had been concluded. The matter proceeded to trial and the jury found in favor of the plaintiff. Defendant appealed.

ISSUE: Did the Iowa Court lack in personam jurisdiction over Defendant because it was a Texas corporation not doing business in the state and did it lack the requisite minimum contacts to satisfy the due process considerations relevant to personal jurisdiction under the Fourteenth Amendment to the Federal Constitution?

HELD: Traditional considerations concerning in personam jurisdiction were irrelevant because the basis for the district court's assumption of in personam jurisdiction was consent. The district court relied on a choice-of-forum clause in the contract between the parties that provided:

> Any action in regard to this agreement or arising out of its terms and conditions may be instituted and litigated in the Iowa District Court for Polk County, Iowa. Customer consents to the jurisdiction of such court and agrees that service of process as provided by the statutes and rules of procedure of Iowa ... shall be sufficient.

With respect to the due process implications of choice-of-forum clauses, the court noted that the U.S. Supreme Court stated "it is settled law that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." See *National Equip. Rental, Ltd. v. Szukhent,* 375 U.S. 311, 315-16 (1964).

The court noted defendant's argument that Iowa courts had categorically rejected application of choice-of-forum clause in *Davenport Mach. & Foundry Co. v. Adolph Coors*

Co., 314 N.W.2d 432 (Iowa 1982). In response to defendant's argument, the court held that its reading of the *Davenport Machine* decision suggests that the court's disapproval of such clauses was only with respect to a denial of personal jurisdiction to a court that clearly had jurisdiction based on the activities of the defendant. In this instance it was not a case in which the choice-of-forum clause had been used to deprive a court of jurisdiction that it otherwise had. In this case, it was an instance of consent to jurisdiction which has long been recognized under Iowa law. Furthermore, defendant's argument that the provision of the agreement was a contract of adhesion was also without merit. The location of the choice-of-forum clause and whether or not the officer of the company executing the agreement read the choice-of-forum clause were insufficient to establish the invalidity of the choice-of-forum clause as a matter of law. Consequently, the issue was one of fact for the court to resolve in ruling on the motion to dismiss. Accordingly, the district court did not err in assuming in personam jurisdiction over defendant.

EVIDENCE

Klein v. Chicago Central and Pacific Railroad Company
596 N.W.2d 58 (Iowa 1999)

Evidence - burden of proof under Federal Employers' Liability Act (FELA)

Pretrial Procedure - designation of expert under IRCP 125

FACTS: Railroad employee brought an action against the railroad under the Federal Employers Liability Act (FELA) for back injuries allegedly sustained while repairing a broken rail. The Defendant CC&P was engaged in interstate commence as a carrier by rail. Plaintiff was and had long been a railroad employee engaged in track and rail maintenance. On an evening in March of 1994, Plaintiff was directed by CC&P to repair a broken rail. This required replacement of a broken thirty-nine foot section of rail that weighed approximately 1,600 pounds. In order to roll the replacement rail in place, Plaintiff applied simple leverage by using a device called a rail fork. CC&P assailed the method Plaintiff chose for the task. Plaintiff testified that he proceeded as he had learned on the job and in accordance with methods he had used during his thirty-nine years of experience with the CC&P. The rail fork and all other materials and equipment used in the repair were furnished for the purpose by CC&P. After the rail was placed, Plaintiff could not straighten his back and his leg was frozen into place.

The Plaintiff then called his supervisor the next morning to report that he had hurt his back. Pursuant to company policy, the company physician, Kenneth McMains, examined the Plaintiff and recommended he see an orthopaedic surgeon. The following month Plaintiff underwent back surgery. David Beck, the physician who performed the surgery, recommended the Plaintiff seek employment outside the railroad industry. Plaintiff was later evaluated for functional capacity and found physically unqualified for the sort of heavy labor he had previously performed. Plaintiff thereafter filed a lawsuit for damages against CC&P claiming negligent supervision, failure to provide proper equipment or reasonable safe tools, lack of sufficient manpower, and failure to provide a safe place to work. His claims were brought under 45 U.S.C. §§ 51-60 commonly known as the Federal Employers Liability Act

(FELA). CC&P denied the allegations. The matter proceed to trial and a jury verdict was returned in favor of the Plaintiff. CC&P then appealed challenging the sufficiency of the evidence to support the award and assailed a number of evidentiary rulings concerning the appropriate burden of proof as well as the exclusion of the testimony of Kenneth McMains, the company's regular physician.

ISSUE: On appeal, the court considered the following issues: (1) was there ample support in the record for the jury finding that CC&P failed to furnish proper equipment and tools, failed to provide a safe workplace and failed to provide sufficient manpower; and (2) whether the trial court improperly excluded the testimony of the company's regular physician Kenneth McMains who examined Plaintiff following the injury.

HELD: With respect to the first issue, the Iowa supreme court noted that while FELA cases are not routinely encountered in state courts, it is clear that Congress intended to greatly lower the bar for injured workers covered by the act, and deliberately allow recovery in cases that would not be allowed under general principles of tort law. The expanded metes and bounds of railroad liability under FELA are broad and will arise from "failing to promulgate and enforce appropriate rules and regulations [and] in neglecting to retain a sufficient number of employees to insure the safety of individual workers." See 32(B) Am. Jur. 2d *Federal Employers' Liability Act* § 29, at 874 (1996). Under the relaxed burden appropriate for FELA cases there was ample support of record for the jury findings that CC&P failed to furnish plaintiff a working place that was reasonably safe, that the rail fork qualified as insufficient equipment to roll the 1,600 pound rail into place, that an inadequate number of workers was assigned to the task, and CC&P failed to adequately train the workers in the safe operation of the boom truck used at the repair scene.

With respect to the second issue, the trial court exercised appropriate discretion in excluding the testimony of the company's regular physician, Kenneth McMains, who examined the Plaintiff shortly following his injury. CC&P had challenged the exclusion feeling that Plaintiff was able to mislead the jury into believing CC&P had unfairly and stubbornly thwarted his attempts to return to work. CC&P argued that McMains' testimony would have made it clear that plaintiff's injuries prevented him from returning. The court noted the factual background leading to the district court's decision. After bringing suit, Plaintiff on July 12, 1996, designated McMains as an expert witness pursuant to Iowa Rule of Civil Procedure 125(a), but later decided not to call him. This change of plan was signaled when, in February 24, 1997, Klein filed his pre-trial statement which omitted McMains as an expert witness. On March 5, 1997, some twelve days before trial was set to - and did - begin, CC&P filed an application to call McMains as its witness, not as an expert, but as a treating physician. This late designation obviously ran afoul of Iowa Rules of Civil Procedure 125(c). The court noted that CC&P's failure to comply with the rule may result in sanctions one of which was exclusion of evidence. The court noted that despite CC&P's contention otherwise, McMains was not Plaintiff's treating physician. McMains saw Plaintiff only twice both times at CC&P's direction. At the time of McMains' last examination, CC&P still had more than thirty days to serve notice it wished to call him as an expert. CC&P did not supplement it's witness list to include McMains until March 5, 1997, just twelve days before trial began. McMains' report on his examination of Klein was completed December 11, 1996. At that point, CC&P had

more than two months in which it could have filed a timely listing of McMains as a witness. The supreme court agreed that the district court correctly held that CC&P's March 5, 1997 designation was not "as soon as practicable" and was clearly not within thirty days prior to trial.

Hendericks v. Great Plains Supply Company
609 N.W.2d 486 (Iowa 2000)

Evidence - intentional destruction required to obtain spoliation instruction

FACTS: Robert and Sandra Hendericks built an new home in Marion, Iowa. Great Plains provided materials and labor for some of the construction, including the installation of cellulose insulation in the attic. Colony Plumbing & Heating, Inc. installed the fireplace and chimney. The Hendericks moved into the home around Thanksgiving 1993. The home was destroyed by fire on Saturday, February 12, 1994. An investigation of the fire soon revealed no radiation shield had been installed to maintain clearance around the chimney flue where it passed into the attic, and insulation which had been improperly packed in around the flue had ignited. State Farm Fire & Casualty Company paid Hendericks for the fire damage. On October 31, 1995 Hendericks and State Farm filed a subrogation action against Great Plains alleging its negligence in installing the insulation that caused the fire. Great Plains counter-claimed alleging Hendericks had failed to procure fire and extended coverage (builder's risk) insurance which named Great Plains as an insured. Thereafter, Great Plains filed a third-party petition for contribution against Colony Plumbing & Heating, claiming the fire was attributable to Colony's work in installing the fireplace and chimney flue. Hendericks subsequently filed a cross-petition against Colony asserting a similar negligence claim. Great Plains later filed a third-party petition against State Farm alleging State Farm had negligently misrepresented the existence of builder's risk insurance and that State Farm should be estopped from denying the existence of such coverage.

Following a bench trial, the district court found Great Plains and Colony were each fifty percent at fault and entered judgment against them for $378,969.21. The court dismissed all other claims. Great Plains and Colony separately appealed and the Hendericks cross appealed.

ISSUES: On appeal, the court was asked to consider whether the district court erred by not sanctioning the Hendericks and State Farm for spoliation of evidence. Defendants argued that testimony of two agents of State Farm should have been excluded because State Farm failed to notify the defendants they were targets of a subrogation claim until nearly a year after the fire and after the fire scene had been demolished. The defendants further contended that the trial court should have held State Farm had a duty to preserve the evidence.

HELD: The intentional destruction of evidence is referred to as spoliation and when it is established, the fact finding may draw the inference that the evidence destroyed was unfavorable to the party responsible for spoliation. It requires more than destruction of evidence. Application of the concept requires an intentional act of destruction. Only

intentional destruction supports the rationale of the rule that the destruction amounts to an admission by conduct of the weakness of one's case. In this instance, the supreme court agreed with the trial court's assessment that the evidence did not support a finding of intentional destruction of evidence. The agents of State Farm extensively photographed the fire scene and preserved portions of the flue pipe, wire and insulation located in the area of the fire's origin. This evidence was preserved and available for examination by the defendants.

INSURANCE

Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Federated Mutual Insurance Company
596 N.W.2d 546 (Iowa 1999)

Environmental Coverage - interpretation and construction of "occurrence" policy

Reasonable Expectations Doctrine - elements

FACTS: The Iowa Comprehensive Petroleum Underground Storage Tank Fund Board (Board) filed a declaratory judgment action seeking to establish that it was entitled to receive insurance coverage for costs of cleaning up petroleum-contaminated ground located at a Casey's General Convenience Store in Centerville, Iowa. The insurance policy at issue was purchased by CML Enterprises, the owner of the property, and was offered by Federated Mutual Insurance Company (Federated). The policy was a commercial package policy offering pollution liability coverage for the period March 5, 1990 through September 5, 1990. The policy insured against claims for "cleanup costs" because of "environmental damage." The policy only applied to claims "caused by a pollution incident that commenced on or after the retroactive date" of March 5, 1990. An exclusion contained in the policy excluded coverage for any "environmental damage caused or contributed to by any 'pollution incident' that commenced prior to the retroactive date."

CML had purchased the property in question in 1978 and later installed two underground storage tanks. The manager of the Casey's Store and CML's principal both stated that numerous incidents occurred between 1978 and 1990 which resulted in the spilling of petroleum on the property, including tanker overfills and drive-offs. Contamination was first discovered at the site on June 28, 1990, by a geo-technical testing team. By July 7, 1990 a gasoline dispenser was hit by a car and released approximately 5 gallons of petroleum onto the property. In 1991, after the initial claim for coverage was filed with CML, a leak was found in an underground pipe nipple. CML filed a claim for benefits with Federated, which was denied on December 10, 1990, based upon the policy exclusion. Federated maintained the environmental damage for which CML sought coverage was "caused or contributed to" by a "pollution incident that occurred prior to the retroactive date" of the policy. CML also forwarded a claim for remediation benefits to the underground storage tank financial assistance program. The Board approved CML's claim and began paying for the cleanup. Thereafter, CML assigned its rights under the insurance policy to the Board who then attempted to recoup its costs from Federated pursuant to the insurance policy. Federated denied the claim and the Board subsequently filed the underlying declaratory

judgment action. Following a decision in favor of Federated pursuant to its motion for summary judgment, the Board appealed.

ISSUES: (1) Whether the district court properly found that the exclusion contained in the policy precluded coverage? (2) Whether the reasonable expectations doctrine should apply and afford coverage despite the exclusion? (3) Did Federated waive its right to assert and/or should it be estopped from asserting that pollution existed on the site prior to the issuance of the policy because it failed to exercise its right under the terms of the policy to inspect the property before accepting the risk?

HELD: With respect to the first issue, the court noted that the exclusion excluded coverage for environmental damage "caused or contributed to" by any "pollution incident" that commenced prior to March 5, 1990. The evidence submitted showed that some accidents occurred on the property prior to March 5, 1990. The evidence revealed that the environmental damage could not be segregated based on different incidents, but had formed one large plume. Therefore, although some of the damage found at the site may have commenced during the policy period, the evidence showed that damage was contributed to by pollution incidents which occurred before that time, making the exclusion applicable. Accordingly, the supreme court agreed with the district court and concluded that the exclusion was not ambiguous and therefore should be applied as the plain language of the exclusion dictated.

With respect to the second issue, the court explained that an insured can utilize the doctrine of reasonable expectation to avoid an exclusion that (1) is bizarre or oppressive, (2) eviscerates a term to which the parties have explicitly agreed, or (3) eliminates the dominant purpose of the policy. However, a prerequisite is that the insured must show "circumstances attributable to the insured that fostered coverage expectations" or that "the policy is such that an ordinary layperson would misunderstand its coverage." See *Benavidis v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 357 (Iowa 1995). The court found that the Board failed to establish one of the prerequisites necessary for the applicability of the doctrine. First, there were no circumstances attributable to Federated that fostered coverage expectations. The Board did not assert nor did the court find any record of representations that would have led CML to believe coverage would be available under the scenario present. Second, the language of the exclusion was not "such that an ordinary layperson would misunderstand its coverage." *Id.* The exclusion as succinct and clearly written in simple language for a layperson to comprehend.

With respect to the final issue, the court held that while it appeared Federated waived its right to conduct an inspection prior to accepting the risk of insuring the property at issue, the wavier only prohibited Federated from later demanding an inspection before paying benefits. The limited waiver did not prohibit Federated from asserting the applicability of the exclusion, which was not associated with the right of inspection. Accordingly, the district court's decision was affirmed.

Continental Insurance Co. v. Bones
596 N.W.2d 552 (Iowa 1999)

Coverage - dependent upon actual claim asserted, not label on claim

Lost-of-Use - damages must arise from physical damage or destruction of tangible property

FACTS: Calvin and Audrey Bones were sued when they refused to honor a contractural guaranty of their son's lease obligation, resulting in the eviction of their son's co-tenant from the premises. In 1995, Bones' son, Gordon, and one Bernard Bunning signed a five-year lease with Sunriver Business Venture, Ltd. for the rental of a commercial building in California. Bones provided Bunning with a personal guaranty wherein they agreed to establish a $50,000 line of irrevocable credit. The purpose of the line of credit was to protect Bunning in the event of a default by Gordon on his lease obligations. Subsequently, rent became due and Gordon failed to pay his half of the rent. Bunning tendered his share to Sunriver, but this partial payment was insufficient to prevent Sunriver from filing an unlawful detainer action to evict Bunning. Bunning attempted to have Bones pay Gordon's overdue rent pursuant to the guaranty agreement. He also sought to draw on the line of credit. The Bones refused to honor their guaranty and obtained an ex parte injunction preventing Bunning from drawing on the line of credit. In the meantime, Sunriver was successful in evicting Bunning from the premises.

After his eviction, Bunning filed a complaint in the California state courts naming Gordon, the Bones, among others, as defendants. Six causes of action were alleged against the Bones. Bones demanded that Continental defend them in the California action, asserting the liability coverage of their homeowners policy encompassed a claim for "wrongful eviction." Continental declined to defend and denied coverage. Continental subsequently brought a declaratory judgment action in Iowa district court to which Bones filed a counter-claim. Upon both parties filing motions for summary judgment, the district court granted the motion filed by Bones and denied Continental's motion finding that (1) the "wrongful eviction" claim encompassed the claim for "loss of use" within the meaning of the policy definition of property damage; and (2) this cause of action was included within the policy definition of personal injury. Continental appealed the district court's decision.

ISSUE: Whether the loss of use of property must be caused by the property's physical injury or destruction in order to fall within the policy definition of property damage?

HELD: The Continental policy at issue defined the property damage as "physical injury to or destruction of real property or tangible personal property including loss of use of the property." On an issue of first impression, the Iowa supreme court reviewed decisions from other courts and held that damages for loss of use of tangible property were covered by the Continental policy only if the property had been physically injured or destroyed. Because there was no dispute that the premises from which Bunning was evicted was *not* physically injured or destroyed, any loss of use of those premises for which Bunning sought to recover in the California lawsuit were not covered "property damage" under Continental's policy of insurance. Second, with respect to the district court's determination that the cause of action for wrongful eviction was included within the policy definition of personal injury, the court first noted that

coverage is controlled by the actual claim asserted against the insured, not the label the claimant choses to put on the claim. Under the factual allegations of the complaint, the claim made against Bones was based on refusal to honor the guaranty agreement. To constitute a tort, the wrongful eviction required a "non-trespassory invasion of another's interest in the private use and enjoyment of land." Restatement of Torts § 822 (1939). In this instance, Bones were not alleged to have invaded Bunning's use of the lease premises. To the contrary, Bunning alleged that Sunriver wrongfully evicted plaintiff from the premises. Although the Bones refused to pay their son's share of the rent to Sunriver, they did not evict Bunning form the premises, or cause him to be evicted. Consequently, the claim was merely one for breach of contract and was not covered under the policy. The district court's decision was reversed and remanded.

City of Burlington v. Western Surety Company
599 N.W.2d 469 (Iowa 1999)

Interpretation - rules of interpretation for insurance policies apply to fidelity bonds

Distinction Between Fidelity Bond and Liability Insurance

FACTS: The fire department of the City of Burlington maintained a master key to all the school buildings in the Burlington school district in order to have immediate access in times of emergency. The key was kept in a lock box on one of the fire trucks. In early 1996, the key was reported missing. Based on an investigation, the fire chief concluded that the key was inadvertently lose. The City then undertook to replace all of the locks on the school district buildings. Although the school district had not demanded this action or threatened to file suit, the City chose to replace the locks in order to avoid the possibility of even greater damage to the school district and, accordingly, an even greater liability claim against the City.

Upon replacing the locks, the City sought coverage for its expenses from its insurer, Western Surety Company. Pursuant to a public employees blanket bond issued to the City that was in effect at the time the key was lost. Under this policy, Western Surety agreed to indemnify the City for "loss caused to the Insured through the failure of any of the Employees ... to perform faithfully his duties or account properly for all monies and property received by virtue of his position or employment during the Bond Period." Western Surety denied coverage and a lawsuit followed. Both the City and Western Surety filed motions for summary judgment. The district court denied the City's motion and granted Western Surety's motion, concluding that the City's expenses did not fall within the terms of the insuring agreement. The City subsequently appealed.

ISSUE: Can insured who incurs expense to avoid a third-party liability claims recover its payment under a fidelity bond?

HELD: The supreme court agreed with the district court and found that the fidelity bond at issue did not provide coverage for such payments. The court held that generally, the purpose of bond is to guaranty the honesty and faithful performance of the insured's employees by protecting the employer/insured against loss. See *Central National Insurance Company of North America*, 522 N.W.2d 39, 42 (Iowa 1994). Thus, a fidelity bond "is direct insurance procured by [the insured] in favor of himself." A fidelity bond is distinguishable from a liability policy in that a liability policy protects the insured against claims brought by third-

parties who have been injured by the insured's conduct. In contrasting liability insurance with a fidelity bond, the court noted that in the liability context the insured's loss is indirect; it is a third-party who directly suffers the loss. Turning to the facts of the case, the court noted that it was undisputed that a fire department employee failed to account for the school district's master key. As a result, the school district was exposed to potential damage should someone use the master key to enter a school building to steal property or vandalize the building. The buildings were owned by the school district, not the City. Therefore, any damage to the buildings would initially be borne by the school district. The fact that the City voluntarily stepped forward to pay the cost of replacing the locks did not change the facts. Accordingly, the Court concluded that the disappearance of the master key caused a loss to the school district, a third-party. The City's potential liability for the School District's expenses or damages merely caused an *indirect* loss to the City. To interpret the fidelity bond as covering this indirect loss would be to convert the bond into a policy of liability insurance. Such was clearly not the intent of the parties as evidenced by the absence of any language indicating that the policy's coverage encompassed the City's liability to third-persons.

Seastrom v. Farm Bureau Life Insurance Company
601 N.W.2d 339 (Iowa 1999)

Bad Faith - elements

Bad Faith - Fairly debatable standard applicable in first-party claim

Insurance - oral agreements and parol evidence

FACTS: On April, 19, 1995, Bruce Brinkman (Brinkman), an agent for Farm Bureau, and Ann Lewis, a Farm Bureau manager, met with Alice and Wayne Seastrom to discuss estate planning and the Seastroms' possible acquisition of life insurance. At the time, Alice was 74 and Wayne was 76 years of age. The Seastroms had two children, plaintiffs Gary Seastrom and JoAnn Jacobsen. The Seastroms owned a farm of approximately 500 acres which was operated by their son. The Seastroms wished have an estate plan in which they would leave their farm to both children, but provide sufficient funds to allow Gary to buyout JoAnn's share and to pay any inherence taxes.

At the April 19 meeting, Lewis obtained copies of the Seastroms' wills and information related to their estate planning goals. Wayne and Alice completed a trial application for a $300,000 joint last-to-die life insurance policy which Brinkman subsequently submitted to Farm Bureau. Brinkman was later informed that Wayne Seastrom was uninsurable and only Alice was to proceed to have a physical exam. Alice completed both the physical exam and diabetic questionnaire. On July 10, 1995, Lewis prepared a lengthy document captioned "Estate Analysis Report." The report contained a description of Alice's anticipated estate inventory and related costs and taxes. The report also contained projections of the premiums required for different levels of life insurance coverage for Alice. One of the projections listed a $21,300 annual premium for a death benefit of $350,000.

Lewis and Brinkman met with the Seastroms on July 12, 1995, and Lewis presented the estate analysis report to them. The report was left with the Seastroms when the meeting concluded. Lewis and Brinkman met once again with the Seastroms on August 4, 1995. On that date, they again reviewed the estate analysis report and the Seastroms indicated they wished to proceed with Lewis' recommendations. Brinkman completed another application for life insurance for Alice with Gary and JoAnn designated as the owners and beneficiaries of the policy. Brinkman did not complete the entire application, but instead wrote the words "everything taken care of on trial app." over one portion of it.

Gary Seastrom was present for part of the August 4th meeting and he wrote a $5,325 check for the quarterly insurance premium. Both Wayne and Gary claimed Lewis directed Brinkman to fill in the amount of $400,000 on the application. Lewis and Brinkman deny that any representations were made about the amount of coverage being provided and they claimed the $400,000 was not inserted into the application until after the August 4th meeting. Lewis and Brinkman claim no determination had been made as to the exact amount of coverage which would be acquired, although Brinkman thought it might be between $300,000 and $400,000.

Lewis claims the $400,000 amount was later added to the application because she knew that amount would adequately cover the Seastroms estate planning needs. If it became apparent less coverage was needed, Lewis could then "order down" and obtain an amount less than $400,000. A dispute existed as to whether Brinkman provided Alice, Wayne, or Gary with a conditional receipt, a perforated form located at the bottom of the final page of the life insurance application. The conditional receipt purported to limit Farm Bureau's liability to no more than $250,000 if an applicant dies prior to the issuance of a life insurance policy. Brinkman and Lewis claim Brinkman filled out the receipt, detached it, and gave it to Alice. Brinkman claimed he told the Seastroms that "this is a receipt saying that we received that amount for the deposit and that is why I am giving this to you." Lewis testified she hear Brinkman tell the Seastroms that "this receipt is evidence that you have a policy." Lewis, herself, told the Seastroms "they had coverage."

Gary and Wayne denied that Brinkman ever gave a conditional receipt to Alice. In any case, Farm Bureau admitted that Brinkman and Lewis never explained the terms or effect of any conditional receipt nor did they inform the Seastroms that any interim insurance coverage they had just purchased was limited to $250,000.

On August 12, 1995, Alice Seastrom died. Farm Bureau had not yet completed its processing of her application and no life insurance policy had been issued. This was the first time in which Farm Bureau had a situation in which an applicant for life insurance had died after completing the application, but before a policy had issued and the face amount of the application exceeded the amount provided by the conditional receipt. Over the course of the next two months, Farm Bureau completed an internal investigation of the claim. At a meeting on September 22, 1995, Lewis and Brinkman met with members of Farm Bureau's legal department to discuss in detail their meeting, conversations, and transactions with the Seastroms. Farm Bureau's claims committee met on September 27th to discuss the claim in detail. Ultimately, Farm Bureau decided that while its liability might be limited to only $50,000 under the conditional receipt, it was going to pay the $250,000 maximum provided thereunder. On

October 10, 1995, Farm Bureau tendered a check for $250,000 to Gary Seastrom and to JoAnn Jacobsen along with a refund of $4,517.44 of the premium Gary had paid. Gary and JoAnn claimed their acceptance of the check was contingent upon their filing a release of all claims against Farm Bureau. Farm Bureau disputed that claim. Seastroms subsequently rejected the check and filed suit against Farm Bureau, Lewis, and Brinkman raising numerous claims including breach of contract, expressed and implied warranty, negligent and fraudulent misrepresentation, first party bad faith, and a request for punitive damages. Farm Bureau proceeded to file a petition for declaratory judgment. The actions were then consolidated.

Immediately before trial, Gary and JoAnn settled with Brinkman and their claims against him were dismissed. Farm Bureau subsequently argued to the district court that the release of any claims against an the agent operated as a release of the claims against the principal and the plaintiff's remaining claims against it should be dismissed. The district court rejected this argument distinguishing between situations in which a principal's liability is contractual and those in which it is based solely on vicarious liability.

Following motions by the defendants, only the breach of contact, bad faith and punitive damages claims were submitted to the jury. The jury found that there had been an oral contract for insurance in the amount of $350,000 and the conditional receipt did not constitute a written contract for insurance benefits on Alice's life. The jury further found that plaintiffs had proven Farm Bureau had conducted itself in bad faith in denying the claim and awarded $5,000 to JoAnn and $7,500 to Gary. Finally, the jury found that Farm Bureau's conduct constituted a willful and wanton disregard for the rights of others and it awarded the plaintiffs $87,500 in punitive damages. Farm Bureau's post-trial motions were denied and the appeal followed.

ISSUES: On appeal, Farm Bureau claimed (1) the district court erred in failing to rule the plaintiffs' release of Brinkman operated as a release of Farm Bureau; (2) in admitting parol evidence; and (3) in failing to direct a verdict or grant a new trial on the breach of contract and bad faith claims. Plaintiffs' cross-appeal argued the district court erred in vacating the jury's award for punitive damages.

HELD: With respect to the first issue, the court noted it had not previously addressed whether the release of an agent operates as a discharge of a principal's liability for a breach of contract. Considering the issue in the context of the case, the court cited Restatement (Second) of Agency § 184(1) (1958) which states:

> Recovery of judgment against the agent of disclosed or partially disclosed principal for failure of performance of a contract to which the agent is a party does not thereby discharge the principal unless the agent and principal were joint contractors.

The court also cited decisions from other jurisdictions which followed the restatement provision. See *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F 2d 250, 274-75 (5th Cir. 1980), *Clifton Cattle Co. v. Thompson*, 117 Cal. Rptr. 500, 503-04 (1974), *Wheaton Lumber Co. v. Metz*, 181 A.2d 666, 670 (1962). On this issue, the court found the reasoning of § 184 and

the decisions from other jurisdictions to be persuasive. Accordingly, plaintiffs settlement with Brinkman did not operate as a release of Farm Bureau's liability on the contract claim.

Second, the court held that the trial court did not err in allowing the admission of parol evidence that varied from the terms of the conditional receipt. Because the plaintiffs argued the circumstances of the case had given rise to a separate oral contract, parol evidence was admissible beyond the language of the conditional receipt.

Third, with respect to the claim that breach of oral contract should not have been submitted to the jury, the court noted that numerous conversations and discussions had taken place between the Seastroms, Brinkman and Lewis. The exact nature of the conversations presented conflicting evidence as to whether the Seastroms had been provided with a conditional receipt at the August 4th meeting. Accordingly, there was sufficient evidence from which the jury could find Farm Bureau never provided the Seastroms with a conditional receipt. Thus, there was sufficient evidence from which the jury could infer there was an oral contract for life insurance, that the contract was not limited by the terms of the conditional receipt, and the exact amount of coverage was to be subject to the application of Farm Bureau's projections to the actual amount of premium which was paid.

With respect to the claim of bad faith, the court noted that Farm Bureau investigated the claim, even if the investigation was not as thorough or all-encompassing as the plaintiffs would have desired. In this instance, the record revealed that Farm Bureau's legal department had met with the Seastroms personally although the claims committee never interviewed Brinkman or Lewis, the owners of the policy, or those present at the time the application was completed. The court held that "in a first party bad faith claim, an imperfect investigation, standing alone, is not sufficient cause for recovery if the insurer in fact has an objectively reasonable basis for denying the claim." See *Sampson v. American Standard Insurance Company*, 582 N.W.2d 146, 152 (Iowa 1998). In this instance, the existence of the conditional receipt and Brinkman and Lewis' contention that the receipt had been given to Alice created a reasonable basis for denying the claim for $400,000 of coverage. Accordingly, that portion of the judgment entered on bad faith was reversed.

Finally, the court turned to plaintiffs' claim that the trial court erred in vacating the punitive damages amount. The court first noted that generally a breach of contract, even if intentional, is insufficient to support an award of punitive damages. An award of punitive damages for breach of contract will be upheld when the breach (1) constitutes an intentional tort, and (2) is committed maliciously in a manner that meets the standards of Iowa Code § 668A.1. A review of the record in this case revealed there was insufficient evidence to support a claim for punitive damages. Farm Bureau had never had a situation in which an applicant for life insurance had died after completing the application but before a policy had issued and the face amount of the application exceeded the amount provided by the conditional receipt. Farm Bureau's decision to rely on the terms of the written conditional receipt when determining its liability was not nor did it constitute an intentional tort. Furthermore, even if Farm Bureau had required the execution of the release in conjunction with the tender of the $250,000 check such conduct would not rise to the level of a willful and wanton disregard for the rights of the plaintiffs. Accordingly, the district court properly vacated the award of punitive damages

Austin v. CUNA Mutual Life Insurance Company
603 N.W.2d 577 (Iowa 1999)

Accidental Death Coverage - not applicable to death or injury resulting from medical treatment to cure disease or unhealthy condition.

FACTS: Plaintiffs' 14 year old daughter, Rachel, suffered from numerous heart problems. Rachel underwent aortic root replacement surgery at the University of Iowa Hospitals. Dr. Ralph Delius, one of the surgeons, advised Mr. and Mrs. Austin that the surgery had a 5% mortality rate. Due to Rachel's prior operations, the doctors encountered extremely fragile tissue and uncontrollable bleeding during surgery, resulting in Rachel's death. Dr. Delius had performed the surgery fifteen to twenty times, and this was his first fatality.

Plaintiff made a claim for accidental death benefits pursuant to an accidental death policy she maintained with CUNA Mutual Insurance Company. CUNA denied coverage claiming that Rachel's death was not accidental within the meaning of the policy. Plaintiff subsequently filed suit and both parties moved for summary judgment. Plaintiff's motion was denied, and CUNA's motion was granted. Plaintiff then appealed.

ISSUE: Was the insured's death an accidental death within the meaning of the CUNA policy?

HELD: The supreme court determined that the policy at issue did not provide coverage for the incident in question. Specifically, the court looked to the policy definitions. The policy provided that CUNA would pay specified amounts ($20,000 as to Rachel) "if an Insured Person sustains a loss within 365 days after the date of an accident." A loss was defined as an "injury which results in Loss of Life or bodily injury of an Insured Person." Injury is defined by the policy as "an bodily harm caused by an accident occurring while the Policy is in force as to the Insured Person and resulting directly and independently of other causes of Loss." The policy, however, did not define "accident." The supreme court looked to the dictionary definition of accident and its decision in *Central Bearings Co. v. Wolverine Insurance Co.*, 179 N.W.2d 443 (Iowa 1970). In that case, the court stated that the word "accident" as used in insurance policies has frequently been defined as "an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character and often accompanied by a manifestation of force." *Id.* at 448. The court went on to cite cases from other jurisdictions utilizing a practical approach in defining accident to include a "man-of-the-street" test when the term "accident" is not defined in the policy. The Iowa supreme court found the rational of other jurisdictions applicable and believes that the better rule, which is consistent with a "person on the street" view, is that intra-surgical deaths are not accidents for insurance purposes. Citing *Couch on Insurance* § 141:79, at 141-114 (footnotes omitted) the court stated "when the insured undergoes medical treatment for the purpose of curing a disease or other unhealthy or abnormal condition which has not itself been produced by a covered accident, the mere fact that the insured dies or is injured as a result of such treatment does not bring the loss within the coverage (of the policy). Consequently, the supreme court affirmed to decision of the district court.

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Interstate Power Company v. Insurance Company of North America (INA)
603 N.W.2d 751 (Iowa 1999)

Environmental Coverage - ground contamination over period of time from seeping is not "accidental"

Environmental Coverage - burden on insurer to show injury was expected or intended

Environmental Coverage - defense based on untimely notice

FACTS: Interstate Power Company owned or formerly owned numerous manufactured gas plants located at sites in Iowa, Illinois and Minnesota. Following the discovery of environmental damage to the sites, Interstate sought insurance coverage from INA for liability imposed upon it by state and federal agencies for environmental cleanup costs. During the period from May 1, 1946 to May 1, 1961, the INA policy provided that liability for property damage extended to "damages because of injury to or destruction of property including the loss of use thereof, caused by accident." In contrast, personal injury coverage under the policy during this period was provided on an "occurrence" basis. INA also provided coverage to Interstate for the period from 1961 through 1964. Under that policy, "occurrence" within the scope of property damage liability was defined to mean "either an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to or destruction of property during the policy period. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence."

INA denied coverage pursuant to the policy. Interstate subsequently filed a declaratory judgment action against INA. At the district court level, INA filed a motion for summary judgment which was granted by the district court for both policy periods at issue. Interstate appealed the district court's decision, contending the alleged property damage was caused by an accident and that the district court erred in granting summary judgment for the 1961 to 1964 policy years. On appeal, INA also urged that in the event the district court's grant of summary judgment was not upheld in its entirety, it was nonetheless entitled to summary judgment with respect to claims involving four of the manufactured gas plant sites on the basis that Interstate failed to provide timely notice to INA concerning the claims.

ISSUES: (1) Whether the alleged property damage was caused by accident? (2) Whether the district court correctly granted summary judgment for the 1961 to 1964 policy years? (3) Whether insurance for three of the subject sites was abrogated because of untimely notice to the insurer?

HELD: With respect to the first issue, the supreme court held that the policy language applicable during the period from 1946 through 1961 clearly focused on the cause of damage rather than the damage itself and required that the cause be of accidental origin. The court noted its prior decisions concerning ground contamination as it relates to the term "accident" within a policy. The court held that as a general principle ground contamination occurring over a period of time from a natural seeping process is not accidental when the source of the contamination is

manufacturing waste allowed to accumulate on or in the earth over a period of several decades. Accordingly, because the contamination was caused from the manufacturing process over a period of time and exposure to the elements, the district court properly granted summary judgment in favor of INA with respect to the 1946 through 1961 policy period.

Second, with respect to the second issue, the court focused on the policy language defining "occurrence." Considering the district court's ruling on this issue, the court noted that coal tar and other solid residues that were the basis of the contamination had been placed on or in the ground many years before the insurance policies went into effect. In addition, the supreme court noted that the district court ruled that any actual occurrence with respect to the damage that occurred was prior to the policy period and that the occurrence relied on by Interstate was after the policy period.

The court held the "repeated exposure to conditions" element of the definition is stated as an alternative to the "accident" element. There was nothing in the policy language that required the repeated exposure to conditions to have occurred during the time that Interstate was operating the manufacturing plants. All that was necessary was that the repeated exposure to conditions cause some damage during the policy period. Consequently, the supreme court ruled that it could not be concluded as a matter of law that no injury occurred during the policy period from 1961 through 1964. Thus, whether the environmental damage that ultimately resulted was expected or intended by Interstate during the time that the insurance was in force from 1961 through 1964 was issued of fact.

With respect to the third issue, the court concluded that Interstate had prior knowledge of its potential liability for substantial cleanup costs at sites located in Mason City, Iowa and Rochester and Albert Lea, Minnesota. Accordingly, the court was convinced that notice given to INA was unreasonably tardy. The underlying facts revealed that when the present declaratory action was filed against INA in June of 1995, Interstate had alleged that as of the second quarter of 1994 it had incurred extensive liability and expenses for contamination of two of the sites and a significant amount at the remaining site.

City of Waterloo v. Black Hawk Mutual Insurance Association
608 N.W 2d 442 (Iowa 2000)

Section 515.150 Demolition Reserve - not applicable to county mutual insurance association

FACTS: Kerry and Christine Corcoran owned a rental house in Waterloo that was damaged by fire in July 1994. Black Hawk was the fire insurer. In June 1995 the Corcorans entered into a settlement with Black Hawk under which Black Hawk paid them $15,750. In October 1995, the City sent a letter to Black Hawk requesting it to provide a demolition reserve on the loss as required by Iowa Code § 515.150. Black Hawk denied the claim, stating that pursuant to Iowa Code § 518, it was not subject to the demolition-reserve requirements of § 515.150.

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The City brought a declaratory judgment action to resolve the issue. The parties agreed to a stipulation of facts and agreed to limit the record to those facts. The district court held that Black Hawk was not subject to the demolition-reserve requirement of § 151.150. The City filed a motion for clarification under Iowa Rule of Civil Procedure 179(b). The court ruled on the motion but did not grant the City the relief it requested. The appeal followed.

ISSUE: Did the demolition reserve requirement of § 151.150 apply to Black Hawk Mutual as a mutual association under Iowa Code Chap. 518?

HELD: The court ruled that Black Hawk was not subject to the demolition reserve provisions of Iowa Code §151.150. As an issue of first impression, the court first noted that neither Chap. 515 nor Chap. 518 suggested any of their provisions were interchangable. Chap. 515 is broad in scope, covering all corporations formed for the purpose of providing insurance other than life insurance. Associations under Chap. 518 have a more restricted scope of authority. Under § 518.11, they are authorized to insure only against loss or damage by (1) any perils "resulting in physical loss or damage to property," (2) theft of personal property, and (3) "injury, sickness or death of animals in the furnishing of veterinary services." These associations are not authorized to write liability insurance. Also, under Chap. 518, the properties that may be insured include only (1) farm properties including residences and other buildings; (2) buildings used in agricultural processing; (3) city residences; and (4) churches, schools and community buildings. Approximately seventy sections under Chap. 515 have no equivalent provisions under Chap. 518. When Iowa Code § 515.150 was adopted in 1988, both Chaps. 515 and 518 were in existence. Yet, the legislature added the demolition reserve provision only to Chap. 515. If the legislature had intended to apply the demolition reserve requirement to mutuals under Chap. 518, the court held it would have added a similar provision to that chapter.

Hamm v. Allied Mutual Insurance Company
612 N.W.2d 775 (Iowa 2000)

UM/UIM - contractual limitation of actions provisions

UM/UIM - 10 year statute of limitations applied

FACTS: On December 16, 1995, plaintiff was a passenger in a vehicle driven by one Allen Breese. Breese was insured under a policy issued by Allstate Insurance Company. The Breese vehicle was struck by one Minh Bao Vien. Viens policy provided $20,000 of liability coverage. Plaintiff and her husband were insured under a policy issued by Allied which provided UIM coverage in the amount of $25,000. Plaintiffs accepted the policy limit of the Vien policy and proceeded to file and action against Allied on January 15, 1998. Allied answered raising expiration of the policy limitation period as an affirmative defense.

The Allied policy contained the following language concerning UIM coverage:

> A. We will pay all sums which an "insured" is legally entitled to recover as compensatory damages from the owner or operator of an

"underinsured motor vehicle" resulting from "bodily injury" to any person caused by an accident.
****
We will pay only after an "insured's" rights to the proceeds of all liability insurance bonds or policies have been determined by judgment or settlement agreement.
****
SUIT AGAINST US
We may not be sued unless all the terms of this policy are complied with. We may not be sued under the Underinsured Motorist coverage on any claim that is barred by the tort statute of limitations.

Allied moved for summary judgment on the basis that plaintiffs' suit was brought after the two-year statute of limitations had expired. The district court agreed and sustained Allied's summary judgment. Plaintiffs appealed.

ISSUES: 1) What is the applicable limitations period for an insured's claim against Allied for UIM coverage under the policy? 2) When does the limitations period begin to run?

HELD: First, the court held that, absent express language in the policy to the contrary, actions based upon UM/UIM policies are subject to the ten-year statute of limitations applicable to contract actions under Iowa Code § 615.1(5). Second, the time period commences at the time an alleged breach of the contract occurs, i.e. the point at which the insurer denies the claim for UM/UIM benefits. Accordingly, the court overruled its prior decisions in *Douglas v. American Family Mut. Ins. Co.*, 508 N.W.2d 665 (Iowa 1993) and *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92 (Iowa 1995) to the extent the court's opinions characterized the applicable limitations period for a UM claim and when it commences.

It should be noted that the court has not precluded insurers from establishing time limits for claims against the tortfeasor and insurer. In fact, the court's opinion specifically states that the insurer has the ability to clearly articulate the applicable limitations period and the event upon which the limitations period begins to run. In this instance, the court held that the Allied policy provisions were ambiguous as to whether an insured must first pursue a claim to recover the limits of the tortfeasor's liability coverage prior to filing suit against the insurer for UIM benefits. Consequently, the court opined that the policy language did not clearly articulate the applicable limitations period for the claim against the insurer or the event from which the limitations period began to run.

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JUDGMENT and LIMITATION OF ACTIONS

Whitters v. Neal
603 N.W.2d 622 (Iowa 1999)

Judgment Lien - cannot renew on motion without filing separate action

FACTS: In August, 1989, the plaintiffs sued the defendant in Linn County District Court for damages arising out of a motor vehicle accident. In October, 1989, the plaintiffs took a default judgment for $3,357.22, plus interest and costs. A general execution on the judgment remained unsatisfied.

In October, 1998, the plaintiffs filed a "motion for renewal of judgment." The defendant resisted on the ground there is no statutory authority to renew a judgment lien. The court overruled the objection and ordered the lien renewed. Defendant thereafter filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) challenging the ruling on the ground the court lacked statutory authority. The district court had cited Iowa Code §§ 614.1(6) and 624.23(1) (1997) as its authority. The judgment that had been rendered against the defendant created a lien on his real estate pursuant to Iowa Code § 624.23(1). Under this section, the plaintiff's lien would expire on October 26, 1999.

ISSUES: Can a judgment creditor "renew" a judgment lien, on motion, without filing a separate action?

HELD: The court held that while the judgment lien is valid only for ten years, the judgment itself would stand for twenty years pursuant to Iowa Code § 614.1 (1997). No case or statutory law was cited that would permit the extension of the judgment lien simply by filing a motion as proposed by the plaintiffs.

A judgment creditor could execute on a judgment, even after the expiration of the judgment lien, provided suit was filed within the twenty-year life of the judgment. The problem with proceeding by execution under the original judgment, after the expiration of the initial ten years, is that the original judgment lien has been lost. If a creditor wants to retain a lien, the proper procedure is to sue on the original judgment and obtain a new lien.

In suing on the original judgment, Iowa Code § 614.3 provides time windows as to when suit may be commenced. However, Iowa Code § 614.3 provides time windows to sue on a *judgment*; it does not affect the right of a judgment creditor to enforce the original judgment *lien*. Enforcement of the lien and a suit on the judgment are independent remedies.

While a judgment creditor may (1) obtain a new lien by suing on the judgment, or, (2) execute under the original judgment, neither of the procedures was implemented in the present case. The plaintiffs had simply attempted to extend the original judgment lien by motion, which is not permitted by Iowa statutes. Accordingly, the district court's decision was reversed and remanded for an order denying the motion to renew the judgment lien.

Workers' Compensation

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Marin v. DCS Sanitation
596 N.W.2d 62 (Iowa 1999)

Third Party Claims — Attorney Fees

FACTS: Aurora Marin received weekly survivors' benefits as the result of the work-related death of her husband, Lorenzo. Marin also later recovered $484,000 in a third party claim related to Lorenzo's death. DCS Sanitation recouped from the third party recovery the benefits it had paid to Marin, less a proportional reduction for attorney fees and costs associated with the third party claim. DCS also asserted a credit against future payments of survivors' benefits to the extent of Marin's remaining recovery. Marin argued that the amount of the credit should be reduced to reflect a proportional recovery for attorney fees. The deputy commissioner agreed with Marin, but the commissioner reversed on intra-agency appeal, holding that a reduction of the credit for benefits which had not yet been paid would constitute a double recovery by Claimant. On judicial review, the district court reversed the commissioner's decision, holding that no double recovery would occur, and that, because DCS benefited from the third party recovery, fairness demanded that DCS make a proportional contribution for attorney fees for the unpaid benefits that would be reduced on account of the recovery.

HELD: Affirmed. The supreme court held that, as DCS benefited from the reduction in its liability for future benefits, DCS should pay proportional attorney fees for the third party recovery. The court determined that there would be no double recovery by Marin as the attorney fees were only recovered and paid once. In reaching its decision, the court relied on its ruling in a similar recent case, *Ewing v. Allied Constr. Serv.*, 592 N.W.2d 689 (Iowa 1999) (discussed above).

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Iowa Erosion Control, Inc. v. Sanchez
599 N.W.2d 711 (Iowa 1999).

Death Benefits – Incapacity from Earning

Death Benefits – Parent as Eligible Dependent

Death Benefits – Effect of Immigration Status of Dependent

FACTS: Juan Sanchez died in the course of his employment with Iowa Erosion Control ("IEC"). After his death, Juan's 50 year old mother, Victoria, applied for survivor's benefits under Iowa Code § 85.31. Victoria was born and raised in Mexico, but had lived with Juan in the United States since 1988. She had a second grade education, and could neither read nor write Spanish, nor could she speak English. Victoria's immigration status was undetermined at the time of hearing, and she had never worked outside the home, instead relying on Juan to support her. IEC denied Victoria's claim, asserting that Victoria was not actually dependent on Juan, and even if she were dependent, she was not physically or mentally incapacitated from earning. Although Victoria was not physically or mentally incapacitated from working, the industrial commissioner determined that Victoria was actually dependent on Juan at the time of his death and that she continued to be incapacitated from earning at the time of hearing because of her illiteracy, lack of education and training, and lack of work experience. The commissioner's award of survivor's benefits was affirmed on judicial review by the district court. IEC appealed to the supreme court.

HELD: Affirmed. The supreme court interpreted Iowa Code § 85.44 to require a survivor to show either actual dependency or a physical or mental incapacity from earning, not both, to qualify for survivor's benefits. Once either of these threshold requirements is met, Iowa Code § 85.31 permits the benefits to continue so long as the survivor can demonstrate an "incapacity from earning." This latter definition of incapacity is broader than mere physical or mental impairments; in this case, Victoria faced "cognitive, governmental, and cultural" barriers to earning. Because Victoria had proven actual dependence on Juan at the time of his death, she met one of the two threshold requirements for initiating survivor's benefits. Consequently, so long as Victoria remains incapacitated from earning, she is entitled to benefits, even if her incapacity is not based on physical or mental impairment. The supreme court also specifically held that Victoria's immigration status was irrelevant to a determination of her entitlement to worker's compensation benefits.

Ellingson v. Fleetguard, Inc.
599 N.W.2d 440 (Iowa 1999)

Cumulative Injury – "Distinct and Discreet Disability" Requirement

Industrial Disability – Effect of Employer Accommodation

Healing Period – Termination by Maximum Medical Improvement

Healing Period – Effect of Reduced Workday

Penalty Benefits – Commencement of Permanent Disability Benefits

FACTS: Linda Ellingson filed two separate workers' compensation claims alleging various injuries to her head, neck, and arms. Her first claim arose from being struck on the head by a 40 pound box on January 4, 1985. Her second claim asserted a cumulative injury manifesting itself on June 17, 1992, allegedly caused by her subsequent work activities aggravating the conditions caused by the 1985 injury. Following the 1985 injury, Ellingson would intermittently be taken completely off work or restricted to reduced work hours by her treating physicians. She eventually underwent cervical surgeries in March 1990 and December 1992. She was placed at maximum medical improvement on April 13, 1993, but continued to intermittently be taken off work or restricted to reduced hours after that date. Fleetguard did accommodate Ellingson's various work restrictions with various types of light duty work.

The deputy industrial commissioner determined that Ellingson's healing period ended effective August 11, 1993, and also awarded 20% industrial disability related to the 1985 injury. The deputy further determined that healing period would only be owed for full days of missed work, and that days where Ellingson worked reduced hours would be compensated by temporary partial disability benefits. The deputy did not specify the periods where healing period and temporary disability benefits would be owed, leaving that matter to the parties to determine. The deputy also denied Ellingson's request for penalty benefits. The deputy specifically determined that Ellingson had not proven her claim of a separate cumulative injury. On intra-agency appeal, the industrial commissioner essentially affirmed the deputy's decision, except adjusting the termination of healing period to an earlier date, April 13, 1993, when Claimant had reached maximum medical improvement.

On judicial review, the district court affirmed the award of industrial disability benefits, but reinstated the deputy's later date for the end of the healing period. The district court also remanded the case to the commissioner for specific findings as to dates Ellingson was entitled to healing period and temporary partial disability benefits, as well

as a reconsideration of interest and penalty based upon those findings. The district court affirmed the denial of penalty benefits for payment of the permanent disability benefits, and also upheld the determination that Ellingson had failed to establish a separate cumulative injury in 1992. Ellingson appealed the district court's rulings on the issues of the denial of the cumulative injury claim, the extent of her industrial disability, the determination of her entitlement to healing period and temporary disability benefits, and the failure to award interest or penalty benefits. Fleetguard appealed the district court's ruling regarding the date of termination of the healing period as well as the extent of Ellingson's industrial disability.

HELD: Affirmed in part, reversed in part, and remanded. The supreme court affirmed the commissioner's ruling that Ellingson had not proven a cumulative injury subsequent to the 1985 traumatic injury. Specifically, the supreme court held that a cumulative injury requires a showing of a "distinct and discreet disability" attributable to work activities, rather than a mere aggravation of her prior work injury. Although the aggravation might be evidence of increased industrial disability, the aggravation itself is insufficient to establish a separate injury. The supreme court also held that evidence of the employer's post-injury accommodations could not be used in evaluating Ellingson's industrial disability unless the accommodations were buttressed by evidence of the availability of similar work accommodations in the competitive job market. Consequently, the supreme court remanded the case to the commissioner for review of the accommodations under this standard.

The supreme court also reversed the district court and reinstated the date of healing period termination set by the commissioner, upholding the commissioner's finding that Ellingson had reached maximum medical improvement on April 13, 1993. The supreme court affirmed the commissioner's determination that Ellingson was not entitled to healing period benefits during partial days of work, but rather was only entitled to temporary partial disability benefits. The supreme court further affirmed the commissioner's determination that, once healing period has terminated by reason of maximum medical improvement, no further healing period benefits are owed for subsequent "retrogression" in the worker's condition. The court did note that intermittent healing period could still apply in situations where an employee returns to work prior to reaching maximum medical improvement.

In considering the penalty benefit issues, the supreme court agreed with the district court that a remand to the commissioner was necessary so that the commissioner could make a specific determination of the dates healing period and temporary partial disability benefits were owed, and to then determine whether penalty benefits were owed for any of those benefit periods. The supreme court did determine, as a matter of law, that no penalty could be imposed for alleged non-payment of permanent disability benefits prior to the end of the healing period. Consequently, the supreme court affirmed the

commissioner's denial of Ellingson's claims for penalty benefits for alleged late payment of permanent disability benefits based on events occurring before April 13, 1993.

West Side Transp. v. Cordell
601 N.W.2d 691 (Iowa 1999)

Alternate Medical Care – Reasonableness of Treatment

Alternate Medical Care – Employer's Loss of Right to Designate Treatment

FACTS: Cordell worked as an over-the-road trucker for West Side Transportation ("West Side"). He was injured in January 1997 in a motor vehicle accident while working for West Side. West Side accepted the injury as compensable and directed Cordell to treat with an authorized company physician in Cedar Rapids. In April 1997, Cordell returned to his home in North Carolina and sought treatment with an orthopedic specialist, Dr. Guthrie. West Side refused to pay for the treatment or authorize another physician in North Carolina to treat Cordell, but instead insisted that he return to Cedar Rapids, Iowa for treatment with the company physician.

Cordell filed a petition for alternate medical care with the industrial commissioner seeking authorization of continued treatment with Dr. Guthrie. After a hearing the deputy commissioner determined that West Side had failed to provide reasonable care without undue inconvenience to Cordell, and ordered that Dr. Guthrie be designated as the authorized treating physician. West Side sought judicial review, arguing that even if West Side was required to provide treatment in North Carolina, West Side was still free to designate a physician other than Dr. Guthrie. The district court affirmed the agency decision, and West Side appealed to the supreme court.

HELD: Affirmed. The supreme court held that an employer must provide care that is: "(1) prompt, (2) reasonably suited to treat the injury, and (3) without undue inconvenience to the claimant." The court further stated that the industrial commissioner has the authority to designate alternate care, including treatment from a physician selected by the worker, if the employer fails to provide reasonable medical care.

Humboldt Community Sch. v. Fleming
603 N.W.2d 759 (Iowa 1999)

Mental/Mental Injuries – Legal Standard for Proof of Causation

Intentional Injury Defense – Suicide

Liens, Indemnity, and Subrogation – Third-Party Medical Malpractice Claims

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FACTS: David Fleming was employed as the superintendent at Humboldt Schools from 1989 until his death by suicide in June 1993. His wife brought a claim for workers' compensation survivor's benefits, alleging that David's suicide was the result of enormous mental stress caused by significant community controversy over a proposal to adopt an educational teaching system called outcome based education ("OBE"). At hearing, Fleming's medical experts testified that David's death was the result of mental stress related to the OBE controversy, while Humboldt Schools' experts testified that the suicide was caused by a personality disorder and a dysfunctional relationship with his parents. Several school superintendents testified that their jobs involved periodic stress associated with a variety of controversial issues. However, many of the superintendents indicated that such stressful incidents are rather rare, occurring only once every few years. Humboldt Schools also argued that the claim was barred because David's suicide was an intentional act not caused by mental derangement. Finally, Humboldt Schools argued it was entitled to a lien and indemnity under Iowa Code § 85.22 from a significant third-party recovery made by Fleming's estate in a medical malpractice lawsuit against a psychiatrist who had treated David just prior to his suicide.

The deputy commissioner awarded survivor's benefits, finding that the OBE controversy was sufficient proof of unusual stress to meet the *Dunlavey* legal causation test. The deputy also ruled that so long as a causal connection could be shown between the mental stress and the mental disorder, and between the mental disorder and the suicide, there was no need to prove David was under a mental derangement at the time of his suicide. This decision was affirmed on appeal to the commissioner and by the district court on judicial review. The agency did not address the § 85.22 lien issue as there had been no third-party recovery at the time of hearing. The district court, however, declined to address the issue as medical malpractice claims had been held not subject to a § 85.22 lien by the Iowa supreme court's recent Toomey decision. Humboldt Schools appealed to the supreme court.

HELD: Affirmed. The supreme court held that the commissioner had properly applied the *Dunlavey* "unusual stress" test, and had properly found that the evidence supported a conclusion that the OBE controversy was significantly greater than the day-to-day stresses routinely faced by school superintendents. The court also agreed that so long as a chain of causation between stress and injury could be shown, there was no need to prove a mental derangement to avoid the intentional injury defense. Finally, the court held that a § 85.22 lien was precluded by the *Toomey* decision, although the court stated that an indemnity claim might still exist independently of a lien.

IBP, Inc. v. Al-Gharib
604 N.W.2d 621 (Iowa 2000)

Appellate Procedure – Appeal Taken Before Ruling on Post-trial Motions

Evidence – Expert Testimony by a Psychologist

Permanent and Total Disability – Sufficiency of Evidence

FACTS: Raad Al-Gharib moved to Iowa in 1993 because of political unrest in his native Iraq. Although trained as a welder in Iraq, Al-Gharib was hired by IBP to work as a meat processor, a job which required him to use a vibrating knife. Eventually, Al-Gharib developed arm complaints from use of the knife, and left employment with IBP after IBP refused to provide him light work as recommended by his treating physicians. Al-Gharib continued to treat for a variety of arm and neck problems which left him unable to work, and also developed depression from his inability to work. The doctor treating the physical complaints stated Al-Gharib would be unable to work until his arm healed, which did not appear medically likely. Al-Gharib's psychologist stated that his depression was caused by his work injury. A state vocational rehabilitation counselor also agreed Al-Gharib could not find work in the competitive job market.

The deputy commissioner found that Al-Gharib had sustained physical and mental injuries to the body as a whole, and awarded medical benefits and permanent and total disability benefits. On appeal, the commissioner held that a psychologist was not competent to provide expert testimony on medical causation issues, and consequently, the commissioner found that Al-Gharib had not proven his mental injury was related to his employment. However, the commissioner did award permanent and total disability benefits based on Al-Gharib's physical conditions.

IBP sought judicial review of the award, and Al-Gharib sought review of the denial of benefits for the mental injury. The district court found that the commissioner had properly awarded permanent and total disability benefits based on the physical complaints, and consequently affirmed the commissioner's decision. Al-Gharib filed a motion under rule of civil procedure 179(b) asking the district court to issue a ruling on the mental injury issues as the commissioner's decision denied medical benefits related to the mental condition. IBP then appealed to the supreme court prior to the district court's ruling on the 179(b) motion, and Al-Gharib cross-appealed. The district court subsequently ruled that the commissioner abused her discretion by relying on a blanket exclusion of testimony from psychologists instead of analyzing the expert's testimony as it appeared in the present case. The district court then remanded the case to the commissioner for a re-examination of the mental injury.

The supreme court transferred the appeal to the court of appeals which held that Al-Gharib's filing of a cross-appeal prior to a final ruling on the 179(b) motion waived any issues with respect to the mental injury. In considering IBP's appeal of the permanent and total disability award, the court of appeals held that it was unclear whether the commissioner relied on the proper factors in making the award, and remanded the case for a reconsideration of the award in light of the proper factors. Al-Gharib then sought further review by the supreme court, which was granted.

HELD: Decision of court of appeals vacated, decision of district court affirmed, case remanded to the commissioner for re-evaluation of the mental injury. The supreme court first noted that filing an appeal or cross-appeal while a post-trial motion was still pending usually constituted a waiver of the issues raised by the appealing party in that post-trial motion. Here, however, Al-Gharib had been forced to file a cross-appeal to protect his rights of appeal because IBP had filed a premature notice of appeal. Consequently, the supreme court determined that there had been no waiver of the mental health issues, and also admitted the district court's ruling on the post-trial motion into the appellate record.

The supreme court then affirmed the district court's ruling on the mental health issues, in particular holding that the commissioner could not apply a blanket rule excluding evidence from psychologists. Finally, the court also affirmed the district court's and commissioner's decisions finding Al-Gharib to be permanently and totally disabled; the court held that substantial evidence supported the commissioner's findings that the primary cause of Al-Gharib's disability were his physical injuries. Consequently, the only issue to be addressed by the commissioner on remand was whether the psychologist's opinions should be admitted into the record, and if so, whether Al-Gharib was entitled to medical benefits for his mental injury.

St. Luke's Hospital v. Gray
604 N.W.2d 646 (Iowa 2000)

Appellate Procedure – Waiver of Issues

Occupational Disease – Latex Allergy

Causal Connection – Sufficiency of Medical Evidence

Extent of Industrial Disability – Sufficiency of Evidence

FACTS: Debra Gray worked as a registered nurse for St. Luke's Hospital. She developed symptoms of a latex allergy which eventually required her to leave her employment as a nurse, and prevented her from taking any employment which would involve significant latex exposure. Gray pursued a claim for workers' compensation

benefits alleging a work injury under Iowa Code chapter 85. The deputy commissioner found that her latex allergy was a work-related injury and awarded Gray 35% industrial disability. St. Luke's appealed the award to the industrial commissioner, arguing that a 35% award was not supported by the evidence, and also arguing that latex allergies were compensable only under the occupational disease statute, chapter 85A. The commissioner ruled that the occupational disease issue had been waived because St. Luke's had neither raised the issue in the prehearing conference report nor argued the issue at hearing. The commissioner held that allowing the issue to be first raised on appeal constituted unfair and prejudicial surprise to Gray. The commissioner also affirmed the award of 35% industrial disability. On judicial review, the district court affirmed the commissioner's award. St. Luke's then appealed to the supreme court.

HELD: Affirmed. The supreme court first agreed that the occupational disease issue had been waived, but addressed the issue by determining whether the latex allergy was compensable as an injury under chapter 85. The court held that an "injury" for purposes of chapter 85 has a broad meaning, and that a latex allergy was significantly unlike the traditional conditions compensated as occupational diseases under chapter 85A. Further, latex allergies are strikingly similar to other conditions which have been found compensable as injuries, including contact dermatitis and asthma. Consequently, the court held that latex allergies are to be compensated as injuries under chapter 85 rather than as diseases under chapter 85A. Finally, the court also held that the award of industrial disability benefits was supported by substantial evidence.

Iowa Supreme Court Bd. of Prof. Ethics v. Lemanski
606 N.W.2d 11 (Iowa 2000)

Ethics – Neglect of Client Legal Matter

Ethics – Failure to Disburse Settlement Funds

Ethics – Failure to Cooperate with Disciplinary Board

FACTS: In 1991, attorney Lemanski filed a workers' compensation petition on behalf of a client. At a hearing in March 1992, the presiding deputy commissioner excluded important medical evidence because of Lemanski's failure to serve the evidence in compliance with the hearing scheduling order. Lemanski's client was denied benefits as a result of the deputy's decision, although some benefits were awarded after remand on judicial review. Lemanski eventually received a settlement check from the employer which he deposited in his client trust account, but he did not disburse the proceeds until one year later. After his client filed a complaint with the local ethics board, Lemanski failed to reply to two separate notices from the ethics board regarding the complaint, and later failed to respond to discovery requests propounded by the board.

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HELD: License suspended for one month. The supreme court noted that Lemanski's conduct constituted neglect of a client's legal matters, failure to provide a client with a proper accounting of trust funds, and conduct prejudicial to the administration of justice (for failure to cooperate with the ethics board's investigation).

Koehler Elec. v. Wills
608 N.W.2d 1 (Iowa 2000)

"Arising out of" Employment – Idiopathic Falls

FACTS: Wills had been employed by Koehler Electric for two days when he fell approximately five feet from a ladder to the floor, sustaining serious head and shoulder injuries. Investigation revealed that Wills suffered from alcohol withdrawal, including delirium tremens. Koehler Electric denied Wills' claim, asserting the injury was the result of a personal medical condition (idiopathic injury), and did not arise out of his employment. The deputy commissioner and commissioner each awarded benefits, holding that the fall from a height to the floor greatly increased Wills' risk of injury, and that his work duties required him to be on the ladder at the time he fell. The award was affirmed on judicial review, and Koehler Electric appealed to the Iowa supreme court.

HELD: Affirmed. The supreme court agreed with the commissioner that a fall from a ladder while performing work duties, even if precipitated by a personal health condition, is compensable because the worker is placed at an increased risk of injury. The supreme court also held that a worker need not introduce expert evidence of an increased risk of injury, but can rely on common sense and lay testimony. Likewise, the worker need not establish that his injuries were enhanced as a result of the fall.

Barnes v. State of Iowa
611 N.W.2d 290 (Iowa 2000).

Temporary Disability – Use of Paid Leave for Medical Appointments

Subject Matter Jurisdiction – Wage Benefit Disputes

FACTS: Eighteen state employees brought a lawsuit in district court claiming the state violated workers' compensation and wage collection law by requiring state employees to use sick leave and vacation time to attend medical appointments related to treatment for work injuries. The state moved for summary judgment, arguing the workers' exclusive remedy was to file individual claims before the workers' compensation commissioner. The workers resisted, claiming the lost wage claims were independent of their workers' compensation claims, and also that the agency did not offer them an adequate remedy because of the number of workers affected by the claim (they also apparently were seeking to be certified as a class action). The district court granted

summary judgment in favor of the state, agreeing that the workers' claims were for lost wages related to their work injuries, and consequently, the claims were within the exclusive jurisdiction of the workers' compensation commissioner. The workers appealed to the supreme court.

HELD: Affirmed. The supreme court agreed that claims for lost wages related to work injuries were within the exclusive jurisdiction of the workers' compensation commissioner. The supreme court also held that, merely because a large number of workers' may have been affected by the state's policy, there was no evidence the workers lacked an adequate remedy before the commissioner. The court did state that claims for lost credit for vacation time and sick leave were based on the workers' employment contracts, and could be brought in district court. In the present case, however, the workers raised only "lost wage" claims initially, and did not raise "lost time" claims in their petition. Consequently, the entire matter was properly dismissed.

Kloster v. Hormel Foods Corp.
612 N.W.2d 772 (Iowa 2000).

Medical Care – Intentional Interference with Medical Care

Subject Matter Jurisdiction – Failure to Exhaust Administrative Remedies

FACTS: In 1995, Kloster injured his low back while working for Hormel Foods. Kloster treated with a company designated physician, Dr. Formanek, who released Kloster to light duty work. Kloster was later released to full duty work, but continued to miss work several afternoons each week for medical treatment. Hormel Foods discovered that Kloster routinely left work on afternoons when no medical treatment was scheduled, and terminated him for gross misconduct. Kloster brought suit in district court, alleging intentional interference with medical treatment and retaliatory discharge, essentially alleging Dr. Formanek "conspired" with Hormel Foods to release him to full duty work before he was medically capable of such work in order to avoid having to report "lost time" claims. The jury found that Kloster's termination was justified, but that Hormel had in fact intentionally interfered with his medical care. The jury, however, found that Kloster had not sustained any damages. Kloster appealed to the supreme court, asking for an award of nominal and punitive damages for the intentional interference with medical care. Hormel Foods cross-appealed, claiming that Kloster's medical care complaints were within the exclusive jurisdiction of the workers' compensation commissioner, and that Kloster had failed to exhaust his available administrative remedies by filing a petition for alternate medical care with the commissioner.

HELD: Vacated and remanded. The supreme court agreed that Kloster's complaints about medical care raised an issue as to the reasonableness of the treatment provided by Hormel Foods. Consequently, the court held that Kloster was required to

pursue and exhaust any available administrative remedies, specifically by requesting an order for alternate medical care through the workers' compensation commissioner. His district court action was barred.

Swartzendruber v. Schimmel
613 N.W.2d 646 (Iowa 2000).

Statute of Limitations – "Discovery Rule"

FACTS: On January 7, 1994, Swartzendruber was working in a grocery store stocking shelves. Although he had a long history of prior hip and back problems, the work that particular day caused a significant increase in his symptoms. The symptoms became worse overnight, and on January 8, 1994, Swartzendruber went to the hospital emergency room. Upon returning home, he called his employer and informed them of his condition. Swartzendruber was never able to return to work at the store. On January 13, 1994, Swartzendruber was informed by an orthopedic surgeon that he would require hip surgery. Swartzendruber again called his employer, this time specifically reporting his condition as a work injury.

Swartzendruber filed a petition for workers' compensation benefits on January 11, 1996. His employer filed a motion for summary judgment, asserting the statute of limitations had run on the claim. Swartzendruber resisted, claiming he did not know the condition was serious until January 13, 1994, when surgery was recommended. The commissioner granted summary judgment, finding that Swartzendruber knew he had a work injury on January 7, 1994, and should have known it was a serious condition no later than January 8, 1994 when he first sought medical treatment. The district court affirmed on judicial review, but the decision was reversed by the Iowa court of appeals which held that, because Swartzendruber had significant prior hip and back problems, there was a genuine issue of material fact as to when he became aware of the seriousness of his condition. The employer sought further review in the supreme court.

HELD: Court of Appeals decision vacated; district court ruling affirmed. The supreme court noted that the "discovery rule" applies to workers' compensation claims, but found that the evidence in the present case established as a matter of law that Swartzendruber, as a reasonable person, should have been aware of the possible seriousness of his condition on January 8, 1994 when he was referred to a specialist, and also informed his employer he felt he might not be able to work his next scheduled shift. Consequently, his petition was barred by the statute of limitations.

Brown v. Star Seeds, Inc.
614 N.W.2d 577, 2000 WL 895208 (Iowa 2000).

Compensation Rate – Seasonal Employees

FACTS: Brown was a self-employed farmer who was hired for several years by Star Seeds to harvest seed corn, an activity performed during a two-week period prior to the normal fall grain harvest. On September 14, 1993, Brown suffered a severe injury when his right hand became entangled in the harvesting equipment; his hand and part of his forearm were eventually amputated. After a hearing, the deputy workers' compensation commissioner found Brown was a "seasonal" employee, and applied Iowa Code § 85.36(9) (1993) (repealed in 1995) to calculate Brown's weekly compensation rate. Relying on *Hartman v. Clarke County Homemakers*, 520 N.W.2d 323 (Iowa Ct. App. 1994), the deputy commissioner held that Brown's significant earnings from his self-employment could not be used in calculating his average weekly earnings. Brown appealed to the workers' compensation commissioner, arguing that the *Hartman* case applied only to Iowa Code § 85.36(10) (1993) (currently § 85.36(9)) (concerning part-time employees). The deputy commissioner's decision was affirmed by the commissioner on intra-agency appeal and by the district court on judicial review. Brown appealed to the Iowa supreme court.

HELD: Reversed and remanded. The Iowa supreme court held that the language in Iowa Code § 85.36(9) (the "seasonal" employee statute) mandated consideration of earnings from "all occupations", while Iowa Code § 85.36(10) (the "part-time" statute) only required inclusion of earnings from "all employment". The court reasoned the different wordings of the two statutes meant that the legislature must have intended self-employment income to be included for seasonal employees, but not for part-time employees. Consequently, Brown's self-employment income should have been included by the commissioner in calculating his compensation rate, and the case was remanded to the agency for a new determination of the compensation rate.

2000 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR SCHEDULE

WEDNESDAY, SEPTEMBER 20, 2000

9:00 a.m **Registration**

11:00 a.m. **Board of Directors Meeting**

1:00 - 1:15 p.m. **Welcome & Report of Association**
- IDCA President, Robert D. Houghton
  Shuttleworth & Ingersoll, P.C.
  Cedar Rapids, IA

1:15 - 1:35 p.m. **Supreme Court Update**
- Honorable Arthur A. McGiverin
  Chief Justice, Iowa Supreme Court

1:35 - 2:15 p.m. **Better than Shepardizing; The Year in Review of Iowa Supreme Court and Court of Appeals Decisions - Case Law Update I (Employment, Attorneys, Commercial, Constitutional, Contracts, Damages, Government)**
- Anjela A. Shutts, Whitfield & Eddy, P.L.C.
  Des Moines, IA

2:15 - 2:45 p.m. **Offers to Confess: Their Effective Use**
- Chad M. Von Kampen
  Simmons, Perrine, Albright & Ellwood, P.L.C.
  Cedar Rapids, IA

2:45 - 3:15 p.m. **Workers' Compensation Update**
- Honorable Iris J. Post
  Iowa Industrial Commissioner
  Des Moines, IA

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

3:30 - 4:00 p.m. **Defending the Environmental Claim**
- Steven J. Pace
  Shuttleworth & Ingersoll, P.C.
  Cedar Rapids, IA

4:00 - 5:00 p.m. **Defending Insurance Agents**
- Maurice B. Nieland
  Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser
  Sioux City, IA

6:00 - 7:30 p.m Reception - Embassy Suites

THURSDAY, SEPTEMBER 21, 2000

8:30 - 9:00 a.m **Ethical Issues for the Iowa Defense Attorney**
- Charles L. Harrington
  Iowa State Bar Association, Des Moines, IA

9:00 - 9:30 a.m. **The Year in Review of Iowa Supreme Court and Court of Appeals Decisions**
Case Law Update II (Negligence, Torts, Indemnity)
- Paul P. Morf
  Simmons, Perrine, Albright & Ellwood, P.L.C.
  Cedar Rapids, IA

9:30 - 10:15 a.m. **Nuts and Bolts of Products Liability: Suggestions on Handling Troublesome Issues for Defense Attorneys in Products Cases**
- Kevin M. Reynolds
  Whitfield & Eddy, P.L.C.
  Des Moines, IA

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

10:30 - 11:15 a.m. **Defense of Trademarks and Trade Names; Internet Abuse of Trade Names and Trademarks**
- Edmund J. Sease
  Zarley, McKee, Thomte, Voorhees & Sease
  Des Moines, IA
- Michael G. Voorhees
  Zarley, McKee, Thomte, Voorhees & Sease
  Des Moines, IA

11:15 - 11:45 a.m. **The Year in Review of Iowa Supreme Court and Court of Appeals Decisions**
Case Law Update III (Appellate Procedure, Civil Procedure, Courts - Jurisdiction and Trial, Evidence, Insurance, Judgment & Limitation of Actions, Workers' Compensation)
- Jason T. Madden
  Bradshaw, Fowler, Proctor & Fairgrave, P.C.
  Des Moines, IA

11:45 - 12:00 p.m **2000 Legislative Report**
- Robert M. Kreamer
  IDCA Legislative Lobbyist
  Des Moines, IA

12:00 - 12:30 p.m. **LUNCH**

12:30 - 1:00 p.m. **Views from the Bench - Court of Appeals**
- Honorable Michael J. Streit
  Court of Appeals, Des Moines, IA

1:00 - 1:30 p.m. **Subrogation Issues Arising out of the Defense of Personal Injury Cases**
- John B. Grier
  Cartwright, Druker & Ryden
  Marshalltown, Iowa

1:30 - 2:15 p.m. **Recent Developments in Employment Law**
- Gordon R. Fischer
  Bradshaw, Fowler, Proctor & Fairgrave, P.C.
  Des Moines, IA

2:15 - 3:00 p.m. **Defending Punitive Damage Claims**
- Thomas D. Waterman
  Lane & Waterman
  Davenport, IA

3:00 - 3:15 p.m. **BREAK**

3:15 - 4:00 p.m **New Model Rules of Professional Conduct**
- David L. Phipps
  Whitfield & Eddy, P.L.C.
  Des Moines, IA

4:00 - 5:00 p.m **New Developments for the Defense Lawyer: The Restatement Third - Compensation or Direction by Third Person: Ethical Issues**
- C. Bradley Price
  DeVries, Price & Davenport, A.P.C.
  Mason City, IA

Recommended Case Handling Guidelines for Insurers and for Law Firms - Where Do We Go Now?
- Wendy N. Munyon
  Grinnell Mutual Resinsurance Company
  Grinnell, Iowa

In the Matter of Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures In the Supreme Court of the State of Montana
- Alanson K. Elgar
  Elgar Law Office
  Mount Pleasant, IA

The ABA Model Rules and Integration of the Same in Your Practice
- Sharon Soorholtz Greer
  Cartwright, Druker & Ryden
  Marshalltown, IA

6:30 - 9:00 p.m **Reception and Banquet**
Glen Oaks Country Club
6:30 to 7:30 p.m. - Reception
7:30 p.m. - Banquet

FRIDAY SCHEDULE ON NEXT PAGE

FRIDAY, SEPTEMBER 22, 2000

7:00 - 8:30 a.m. **Board of Directors**

8:30 - 8:45 a.m. **Update from the Defense Research Institute**
- Timothy P. Schimberg
  DRI Representative
  Fowler, Schimberg & Flanagan
  Denver, Colorado

8:45 - 9:30 a.m. **New Developments Under the ADA**
- Iris E. Muchmore
  Simmons, Perrine, Albright & Ellwood, P.L.C.
  Cedar Rapids, IA

9:30 - 10:15 a.m. **Good Faith Settlements and the Right to a Defense in Iowa**
- Gregory G. Barnsten
  Smith Peterson Law Firm
  Council Bluffs, IA

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

10:30 - 11:15 a.m. **Pretrial Motions**
- Michael J. Coyle
  Fuerste, Carew, Coyle, Jurgens & Sudmeier, P.C.
  Dubuque, IA

11:15 - 12:00 p.m. **Medical Malpractice Defense: The Most Common Mistakes, Observations and Suggestions from Filing Through Verdict**
- Thomas A. Finley
  Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C.
  Des Moines, IA

12:00 - 12:30 p.m. **LUNCH**

12:30 - 1:15 p.m. **Iowa Federal Courts Entering the 21ST Century**
- Honorable Charles R. Wolle,
  Des Moines, IA

1:15 - 2:45 p.m **Mediation from the Plaintiff, Defense and Mediator's Point of View - A Panel Discussion**
- David S. Wiggins (for the Plaintiff)
  Wiggins & Anderson, P.C.
  West Des Moines, IA
- Neven J. Mulholland (for the Plaintiff)
  Johnson, Erb, Bice, Kramer, Good & Mulholland, P.C.
  Fort Dodge, IA
- John M. French (for the Defense)
  Peters Law Firm, P.C.
  Council Bluffs, IA
- Bruce L. Walker (for the Defense)
  Phelan, Tucker, Mullen, Walker, Tucker & Gelman, L.L.P.
  Iowa City, IA
- Paul C. Thune (Mediator)
  Paul Thune Law Firm
  West Des Moines, IA

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2000 ANNUAL MEETING & SEMINAR

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OFFERS TO CONFESS: THEIR EFFECTIVE USE

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I. STATUTORY FRAMEWORK

Iowa Code Chapter 677 provides four different methods for offers to confess judgment The four types of offers to confess vary by when, where and how they can be utilized.

A. Offer to confess before action brought (Iowa Code §§ 677.1-677.3).

A potential defendant may make an offer to confess judgment before an action for the recovery of money is even filed. A potential defendant may go before a clerk of court in either his county or the potential plaintiff's county and offer to confess judgment for a specified sum as provided for in Iowa Code Chapter 676. (Iowa Code § 677 1).

If the potential plaintiff, after notice, refuses to accept the offer and thereafter commences an action in which he does not recover more than the amount so offered, the plaintiff "shall pay all the costs of the action." (Iowa Code § 677.2).

As with all offers to confess judgment, an offer "shall not be treated as an admission of the cause of action or amount to which plaintiff is entitled, nor be given in evidence." (Iowa Code § 677.3).

B. Offer to confess judgment after action brought (Iowa Code §§ 677.4-677.6).

This second type of offer to confess judgment can be made after an action for the recovery of money is brought To utilize this type of offer to confess, the defendant "may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action." (Emphasis added) (Iowa Code § 677.4).

If the plaintiff is present in court when the offer is made, he must make a decision to refuse or accept the offer to confess judgment If the plaintiff is not present, he must receive three days notice prior to the offer. If the plaintiff refuses to accept the judgment and at trial does not recover more than was offered to be confessed, the plaintiff "shall pay the costs of the defendant incurred

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after the offer." (Iowa Code § 677.5). Once again, this offer is not treated as an admission and is not to be given in evidence at trial. (Iowa Code § 677.6).

C. Offer to confess after action brought (not in court) (Iowa Code §§ 677.7-677.10).

This type of offer to confess judgment differs from the prior type with regard to how the offer to confess is made. Whereas in Iowa Code § 677.4, the offer is to be made "in court," under this type of offer to confess judgment the defendant before trial simply serves upon the plaintiff or the plaintiff's attorney an offer in writing "for a specified sum with costs." (Iowa Code § 677.7).

To accept this type of offer, the plaintiff should give notice to the defendant within five days after the offer is made. An affidavit that the notice of acceptance was delivered in the time limited may be filed by the plaintiff or the defendant may file a similar document. Once the acceptance has been verified, "judgment shall be rendered by the court accordingly." (Iowa Code § 677.8).

If this type of offer to confess judgment is not accepted within five days "the offer shall be treated as withdrawn." Furthermore, a withdrawn offer to confess "shall not be given in evidence or mentioned on the trial." (Iowa Code § 677.9). If the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff "shall pay the defendant's costs from the time of the offer." (Iowa Code § 677.10).

D. Conditional offer (Iowa Code §§ 677.11-677.13).

This last type of offer to confess judgment permits the defendant to make an offer to confess judgment without waiving his right to trial of a defense. To utilize this type of offer, the defendant, after filing an answer, needs to serve an offer to confess judgment in writing on the plaintiff or the plaintiff's attorney. The offer should indicate that if "the defendant fails in the defendant's defense, the amount of recovery shall be assessed at a specified sum." (Iowa Code § 677.11).

The plaintiff has five days to accept the offer "or within three days if served in term time." If the offer is accepted and the defendant fails in a defense, "the judgment shall be for the amount so agreed upon." (Iowa Code § 677.12).

If the plaintiff does not accept the offer and does not subsequently recover more than the sum mentioned in the offer, "the defendant shall recover the defendant's costs incurred in the defense." As before, a nonaccepted offer "shall not be given in evidence or mentioned on the trial." (Iowa Code § 677.13)

E. Miscellaneous.

Iowa Code § 677.14 provides "The making of any offer pursuant to the provisions of this chapter shall not be cause for a continuance of the action or a postponement of the trial."

Unless authorized by all partners or unless a partner has abandoned the business, the authority of all of the partners of a partnership is needed to confess a judgment. Iowa Code § 486.9(2)(d).

II. CASE LAW TOPICS

A. Amount of Judgment.

In Drew v. Lionberger, 508 N.W.2d 83 (Iowa App. 1993), the defendant filed an offer to confess judgment for $2,000.00 which was rejected. The trial court awarded $1,472.62 and costs were taxed to the plaintiff. However on appeal, the court of appeals determined that treble damages were appropriate. As the treble damages increased the judgment above $2,000.00, Iowa Code § 677.10 no longer dictated the prior assessment of costs and the defendants were ordered to pay the costs of the trial below. Id. at 86.

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B. Authorization.

In a case not involving an offer to confess judgment, but rather the settlement of a case, the Supreme Court held that an attorney employed to defend a case had no general authority to compromise the litigation in the absence of special authority provided to him by his client. A settlement made without the knowledge and consent of a client was not binding upon the client. Nothem v. Vonderharr, 175 N.W. 967, 974 (Iowa 1920). See also Kilmer v. Gallaher, 84 N.W. 697 (Iowa 1900).

In First National Bank v. Bourdelais, 80 N.W. 553 (Iowa 1899), the court held that an attorney cannot consent to a judgment, including a confession of judgment, without special authority from his client. Id. at 554.

C. Condemnation.

The provisions of Iowa Code Chapter 677 are applicable to a condemnation action. Tilton v. Iowa Power and Light Co., 94 N.W.2d 782, 785 (Iowa 1959). See also Draker v. Iowa Electric Co, 182 N.W. 896, 900 (Iowa 1921). In such actions, attorneys' fees may be considered taxable court costs. Such additional court costs makes an offer to confess especially useful in these cases.

D. Court Costs.

1 In Coker v. Abell-Howe Company, 491 N.W.2d 143 (Iowa 1992), the court addressed what court costs are available pursuant to Iowa Code Chapter 677. The defendant offered $100,000 in an offer to confess judgment and at trial, because of comparative fault, the plaintiff took nothing. The court found that court costs "should be read no more broadly in Chapter 677 than it has been read in other statutes and rules regarding costs." Id. at 152. While Chapter 677 is designed to "encourage the settlement of disputes and discourage unnecessary and costly litigation" and while "this statute should be given liberal construction to serve those purposes," the court refused to

expand the definition of taxable court costs. Id. at 153. The court found that "[t]his powerful tool need not be made stronger by expanding which costs will be allowable in the context of a confession of judgment." Id. at 153. This case contains a good discussion of when deposition transcripts are taxable as court costs.

2 In Brockhouse v. State, 449 N.W.2d 380 (Iowa 1989), the court was asked to interpret an offer to confess judgment for $10,000 "with costs to the time of this offer." The case was a condemnation action in which attorneys' fees may, by statute, be taxable as court costs. The offer to confess judgment was refused. At trial, plaintiffs received $7,500 in damages plus court costs of an additional $9,000. The question before the court was whether the phrase "with costs" meant $10,000 plus costs or $10,000 including costs. The district court had held that the State's offer to confess judgment was actually $6,000 plus $4,000 in court costs which existed at the time of the offer to confess judgment. The supreme court reversed on that issue.

> The trial court's interpretation of the term "with costs" would defeat, rather than advance, the legislative purpose in preventing the accumulation of costs. Since defendants are in no position to know the amount of attorneys' fees accrued at the time they make a settlement offer, a construction of the statute that held the term "with costs" to be inclusive would make it impossible for defendants to know exactly what amount of damages they were offering. . . . Such a result would clearly defeat the legislative intent to promote settlement. We therefore conclude that the term "with costs" as contained in Iowa Code § 677.7 means that costs are tendered in addition to the sum in the offer, and that this term was incorporated into the [State's] offer.

Id. at 383. Query: What if the offer to confess judgment states that it is for a particular amount "inclusive" of all costs and interest? See Appendix A.

3 In Weaver Construction Co. v. Heitland, 348 N.W.2d 230 (Iowa 1994), the court was asked to assess attorneys' fees as a part of court costs. The case involved a breach of contract action.

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Defendant offered to confess judgment for $17,500 and plaintiff's ultimate verdict was only $12,902.89. Defendant requested that (1) plaintiff be assessed all the court costs in the case; and (2) that those costs include the defendant's attorneys' fees.

On the first issue, the court noted that while Iowa Code § 677.10 stated that a plaintiff whose recovery did not exceed the offer he rejected "he cannot recover costs," a more "sensible reading" of the statute was that such a plaintiff could only recover those costs incurred until the time the offer to confess judgment was made. Accordingly, the plaintiff was entitled to costs up to the time the offer to confess judgment was made. Id. at 232.

With regard to attorneys' fees, the court noted that in selected areas such as contempt in dissolution actions, certain antitrust cases, and condemnation proceedings, reasonable attorneys' fees are taxable as court costs. Such statutes indicate that when the legislature wants to provide for the assessment of attorneys' fees against a losing party, it can and does so provide. Id. at 232. As the defendant in this case could not point to a similar statute for a breach of contract action, attorneys' fees were not taxable. Even though Iowa Code Chapter 677 is to be provided a "liberal construction," the court was not willing to provide for the cost-shifting of attorneys' fees without legislative approval. Id. at 232-33.

Interestingly, the court stated that in addition to the lack of legislative approval, a statute which provided for the cost-shifting of attorneys' fees for only one side of a lawsuit could violate "fundamental fairness." "If a party who rejects an offer of settlement should sometimes be required to pay the other party's full expense of further litigation, fundamental fairness suggests that defendants as well as plaintiffs should be subjected to that sanction." Id. at 233.

E. Effect of Insufficient Offer.

In McClatchey v. Finley, 17 N.W. 469 (Iowa 1883), the defendant offered to confess judgment for $125 and the plaintiff refused to accept. The jury found for the plaintiff initially in the sum of $131.15 for a promissory note but then found a failure of consideration and found in favor of the defendants on a counterclaim. Accordingly, the final verdict was a defense verdict. The trial court ruled that although the defendants had prevailed at trial, defendants should be liable for the court costs incurred up to the time the offer to confess judgment was filed. The supreme court reversed, finding that "[i]f the offer to confess judgment was sufficient in amount, then the defendants were entitled to costs no matter whether the issues were found in their favor or not. But as the offer was insufficient it has no effect on the question of costs." Id. at 469. Defendants were entitled to all the court costs for the action as successful litigants regardless of the offer to confess judgment. In other words, defendants should not be penalized for making an offer to confess judgment when the defendants ultimately prevailed at trial anyway.

F. Evidence.

1. In Moore v. Bailey, 163 N.W.2d 435 (Iowa 1968), plaintiff appealed arguing that the damages awarded at trial were so inadequate as to require a new trial. One of the arguments made by plaintiff on appeal was that the defendant's pretrial offer to confess judgment of $6,000 was evidence that the jury's later verdict of $4,070.50 was inadequate. The court flatly rejected this type of argument:

> Section 677.6, Code of Iowa, provides that neither such offer nor the amount thereof may be used at the trial of the case. Offers of settlement are to be encouraged as a mean of avoiding prolonged, extensive and uncertain litigation. If they prove unsuccessful, a party should not later be prejudiced by having attempted to dispose of the dispute without trial. In arriving at our conclusion here we have

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> disregarded both the fact an offer of settlement was made and the amount of it.

Id at 437.

2. In Reich v. Bolch, 27 N.W. 507 (Iowa 1886), defendant served an offer to permit judgment which the plaintiff rejected. However at trial, the plaintiff's counsel entered the offer to confess judgment into evidence without objection from the defendant. The defendant later appealed citing the statute making offers to confess judgment inadmissible at trial. The court refused to reverse. "The act complained of was clearly in violation of this [statutory] provision. The court was not asked at the time, however, to take any action with reference to the matter. ... [Defendant] proceeded, without objection, after the objectionable act had been committed in the presence of the jury, to try his cause to that jury. He in effect consented that the cause might be submitted to that jury, ..." Id. at 508. Practice pointer: See motion in limine section attached as Exhibit "B" to appendix.

G. Interest.

In Hughes v. Burlington Northern Railroad Co., 545 N.W.2d 318 (Iowa 1996), the defendant filed an offer to confess judgment "for the specified sum of $50,000.00 together with costs accrued to the date of this offer." The plaintiffs accepted this offer. However, after accepting the offer, plaintiffs made application to the court for allowance of court costs and a determination of interest entitlement. The district court ordered defendant to pay the court costs which had been filed with the clerk before the filing of the offer to confess judgment. However, the district court refused to order the defendant to pay for court costs filed after the offer to confess judgment was filed or to pay interest. The Supreme Court affirmed finding that an offer to confess judgment is in essence a contract made by the parties and approved by the court.

> Although the court entered a judgment on the offer to confess judgment, such a judgment is a product of a voluntary agreement, not of a judicial determination. As such the parties could agree to settlement figures that include interest, or that provide for prejudgment statutory or other interest, or that provided interest at a stated rate commencing at a stated time. If there is no agreement as to prejudgment interest, the judgment amount would draw statutory interest from the date of the judgment only. Where the offer is silent as to prejudgment interest and its rate, the court will not impose terms.

Id. at 322. Furthermore, the district court properly only assessed to defendant those costs filed with the clerk of court at the time the offer to confess judgment was filed, consistent with the language in the offer to confess judgment filed by the defendant. Id. at 322.

H. Rejection of Offer.

In Benson v. Chicago & Northwestern Railroad, 84 N.W. 1028 (Iowa 1901), the plaintiff refused the defendant's offer to confess judgment. After this refusal, the plaintiff called its first witness at trial. "Before the evidence of that witness was concluded, [plaintiff] decided to accept the offer, and judgment was rendered thereon against the defendant over its objections." Id. at 1028-29. The supreme court reversed and found that a rejection of an offer to confess judgment "is binding and conclusive." Id. at 1029. A plaintiff who rejects an offer "is bound by the election first made, and cannot afterwards change his mind and bind the other party by his subsequent action." The court stated that offers to confess judgment were similar to contracts and that just as a contractual offer is treated as withdrawn if it is rejected, an offer to confess judgment is presumed withdrawn once it is rejected. There was "no evidence that defendant held or intended to hold the offer open during the entire progress of the trial." "Prejudice to the defendant, or the want of it, is not important. The whole matter turns on the meeting of the minds, and on the effect of the rejection of the offer to confess." Id. at 1030.

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I. Validity of an Offer to Confess.

1. In 3s Inc., Co. v. Zarek, 504 N.W.2d 153 (Iowa App. 1993), the Iowa Court of Appeals held that an offer to confess judgment which was not filed with the clerk of court was not effective. In that case, the defendant had mailed a written document to the district court judge and to opposing counsel which defendant maintained constituted an offer to confess judgment under Iowa Code § 677.4. That statute requires the offer to confess judgment to be made "in court." The Iowa Court of Appeals held that as this document was never filed with the clerk of court, the document was not properly considered an offer to confess judgment and accordingly Chapter 677 was inapplicable. Query: Could this document have been considered an offer to confess judgment under Iowa Code § 677.7 which only requires an offer to confess to be served upon the plaintiff or the plaintiff's attorney?

2. In Scheer Construction, Inc. v. W. Hodgman and Sons, Inc., 326 N.W.2d 328 (Iowa 1982), plaintiff claimed that an offer to confess judgment was defective because it was not in writing, did not include costs, interest and attorneys' fees, and was submitted without prior notice. Id. at 332. There, the defendant's attorney on the morning of trial before any witness was sworn "dictated into the record an offer to confess judgment for $3,500, together with costs not including Iowa Code § 573.21 attorney fees [in a condemnation case]." Id. at 331.

The court found the defendant had made a valid offer to confess judgment. The decision contains a good overview of the four statutory methods for making an offer to confess judgment. Pursuant to Iowa Code § 677.4, under which this offer to confess was made, there is no requirement that the offer be in writing so long as it is made "in court." The court found that defendant's offer to confess judgment did include court costs. However, even if an offer to confess judgment did not contain court costs, that would not be fatal. Finally, while defendant could have made an offer to

confess judgment which included attorneys' fees in a condemnation action, "such fees need not specifically be mentioned" in an offer to confess judgment. Id. at 334. Finally, defendant was not required to specify whether interest was included with the offer. If the offer had been accepted, it would have resulted in a judgment which would have drawn interest as governed by statute. Id. at 334.

3. In Lingo v. Belt, 201 N.W. 5 (Iowa 1924), the court held that an offer to confess judgment made in open court and in the presence of plaintiff's attorney was not valid if the plaintiff was not present. Under the statute then in force (a predecessor to Iowa Code § 677.5), an offer to confess in open court must be made in the plaintiff's presence or the plaintiff must have three days' notice of the offer if he was not present when it was made. Although the opinion does not specify, apparently the offer to confess was made at trial and three days did not elapse between the time of the offer and the verdict. Accordingly, the court found this was not a valid offer to confess judgment pursuant to the statutory language. Id. at 5.

4. In Harris v. Olson, 558 N.W.2d 408 (Iowa 1997), defendant served by mail an offer to confess judgment five days before trial was scheduled pursuant to Iowa Code § 677.8. Plaintiff did not respond to the offer to confess but instead tried the case to verdict. The offer to confess judgment was in the amount of $12,500 and the jury's verdict was $4,600. After the verdict was returned, plaintiff attempted to accept the offer to confess judgment. Plaintiff argued that pursuant to the statute he had eight days (five days pursuant to the statute plus three days under Iowa Rule of Civil Procedure 83(b) for service by mail) in which to accept the offer.

The district court and Supreme Court rejected this attempt. The court found that the plaintiff's view of the statute "would permit a plaintiff to delay accepting a confession of judgment until after trial, in the hope of obtaining a higher money judgment. Such a tactic, however, would

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thwart the incentive to settle, which comes from uncertainty in the outcome of litigation." Id. at 410. The plaintiff's argument was consistent with the literal language of the statute, but the court refused to allow the plaintiff to "hedge his bet on a higher recovery by delaying acceptance" of a confession of judgment until after the jury had returned a verdict. If this was permitted, it would "foster judgment shopping, a patently absurd result." Id. at 410. The court also stated in a footnote that the plaintiff's argument regarding the three day grace period for mailing by service pursuant to Iowa Rule of Civil Procedure 83(b) was incorrect. The three day grace period does not apply to statutory time frames and accordingly plaintiff only had five days in which to accept the offer to confess judgment.

5. When an offer to confess judgment is made in court, in the absence of evidence to the contrary, the appellate court may presume the plaintiff's presence. Manning v. Irish, 47 Iowa 650, 652 (1878). Practice pointer: When dictating an offer to confess judgment into the record pursuant to Iowa Code § 677.4, the better practice would be to specifically note the presence of plaintiff and plaintiff's counsel.

III. PRACTICE POINTERS/ISSUES

Offers to confess judgment are sometimes an effective way to settle a case. There is a certain percentage of conservative plaintiffs who will not want to run the risk of becoming responsible for any court costs. Even though the amount of court costs in many cases is not great, some plaintiffs do not like the thought of being ordered to pay any court costs in a case. Thus, an offer to confess judgment can be a way of shifting at least a part of the risk of trial from the defendant to the plaintiff.

There is no apparent disadvantage to utilizing an offer to confess judgment whenever a settlement offer is made. Plaintiff's counsel should discuss the offer to confess judgment with his client and such discussions regarding the possibility of court costs being taxed against the plaintiff

can lead to the settlement of certain cases. If a plaintiff rejects an initial offer to confess judgment, there is nothing in the statutes which prevent a second offer to confess judgment in a higher amount being made.

The better practice is probably to file offers to confess judgment, even those made pursuant to Iowa Code § 677.7. Filing the offer to confess judgment with the court provides a better record of the offer. However, if a case will be tried to the bench, counsel will want to reconsider whether they want to file an offer to confess judgment and thus notify the court of the defendant's settlement offer. In that case, the better practice may be just to serve the offer to confess judgment on opposing counsel and make the necessary record with the court only if needed after the judgment.

Although sometimes seen as synonymous, an offer to confess judgment is different than a settlement offer. In actuality, a defendant making an offer to confess judgment has not offered the plaintiff any money. Rather, the defendant has simply offered to allow the court to file a judgment against the defendant. Accordingly, if it is not clear, plaintiff's counsel may want to inquire of defendant whether or not an actual settlement offer (i.e., cash) is being made or whether defendant is simply consenting to a judgment. In practice, an offer to confess judgment is often considered the equivalent of a settlement offer and many plaintiffs do not bother to have a judgment actually entered against the defendant. If an accepted offer to confess judgment does result in an actual judgment entry, defense counsel should make sure that a release and satisfaction of judgment is subsequently filed.

One issue which has arisen in other states, but not in Iowa's appellate cases thus far, is the issue of multiple plaintiffs. If a defendant makes a single sum offer to confess judgment, it is not clear if such an offer would be effective against multiple individual plaintiffs. The better practice

to avoid any appellate arguments would be for defense counsel to file separate offers to confess judgment for each individual plaintiff.

In the insurance defense arena, many insurance companies have now evaluated cases before they are assigned to defense counsel. If the insurance company has already told plaintiff's counsel that a prior settlement offer was its "final" or "best offer," defense counsel should consider filing an offer to confess judgment along with the answer. An early offer to confess judgment can be a signal to plaintiff's counsel that no further settlement offers will be made and also place all subsequent court costs at issue. In contrast, filing an offer to confess judgment shortly before trial often leaves few court costs left to be incurred or taxed.

IV. PROPOSALS FOR AMENDING IOWA'S OFFER TO CONFESS JUDGMENT LAWS

In this author's opinion, there are two deficiencies with the current Iowa law on offers to confess judgment. First, there are not enough taxable court costs to make offers to confess judgment effective; and second, some statutory device similar to an offer to confess judgment should exist for plaintiffs.

With regard to court costs, current Iowa law simply does not usually create a large amount of taxable court costs. The legislature should give serious consideration to increasing the amount and types of court costs which are taxable. For example, the expert witness fee of $150 should be increased. Additional areas of court costs should be considered. While the subject of eliminating the "American rule" for attorneys' fees is controversial, it should be considered in the context of revising the offer to confess judgment statutes. Even if attorneys' fees were not included, the legislature could consider making a "per diem" type of court cost available for each day of trial. For example, the legislature could state that each full day of trial would result in a certain dollar figure

of taxable court costs, i.e., $500 per trial day. Increasing the amount and types of court costs would give offers to confess judgment additional teeth and make them more effective in getting cases resolved at an earlier stage.

The legislature should also consider creating a similar settlement procedure for plaintiffs. Plaintiffs should be permitted to file some type of "offer to accept judgment." Granting plaintiffs this type of tool would "level the playing field" and give plaintiffs an additional weapon in which to try to get cases resolved at an early stage. As noted above, in Weaver Construction Co. v. Heitland, 348 N.W.2d 230 (Iowa 1994), the Supreme Court has already questioned whether a statute which provided for the cost-shifting of attorneys' fees would violate "fundamental fairness" if it only applied to defendants. Accordingly, if significant additional court costs were created by the legislature, the legislature should at the same time create a similar settlement tool for plaintiffs.

V. APPENDIX

A. Offer to Confess Sample

B. Section of Motion in Limine Sample

B

A. OFFER TO CONFESS SAMPLE

IN THE IOWA DISTRICT COURT FOR _____ COUNTY

_____, Plaintiff,	)	LACV _____
vs.	)	DEFENDANT'S OFFER TO CONFESS JUDGMENT WITHOUT ANY ADMISSION OF LIABILITY
_____, Defendant.	)	

COMES NOW the Defendant, pursuant to Iowa Code Chapter 677 and without in any way, shape, or form admitting any liability whatsoever, herewith makes an offer to confess judgment in the amount of $_____ for the Plaintiff, inclusive of all costs and interest. This offer to confess judgment is being made after the action is brought and is being served upon the Plaintiff through his attorney.

If the Plaintiff accepts this office, notice is to be given to the Defendant through the undersigned counsel within five (5) days after the offer is made.

If the Plaintiff fails to accept this offer, the offer is to be treated as withdrawn and shall not be given in evidence or mentioned at trial and, pursuant to Iowa Code Section 677.10, if Plaintiff fails to obtain a judgment for more than was offered by the Defendant, then Plaintiff shall not recover his costs but shall pay the Defendant's costs from the time of this offer.

CHAD M. VONKAMPEN LI0014129
SIMMONS, PERRINE, ALBRIGHT & ELLWOOD, P.L.C.
115 3rd Street SE, Suite 1200
Cedar Rapids, IA 52401
Tel: (319) 366-7641; Fax: (319) 366-1917

ATTORNEYS FOR DEFENDANT

Copy to:

B. SECTION OF MOTION IN LIMINE SAMPLE

I. **To exclude evidence of settlement negotiations, settlement offers and Defendant's offer to confess judgment.**

Pursuant to Iowa Rule of Evidence 408, settlement negotiations including offers to compromise a claim are not admissible to prove liability. Furthermore, pursuant to Iowa Code § 677.9, offers to confess judgment are inadmissible in evidence. Accordingly, Defendant requests an order from the court excluding any and all evidence regarding settlement negotiations, settlement offers, and the offer to confess judgment filed herein by the Defendant.

C

SELECTED

WORKERS' COMPENSATION COMMISSIONER

FINAL AGENCY ACTION / APPEAL DECISIONS

Iris J. Post

Iowa Workers' Compensation Commissioner
Iowa Division of Workers' Compensation
1000 E. Grand Ave.
Des Moines, Iowa 50319

C

AFFIRMATIVE DEFENSES – WILLFUL INJURY

Gavin v. John Deere Waterloo Works, File No. 1058710 (August 31, 1999).

Defendant argued that claimant's claim should be barred because he continued to work in an injurious environment and the claim should be barred pursuant to Iowa Code section 85.16 (willful injury). Defendant's argument was rejected. Assumption of the risk doctrine is not applicable to workers' compensation law.

AGRICULTURAL – FAMILY MEMBER

Zomer v. West River Farms, Inc., File No. 1128210 (March 30, 2000).

Claimant was the son-in-law of the sole owner of a family farm corporation. Claimant was injured while engaged in agricultural pursuits. The employer had purchased workers' compensation insurance but did not have the insurance endorsement that specifically included the claimant. Iowa Code Chapter 85 did not apply to claimant's injury. The agency had no subject matter jurisdiction over claimant's claim.

ALTERNATE MEDICAL CARE

Asmus v. Farmland Foods, Inc., File No. 1252303 (August 2, 1999).

Claimant sought arthroscopic shoulder surgery. Prior physicians have told claimant there is nothing they can do even when claimant is having symptoms. Defendants offered, at the time of hearing, to have the claimant be seen by Dr. Nepola at the University of Iowa. Claimant would accept Dr. Nepola if care is timely. Defendants had 14 days to have claimant see Dr. Nepola. The alternate care requested was granted.

Davis v. Roberts Dairy, File No. 1244258 (April 19, 1999).

Claimant requested alternate care on two grounds: first, he had a shoulder injury and the authorized doctor was a hand specialist; second, claimant alleged a breakdown

in the doctor-patient relationship, as he felt the authorized doctor deceived him with regard to work releases. It was held that the care offered was not reasonably suited to treat the injury. Furthermore, the case reinforced prior decisions finding that a breakdown in the doctor-patient relationship is a basis upon which to request alternate care.

Rice v. Busco, Inc., d/b/a Arrow State Lines, File No. 1218108 (June 30, 1999).

Alternate care provided. Care by a non-spine specialist, although a board certified orthopedic surgeon, was not care reasonably suited to the injury when the past authorized physicians recommended evaluation by a spine specialist.

Shipley v. Eagle Iron Works, File No. 1177871 (July 13, 1999).

Claimant was released by the company doctor despite having very substantial residual symptoms. The authorized doctor told claimant he had nothing further to offer. Claimant sought the opinion of another orthopedic surgeon who offered reasonable treatment alternatives. Alternate care ordered for claimant.

Stackhouse v. Mid Iowa Workshops, File No. 1232203 (August 5, 1999).

Changed care to physician who recommended surgery. Held that defendants' care was unreasonably suited to treat injury. They relied on only the views of one physician whose care virtually ended when he felt claimant's pain was a somatization only despite the fact claimant had uncontrolled urination.

Tyler v. Minnesota Rubber, File No. 1252188 (September 10, 1999).

Alternate care denied. Treating physician made referral to claimant's past orthopedic surgeon. Employer representative requested a different referral as they had a bad relationship with that physician. The treating physician approved of this different referral.

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Claimant failed to show dissatisfaction with the care. She was only dissatisfied that the referral was not to her past orthopedic surgeon. Claimant failed to show that the employer's choice of referral was inappropriate. The referral was approved by the treating physician who felt he also was an excellent physician. Claimant stated that she did not know this physician. Held that Iowa provides for choice of provider to defendants, not claimant.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Costello v. Ralston Purina Company, File No. 1133849 (May 21, 1999).

Claimant, who had laryngitis and hoarseness at work, failed to prove an injury arising out of and in the course of her employment. Claimant reported to many medical providers that her hoarseness or laryngitis began when shrink-wrap or bundling machines were installed in the work environment. Uncontroverted evidence established that claimant had hoarseness or laryngitis complaints many months prior to the installation of the bundling machines. When informed of the temporal relationship between the bundling machines, claimant's physicians backed off their opinion that the shrink-wrap was the cause of her problems. Claimant must prove by a preponderance of the evidence that she sustained the injury arising out of the employment. Merely walking into work and getting hoarse does not satisfy claimant's burden of establishing that the work environment is responsible for the injury. Claimant had been diagnosed as having psychogenic hoarseness by at least one medical provider.

McIlravy v. Ace Construction, File No. 1169232 (December 29, 1999).

Claimant carried burden of proving that his injury arose out of and in the course of employment. The only expert medical opinion in the record established a causal connection. Defendants had contended that the injury was idiopathic but the claimant had no preexisting defect or weakness. Claimant's medial meniscus tore while he was walking performing the duties of his employment. There was no identifiable trauma other than the walking itself at the time of the tear, but the doctor attributed the tear to

the heavy work that the claimant performed. The claimant's knee was otherwise healthy and free from signs of other pathology. Claimant awarded healing period, permanent partial disability, Iowa Code section 85.27 benefits and Iowa Code section 86.13 penalty benefits.

CAUSAL CONNECTION

Davis v. Scribner Foods d/b/a Food Saver, File No. 1134924 (November 30, 1999).

Claimant failed to establish that her injury at work resulted in vestibular disorder and subsequently in a mental injury resulting in emotional disability. Objective medical evidence failed to support claimant's assertion that she had sustained vestibular disorder, which was responsible for her depression.

Krull v. Ballard Community School District, File No. 1110532 (November 30, 1999).

Claimant, who alleged that working as a teacher with requirements of almost constant daily talking resulted in her permanent hoarse voice condition, failed to establish causal connection between the work and her disability. Although many medical providers indicated that the work claimant had performed was a possible cause of her voice problems, none of the medical providers offered the opinion that within a reasonable degree of medical certainty the work claimant performed was the probable cause of her voice hoarseness. Therefore claimant must take nothing from the file.

Whiton v. Drake University, File No. 1114227 (December 29, 1999).

Claimant's injured vocal chords and ability to speak were found causally linked to fumes in the workplace used to cure repaired water boilers, which activity was taking place in basement of old building on Drake Campus.

Treating otolaryngologist Herwig opined claimant's condition of spasmodic dysphonia was not curable, was a life-long condition, could have been caused by fumes, and lay people who worked or knew claimant could tell if claimant had unusual vocal condition before and after the incident. Numerous witnesses testified, without

challenge, claimant's voice changed after fumes incident. Two other coworkers also smelled odor, developed a headache and went home (but had no lasting effects). Held: causal connection established based on medical and lay testimony.

CHANGE OF CONDITION

Bochicchio v. Great Plains Processing, File No. 1012704 (September 17, 1999).

Claimant awarded medical benefits and an additional ten percent industrial disability on review-reopening where claimant's psychological condition was not permanent at the time of the prior hearing, but at the time of the review-reopening he had been given a rating of permanent impairment.

Van Wey v. Heinz, USA, File No. 848411 (August 26, 1999).

There were no increase of impairment or restrictions since the original award, but claimant had increased motivation since the award and appeal decision. This increased motivation under the circumstances in this case was not sufficient to show change in circumstances warranting an increase in award of industrial disability.

COMMUTATION

Danker v. IBP, Inc., File No. 841609 (December 17, 1999).

Claimant is permanently and totally disabled. Claimant suffers from depression related to injury and association with defendant. Psychiatrist states that the claimant can handle his own affairs and should sever his relationship, the weekly benefits from defendant, with the defendant. It is in the claimant's best interest to get a commutation.

CUMULATIVE/GRADUAL INJURIES

Thompson v. Brown Brothers Inc., File No. 1120225 (April 30, 1999).

In 1978, Thompson entered an electrician's apprenticeship program and became a journeyman electrician doing residential work. In 1985, he entered into a 2-year

program to do commercial wiring. Thompson's work required him to repetitively use his arms overhead. He first saw his family physician in 1993 for right shoulder pain. He told the doctor the pain had been there off and on for 15 years. In September of 1994, the family doctor injected the right shoulder. In February of 1995, Thompson complained of left shoulder pain.

Thompson began working for defendant on May 15, 1995. His worked required use of a trencher. Thompson noted a popping and soreness in his left shoulder while using this machine. He went to the doctor again on May 31, but then was able to work without missing a day through July 8. Then, on July 9, Thompson was in a jet ski collision and broke his leg. The crutches caused him more shoulder pain.

An arthrogram done July 28, 1995, showed a rotator cuff tear in the left shoulder. Surgery was recommended and scheduled for August 8, 1995. A second surgery was necessary on December 28, 1995. The surgeon opined the tear was related to the 18 years of work Thompson had performed as an electrician.

In reversing the deputy's decision, the commissioner found that the fact the rotator cuff tear may have been in progress prior to the work done for defendant was not determinative. Neither was the fact that he had sought medical treatment prior to working for defendant. The medical evidence supported the finding that Thompson's condition occurred with his work activity over several years. However, it was his work for defendant that was the "last injurious exposure" prior to the surgery of August 8, 1995. Accordingly, Thompson's cumulative injury manifested itself on July 8, 1995. Industrial disability of 25 percent was awarded.

Weishaar v. Snap-On Tools, File Nos. 847903 / 916722 / 916723 / 916724 / 916725 / 916726 / 916727 / 916728 / 916729 / 916730 / 916731 (July 26, 1999).

On remand from the supreme court, it was found that Weishaar, a 36-year-old lady with two percent impairment to each shoulder, sustained one continuous gradual injury process extending from 1982 to 1991. This injury resulted in 45 percent industrial disability.

Claimant originally filed a petition for benefits on May 4, 1987, alleging a cumulative injury date of 1982-present. Claimant was ordered to amend her petition to allege specific injury dates, which she did. An arbitration decision found claimant established a bilateral carpal tunnel injury, but failed to prove her shoulder or back injury was work-related. Claimant appealed and also filed ten new petitions alleging further injury dates. The decision of the deputy was affirmed and judicial review was sought. The district court remanded the decision to the commissioner to consider possible cumulative injury dates following April 29, 1986.

The course of the ten petitions filed is detailed in Weishaar, 582 N.W.2d 177 (Iowa 1998). On the supreme court's remand, the commissioner held that claimant sustained a cumulative or gradual injury process from 1982 to 1991. The injury process was the result of claimant's work for defendants. It was found that claimant's cumulative injury manifested on January 17, 1991, the last day of exposure to the injurious work environment. As a result of the gradual injury, claimant incurred a 45 percent industrial disability.

Claimant argued that although not totally disabled, her partial disability was so great that she should be awarded the full 500 weeks of benefits. The commissioner found no statutory authority for applying Iowa Code section 85.34(2)(u) in the manner proposed by claimant.

DISABILITY, EXTENT - INDUSTRIAL DISABILITY

Bappe v. Rockwell International, File No. 1118441 (May 28, 1999).

Claimant sustained a 35 percent industrial disability as a result of a work injury that materially and substantially aggravated a preexisting myofascial pain syndrome.

Wentworth v. Rockwell International, File No. 1068926 (July 14, 1999).

Claimant was 39-years-old at the time of hearing. He had a 2-year degree in electronics. He demonstrated the intellectual capacity for retraining. His work history involved extensive use of his hands. He was diagnosed with bilateral carpal tunnel

syndrome and RSD. He could no longer perform work that requires extensive use of his hands. Claimant was assigned functional impairment of zero percent on the left and eight percent on the right. Claimant did not look for work following his termination. Claimant sustained a 50 percent industrial disability.

DISABILITY, EXTENT - SCHEDULED MEMBER

Magana v. IBP, Inc., File No. 1031284 (July 23, 1999).

Case was remanded from the court of appeals for additional findings on the situs of the actual impairment. Claimant's medical records contained the following diagnoses: left arm overuse; overuse syndrome of the shoulder and arm; overuse syndrome of both upper extremities; upper back pain radiating down the sides. There was no specific finding of impairment to anything other than the left upper extremity. While a rotator cuff problem was suspected, claimant was not diagnosed with a rotator cuff injury. Claimant's subjective complaints as to the situs of pain were not sufficient to extend the disability to the shoulder. Claimant's disability limited to the schedule for the arm.

EXTRATERRITORIAL JURISDICTION

Terry v. Heartland Express, Inc., File No. 1125592 (November 30, 1999).

Claimant, who applied for employment with an Iowa-based trucking company at its Georgia terminal, was found to have been hired in Iowa where his application was only acted on after being sent to the main office in Iowa. In addition, amendments to Iowa Code section 85.17, jurisdiction section, found to be prospective and not retrospective in application.

FULL RESPONSIBILITY RULE

Davis v. Titan Wheel International, File No. 1171753 (September 30, 1999).

Full responsibility rule applies even if one of the prior injuries was resolved on the basis of a special case settlement.

Floyd v. Quaker Oats, File Nos. 1138890/1168240/1168244 (January 19, 2000).

Held that since Auten and Nelson dealt with industrial disability, this agency would not apply the full responsibility rule to scheduled member cases.

HEALING PERIOD

O'Brien v. State of Iowa, File No. 1197887 (July 31, 2000).

Healing period. Claimant entered a healing period after it was determined that she had reached MMI and was given an impairment rating. Healing period began when she started treatment with a chiropractor and ended after she was relieved of all symptoms and her original treating orthopedic surgeon confirmed to the employer that she could handle the essential functions of the job. Claimant was given zero percent functional impairment rating after her healing period. Employer gets credit for PPD paid in good faith on original impairment rating toward amount of healing period benefits awarded.

INDEPENDENT MEDICAL EXAMINATION

Mitchell v. Perry Lutheran Home, File No. 1129508 (September 29, 1999).

A physician's failure to rate impairment at all is not the same as a zero rating of impairment and does not trigger defendants' obligation to pay for an 85.39 examination.

C

MEDICAL BENEFITS

Freels v. Archer Daniels Midland Co., File No. 1161214 (June 30, 2000).

Medical benefits awarded. Claimant was not required to utilize alternate medical care procedures under Hansen v. Sam's Club, where employer has denied liability for the injury itself and therefore lost the authorization defense.

Meyers v. Holiday Express Corporation, File Nos. 913214/681251 (July 31, 2000).

Claimant awarded payment for lifetime replacement of knee brace, as the plain meaning of the statute clearly indicates that defendants are required to pay for a breakdown of an orthopedic appliance due to ordinary wear and tear.

Thackery v. Arts-Way Manufacturing, File No. 1091427 (May 28, 1999).

As the result of a work-related fall, claimant sustained a spinal cord injury resulting in parapeligia in the lower extremities and a traumatic brain injury. Issues in the case centered around appropriate benefits under Iowa Code section 85.27. The first issue was whether claimant was entitled to reimbursement for living expenses for claimant's spouse. Claimant's spouse stayed with claimant during his treatment at Mayo. Her daily expenses were $35. The record reflected that her presence had a positive effect on claimant's treatment. Defendants did not challenge the reasonableness of $35. Those living expenses were ordered to be reimbursed.

A second issue was the value of the nursing services provided by claimant's spouse. She was specifically trained on a number of nursing services required to be performed. The medical records reflected the services provided were nursing services and would take around six hours daily. Based upon the estimates provided, the reasonable value of such services was $20/hour, for an annual amount of $43,800.

Another issue concerned the rental of a condo in Florida. Since claimant owned his home in Iowa, it was held that claimant's rental in Florida was more based upon leaving Iowa's winter behind, rather than due to the work-related physical condition of claimant. Rental expenses for the Florida condo were not awarded.

The next issue was the allowable costs for housing modifications. Claimant's house was valued at $30,000. Remodeling estimates ranged from $108,720.15 to $57,616.58. A local contractor estimated costs to be $61,388.00. Claimant ended up building a new home at a cost of $159,000. Remodeling the $30,000 house with $61,388 worth of modifications was found to be most reasonable, as there was no evidence the modifications would not increase the value of claimant's home and remodeling was less expensive than the cost of building new.

Knipfer v. Terry Knipfer d/b/a Terry's Handy Andy, File No. 1057905 (June 30, 1999).

Claimant sustained a work injury leaving him a quadriplegic. He requested the following items pursuant to Iowa Code section 85.27: 1) van with modifications to accommodate a wheelchair and allow claimant to operate the van; 2) central air conditioning; 3) motorized wheelchair; 4) portable commode; 5) lift used to transport claimant from chair to shower; 6) payment of services provided by family members; and 7) modifications to residence.

Van. Claimant was not entitled to purchase price of van, as in Sioson, since the evidence established that claimant relied on similar transportation prior to his injury. However, claimant was awarded costs of converting van to accommodate wheelchair, as well as driving controls.

Air conditioning. Claimant testified the paralysis inhibited his ability to perspire and regulate his body temperature. Claimant installed AC before getting script from his doctor and without giving defendants the opportunity to have a role in selecting and costing out different options. Air conditioning was not awarded as it is more akin to an item of personal comfort than a medical appliance.

Wheelchair. Defendants had already purchased a manual wheelchair. Claimant desired an electric wheelchair. Claimant was awarded an electric wheelchair since, unlike air conditioning, a wheelchair is clearly an appliance designed to improve or replace lost function.

Family services. Outside nursing care was provided occasionally. However, that care was not available constantly. Claimant's wife was trained to performed certain nursing services, and the medical record noted that claimant's wife "does bowel program every 2-3 days." The parties stipulated the reasonable rate for such services was $7/hour. Defendants ordered to pay for such services, however, not for general care such as bathing, feeding, or dressing.

Portable commode. Claimant sought payment for a portable commode for times he was traveling away from home. Since this item was necessitated by "personal pleasure trips" by claimant, it was not the responsibility of defendants to provide a portable commode.

Shower lift. Defendants were ordered to pay for shower lift since same is a reasonable appliance designed to replace lost function.

Housing modifications. Claimant sought payment for installation of a wheelchair ramp ($412) and door handles that he could operate ($52.81). These items were ordered to be paid by defendants.

NOTICE OF INJURY

Reinier v. Kent Feeds, Inc., File No. 1105824 (October 25, 1999).

Claimant was in his early 50s when he was forced to retire due to osteoarthritis affecting his hands. Medical evidence showed that the arthritic condition had been exacerbated and progressed in part due to the strenuous repetitive use that claimant made of his hands during his years of employment with the employer. Claimant was shown to be medically disabled on April 7, 1995, but did not give the employer notice of injury in accordance with Iowa Code section 85.23 until the employer was served with the original notice and petition of this proceeding in April 1996. The employer knew that the claimant had arthritis, that performing his work caused his hands to be painful and that the condition was impairing the claimant's work performance. It was held that the knowledge did not constitute actual knowledge of injury in accordance with Iowa Code section 85.23 because the employer had no reason to believe that the work was altering

the preexisting arthritic condition. It was held that experiencing pain from the condition was simply a manifestation of the existence of the condition itself and was not something that would alert a reasonably conscientious manager to the potential for a workers' compensation claim.

PENALTY

Cordell v. Westside Transport, Inc., File No. 1164763 (February 29, 2000).

Claimant awarded maximum 50 percent penalty where defendants relied on inaccurate information and untenable defense to continue denying temporary weekly benefits. Defendants' original denial of temporary benefits was linked to insisting claimant stay in Iowa to receive medical care, even though claimant over-the-road trucker lived in North Carolina. Once defendants acknowledged liability and agreed to provide alternate medical care in North Carolina (following an alternate care hearing), defendants' continued insistence claimant return to Iowa for "suitable light duty work" was untenable.

In assessing factors called out in Robbennolt, considered fact that same attorneys for both sides had dealt with similar issue (with same employer) in 1993, with defendants' position being found untenable by this agency. This factor considered in assessing maximum penalty. Iowa Code section 86.13.

Kinter v. Archer Daniels Midland, File No. 1126074 (September 21, 1999).

Although it was held that the reason for the denial of payment of permanency benefits was valid as the entitlement to such benefits was fairly debatable, $2000 was assessed as penalty for failure to convey that reason to claimant at any time during a nine-month delay in voluntary payment of permanency benefits. Meyers v. Holiday Express Corporation, 557 N.W.2d 502 (Iowa 1996).

Kremenak v. Steiner Construction, File No. 1152098 (October 28, 1999).

Claimant awarded ten percent penalty for healing period benefits. Four of the eight payments were late by two to eleven days.

Claimant awarded 50 percent penalty for failure to pay any permanent partial disability benefits prior to the hearing. Defendants made no payment of permanent partial disability despite the fact they agreed claimant's condition was permanent and claimant had restrictions and the defendants chosen independent medical examination doctor rated claimant's impairment at seven percent. Penalty assessed for failure to commence payment of 35 weeks of permanent partial disability.

McGinity v. Vogel Paint & Wax Co., Inc., File No. 1166463 (February 10, 2000).

Following initial medical uncertainty about the nature of claimant's disability, if any, one of defendants' treating doctors opined that claimant's left elbow lateral epicondylitis was work related and resulted in a ten percent functional impairment. Defendants paid no permanent partial disability benefits prior to the hearing and offered no direct evidence why no benefits were paid. Claimant was entitled to 50 percent penalty benefits.

Owens v. Quaker Oats, File No. 1013589 (October 29, 1999).

Penalty of $5000 assessed for nonpayment of healing period benefits for a denial of a claim without supportive medical expert opinion when the treating physician supported compensability of the claim.

Sanem v. MCI Services, File Nos. 1168674/1168675/1168676/1168677/1168678/1168679 (March 28, 2000).

No penalty was assessed for delay in commencement of benefits that appeared to be timely paid. A 50 percent penalty was assessed on the difference between the correct rate based on stipulations and the rate paid.

Smith v. IES Railcar, File No. 1168921 (March 22, 2000).

Penalty based in part on past impositions of penalty against same employer, even though technically they involved a predecessor (name of company had been changed) or another subsidiary of the employer.

Syas v. Van Wyk Trucking, File No. 1103953 (May 25, 1999).

Penalty of $9000 was imposed where employer paid only five percent permanent partial disability, where the evidence demonstrated a much more significant loss.

Sylvara v. Hancock/Winnebago Counties Home Health Care Aide & Nursing Services, File No. 1134322 (December 29, 1999).

Penalty was assessed as follows:

Fifty percent for failure to pay temporary partial disability benefits. Fifty percent of the difference between the rate paid and the stipulated rate for voluntary payments of some healing period benefits. Five percent penalty for untimely payment of five weeks of healing period benefits (approximately 60 percent of healing period benefits voluntarily paid timely). No penalty was assessed for healing period benefits that were not voluntarily paid but entitlement to healing period benefits was fairly debatable.

Wentworth v. Rockwell International, File No. 1068926 (July 14, 1999).

Defendant was liable for 25 percent penalty for four weeks of permanent partial disability benefits that were unreasonably delayed. It took defendant six weeks to commence permanent partial disability benefit payments after defendant had received an impairment rating for a condition that defendant should have known would result in permanent partial disability.

C

PROCEDURE—RAISING ISSUE

Florie v. Hagemann Enterprises, Inc., File 1124692 (August 31, 1999).

Claimant who injured his shoulder and neck when he rolled a truck awarded 15 percent permanent partial disability. Defendants were allowed to raise the rate of compensation as an issue at the time of hearing even though the position they sought to assert was inconsistent with their discovery responses and the rate at which they had been paying compensation. Claimant, a truck driver, was not prejudiced by consideration of the rate issue when claimant himself testified to a lower amount for his gross earnings, and where claimant knew or should have known truck expenses were included in the figure provided by defendants. Defendants discovered the error and brought it to claimant's attention one week before hearing.

PSYCHOLOGICAL INJURY

Brown v. Quik Trip Corp., File No. 1059074 (May 28, 1999).

Claimant was working for employer on January 18, 1994, when a fight broke out in the store which resulted in a customer getting shot. Claimant testified that there was blood everywhere and that he was required to clean it up. He was concerned about AIDS, and did wear gloves. Claimant had to go to the police station to identify pictures as well as testify in court on behalf of one of the people involved.

Then, on January 24, 1994 while working the overnight shift, a robbery occurred. Claimant was stocking a case when he was grabbed by the robber. He felt an object which he believed to be a gun stuck in the middle of his back. He followed store procedures in giving all the money in the register to the robber. Claimant was told by the robber to get down on the floor or he would blow his head off. Claimant did not finish his shift.

In April, claimant saw a doctor to treat aggravating sores that were appearing in his mouth. He had never had such problems prior to the 1994 events. In June,

claimant went to see a counselor to help with the anxiety claimant experienced while working. It was recommended that claimant not work any more overnight shifts.

Claimant only missed one week of work as a result of these incidents. Claimant requested more time off, but was told that he would not get paid if he took more time off.

Claimant also testified that after being a second assistant for over 7 years, he would like to be promoted to first assistant. Prior to hearing, claimant had met with his manager to discuss a possible promotion. Claimant was told he was qualified for a promotion, but that the employer was not willing to do so until the workers' compensation matter was completed.

Claimant had no past psychiatric history. The weight of the medical evidence suggested that it was the second robbery, that resulted in the diagnosis of post traumatic stress disorder. Based upon the weight of the medical evidence, the deputy found medical causation.

As for legal causation, the employer argued that such events are common and expected in the industry. The deputy found that while convenience stores are robbed frequently, one should not expect to be robbed or killed while working. Further, the lack of promotion concerned the deputy. Since the work stresses when viewed objectively, and not as the employee perceived them, were of greater magnitude than the mental stresses workers employed in the same or similar jobs experience routinely, the deputy found legal causation, and awarded claimant 25 percent industrial disability.

On appeal, the commissioner reversed, finding no legal causation. This reversal was based on the fact that claimant introduced no evidence or witnesses, other than his own testimony, to establish the stress he experienced as a Quik Trip attendant was greater than that experienced by other gas station attendants. Furthermore, defendants submitted evidence demonstrating the frequency of similar occurrences, reflecting that such experiences are quite common in the industry.

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Lincoln v. Iowa Men's Reformatory, File No. 1155140 (October 12, 1999).

Claimant proved that his mental condition (including post-traumatic stress disorder) was the result of an attack on him by a dog that took place while claimant was training in K-9 unit. Claimant did not prove a mental-mental injury under the Dunlavey legal standard that resulted from his witnessing a dog attack on another individual. Persons training for the K-9 unit witnessed dog attacks. Claimant's mental stress in witnessing the dog attack was no greater than similar employees.

RATE

Bomar v. Midwest Elevator Corp., File No. 1156716 (December 17, 1999).

The weekly rate was calculated on the basis of the 13 weeks claimant worked prior to the injury. Claimant worked some weeks at more than 40 hours, some of 40 hours, and some less than 40 hours. Held that weeks less than 40 hours due to nature of business, (i.e., weather, construction) were still representative weeks.

SPECIAL CASE SETTLEMENT

Barnhart v. Coalition for Family and Children's Services in Iowa, File Nos. 1182639/ 1160507 (December 28, 1999).

An order from the Iowa District Court found that claimant had settled her workers' compensation claim, that an enforceable Iowa Code section 85.35 agreement between the parties existed, and ordered the agency to approve the settlement, even though claimant had subsequently refused to sign the settlement documents. Although claimant, no longer represented by an attorney and in default in the district court action, did not sign the documents, it was held that the district court conclusion that an enforceable agreement existed was binding on this agency and was an appropriate substitute for claimant's signature, and the district court's order to approve the settlement should be carried out. The settlement was ordered approved.

STATUTE OF LIMITATIONS—THREE YEARS

Romero v. Con Agra, Inc. d/b/a Monfort, File No. 1169204 (December 22, 1999).

Weekly benefits paid to an illegal alien working under a pseudonym, even though paid in the "wrong" name, nonetheless brought the three-year statute of limitations into operation.

SUBJECT MATTER JURISDICTION

Hayden v. Ameristar Casino Council Bluffs, File No. 1198216 (October 29, 1999).
Engler v. Ameristar II, File No. 1216414 (October 29, 1999).
Trumbauer v. Ameristar Casino Council Bluffs, File No. 1133774 (October 29, 1999).

In three cases involving the same jurisdictional issue, it was found that employees injured while working on casino excursion boats engaged in navigation on navigable rivers were each a "seaman" as part of the boat's crew, and on a "vessel" engaged in transportation, and therefore the federal "Jones Act" pre-empted any state jurisdiction, as well as under Iowa Code section 85.1(6). Petitions dismissed without prejudice for lack of subject matter jurisdiction.

Cassatt v. Lady Luck Casino-Bettendorf, File No. 1232051 (March 31, 2000).

Claimant worked on a casino boat and was found to be a "seaman" for purposes of the "Jones Act." This agency has no jurisdiction over the injury.

D

DEFENDING THE ENVIRONMENTAL CLAIM

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DEFENDING THE ENVIRONMENTAL CLAIM

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D

I. ENVIRONMENTAL CLAIMS IN GENERAL– SOME BACKGROUND

A. Environmental Law

1. Statutes, regulations, ordinances and rules exist at all levels of government

a) Federal examples

(1) Comprehensive Environmental Response, Compensation and Liability Act "CERCLA" (the Superfund law) – 42 U.S.C. §§ 9601-9675

(2) Clean Air Act "CAA" – 42 U.S.C. § 7401, et seq.

(3) Clean Water Act "CWA" – 33 U.S.C. §§ 1251-1376

(4) Resource Conversation and Recovery Act "RCRA" – 42 U.S.C. §§ 6901-6922(k)

(5) Superfund Amendments and Reauthorization Act "SARA" – 42 U.S.C. §11021

b) State examples

(1) Iowa Code Chapter 455A – Department of Natural Resources

(2) Iowa Code Chapter 455B – jurisdiction of Department of Natural Resources covers air, water, hazardous waste, solid waste, animal feeding operations, underground storage tanks, and much more

(3) Regulations – 567 I.A.C.

(a) Air Quality - Chapters 20-34

(b) Water – Chapters 35-59

(c) Wastewater Treatment and Disposal - Chapters 60-64

(d) Animal feeding operations – Chapter 65

(e) Solid waste management and disposal– Chapters 100-119

c) County examples

(1) Linn and Polk Counties – air permitting and enforcement

(2) General regulations on health and safety

(3) County health departments and sanitarians

(4) Approval of new septic systems and wells

d) City examples

(1) Local ordinances

(a) Primarily local water pollution control facilities

(b) Delegation of authority to local units under National Pollution Discharge Elimination System (NPDES) – 33 U.S.C. §1311, et seq.

2 Alphabet soup - some common and much-used acronyms:

a) AO – Administrative Order

b) BACT – Best Available Control Technology

c) CAA - Clean Air Act

d) CERCLA - Comprehensive Environmental Response, Compensation and Liability Act (the Superfund law)

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e) CWA - Clean Water Act

f) DOJ - Department of Justice

g) EPA or USEPA - Environmental Protection Agency

h) EPCRA - Emergency Planning and Community Right-to-Know Act (Title III of SARA, commonly called Right-To-Know or SARA Title III)

i) FOIA - Freedom of Information Act

j) IDNR - Iowa Department of Natural Resources

k) LUST - Leaking Underground Storage Tanks

l) MSDS - Material Safety Data Sheet

m) NEPA - National Environmental Policy Act

n) NESHAP - National Emissions Standard for Hazardous Air Pollutants

o) NOV - Notice of Violation

p) NPDES - National Pollutant Discharge Elimination System

q) PRPs - Potentially Responsible Parties

r) PSD - Prevention of Significant Deterioration

s) RCRA - Resource Conservation and Recovery Act

t) SARA - Superfund Amendments and Reauthorization Act of 1986

u) SIP – State Implementation Plan

v) SPCC Plan – Spill Prevention Control and Countermeasure Plan

w) TSCA – Toxic Substances Control Act

x) UST – Underground Storage Tank

3. Lack of case law

a) Quickly changing technology and regulations

b) New area; e.g., Mel Foster Co. Properties Inc. v. American Oil Co., 427 N.W.2d 171 (Iowa 1988)

B. The Players – Who's on the Other Side?

1. Iowa Department of Natural Resources

a) Most personnel in Des Moines

b) Field offices

(1) Manchester
(2) Mason City
(3) Spencer
(4) Atlantic
(5) Des Moines
(6) Washington

c) Solve-the-problem oriented

2. Environmental Protection Agency – Region VII – Kansas City

a) Enforcement oriented

b) Usually allow IDNR to handle most matters

3. Local pollution control facilities – cities

4. Air regulators

a) Linn and Polk Counties – air permitting and enforcement

b) Rest of state – Des Moines, separate office at 7900 Hickman Road in Urbandale, Iowa

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5. Local health departments

6. Adjoining property owners

7. Personal injury claimants

8. Former sellers or buyers of real estate or businesses

9. Disgruntled employees – complaints

10. Underground Storage Tank Fund - "subrogation claims" – Iowa Code Chapter 455G

C. Kinds of Matters and Claims

1. Permit disputes

a) Terms and conditions of permit as issued

b) Changing of permits

c) Revoking or suspending permits

2. Alleged violations

a) Permits

b) Statutes or regulations

3. Complaints by third parties to governmental entities or regulators

a) Citizen complaints taken very seriously

b) Actual threat to human health or safety

4. Investigations

a) Information requested from your client

b) Subpoenas - can be very broad

c) Grand jury subpoenas or investigations on criminal matters

5. Claims and lawsuits

a) Personal injury from a pollutant

b) Cleanup liability from regulators or third parties

c) Property damage

6. Criminal charges - state or federal

II. HOW CLAIMS ARISE.

A. Permit Disputes

1. When conditions of permit are incorrect, not feasible or violate applicable laws or regulations

2. Permit issuance

a) Permit issuance deemed to be final agency action under Iowa Administrative Procedures Act

b) BE CAREFUL - appeal must be filed within 30 days of receipt of notice of Department's action - 561 I.A.C. 7.5(1)

3 Permit amendments or variances - done incorrectly or without proper notice

a) Example: For PSD Permits and Title V Permits, public comment required for all but minor administrative changes.

b) Again, appeal must be filed within 30 days of receipt of notice of Department's action. 561 I.A.C. 7.5(1)

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B. Complaints

1. Private citizen complaints - taken very seriously, will be investigated

2. Disgruntled employees – whistle-blowers

3. Anonymous complaints

C. Notices of Violation – Administrative Orders

1. Iowa Department of Natural Resources

a) Heavy fines and ability to shut down business

b) History of violations very important

c) Appeals must be filed with the Department in Des Moines within 30 days after receipt of notice – 561 I.A.C. 7.5(1)

2. Environmental Protection Agency

a) Philosophy of EPA – enforcement

b) Inspections and request for information

c) Criminal context

d) Consent orders

D. Third-Party Claims

1. Leaking underground storage tank cases

2. Personal injury claims

3. Pollution from neighbors or third parties

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E. Insurance Claims – Under General Liability

1. Pollution exclusions

2. Pollution coverage endorsements and policies

F. Criminal charges

III. LEGAL CLIMATE – IT MAY BE BETTER THAN YOU THINK

A. Iowa Case Law

1. Blue Chip case, Blue Chip Enterprises v. Dept. of Nat. Res., 528 N.W. 2nd 619 (Iowa 1995) (March 29, 1995) – owner responsible for cleaning up what you have caused

a) Can be liable for assessment costs

b) Does not apply to third-party claims

2. Risk-Based Corrective Action Standards for hydrocarbons (RBCA) – the trend

3 Land Recycling and Remediation Standards– Iowa Code Chapter 455H

4. Brownfields initiatives generating new laws

5. Mel Foster Co. Properties Inc. v. American Oil Co., 427 N.W.2d 171 (Iowa 1988) - first Iowa leaking underground storage tank case to reach Iowa Supreme Court

B. Federal Law

1. Not as favorable – no Blue Chip

2. Joint and several liability

3. Innocent landowner defense

4. Still can be very risky

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IV. APPEALS

A. Iowa Department of Natural Resources

1. File in Des Moines

2. Time for appeal

a) I.A.C. §561-7.5(1) Notice of Appeal, states:

> Any person appealing an action of the department shall file a written notice of appeal within 30 days of receipt of notice of the department's action, unless a shorter period is specified by the particular rules or statutes or governing the subject matter. The notice of appeal shall state the name and address of the appellant, identify the specific portion or portions of the action of the department that is being appealed, include a short and plain statement of the reasons the specific action is being appealed

b) Beware of final agency action – objectionable provisions of permits must be appealed within 30 days of receipt of notice of permit

3. Contested case proceedings apply – 561 I.A.C. 7 and Iowa Code Chapter 17A

4. Case assigned to administrative law judge

B. Local Appeals

1. County level

a) Check county ordinances and regulations

b) May need to use writ of certiorari as vehicle

2. City level

a) Municipal ordinances govern

b) Sometimes lack of appeal provisions - finality of permit issuance or action may be in question (amendment to municipal code may be necessary -- Cedar Rapids example)

C. Stay of Administrative Action

1. Not automatic

2. Agreement with regulator possible

3. Informal settlement discussions in air pollution matters - stay automatic under 561 I.A.C. 7.4(1)

V. ACTIONS TO BE TAKEN BY YOU

A. Spot Issues and Identify Claims and Opponents

B. Know Your Deadlines

C. Pick Your Battles

VI. RESOURCES

A. EPA Website: www.epa.gov

B. IDNR Website: www.state.ia.us/government/dnr

C. Iowa Bar Association Environmental Law Manual

DEFENDING INSURANCE AGENTS

E

Maurice B. Nieland
Rawlings, Nieland, Probasco, Killinger,
Ellwanger, Jacobs & Mohrhauser
522 Fourth Street, Suite 300
Sioux City, Iowa 51101
(712) 277-2373

DEFENDING INSURANCE AGENTS

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INTRODUCTION

I Status of Agent Involved
- A. Independent agent - agency contracts - sells for many insurance companies
- B Captive agent - works as an employee for only one company, i.e. State Farm, Allstate, Farm Bureau, American Family

II. Size of Agency Involved
- A. Small one-person office
- B. Large multiple employee office, many risks, many agents, many companies

III. Relationship of Agent with the Insured
- A. Long-term established relationship
- B. Taking over relationship from prior agent
- C. What was requested of the agent
- D Was agent's role to advise or procure a product
- E Cars added? Buildings added? Routine matters

IV Undertaking Assumed by the Agent
- A. Fill orders
- B. Serve as general insurance agent
- C Risk management services
  - 1 New activities, risks and available coverages
  - 2. New exposure and tolerance of insured

V Authority of the Agent - Binding authority
- A. Agent for the insured
- B. Agent for the insurance company
- C. Dual agency

VI. Handling of Claims
- A. Determination of claim by agent
- B Transmittal of claim by agent to insurance carrier

FACT SITUATION #1

1. Two-person insurance agency. County seat town. Agency writes primarily auto, personal, farm and some commercial. Office also sells real estate. Two young agents - both college graduates Have agency contracts with six to eight insurance companies.

2. Customer profile. Customer was the owner of a men's clothing store in the same county seat town. Store had fairly large inventory. Sold high quality goods. Inventory included sport coats, suits, overcoats and leather coats.

3. Loss occurrence: Owner came to the store on a Sunday afternoon in the summer to hose off some rubber mats and do other maintenance. The store was closed. Upon entering the rear door from the alley, he noticed that the lock had been tampered with and the store had been entered. Upon entering the store, he noticed that his high-end goods including business suits, sport coats, leather coats and overcoats had been "cleaned out". Burglary loss/robbery.

4. Store owner immediately called one of the two agents, agent that did not customarily handle the account. First agent indicated he would have to call second agent and get back to the owner. First agent went out to see second agent who was mowing his lawn. First agent explained the phone call and indicated he didn't think that burglary loss was covered. Second agent, who was familiar with the file, said "I know the loss wasn't covered. Customer has always been too cheap to buy burglary insurance." Agents went down to the office to check the file for sure, appeared to be no coverage, called the customer back, advised customer they would call the company first thing Monday morning. Called the company, no coverage verified.

5 Now insurance company says no coverage. What other avenue of recovery is there? Suit against insurance agent? What are the theories? What are the rights and responsibilities of the agent vis-à-vis the policyholder?

FACT SITUATION #2

1. Two-person small town insurance agency office. Office handles primarily auto, homeowners, farm, some commercial.

2. Customer profile. Customer was a large national paint manufacturer and distributor with retail facilities, manufacturing facilities, truck fleets and extensive business holdings across the country.

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3. Event situation. Approximately twenty years ago the paint manufacturer, when cleaning out paint mixers, vats and other manufacturing facilities, used certain solvents and solutions containing metals including cadmium and other harmful ingredients. The policyholder took these items to the city landfill where they were burned for a period of time. Eventually, the city stopped the burning. The policyholder then looked around for a "dumping ground", found a forty-acre piece of farmland that had a fishing pond on it and bought it. Went out to the farm with bulldozers, dug some trenches about 200 feet long, 12 feet deep and 8 feet wide with the bulldozer. They would then load the solutions and solvents in 55 gallon drums, put them on a flatbed truck, drive out to the waste area and kick the drums into the trenches. The materials would then "volatize", meaning evaporate, seep away or otherwise disappear over a period of time.

4. Subsequent events. After a number of years, farmers, homeowners and other individuals living "down stream" from the paint solvent dumping site began to get contaminated wells and water supply. Complaint was made to the DNR and the EPA, investigation ensued, and the harmful materials were traced to the paint dumping site.

5. Once the source of contamination was ascertained, the EPA stepped in, both national and federal, a CERCLA claim was enacted, and a large reclamation effort was mandated. All of the dirt had to be dug out and remediated. All of the water had to be purified, scrubbed, and the clean-up costs escalated into the millions.

6 Conversations with agents. Agents lived in the same town, a letter was written, denial was made by agents on the basis of "pollution exclusion".

7. Years later there were discussions at the local Elks, Kiwanis or Rotary about "never having insurance when you need it" and the pollution exclusion.

8. More years went by and the paint factory president was sitting on an airplane next to a lawyer who was engaged in pollution loss claims against insurance companies.

9. Claims were then submitted both to the insurance carriers of the paint manufacturer and to the agents. Denials were made on the basis of the statute of limitations and the pollution exclusion and suit was brought against both the insurance companies over a period of 15 to 25 years and the insurance agents.

FACT SITUATION #3

1 Small town insurance agency. Two or three agents in the office. One agent was "moving out" of certain policies and "turning them over" to another agent. Risks written include personal, auto, farm and very little business and commercial.

2. Insurance client. Big farmer. Hog operation. Cattle operation. Grain operation. Confinement buildings. Corporations involved. Two sons in the business.

3. Renewal situation. Old agent and new agent sat down at the kitchen table a couple days before Christmas and went through all the policies. Wanted to move some of the risks to various corporations and have some of the real estate and buildings insured under various corporations. Legals of the land required.

4. Risk being exposed. Insureds had hogs in hog confinement buildings where suffocation was at issue.

5. Renewals of policies sent in over the holidays. January 3rd power went off, had suffocation loss of large number of big hogs. No post-mortems.

6 Insured called insurance company, not agent. Was advised by insurance company had "no coverage". Insured then called agent, old agent and new agent went out to the farm to discuss. Advised "sorry we didn't discuss suffocation loss".

7. Father and son over the years had signed off a "laundry list" of coverages they desired and did not desire including "suffocation loss".

8. Underwriting requirements. Would have needed an engineer's report, an insurance company inspection, installation of alarm system, installation of backup electrical system including generator. Sabotage vs. Natural loss

9. What are the issues? Should there have been coverage? What was discussed? Would the proposed insured even have requested coverage if it had been available? Would the coverage have been obtained in time? No binding authority for the agent?

FACT SITUATION #4

1. Captive insurance agent, small town agency, one agent in office.

2. Insurance client. Contractor, small remodel, repair and fix-up. One pickup and an employee or two.

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3. Risk situation. Insured "branched out" and built an eight-lane bowling alley. Upon completion, a 12 inch March snow settled in on the roof, the roof went down, building was a total loss.

4. Knowledge of the agent. Did the agent know the activities of the insured and write the coverage to save premium, "paper hanger and decorator" vs "large building construction"

WHAT IS THE STANDARD OF CARE?

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IS AN EXPERT NECESSARY?

Case law holding expert testimony is not needed in case where agent fails to secure requested coverage.

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a. Clary Insurance Agency v. Doyle, 620 P.2d 194, 200 (Alaska 1980)

b. Pearsall Chemical Corp., 219 A.2d 67, 73 (Maryland 1966)

c. Dimarino v. Wishkin, 479 A.2d 444, 446 (N.J. 1984)

d. Consolidated Sun Ray, Inc. v. Lea, 401 F.2d 650, 658 (3d Cir. 1968)

Cases where expert testimony necessary if situation involves complex business transactions or intricate gaps in coverage.

a. Atwater Creamery Co. v. Western National Mutual Insurance Co., 366 N.W 2d 271,, 279 (Minn. 1985)

b Todd v. Malafronte, 484 A.2d 463, 466 (Conn. 1984)

c Bicknell, Inc. v. Havlin, 402 N.E 2d 116, 119 (Mass. 1980)

Iowa Supreme Court case holding in Humiston Grain Co. v. Raleigh Interstate Transportation Co., 512 N.W.2d 573 (Iowa 1994). This case involves a third party claim against an insurance agent for overlooking subrogation issues in the policy he sold. The policy contained 26 pages of boilerplate language that the agent determined he would not be able to decipher. The agent claims he told the party that they needed to obtain legal counsel to interpret this language, however, the party denies they were told this.

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The court stated that insurance agents are held to a standard of care normally possessed by those in the insurance industry, citing Kastler v. Iowa Methodist Hospital, 193 N.W.2d 98, 101 (Iowa 1971), and unless that person's lack of care is so obvious, an expert's testimony is needed. (Citing Perin v. Hayne, 210 N.W.2d 609, 613 (Iowa 1973).)

MISCELLANEOUS:

1 Example of check lists (attached)

2 S & W Agency, Inc. v. Foremost Insurance Co., 51 F.Supp.2d 959 (N.D. Iowa 1998).

POLICY CHECK SHEET

	YES	NO
Select Farm Dwelling Endorsement——RC 52		X
Custom Farm Dwelling Endorsement——RC 54		X
Commander——RC 53		X
Broadform - Dwelling & Household——RC 412	X	
Extended Theft——RC 77	X	
Replacement Cost——RC 107	/	X
Personal Property Replacement Cost——RC 90		X
Dwelling Special Coverage——RC 99		X
Special Property——RC 141		X
T V & C B Antenna		X
Satellite Receiving Dish		X
Submersible Pump		X
Rebuilding Endorsement——RC 306		X
Contract of Sale/Mortgage Clause——RC 123--RC 282		X
Comprehensive Machinery——RC 56		X
Livestock Endorsement——RC 69		X
Cab Glass Endorsement——RC 64		X
Peak Season——RC 85		X
Collision and Overturn——RC 137		X
Leased/Rented Equipment——RC 87		X
Additional Operating——RC 84		X
Theft/Collision Deductible Removal--RC 55		X
Weight of Ice/Snow/Sleet——RC 135		X
Suffocation of Livestock——RC 91		X
Earthquake (Brick or Frame--Structure or Contents)--RC 130		X
Roofing Endorsement——RC 307		X
Other		
Other		
Other		

I HAVE REVIEWED THE ABOVE ENDORSEMENTS AND DESIRE ONLY THOSE COVERAGES INDICATED WITH AN "X" IN THE YES COLUMN, THOSE INDICATED WITH AN "X" IN THE NO COLUMN, I DO NOT WISH TO INCLUDE IN MY COVERAGES.

DATE 10/10/00 INSURED'S SIGNATURE Dan Fredrickson

AGENT'S SIGNATURE [signature]

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4-1-99

IN THE IOWA DISTRICT COURT FOR IDA COUNTY

RIDGE VIEW PORK INC.
5192 Hwy 20
Holstein, Iowa 51025
ID# 42-1410331

Plaintiff,

vs.

FARMERS MUTUAL
INSURANCE ASSOCIATION
106 2nd Street, P O. Box 40
Schleswig, Iowa 51461

DAVID KISTENMACHER
107 East 2nd Street
Holstein, Iowa 51025

Defendants.

NO: LACV013079

AFFIDAVIT OF BRIAN FRIEDRICHSEN

COMES NOW the Affiant and after being duly sworn states:

1 The Plaintiff is an Iowa corporation. My brother Dan and I are the officers of the Corporation and manage the corporation. I was primarily in charge of the insurance matters as relates to this lawsuit.

2. The policy was renewed on December 23, 1996. Dan and I spent time reviewing all of our insurance matters with Don Buell and David Kistenmacher. Dave was taking over Don's policies and we all went over the renewal. We specifically asked a lot of questions. Kistenmacher made the statement that we had considerably more insurance than he sells to most people.

3 That after the loss I talked to Kistenmacher. He said, "I should have told you suffocation may not be covered."

4. I did in fact receive the January 8, 1997 letter rejecting coverage.

5.

DEFENDANT'S EXHIBIT 306

Blumberg No. 5114

6.

E

Brian Friedrichsen

Brian Friedrichsen

Subscribed and sworn to before me by the said BRIAN FRIEDRICHSEN on this 1 day of April, 1999.

Notary Public in and for the
State of Iowa

— Since 1879 —
Farmers Mutual Insurance Association
106 2nd St., Box 40
Schleswig, Iowa 51461

January 8, 1997

Ridge View Pork, Inc.
C/O Dan Friedrichsen
1576 Dodge Avenue
Holstein, Iowa 51025

RE: Policy # 15932
Claim # 97-0004-F

Dear Insured (Ridge View Pork Inc.),

As per the telephone conversation between Brian and I on January 2, 1997 with regards to the hogs suffocating. At which time I stated there was no coverage under the Farmate policy.

Enclosed is a copy of your Farmate policy which is a named peril policy for you to review. I have highlighted the areas indicating no coverage for suffocation.

Please note pages 6 & 7:

EXCLUSIONS

1. We will not pay for loss or damage caused by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

2. Unless liability is assumed in this policy or by endorsement, we will not cover loss to:

m. Livestock or poultry from:

3) suffocation
unless such loss is caused directly by fire.

We are sorry that we cannot be of service to you at this time, if you should have any questions in the future, please call the office, your agent or myself.

Sincerely,

Richard W. Pickel

Richard Pickel
Claims Adjuster
Farmers Mutual Insurance Association

RP/ej

enclosure

EXHIBIT
B

GRINNELL MUTUAL UNDERWRITING GUIDELINES FOR SUFFOCATION COVERAGE

IMPORTANT: All buildings being considered for this coverage must be inspected and approved by Grinnell Mutual before coverage can be bound. Meeting these guidelines does not automatically guarantee coverage will be bound.

The following are proposed underwriting guidelines for buildings and equipment, auxiliary generators, and alarm systems:

GENERAL UNDERWRITING GUIDELINES

Building and Equipment:

1) There must be an established routine maintenance program for the building(s) and equipment.
2) The building electrical service entrance(s) must be protected with the use of a secondary lightning surge arrestor(s).
3) There must be a minimum of two ventilation fans per building.
4) There must be a minimum of two electrical circuits to ventilation fan motors per building.
5) There must not be more than two ventilation fan motors per circuit. In each livestock room, ventilation fan motors must be on separate circuits and meet the requirements of Item #3 and Item #4 above.

AUXILIARY GENERATORS

Automatic-Start Auxiliary Generator System:

1) The equipment and installation must be checked and approved for use by the electrical power company.
2) The preferred location is external of the building in a building all its own. If the unit is inside a building (with another occupancy) the unit must then be enclosed in a one-hour fire resistive room.
3) The unit must be installed in accordance with the requirements of the National Electrical Code.
4) The unit must be installed in accordance with manufacturer's recommendations.
5) The unit must be started (tested) under load once a week and a log kept showing the date and time of operation.
6) The unit must be sized to handle the minimum ventilation rates for that building and/or livestock rooms.
7) The unit must provide for a fully automated start up and transfer.
8) All adult family members and employees should be trained in operation of the auxiliary generator.

Manual Start or PTO Auxiliary Generator System:

1) The equipment and installation must be checked and approved for use by the electrical power company.
2) The preferred location is external of the building in a building all its own. If the unit is inside of a building (with another occupancy), the unit must be enclosed in a one-hour fire resistive room.
3) The unit must be installed in accordance with the requirements of the National Electrical Code.
4) The unit must be installed in accordance with manufacturer's recommendations.
5) The unit must be started (tested) underload weekly if a manual start unit and twice monthly if a PTO unit. In either case, a log should be kept showing the date and time of operation.
6) The unit must be sized to handle the minimum ventilation rate for that building and/or livestock rooms.
7) The manual start auxiliary generator must be manually and/or automatically transferred. The PTO auxiliary generator must be driven by an external source of power and must be manually and/or automatically transferred.
8) All adult family members and employees should be trained in operation of the auxiliary generator.

Approved Alarm Systems:

This shall mean a system capable of monitoring electrical power failure and temperature extremes.

1) All devices for the alarm system must meet the requirements of Article #547 of the current National Electrical Code.
2) The alarm's electrical system must be installed in accordance with the requirements of the National Electrical Code.
3) The system must be capable of sounding an alarm at the livestock building(s) and at the residence of the owner/manager, or in at least three off-premise locations. This can be accomplished by one or more of the following methods:
   a) telephone;
   b) hard wire system (transmitting lines are buried underground);
   c) line carrier transmitting/receiving system providing it does send a continuous signal during a "normal" state;
   d) digital communicator (would transmit an alarm to a computer which in turn would make notification of alarm); and/or
   e) wireless radio with appropriate base, mobile or pocket receiver
4) The alarm system sensing devices are to be wired on a "supervised loop" circuit.
5) The alarm system must be fully operational if AC current or primary power fails.

DEFENDANT'S EXHIBIT 302

Blumberg No. 5114

5) All sensing devices installed within the livestock area must be dust, moisture, and corrosion resistant.

7) The electrical power outage alarm system must monitor the "hot legs" of the main electrical service entrance panel as well as any branch feeder panels of 100 amps or larger.

8) On ventilation fan motor circuits, power failure devices should monitor the load side of the electrical system. Any air flow, shaft rpm, power sensors, or similar solid state sensors are acceptable providing they are designed to be utilized in a damp, corrosive, and dusty atmosphere.

9) The hi-low sensor should have a readable dial and be designed for use in a damp, dusty, and corrosive atmosphere. Each sensor should sense an area no larger than 2,500 square feet and be placed within the 4-8 foot zone above the floor. Each livestock room must have a minimum of one sensor.

4 OPTIONS TO QUALIFY FOR COVERAGE

Meeting all requirements in any of the levels of protection will meet the preliminary requirements for coverage. It will still require an inspection by Grinnell Mutual.

For Rating Purposes: Level 1 is fully protected rate; levels 2, 3 & 4 are a partially protected rate.

Building Protection Level 1 (Generator Required)

1) An automatic start auxiliary generating system
2) An approved alarm system (power outage and temperature extremes)

Building Protection Level 2 (Generator Required)

1) An automatic start auxiliary generating system

Building Protection Level 3 (Generator Required)

1) A manual start or PTO auxiliary generating system.
2) An approved alarm system (power outage and temperature extremes)

Building Protection Level 4 (No Generator Required)

1) Doors, windows, sidewall louvers or curtains in the building must have the capability of being manually operated by an individual of normal intelligence and strength.
2) Doors, windows, sidewall louvers or curtains in the building must provide, when open, a cumulative unobstructed open space equal to 20% of the combined sidewall area.
3. Doors, windows, sidewall louvers or curtains in the building must be proportionately spaced in opposite sidewalls to allow for natural air currents to flow through the building.
4. The building must be equipped with an approved high-low temperature sensing system capable of sounding an alarm. (See items 1-6 and 9 above.)

If you have any questions, please call the loss control department in your region.

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TOTAL P.03

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LIVESTOCK SUFFOCATION ENDORSEMENT

In consideration of the premium charged **livestock** is covered for death resulting from suffocation caused by electri[illegible] interruption or mechanical breakdown of ventilating equipment. The loss must occur at the covered building(s) descr[illegible] below:

Covered Building	Location	Amount of Coverage

ADDITIONAL EXCLUSIONS

Coverage is not provided under this endorsement for loss resulting directly or indirectly from:

1. failure to maintain an Approved Alarm System or Automatic Standby Generating System as effective as the one installed when this endorsement became effective;
2. loss caused or contributed by:
   a. disease or infection or parasites of any type;
   b. ingestion of any substance;
   c. inoculation or treatment by any person;
   d. birth, rigors of birth or being still born; or
3. loss caused by the destruction of **livestock** at the direction of any civil authority.

SPECIAL DEDUCTIBLE

In the event of a loss covered by this endorsement, a special $1,000 per occurrence deductible will apply at each locatio[illegible]

This endorsement does not increase the limit of liability applying to livestock. All other provisions of this policy apply, unless altered by this endorsement.

White-Insured, Canary-Farm Mutual, Pink-Mortgagee, Gold-Agent
(Photocopy for Submission to GMRC)

Blumberg No. 5114

DEFENDANT'S EXHIBIT 303

SUFFOCATION ENDORSEMENT **RC 91 (1-94)**

Effective Date: January 1, 1994

Lines Used With: FarMate

States: IA, IL, IN, MN, MO, ND NE, SD, WI

Required for Reinsurance Processing: A copy of the endorsement showing locations and building descriptions, amount of coverage and deductible must be submitted. If coverage is to be reinsured 100% it must be clearly indicated at the time the endorsement is added to the policy.

Note: If 100% reinsurance coverage is desired or if coverage is direct with Grinnell Mutual, prior approval must be obtained from the Reinsurance Unit before coverage may be bound.

Purpose: Provides coverage for loss due to the suffocation of livestock caused by "electrical interruption or mechanical breakdown." This endorsement is designed for use with cattle and hog confinement risks. Poultry risks are not eligible for coverage.

Note: There is a separate application (RC 82A) for this endorsement that should be completed and signed by the applicant and agent.

2410.1 Insurance Contract - Essentials For Recovery. The plaintiff must prove all of the following propositions:

1. The plaintiff was insured for loss due to [theft, fire, storm, liability, etc.] by the defendant on the date of loss.

2. The plaintiff had paid the premiums which were due.

3. The plaintiff had a loss by [theft, fire, storm,liability, etc.] which was covered by the insurance policy with the defendant.

4. The plaintiff gave the defendant [(notice of loss required by the policy) or (the failure to give notice of loss was excused, waived, or not prejudicial.)]

   [(timely proof of loss) or (the failure to give proof of loss was /excused/ /waived/ /not prejudicial.)]

5. The defendant did not pay the plaintiff's claim.

6. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If 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 the propositions, then you will consider the defense of_____ as explained in Instruction No. _____.]

Comment

Note: Omit portions of paragraph 4 which are not applicable.

Note: For measure of recovery of total property loss, see: McIntosh v. Home Mutual Insurance Assn., 198 Iowa 1038, 1039, 200 N.W. 694. To determine actual cash value by using market value and/or replacement cost, see: Britven v. Occidental Insurance Co., 234 Iowa 682, 685 to 687, 13 N.W.2d 791, 793 to 794; Stortenbecker v. Iowa Power & Light Co., 250 Iowa 1073, 1080, 96 N.W.2d 468, 472.

2400.9 Impossibility Of Performance. Impossibility of performance means extraordinary circumstances which:

1. Prevent a person from carrying out the terms of the contract.

2. Could not reasonably have been anticipated; and

3. Are not the fault of that party.

Performance is not excused if the party who promised to perform created the circumstances which made performance impossible, or just because performance became economically burdensome or unattractive.

Authority

Yager v. Farmers' Mut. Telephone Co., 323 N.W.2d 245 (Iowa 1982)

Associated Grocers of Iowa Co-op, Inc. v. West, 297 N.W 2d 103 (Iowa 1980)

Nora Springs Co-op Co. v. Brandau, 247 N.W.2d 774 (Iowa 1976)

Comment

Note: This instruction may be used where a plaintiff claims this ground as an excuse for nonperformance or where defendant raises this affirmative defense as a discharge of a duty. If the contract is within the scope of Article 2 of the Uniform Commercial Code, the Instruction should be modified to conform with Iowa Code Sections 554.2101 and 554.2615 (a).

12/92

2400.10 Prevention Of Performance. Performance is excused if the other party prevents it or makes it impossible.

Authority

Sheer Const., Inc. v. Hodgman and Sons, Inc., 326 N.W.2d 328 (Iowa 1982)

Kaltoft v. Nielsen, 252 Iowa 249, 106 N.W.2d 597 (1960)

Comment

Note: This instruction may be used where a plaintiff claims this ground as an excuse for nonperformance or where defendant raises this affirmative defense as a discharge of a duty.

2400.11 Waiver Of Performance. The right to insist on performance can be given up. This is known as a "waiver". A waiver may be shown by actions, or you may conclude from (name)'s conduct and the surrounding circumstances that a waiver was intended. The essential elements of a waiver are the existence of a right, knowledge of that right, and an intention to give

2400.12 Renunciation. Performance is excused where one party clearly rejects the contract by giving notice to the other that they will not perform.

Authority

Glass v. Minnesota Protective Life Ins. Co., 314 N.W.2d 393 (Iowa 1982)

Comment

Note: This instruction may be used where a plaintiff claims this ground as an excuse for nonperformance or where defendant raises this affirmative defense as a discharge of a duty.

2400.13 Definition - Implied Contract. The law implies a promise to pay the reasonable value of services [and materials] a person knowingly accepts from another.

Authority

In Re: Holta's Estate, 246 Iowa 527, 68 N.W.2d 314 (1955)

12/86

2400.14 Definition - Implied Contract As To Compensation. When a person employs someone to provide services [and materials] without agreeing on the amount of pay, an agreement is implied to pay the reasonable value of those services [and materials].

Authority

Olberding Constr. Co. v. Ruden, 243 N.W.2d 872 (Iowa 1976)

Heninger & Heninger v. Davenport Bank & Trust Co., 341 N.W.2d 43 (Iowa 1983)

McDonald v. Welch, 176 N.W.2d 846 (Iowa 1970)

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Note: *See: Henschel v. Hawkeye-Security Insurance Co., 178 N.W.2d 409, 415-417 (Iowa 1970) concerning legal excuse for not giving notice of loss. See. Pirkl v. Northwestern Mut. Ins. Ass'n., 348 N.W.2d 633, 637 (Iowa 1984) concerning legal excuse or no prejudice for not giving notice of loss within a specific time period. See. Basta v. Farm Property Mutual Insurance Assoc., 217 Iowa 240, 249, 252 N.W. 125 (1933) on the issue of the insurance company's waiver of a proof of loss statement.*

Caveat: *Instructions in a breach of insurance contract case must be tailored to the specific language of the insurance policy.*

PRACTICE POINTERS

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OUTLINE OF LAWSUIT

Ridge View Pork v. Kistenmacher

I. Claim of Agent Malpractice or Negligence

A. No proof without expert; no expert; Motion in Limine should be sustained (Should have inquired, should have asked)

B. Even if no expert necessary:
   1. No binding authority by agent
   2. Plaintiff could not meet the underwriting requirements

II Claim of Misrepresentations

A. If said had S/L coverage - no binding authority

B. Impossibility - because no binding authority - no meet underlying requirements

Ridge View Pork v. Kistenmacher

POINTS TO STRESS

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1 Don Buell never sold one S/L policy

2 Don Buell offered (two) customers but turned down thirty days later.

3 Farmers Mutual only wrote ____ S/L policies (check with Tim Clausen and Larry Abbey).

4 Conflict in plaintiff's pleadings:

a Petition - Kistenmacher saying they had coverage for S/L
b In amendment of other pleading says "should have talked" admission by Kistenmacher after loss - INCONSISTENT

5 Richard said re no S/L "Yes I know, but the boys don't know".

6 Never asked for it after the loss - never made an application for it - never priced it - never asked Kistenmacher to see what it would cost, never checked underwriting, never applied for

7 All of the Friedrichsens signed off "no" on prior apps
(Why DK didn't offer it? Talk about it? Relied on Don?)

8 Dave now has two policies with S/L (Conover and _____)(all meet all of the underwriting requirements)

9 Describe all corporate officers, corporations, directors, shareholders, who owns what. Big outfit!!!

10 Establish Richard "agent" in Ridge View Pork, imputed knowledge, didn't have S/L. Go through interlocking officers, agents, directors, employees and management (need instruction)

11 Describe how policyholders can <u>control</u> loss for suffocation where they can't control it for fire - wind - hail, etc.

12 Notes of conversations? Recalls? Three years ago?

13 Explain agency "independent" insurance company (make diagram), customers, re-insurer and trace payment of premium

14. Exhibits - S/L underwriting regs, S/L endorsement

15. Richard called company first after the loss, not the agent, knew the agent was not responsible. Had not told them they had coverage (IMPORTANT)

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ETHICAL ISSUES FOR THE IOWA DEFENSE ATTORNEY

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Charles L. Harrington
Ethics Counsel
Iowa Supreme Court Board of Professional Ethics and Conduct
Des Moines, Iowa

ETHICAL ISSUES FOR THE IOWA DEFENSE ATTORNEY
Selected Rules, Cases, and Ethics Opinions

Charles L. Harrington, Ethics Counsel
Iowa Supreme Court Board of Professional Ethics and Conduct
Des Moines, Iowa

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I. CONFLICT OF INTEREST AND CONFIDENTIALITY CONCERNS IN INSURANCE DEFENSE SITUATIONS.

A. Rules.

EC 5-21.

The obligation of a lawyer to exercise professional judgment solely on behalf of a client requires that the lawyer disregard the desires of others that might impair free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to the client; and if the lawyer or client believes that the effectiveness of the lawyer's representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

EC 5-23.

A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. . . . Since a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of professional freedom.

DR 5-107. AVOIDING INFLUENCE BY OTHERS THAN THE CLIENT

(A) Except with the consent of the client after full disclosure, a lawyer shall not:

(1) Accept compensation for legal services from one other than the client.

(2) Accept from one other than the client any thing of value related to representation of or employment by the client.

(B) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

B. Ethics Opinion.

Iowa Supreme Court Board of Professional Ethics and Conduct, Formal Opinion 99-01:

You state that in cases where an insurance company ("Insurer") has engaged a lawyer or law firm to represent its insured, the Insurer frequently requests the lawyer to agree to a variety of requirements, usually called "Guidelines," as a condition of the engagement. These Guidelines sometimes include requirements which: 1) specifically control how a law firm staffs a file, provide that a non-lawyer claims representative can perform tasks traditionally performed by a lawyer, set forth when and to whom the lawyer may assign various legal tasks (such as to legal assistants); determine who in the law firm can perform legal research, require a lawyer to rely upon research by an unsupervised paralegal, require prior approval for depositions or pleadings, curtail interoffice meetings of lawyers working on the file, limit written communication with the insured to a minimum, or dictate how and when specific legal tasks may be performed such as the use and type of discovery; and 2) require the lawyer to keep a time based service-log describing in detail the specific legal services rendered by the lawyer to the client and the amount of time it took to perform the service, etc. The service-log is for review by the Insurer or a third party, outside auditor in determining whether, in their judgment, the services were necessary and the time charged reasonable.

You ask whether it is proper for an Iowa lawyer to agree to, or accept or follow an engagement that requires following such Guidelines.

1) Control of Work - The Iowa Supreme Court has held that when an Insurer retains an attorney to represent an insured, the lawyer has an attorney-client relationship with the insured. See Henke v. Iowa Home Mutual Cas. Co., 249 Iowa 614, 87 N.W.2d 920 (1958); see also Formal Opinions 87-16 and 88-14. The primary question concerns who can direct and control legal services rendered by a lawyer to a client and how those services are to be delivered. The Iowa Code of Professional Responsibility for Lawyers answers the question. Only the lawyer and the client can direct and control the legal services rendered to the client. "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the professional judgment in rendering such legal services." DR 5-107(B). See also EC 5-1, 5-21, and 5-23. Determining the legal services necessary to represent the client and who, within the lawyer's office renders them, are and must be solely within the province of the lawyer. In making those decisions, the lawyer must comply with DR 3-104 as well as EC 3-6 of the Iowa Code of Professional Responsibility.

2) Outside Auditors - Guidelines which direct and require the lawyer to keep and reveal a detailed narrative legal service-log raise both the issue of control of

the lawyer's professional judgment in violation of DR 5-107(B) and whether the attorney-client privilege is jeopardized. A lawyer is required to protect the confidences and secrets of a client and they may not generally be revealed without the client's consent, after full disclosure. DR 4-101. Any requirement that the lawyer obtain the insured's consent to such a disclosure creates an ethical dilemma for the lawyer. As the Washington State Bar Association has stated, "This is because it is almost inconceivable that it would ever be in the client's best interests to disclose confidences or secrets to a third party." WSBA Formal Opinion 195, 6/24/99. "If there is the slightest risk of embarrassment to the client or waiver of privileged information, independent counsel could have an affirmative duty to recommend against disclosure." Id.

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It is the opinion of the Board that:

1) it would be improper for an Iowa lawyer to agree to, accept or follow Guidelines which seek to direct, control or regulate the lawyer's professional judgment or details of the lawyer's performance; dictate the strategy or tactics to be employed; or limit the professional discretion and control of the lawyer.

2) it would be improper for an Iowa lawyer to agree to, accept or follow such proposed service-log requirements in any form that causes the attorney-client privilege to be placed in jeopardy, if the service log is sent to a third party. An Insurer may require a lawyer to identify the services rendered and time spent, so long as it does not control the lawyer's professional judgment or undermine the attorney-client privilege.

Lawyers also should review DR 1-102(A), DR 5-105(C) and (D), DR 6-101(A), DR 7-101(A) and Canon 9, and their pertinent Ethical Considerations.

II. OTHER CONFLICT SITUATIONS—MULTIPLE CLIENTS AND FORMER CLIENTS.

A. Rules.

EC 4-6. The obligation of a lawyer to preserve the confidences and secrets of a client continues after the termination of employment. . . .

DR 4-101. PRESERVATION OF CONFIDENCES AND SECRETS OF A CLIENT.

. . . . . .

(B) . . . [A] lawyer shall not knowingly:

(1) Reveal a confidence or secret of a client.

(2) Use a confidence or secret of a client to the disadvantage of the client.

(3) Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

DR 5-105. REFUSING TO ACCEPT OR CONTINUE EMPLOYMENT IF THE INTERESTS OF ANOTHER CLIENT MAY IMPAIR THE INDEPENDENT PROFESSIONAL JUDGMENT OF THE LAWYER.

(A) In no event shall a lawyer represent both parties in dissolution of marriage proceedings whether or not contested or involving custody of children, alimony child support, or property settlement.

(B) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(D).

(C) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the representation of another client, except to the extent permitted under DR 5-105(D).

(D) In the situations covered by DR 5-105(B) and (C), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

(E) If a lawyer is required to decline employment or to withdraw from employment, no partner or associate of the lawyer or the lawyer's firm may accept or continue such employment.

DR 5-106. SETTLING SIMILAR CLAIMS OF CLIENTS.

(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against the clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

B. Cases.

***In Interest of J.C.*, 560 N.W.2d 33, 35 (Iowa App. 1996).** This is not an insurance defense case but it summarizes a basic problem in defending multiple clients in the same case: "There is a conflict when one attorney representing two people cannot use the attorney's best efforts to exonerate one client for fear of implicating the other and the attorney is faced with the dilemma of abandoning or pursuing defenses and tactics that would help one client and hurt the other."

***Richers v. Marsh & McLennan Group Associates*, 459 N.W.2d 478 (Iowa 1990).** In this appeal the Iowa Supreme Court found a conflict of interest requiring disqualification of plaintiff Sue Richers' attorneys, Shuttleworth & Ingersoll, P.C. (Shuttleworth).

Defendant Marsh & McLennan Group Associates (MMGA) is an insurance brokerage firm. Richers' suit raised various claims arising from the termination of her employment with that firm.

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The conflict arose from Shuttleworth's prior representation of MMGA as defendant in another lawsuit brought by an insured, one John Oaks. Oaks alleged MMGA had improperly denied his disability claim. He asserted, inter alia, that an employee of MMGA had given him incorrect insurance-coverage information. Because Richers had been manager of the department in which this employee worked, she was an important witness in the Oaks suit. By the time Richers filed her own suit against MMGA, the Oaks case was still pending but Shuttleworth was no longer defending MMGA.

In analyzing MMGA's motion to disqualify Shuttleworth, the Court invoked the "substantial relationship" test. This test applies to situations where a party objects to his former lawyer's current representation of an adverse party. Disqualification turns on the relationship between the factual issues in the former and current representations.

Here the Court found the Oaks and Richers cases to be substantially related:

> Each count in plaintiff's [Richers'] petition grows out of the termination of her employment. While the Oaks suit alleges that misinformation was given to a policyholder, it is uncontradicted that this complaint was directed against an employee supervised by plaintiff and that plaintiff was an important witness in the case. The ability of MMGA to properly train and supervise its personnel is a central issue in both cases. As the person responsible for supervising and training the employee implicated in the dispersal of incorrect coverage information, plaintiff's alleged inability to perform these aspects of her job is closely related to Oaks' claim and is crucial to her own causes of action.

Because the issues in the two suits were substantially related, the Court disqualified Shuttleworth from representing Richers. The Court said it was unnecessary to determine whether Shuttleworth actually disclosed any confidences of MMGA. The substantial relationship rule "affords the former client a presumption of disclosure of information in the former representation."

***Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Walters*, 603 N.W.2d 772 (Iowa 1999).** Walters was disciplined for, among other things, engaging in the kind of conflict addressed in *Richers, supra*. He had represented Keri Helps in a dissolution of marriage action. Shortly after the dissolution decree was entered, Walters represented Keri's former husband, Rodney Helps, in an involuntary hospitalization proceeding. A few months later he again represented Keri, seeking this time to hold Rodney in contempt

and enjoin him from contact with Keri and their minor child. The Iowa Supreme Court concluded that issues in the involuntary hospitalization proceeding bore a substantial relationship to issues in the domestic proceedings. The Court concluded that the alternating representations implicated concerns of confidentiality, conflict of interest, and loyalty. under DR 4-101(B)(1) and (2) (confidentiality) and DR 5-105(B) and (C) (conflict in multiple representation).

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III. DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION.

A. Rules.

DR 1-102. MISCONDUCT.

(A) A lawyer shall not:

. . . . . .

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on the fitness to practice law.

. . . . . .

DR 7-102. REPRESENTING A CLIENT WITHIN THE BOUNDS OF THE LAW.

(A) In the representation of a client, a lawyer shall not:

. . . . . .

(3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

. . . . . .

B. Cases.

***Committee on Prof'l Ethics & Conduct v. Van Etten*, 490 N.W.2d 545 (Iowa 1992).** Van Etten represented the defendant in a delinquent student loan matter. He filed a motion to dismiss, in which he alleged (incorrectly) that the statute of limitations had run. After speaking with plaintiff's counsel, Van Etten realized the motion to dismiss had no merit. Van Etten told plaintiff's counsel he would withdraw the motion and would advise the district court fully. However, Van Etten failed to do so. Plaintiff's counsel, relying on Van Etten's representations, did not attend the hearing on the motion to

dismiss. Consequently, the court sustained the motion and dismissed the plaintiff's petition. Van Etten later assured plaintiff's counsel that the court's ruling resulted from a misunderstanding and that he would take steps to correct the matter. He took no action to rectify the matter, however.

The Iowa Supreme Court found that Van Etten's conduct and representations to plaintiff's counsel violated DR 1-102(A)(4), (5) and (6) and DR 7-102(A)(3) and (7). For this and for the neglect of an unrelated probate matter, Van Etten's license was suspended for not less than six months.

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***Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Lesyshen*, 585 N.W.2d 282 (Iowa 1998).** Lesyshen committed multiple ethical violations in two legal matters. The first of these was a personal injury action in which she represented the plaintiff. Lesyshen's client had been injured when the driver of the automobile in which she was a passenger lost control and rolled the vehicle. In the suit against the car's driver, Lesyshen failed to answer interrogatories regarding expert witnesses (resulting in exclusion of most medical bills and the inability to prove any elements of future damages) and failed to timely list lay witnesses in response to another interrogatory (resulting in three of her four lay witnesses being excluded from testifying in the plaintiff's case in chief).

Lesyshen conducted no discovery of her own. She failed to give her client a copy of the client's deposition to review before trial. She allowed the case to be dismissed under IRCP 215.1 (although it was later reinstated). She waited until the day before trial to notify her lone medical witness that he was to testify, had to subpoena him to be present, and did not confer with him until he arrived at the courthouse.

In the subsequent disciplinary proceeding the Iowa Supreme Court concluded: "Because of [Lesyshen's neglect,] what began as a case of clear liability with over $20,000 in medical bills and ample insurance coverage, ended with a $2000 judgment, resulting in her client's bankruptcy."

In the same case Lesyshen forged her client's signature to supplemental interrogatory answers. To make matters worse, she allowed her client to testify at trial that she (the client) had signed the answers.

In a separate matter Lesyshen obtained an ex parte order transferring custody of a child to her client. She knew but failed to tell the judge that the custodial parent was represented by counsel.

Lesyshen's many violations resulted in an indefinite suspension of her law license, with no possibility of reinstatement for six months

***Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Stein*, 586 N.W.2d 523 (Iowa 1998).** Stein represented the plaintiffs in two malpractice suits. He made repeated misrepresentations designed to conceal the neglect of his clients' cases. The neglect included failure to respond timely to discovery and failure to meet deadlines for various appellate filings. In letters to opposing counsel and in filed certificates of service, Stein represented he had timely served the items in question. Opposing counsel, however, either did not receive the documents or received them on dates inconsistent with the purported mailing or delivery dates. The commission and the Iowa Supreme Court concluded Stein made misrepresentations concerning eight separate mailings and one

hand-delivered filing. The court found the neglect to be serious and the misrepresentations even more so. The court suspended Stein's license indefinitely with no possibility of reinstatement for six months.

***Committee on Prof'l Ethics & Conduct v. Mollman*, 488 N.W.2d 168 (Iowa 1992).** This was the first Iowa case to address surreptitious tape recordings by lawyers. The Committee charged Mollman with violating DR 1-102(A)(4) and Formal Ethics Opinion 83-16, which prohibits lawyers (with a limited exception for criminal prosecutors) from engaging in undisclosed tape recordings.

Mollman had engaged in the occasional recreational use of controlled substances with Edward Johnson and other close friends in the Cedar Rapids area. The FBI was aware of this activity and offered Mollman immunity from prosecution if he would arrange a cocaine buy from Johnson. Mollman declined this offer, apparently because Johnson was not a "dealer" and because he did not want to prompt his friend to commit a serious crime. However, in exchange for sentencing leniency, Mollman did agree to wear a hidden "wire" and engage Johnson in conversation regarding their use of drugs.

Mollman went to Johnson's home. He told Johnson, who was aware the FBI was investigating drug activity in Cedar Rapids, that he had come so they could get their "stories straight." In the course of their conversation Johnson made incriminating statements which were recorded by the FBI. In exchange for his services, Mollman was allowed to plead guilty to one count of possession of cocaine. He was fined and placed on probation. Johnson was sentenced to prison.

Mollman previously had represented Johnson on an OWI charge. In the disciplinary proceedings against Mollman, Johnson testified that he considered Mollman to be his lawyer as well as his friend. The Iowa Supreme Court declined to find that an attorney-client relationship existed at the time of the recorded conversation, but noted: "[I]t appears that Mollman was able to draw incriminating statements out of Johnson precisely because their conversation centered on the legal implications of the way they had pooled their resources to purchase and share drugs in the past. The tape clearly reveals that Johnson looked to Mollman for guidance, if not legal advice, on these matters and, in doing so, made the admissions federal agents wanted." The Court concluded that Mollman elicited Johnson's incriminating statements by deceit in violation of DR 1-102(A)(4).

Mollman argued that his conduct fell within the "prosecutorial exception" in Formal Opinion 83-16. The Court rejected this argument because Mollman was not a law enforcement attorney and was acting for his own benefit rather than that of the public. The Court further held Mollman's conduct was not excused by erroneous advice from federal prosecutors that his conduct was ethical. The Court suspended Mollman's law license for not less than thirty days.

***Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Plumb*, 546 N.W.2d 215 (Iowa 1996).** The person recorded by Plumb, attorney James Cleverley, Jr., represented a former boyfriend of Plumb's sister. Plumb allegedly told Cleverley that he would "set

up" the former boyfriend "on a drug deal" if he did not stay away from his sister. Cleverley wrote his client to warn him of Plumb's threat.

After learning of Cleverley's letter, Plumb went to see him, purportedly "to gather proof that he had not made the threats Cleverley claimed." He engaged Cleverley in a conversation which—unbeknownst to Cleverley—was tape recorded. Cleverley happened to be a part-time judge, and the conversation took place in his chambers at the courthouse.

The Iowa Supreme Court held that the secret recording violated DR 1-102(A)(4) (lawyer shall not engage in dishonesty, deceit, or misrepresentation). The Court found it "especially troubling that Plumb tape recorded a conversation with a judge in chambers." Noting that Plumb was relatively inexperienced in the practice and that his conduct was motivated by self-defense concerns, the Court issued a public reprimand.

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IV. FRIVOLOUS CLAIMS, DEFENSES, AND ACCUSATIONS.

A. Rules.

DR 7-102. REPRESENTING A CLIENT WITHIN THE BOUNDS OF THE LAW.

> (A) In the representation of a client, a lawyer shall not:
>
> (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
>
> (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that a lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

. . . . . .

DR 7-109. CONTACT WITH WITNESSES.

. . . . . .

> (B) A lawyer shall not advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness therein.

DR 8-102. STATEMENTS CONCERNING JUDGES AND OTHER ADJUDICATORY OFFICERS.

. . . . . .

> (B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

B. Cases.

***Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Hohnbaum*, 554 N.W.2d 550 (Iowa 1996).** This is a good example of the overzealous defense of a lawsuit, involving misrepresentation and frivolous positions. Hohnbaum was hired by an insurance company to represent Audrey Biere, the driver/owner of an automobile which struck another vehicle from behind on I-235 in Des Moines. Following the accident Biere filed a report with the department of transportation in which she admitted that her vehicle struck the rear of the other car. Based on conversations with Biere and on the insurance company's investigative file, Hohnbaum filed an answer in which he admitted that his client's car hit the other vehicle from behind.

After filing the answer, Hohnbaum learned that the officer who investigated the accident had mistakenly reversed the order of the cars in his report. A few days before the lawsuit was set to be tried, Hohnbaum moved to amend the answer to deny that Biere's vehicle had struck the plaintiff's car. In arguing on behalf of the motion, Hohnbaum told the district court: "We all make mistakes, and we have to file an answer sometimes without receiving a file." The truth, however, was that Hohnbaum had received the insurance company's file *before* he filed the answer, and he knew from reviewing that file and talking with his client that her vehicle was the one to the rear. The court denied the motion to amend, but Hohnbaum persisted in a trial strategy "aimed at confusing the issue of who struck whom." Hohnbaum's client was absent from the trial and so did not testify. The Iowa Supreme Court found that he had "encouraged her to stay away for the purpose of frustrating the jury's search for truth." This trial strategy proved unsuccessful (a verdict of about $100,000 was awarded to the plaintiff).

The Iowa Supreme Court concluded that Hohnbaum "was justified in making the plaintiff prove her case. He was not justified, however, in making misleading statements to the court or in persisting in a position that was patently frivolous." The Court suspended his license with no possibility of reinstatement for three months.

***Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Ronwin*, 557 N.W.2d 515 (Iowa 1996), *cert. denied*, 520 U.S. 1241 (1997).** This case involves inexcusable claims and accusations by a plaintiff's lawyer. Ronwin filed a civil action against the owner of a child care center and one of her employees. The plaintiff in the suit was a corporation of which Ronwin was sole shareholder, officer, and director, National Child Care, Inc. Ronwin and care center's proprietor, Janet Dickinson, had agreed orally to form a corporation that would own and operate child care centers. When Ronwin later rejected certain demands by Dickinson concerning share of ownership and salaries, Dickinson severed her connection with Ronwin's business.

The other defendant, Susan Hill, worked as a cook for Dickinson's business. Hill had attended a zoning and planning commission meeting in Windsor Heights at which the commission considered Ronwin's request for a zoning change to permit construction of a child care center. Although Hill spoke in favor of the rezoning, the request was turned down. It was after this meeting that Dickinson ended her business relationship with Ronwin, who then sued her in state district court. He named Hill as a co-defendant, alleging she had cast "deliberate disparagement" on Ronwin's rezoning efforts and

encouraged Dickinson to sever her relationship with Ronwin. However, as the Supreme Court found in the subsequent disciplinary action, "[i]t is obvious the refusal to rezone the Windsor Heights property was not the result of Hill's participation at the zoning meeting" and that "he named her as defendant as a trial tactic."

After Ronwin rested in the lawsuit, Judge Hutchison granted the defendants' motion for a directed verdict. The judge also granted Hill's motion for sanctions under IRCP 80, including attorney fees, in the amount of $10,000 against Ronwin personally and his corporation. The directed verdict and sanctions award were upheld on appeal.

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Ronwin then filed a 49 page complaint in federal court naming as defendants Judge Hutchison, Judge Donielson of the Iowa Court of Appeals, Chief Justice McGiverin of the Iowa Supreme Court, and Dickinson and Hill and their attorneys. In the course of the federal proceedings (which resulted in dismissal of Ronwin's complaint), Ronwin alleged that "[Judge] Hutchison was deliberately lying to set the stage to help Dickinson and Hill steal $30,000 from Ronwin," that the Iowa proceedings before Hutchison "were rigged," that a statement by Hutchison "is a deliberate fraud and lie, and patently so," that "the acts and omissions of the defendants (including Hutchison) amount to a gigantic fraud . . . to steal at least $30,000 from National and Ronwin," and that "Hutchison's conduct amounts to criminal obstruction of justice." His brief to the 8th Circuit Court of Appeals was replete with further allegations of fraud, conspiracy, or lying by Judge Hutchison and others.

In the disciplinary action the Iowa Supreme Court found Ronwin violated several rules by filing a frivolous lawsuit and making false statements about judges. The Court found that the state and federal suits against Hill were "particularly reprehensible because she was an innocent outsider with no financial means to defend the suits." In revoking Ronwin's license the Court added: "We are not willing to tolerate repeated false malicious accusations of judicial dishonesty. Lawyers who make frivolous and unsupported allegations of criminal conduct against judges deserve harsh punishment."

***Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Wanek*, 589 N.W.2d 265 (Iowa 1999).** Wanek was charged with misrepresenting facts to a federal bankruptcy court and asserting unwarranted legal positions in a chapter 13 proceeding. The grievance commission found him guilty only of conduct prejudicial to the administration of justice, in violation of DR 1-102(A)(5), and recommended a private admonition. On appeal, the Iowa Supreme Court determined Wanek violated not only DR 1-102(A)(5), but DR 1-102(A)(4) and (6) (misrepresentation and conduct reflecting adversely on fitness to practice), DR 7-102(A)(5) (knowingly making false statement of fact in representation of client), and DR 7-102(A)(1) and (2) (taking action on behalf of client when it is obvious such action would serve merely to harass or injure another and knowingly advancing unwarranted claim). The court concluded he "crossed the line dividing zealous advocacy from sharp—and unethical—practice."

Wanek's clients, Tim and Shirley Gerk, had operated a newspaper distribution business. In 1994 they were involved in a tax dispute with the Internal Revenue Service for the years 1987 through 1991. The IRS claimed Gerks owed taxes in the amount of $1,151,036.68. One factor in the dispute was the IRS's disallowance of deductions

claimed for cost of goods sold. In June 1994 Gerks faced an imminent tax sale of their residence.

Respondent filed a chapter 13 reorganization petition to stay the tax sale and to seek discovery from various newspaper corporations concerning the amount of payments Gerks had made to buy newspapers during the tax years in question. Respondent initiated the discovery by sending letters by ordinary mail to the New York Times, the Chicago Tribune, and Investor's Business Daily of Los Angeles (IBD). None of these letters was directed to a named person or to the corporation's legal department. Moreover, the addresses to which the letters were sent were either incomplete or totally inaccurate. The letter to IBD and a letter to The Times at an Illinois address were returned to Wanek as undeliverable.

When the newspapers failed to respond to the informal discovery requests, Wanek obtained orders to compel discovery, and, eventually, a judgment for sanctions of $1,151,036.68 against each of the corporations. Because the sanctions motions were mailed to the same incomplete or inaccurate addresses as the discovery letters, The Times did not receive the motion until after the order for sanctions had been entered. The motion against IBD was returned to Wanek as undeliverable. IBD was unaware judgment had been entered against it until its bank account was frozen several months later upon service of writ of execution.

The three corporations moved to set aside the judgments. Wanek resisted. He pursued execution against IBD in disregard of the undeliverable letters and notices that had been returned to him, and did so even after learning that the information sought from IBD could net Gerks a tax savings of no more than $1,200 to $1,500, a mere a fraction of the $1,151,036.68 judgment. Several months later—after the IRS and Gerks had settled their tax dispute for $112,265, the corporations had incurred litigation expenses totaling almost $100,000, and Wanek had withdrawn from the case—the Gerks through new counsel agreed to vacate the judgments. Meantime, Wanek had made a number of written and oral misrepresentations in the bankruptcy proceedings. Though he eventually acknowledged that some mail to IBD had been returned to him undelivered, a search of his file after it was in the hands of Gerks' new counsel revealed more returned letters to the newspapers than he had admitted.

The court noted a number of "troubling themes" in this case: "A certain cynicism about any representation made by 'big city' lawyers who claim not to have received documents sent weeks earlier. A certain attitude that a million dollar judgment—whether justifiable or not—makes for good leverage when it comes to catching the attention of big corporations. And when it is 'the little guy' versus a 'big guy' like the IRS or the New York Times, and it all turns out 'okay' in the end, a little prevarication here and there doesn't matter." The court noted that "obvious mistakes over misaddressed mail" ended up involving lawyers from New York, Chicago, and Los Angeles "in six months of litigation in Iowa at a cost of nearly $100,000."

Expressing dismay as to the loss of "idealism about how professionals might handle things with less nonsense and more civility," the court suspended Wanek's license indefinitely with no possibility of reinstatement for two months.

V. EX PARTE COMMUNICATION WITH COURT.

A. Rules.

DR 7-110. CONTACT WITH OFFICIALS.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if a copy is promptly delivered to opposing counsel or to the adverse party if not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if not represented by a lawyer.

(4) As otherwise authorized by law.

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B. Cases.

***Iowa Supreme Ct. Bd. of Prof'l Ethics and Conduct v. Ackerman*, 611 N.W.2d 473 (Iowa 2000).** This case involves misconduct in a criminal law proceeding. As counsel for the defendant, Ackerman moved to dismiss the charge for failure to file an indictment or information within forty-five days of arrest. He presented the motion to a judge and obtained an order of dismissal without advising the county attorney. To make matters worse, Ackerman misstated the facts in his motion—the truth was that an information had been filed within forty-five days of his client's arrest. Ackerman had adopted, without checking, his legal assistant's miscalculation of the relevant dates. He also blamed a breakdown in communication with the legal assistant for the failure to clear the order with the county attorney.

The Iowa Supreme Court held that Ackerman's conduct could not be excused by "an isolating wall of sloppiness and confusion." The Court concluded that the ex parte presentation of the dismissal order violated DR 7-110(B) and that the misrepresentation violated DR 1-102(A)(1), (4), (5), and (6). Ackerman's license was suspended indefinitely with no possibility of reinstatement for thirty days.

See also Board v. Lesyshen, supra.

VI. SETTLEMENTS.

A. Rules.

DR 1-102. MISCONDUCT.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on the fitness to practice law.

EC 7-7. In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make independent decisions. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples in civil cases, it is for the client to decide whether to waive the right to plead an affirmative defense....

B. Cases.

***Committee on Prof'l Ethics & Conduct v. Chipokas*, 493 N.W.2d 414, 417-18 (Iowa 1992).** Chipokas committed multiple ethical violations, including the acceptance of a settlement offer without obtaining his client's consent. Chipokas represented Robert Vest in a workers' compensation claim against the City of Cedar Rapids. Vest directed Chipokas to forward all settlement offers to him in writing so that he could show them to trusted friends and obtain their advice. He did not give Chipokas authority to settle for a specific amount. Despite this lack of authority, Chipokas sent a letter to opposing counsel stating that Vest was willing to accept a $45,000 offer. The case was then "settled" for that amount.

When Vest learned that Chipokas had settled the case, he fire Chipokas and retained new counsel to pursue the workers' compensation claim. The City of Cedar Rapids then sued Vest for specific performance of the alleged settlement. The district court found that Chipokas did not have authority to settle the case.

In the disciplinary proceedings the Iowa Supreme Court concluded Chipokas violated a number of rules, including EC 7-7 which provides that it is solely the client's decision whether to accept an offer of settlement. The Court further found that Chipokas violated DR 1-102(A)(4) by misrepresenting to opposing counsel that he had authority to settle. Chipokas also violated DR 1-102(A)(5) (conduct prejudicial to the administration of justice) because "the Benton County district court had to take valuable time to hear [the specific performance] suit, which would not have been filed except for Chipokas' unauthorized conduct." For this and other misconduct Chipokas' license was suspended for not less than a year.

***Committee on Prof'l Ethics & Conduct v. Hearity*, 460 N.W.2d 448 (Iowa 1990).** Hearity represented the plaintiffs in a lawsuit against the City of Oelwein and two

police officers. During the proceedings he twice took defaults after promising not to. The defaults were set aside. After a settlement was reached, Hearity's clients became upset by what they perceived as gloating by the city attorney regarding the relatively small amount of the settlement. Hearity assisted his clients in attempting to renege on the settlement agreement. The defendants incurred considerable expenses in enforcing the agreement. *See Hearity v. Iowa District Court*, 440 N.W.2d 860 (Iowa 1989). In subsequent disciplinary proceedings, the Court concluded that Hearity's conduct violated DR 7-102(A)(1) and (2), as well as DR 1-102(A)(5) and (6). Because of Hearity's relative youth and inexperience, the Court determined that a public reprimand was sufficient.

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VII. COMMUNICATION WITH ADVERSE PARTY.

A. Rules.

DR 7-104. COMMUNICATING WITH ONE OF ADVERSE INTEREST.

(A) During the course of representing a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party known to be represented by a lawyer in that matter except with the prior consent of the lawyer representing such other party or as authorized by law.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

B. Case.

***Iowa Supreme Ct. Bd. of Prof'l Ethics and Conduct v. Sullins*, 556 N.W.2d 456 (Iowa 1996).** Sullins learned from prosecutors that they were bringing a CHINA proceeding concerning the daughter of one of his clients. The client was suspected of sexually abusing her. At the close of business that day, a deputy clerk informed Sullins that the CHINA petition had been filed but that no order appointing counsel for the child had yet been entered. From his experience Sullins knew that counsel is routinely appointed for the child in such proceedings but that there typically is some delay between filing of the petition and entry of the order appointing counsel. Taking advantage of that delay, Sullins went to the child's residence that night and personally interviewed her.

The Iowa Supreme Court held that under the circumstances Sullins violated DR 7-104(A)(1), prohibiting communication with a party known to be represented by a lawyer without obtaining that lawyer's consent. Sullins also was found to have failed to respond to inquiries concerning his conduct in another matter by the Polk County Bar Association. For these violations, the Court issued a public reprimand.

VIII. LAW OFFICE MANAGEMENT/CRIMINAL CONDUCT (TAX).

A. Rules.

DR 1-102. MISCONDUCT.

(A) A lawyer shall not:

. . . . . .

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on the fitness to practice law.

. . . . . .

B. Case.

***Iowa Supreme Ct. Bd. of Prof'l Ethics and Conduct v. Morris*, 604 N.W.2d 653 (Iowa 2000).** Morris pleaded guilty to a state charge of fraudulent practice in the fourth degree, based on his willful failure to pay withholding taxes on his law office employee's wages and to file the required withholding forms. At the subsequent disciplinary hearing Morris testified he did not pay the withholding taxes because of his limited income.

Although many lawyers have been disciplined for failure to file personal income tax returns, this is the first case in which the Iowa Supreme Court has considered a lawyer's failure to pay employee withholding taxes in the operation of a law office. The Court concluded the withholding violations were at least as serious as a failure to file personal income tax returns and that the conduct violated DR 1-102(A)(3), (4), (5), and (6). Morris, who had a prior disciplinary record, had his license to practice suspended for at least six months.

THE "NUTS AND BOLTS" OF PRODUCTS LIABILITY: SOME SUGGESTIONS ON HANDLING TROUBLESOME ISSUES FOR DEFENSE ATTORNEYS IN PRODUCTS CASES

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INTRODUCTION

The defense of a products liability case involves successfully traversing a minefield of traps at various stages of the case. Although most counsel can identify these traps, not everyone is in agreement on how best to deal with them.

The examples discussed below comprise some of the biggest challenges confronting the defense practitioner in a product liability case involving a serious personal injury. Unless these issues are handled successfully, it will be difficult, if not impossible, for the court and jury to focus on the relevant liability facts of the accident in question.

This paper will present a representative sampling of some of the more well-known "traps." After a brief synopsis of the black-letter law, we will discuss a few of the strategic and practice considerations attending each one of them, along with some suggestions on how to deal with these problems.

1. OTHER ACCIDENTS, CLAIMS OR LAWSUITS.

A. The law of the admissibility of other accidents, claims or lawsuits.

Prior to presenting any evidence regarding other accidents, claims, complaints, warranty claims or lawsuits allegedly of the type involved in a case, a plaintiff must make a preliminary showing, outside the presence of the jury, of a proper foundation for the admissibility of the proffered evidence. A proper foundation pursuant to Federal or Iowa R. Evid. (hereinafter "Rules") 104(a) requires a showing of: (a) a substantially similar product; and (b) an incident that occurred under substantially similar circumstances as the accident at issue.

Under Rules 401, 402 and 403, evidence of other accidents, claims, complaints, warranty

claims or lawsuits must be "substantially similar" in order to be admissible in evidence. In Iowa, evidence of other lawsuits, complaints or claims is not admissible without a preliminary foundational showing that the facts of the other matters are substantially similar to the facts in this case. Lovick v. Wil-Rich, 588 N.W.2d 688, 697 (Iowa 1999); Fell v. Kewanee Farm Equip. Co., 457 F.2d 911, 920 (Iowa 1990) (other accidents kept out of evidence because the same part of the machine was not involved; finding affirmed on appeal); Oberreuter v. Orion Indus., Inc., 398 N.W.2d 206, 211-212 (Iowa App. 1986) (plaintiff's evidence of an allegedly similar accident was too remote and was properly ruled inadmissible on relevancy grounds); Madison v. Colby, 348 N.W.2d 202, 209-210 (Iowa 1984) (premises liability case; subsequent fall kept out of evidence because it occurred under different conditions); Eickelberg v. Deere & Co., 276 N.W.2d 442, 445 (Iowa 1979) (inconvenience of trying collateral issues is a concern; admission or rejection of such evidence calls for the exercise of sound judicial discretion by the trial court; evidence kept out because circumstances were different, and this finding was affirmed on appeal).

Federal courts, including the Eighth Circuit, have similarly applied evidentiary rules limiting the admissibility of evidence of other accidents, claims or lawsuits. See, e.g., Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496 (8th Cir. 1993) (evidence of other injuries may raise extraneous controversial points, lead to confusion of issues and present undue prejudice disproportionate to its usefulness); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985) (before other accidents are relevant, the circumstances of the other accidents must be substantially similar to the facts at issue in the instant litigation); Thomas v. Chrysler Corp., 717 F.2d 1223 (8th Cir. 1983) (testimony of two van owners who would have testified that their vans' doors opened while vans were in motion was not admissible; sufficient similarity of conditions

of product, or circumstances of accidents not shown).

Absent a showing of substantial similarity of the condition of the product and factual circumstances of the accident, evidence of this type is not relevant and therefore, inadmissible. Further, in a close case the probative value of such evidence may be outweighed by its tendency to invite a decision on an improper basis, and may be excludable under Iowa R. Evid. 403.

B. Strategy and practice considerations.

Defense counsel must seek, at the earliest possible stage, to determine whether and to what extent the other accidents, claims and lawsuits may be involved in the subject action. This should be a part of the initial conference with the client. This issue should not be ignored, and it will not simply "go away." The question should be posed to the client in the manner in which defense counsel believes it will be posed by the adversary, and/or permitted by the trial court.

Once other accidents, claims or lawsuits have been identified by the client, their initial discoverability must be examined. This requires a close examination of the precise circumstances of each accident. Ordinarily a company witness, engineer, or product safety manager familiar with this information can be of great assistance in distinguishing the other accidents from the one at bar. Ultimately, the potential admissibility of this information into evidence must be considered. In order to know exactly what information will be presented to the jury, pretrial motions should be filed to test the admissibility of this evidence. This can be done through pre-trial motions *in limine* pursuant to Rule 104(a), or by virtue of Iowa R. Civ. P. 116 regarding "[S]eparate adjudication of law points."

In a case involving detailed matters of a considerable nature, it may be necessary (and in the defendant's best interests) to ask for a Rule 104(a) evidentiary hearing in order to determine

the relevance and admissibility of the proffered evidence. It may even be necessary for defense counsel to have an expert witness testify as to why the proffered incidents are not relevant to the case at hand. This hearing should be reported in order to create a fulsome record on appeal, should the court deny your motion *in limine*.

In the unusual situation where the subject product has not been involved in any prior accidents, claims or lawsuits, defense counsel should be prepared to present that evidence as a major tenet of the case. More likely than not, the defendant will be required to prove that it has some type of "system" set up such that incidents are likely to come to its attention. For example, if product dealers and distributors are instructed to report such incidents to the defendant, this can be helpful to establish that if, in fact, there had been any other accidents, claims or lawsuits involving this product, that such information would have certainly come to the attention of the defendant. The complete absence of other accidents, claims or lawsuits can be very probative evidence in a design defect case, or a situation where the defendant claims that plaintiff was negligent and caused his or her own injury.

Broad, far reaching and virtually limitless discovery is often sought regarding other accidents, claims and lawsuits. Defense counsel should make every effort to limit the proper scope of discovery to those incidents which are relevant to the subject matter of the case, or reasonably related so as to lead to the discovery of admissible evidence. If discovery of voluminous documentary information is involved, the defendant should request an order from the court requiring the plaintiff to pay for this marginal, yet expensive, discovery. This is especially justified where a plaintiff asks for discovery of matters which are only slightly or potentially probative. Defense counsel should not forget to enforce the "proportionate" requirement in the

discovery rules Iowa R. Civ P. 123 (a)(2)(C).

Both the Iowa and Federal Rules of Civil Procedure provide mechanisms for a defendant to limit the proper scope of discovery. Absent an agreement by the parties, the court can enter an order delimiting the scope of permissible discovery. If no effort is made to properly limit the scope of discovery, it will predictably be more difficult to keep other incidents out of evidence when proferred by opposing counsel

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In a case where numerous other accidents exist and will be admitted into evidence, that information must be placed into proper context for the court and jury. Plaintiffs in recent cases have called other injured plaintiffs to the witness stand to tell about their accidents as well. See, e.g., Burke v. Deere & Co. and Lovick v. Wil-Rich, cited infra. Rule 403 may be used to try to prevent or limit such unfairly prejudicial evidence. Counsel may want to consider calling other users and consumers of the product to the stand to relate their experience of using the product correctly, and according to the instructions and warnings, without any injury occurring. Also, the relative scarcity of numbers of accidents involving a product where hundreds of thousands have been built and sold may be used to prove the "reasonable" nature of the design, and the lack of any "defect" with regard to the design. For example, in Sturm v. Clark Equipment Co., 547 F. Supp. 144 (W. D. Mo. 1982), aff'd, 732 F.2d 161 (8th Cir. 1984), the court permitted evidence that there had been only one accident in 74,000 machine years of usage of 34,000 machines to demonstrate the reasonableness of the design and to rebut allegations concerning design defect. The defense ultimately won the verdict. This demonstrates that in providing the plaintiff with information concerning other accidents, the defendant may be able to use that same evidentiary information to its advantage at trial.

2. SUBSEQUENT REMEDIAL MEASURES.

A. The law of the admissibility of subsequent remedial measures.

Iowa R. Evid. 407 provides as follows:

Rule 407 Subsequent remedial measures.

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered in connection with a claim based on strict liability in tort or breach of warranty or for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Iowa R. Evid. 407 (emphasis added). The primary goal of Rule 407 is to avoid the jury confusion which would result form the admission of and focus on subsequent actions taken by a manufacturer, changes which the jury may equate with a tacit admission that the prior condition or warnings were defective, when the relevant issue is the condition of the product or warning at the time of sale. Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) (discussing comments to Fed. R. Evid. 407). However, this laudable public policy goal does not apply in Iowa. In Iowa, subsequent remedial measures are admissible in a strict liability or implied warranty case, and this evidence may be used to establish liability on the part of the defendant.

Fed. R. Evid. 407 was recently amended to make it clear that it applies in product liability actions. Prior to the amendment, only two circuits interpreted Rule 407 as not applying to products cases, and the Eighth Circuit was one of them. However, today it is clear that Fed. R. Evid. can be used to keep out subsequent remedial measures in a products case, while Iowa Evid. 407 can be used by plaintiffs as a basis for the admissibility of such evidence.

In a negligence case in Iowa, subsequent remedial measures are not admissible to prove

negligence or culpable conduct. Iowa R. Evid. 407. The term "event," as used in the rule excluding evidence of subsequent remedial measures, refers to the accident or time of plaintiff's injury. See Tucker v. Caterpillar, Inc., 564 N.W.2d 410, 414 (Iowa 1997) ("event" is the date of the accident, not the date of the design in question).

While plaintiffs will frequently argue that they are entitled to admit evidence of subsequent remedial measures on the issue of "feasibility," Rule 407 specifically limits evidence of subsequent remedial measures to demonstrate feasibility only if feasibility is "controverted." Iowa R. Evid. 407. This limitation has been upheld by numerous courts. See, e.g., Cameron v. Otto Bock Orthopedic Indus., Inc., 43 F.3d 14, 17 (1st Cir. 1994); Mills v. Beech Aircraft Corp., Inc., 886 F.2d 758, 763-64 (5th Cir. 1989); Albrecht v. Baltimore & Oh. R.R. Co., 808 F.2d 329, 331 (4th Cir. 1987); Fish v. Georgia-Pacific Corp., 779 F.2d 836, 840 (2nd Cir. 1985); Werner v. Upjohn Co., 628 F.2d 848, 855 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981). Further, improper admission of this evidence can result in reversible error, possibly requiring a new trial. See Albrecht, 808 F.2d at 332 (finding that it was reversible error to exclude evidence of subsequent remedial measures when feasibility was not contested); Fish, 779 F.2d at 840 (holding that, despite limiting instruction, reversible error resulted from admission of evidence respecting subsequent remedial measures).

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B. Strategy and practice considerations.

All other things being equal, if federal diversity jurisdiction is available to the defendant, federal court removal may be advisable, especially if the product involves potentially damaging proof of subsequent remedial measures. This is because under Fed. R. Evid. 407, subsequent remedial measures are not admissible in a products case. On the other hand, Iowa R. Evid. 407

makes it clear that such remedial measures are admissible in a products case.

Even so, removal does not guarantee that subsequent remedial measures will not be admitted on issues other than liability, such as "feasibility." Even Fed. R. Evid. 407 has explicit exceptions where the rule does not apply. Clearly, however, a plaintiff may not use the fact that a product's design has been changed, by reason of the subject incident, as proof of negligence, fault or culpable conduct on the part of the product manufacturer.

If defense counsel is working on a case with potentially damaging subsequent remedial measures, care must be taken to not argue the issue of feasibility or any other issue that would "open the door" for the exceptions to Rule 407. Even if feasibility of precautionary measures is not in issue, and is stipulated to, this does not mean that the defendant cannot rely on the defense of "state-of-the-art" under Section 668.12 Code of Iowa (1999). Just because something is possible to do as a design alternative, does not mean that the design in question is not "state-of-the-art" under Iowa law. Defense counsel will need to be careful in making this distinction for the trial court, however, as most judges may become confused in comparing the terms "feasibility" and "state-of-the-art."

On the other hand, injecting the defense of "state-of-the-art" into the case may bring forth a troublesome claim of "continuing duty to warn" that plaintiff might not have otherwise made, or thought about.

As is true of proof of other accidents, claims or lawsuits, the potential admissibility of subsequent remedial measures should be determined at the earliest possible stage of the claim or litigation. If such measures are likely admissible, the client needs to be told this so that they can factor that into their evaluation of the matter.

Finally, the Iowa Supreme Court has held that a "failure to warn" claim in Iowa is one based exclusively on negligence, and not strict liability. See Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994). Thus, any subsequent remedial measures involving a post-accident change in warnings or instructions is not admissible, since this is a negligence claim and not one based on strict liability in tort. Many trial judges will not be familiar with this subtle distinction and should be educated by defense counsel to insure that the jury's decision is not based on an improper evidentiary ground, such as inadmissible "subsequent remedial measures."

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3. PUNITIVE DAMAGES.

A. The law of punitive damages.

Punitive damage claims in Iowa are exclusively governed by statute. Iowa Code § 668A.1 (1999); McClure v. Walgreen Co., 2000 Iowa Sup. LEXIS 125 (decided July 6, 2000); Burke v. Deere & Co., 6 F.3d 497, 511 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (U.S. 1994); Hockenberg Equip. v. Hockenberg's Equip. & Supply Co., 510 N.W.2d 153, 156 (Iowa 1993) The statutory standard requires the plaintiffs to establish that a particular defendant knew that its conduct or product was dangerous or unsafe and continue in that conduct despite knowledge of the danger. Burke, 6 F.3d at 511. Further, plaintiffs must prove the foregoing facts by a preponderance of "clear, convincing and satisfactory evidence." Pulla v. Amoco Oil Co., 882 F. Supp. 836, 874 (S.D. Iowa 1994), aff'd and rev'd in part on other grounds, 72 F.3d 648 (8th Cir. 1995); Beeman v. Manville Corp. Asbestos Fund, 496 N.W.2d 247, 255 (Iowa 1993). Specifically, to receive punitive damages, the statutory standard requires a plaintiff to demonstrate that:

[B]y a preponderance of clear, convincing and satisfactory evidence, the conduct

> of the Defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.

Iowa Code at § 668A.1 (emphasis added); see also Lovick v. Wil-Rich, 588 N.W.2d 688, 699 (Iowa 1999) (stating that conduct must follow the standard promulgated in Section 668A.1 to justify a punitive damage award).

When seeking punitive damages, plaintiffs are held to a heightened burden of proof. This is because punitive damages are extraordinary in nature, and are not intended to provide compensation, but instead to punish aberrant behavior and prevent future instances of similar conduct. Pulla, 882 F. Supp. at 873; Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 865 (Iowa 1994); Beeman, 496 N.W.2d at 255. Because of their non-compensatory nature, both Iowa courts and federal courts construing Iowa law strictly limit a claimant's right to recover punitive damages. See Burke, 6 F.3d at 511-12; Pulla, 882 F. Supp. at 873-74; Hockenberg, 510 N.W.2d at 156; Beeman, 496 N.W.2d at 255. Merely demonstrating that a defendant's conduct was objectionable is insufficient. Lovick, 588 N.W.2d at 699. Plaintiff must establish, by "clear, convincing and satisfactory evidence," a "persistent course of conduct" by the defendant which exhibits the complete absence of care and "disregard for the consequences." Pulla, 882 F. Supp. at 874; Beeman, 496 N.W.2d at 255. This showing is required to satisfy the "willful and wanton" standard.

> Conduct is willful and wanton when the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. An award of punitive damages is not appropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue.

Burke, 6 F.3d at 511 (emphasis added).

If plaintiffs are unable to establish, through a clear, convincing and satisfactory preponderance of substantial evidence, that defendants acted with "willful and wanton disregard" for the rights or safety of others as required by Iowa substantive law, plaintiffs are not entitled to recover punitive damages. See Burke, 6 F.3d at 511 (noting that plaintiffs are not entitled to punitive damages if there is any basis for disagreement or debate respecting defendant's conduct); Pulla, 882 F. Supp. at 881 (same); Hillrichs v. Avco Corp., 514 N.W 2d 94, 100 (Iowa 1994) (same) Moreover, the fact that a product or a manufacturer's conduct was in accord with the "custom and practice" in the industry further bolsters the position that plaintiffs are not entitled to exemplary damages.

> [W]here a defendant lacks specific knowledge of a potential harm and its conduct does not set it apart from others with the same general knowledge, the defendant may have acted negligently, but has not acted with willful and wanton disregard for the rights of others such that punitive damages will lie

Pulla, 882 F. Supp. at 881. Further, punitive damages are inappropriate if the risk at issue "could reasonably have been perceived as slight" by the defendant Burke, 6 F 3d at 511.

B. Strategy and practice considerations.

Punitive damages claims are extremely risky. A lay-person jury has almost unlimited discretion in considering a claim for punitive damages. The mere fact that the trial court has chosen to submit such a claim to the jury should be cause for great concern for any product manufacturer. Unfortunately, however, trial judges can be reticent to dismiss such claims except in the most clear of situations, where plaintiffs ordinarily voluntarily dismiss their claims.

One risk inherent in a submissible punitive damages case is that the jury will be told of the financial condition of the defendant. Even though the Iowa punitive damages statute, Chapter

668A, makes it clear that the mere assertion of a punitive damages claim does not render discoverable the defendant's financial condition, such matters will be discoverable (and likely admissible) once the trial court has determined that a proper punitive damages case has been shown. For most product manufacturers, the effect will be to inform the jury that the defendant has hundreds of millions of dollars, if not billions of dollars, with which to respond to a punitive damages judgment. This seldom bodes well for a large multi-national corporation in a serious personal injury case.

The United States Supreme Court gave defendants an additional punitive damages argument in BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1997). In Gore, the Court found that it was constitutionally impermissible for a jury in one jurisdiction to punish a defendant for conduct that may have been legal when committed in another jurisdiction. For example, if other allegedly wrongful acts are the basis for punitive damages liability, defense counsel should investigate the situs of those other wrongful acts and determine, according to the law of that locality, whether such conduct was wrongful or illegal. If it was not, then a good argument can be made premised on Gore that it would be unconstitutional for an Iowa jury to punish a defendant based on conduct that was legal in the jurisdiction where it occurred.

Defendant may urge that the Iowa punitive damages statute, Chapter 668A, requires intentional conduct by a defendant before punitive damages may be awarded. This issue has never been decided by the Iowa Supreme Court. When Chapter 668A was enacted by the Iowa Legislature in 1986, it was a clear attempt to make punitive damages claims more difficult to win. The standard of proof was set as a preponderance of "clear, convincing and satisfactory" evidence. The type of conduct was identified as "willful (i.e., intentional) and wanton disregard

for the rights or safety of another." Whereas reckless or grossly negligent conduct may have formerly supported an award of punitive damages, now willful conduct is required. Defendant's conduct must be willful and wanton, not willful "or" wanton. Such an argument may be used to severely restrict the applicability of punitive damages claims in products cases.

If the foregoing argument is not successful with the Iowa Supreme Court, counsel can, nevertheless, use it with the jury to illustrate exactly why an award of punitive damages is not proper in the case at bar.

4. FAILURE TO WARN CLAIMS.

A. The law of failure to warn.

Under Iowa law, claims that a product manufacturer failed to provide sufficient warnings or instructions are strictly limited to negligence grounds. Lamb v. Manitowoc Co., Inc., 570 N.W.2d 65, 68 (Iowa 1997); Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994).

> [T]he correct submission of instructions regarding a failure to warn claim is under a theory of negligence and the claim should not be submitted as a theory of strict liability.

Olson, 522 N.W.2d at 289

To be successful under a negligent failure to warn claim under Iowa law, Plaintiffs must satisfy the following standard:

> Regarding Plaintiff's claim that Defendant was negligent in failing to provide warnings, a supplier of a product has a duty to warn the user of the product if:
>
> (a) the supplier knows or should know of a condition of the product, in light of the generally recognized and prevailing best scientific knowledge at the time, which was likely to be dangerous when used in an intended or anticipated manner, and,

(b) the supplier has no reason to believe that the user will realize the dangerous condition.

A supplier is not required to warn about products when the danger, or potential danger, is generally known and recognized.

Under these circumstances, the suppler has a duty to exercise reasonable care to inform the user of the product of the dangerous condition or of the facts which make it likely to be dangerous.

Iowa Civil Jury Instruction 1000.7; Olson, 522 N W.2d at 289-90. Under this standard, a plaintiff must establish, among other things, that: 1) defendant knew or should have known that the product was unreasonably dangerous as manufactured; 2) defendant had no reason to believe that product users would recognize the dangerous condition; 3) defendant failed to provide an adequate warning; and 4) the absence of a warning was a proximate cause of plaintiff's injuries and damages.

B. Strategy and practice considerations.

In most failure to warn claims, the primary defense will be lack of proximate cause. Defense counsel is on solid ground here, since no scientific study has ever proven the efficacy of an on-product warning. See, e.g., "A Critical Analysis of On-Product Warning Theory," William H. Hardie, BNA Product Safety & Liability Reporter, Feb. 11, 1994. Due to the state of knowledge in this area even today in the year 2000, it cannot be proven, to a reasonably certain degree, or by a preponderance of the evidence that a particular plaintiff would have acted differently had a certain warning been on a product or in a package insert.

In fact, in recent years plaintiff's counsel have used the proven ineffectiveness of on-product warnings to argue that giving a warning is not good enough if the product is otherwise defectively designed.

When the defense of a warnings case establishes the proven ineffectiveness of on-product warnings, plaintiff's customary retort is: "[A]t least if they had been told, they would have had a chance to avoid the accident." Although this argument may be attractive by virtue of its simplicity, it completely ignores the fact that a plaintiff, in a personal injury case, must prove their case by a preponderance of the evidence. A preponderance of the evidence is 50%+, not a mere "chance" that an additional warning "might" change the subject Plaintiff's conduct in such a way as to avoid the accident. In this manner, plaintiff's counsel's "chance" argument can be used to prove that plaintiff's case has not met its burden of proof

Another approach that defense counsel should be ready for is the argument that "the warning on the product serves to remind the plaintiff of the danger." This argument is often injected into the case by the testimony of plaintiff's liability or human factors expert or "advocate." In truth and in fact, however, there is no legal duty to remind a plaintiff or consumer of that which they already know. Thus, there is no legal duty to put a warning on a product to remind a user or consumer of a hazard. See, e.g., "Use of Product Warning Labels As A Reminder," William H. Hardie, BNA Product Safety & Liability Reporter, Aug. 9, 1996. Simply put, if the danger is open and obvious, there is no legal duty to warn. If the particular user or consumer already knows of the danger, then there is no proximate cause between the product manufacturer's failure to warn and the accident that occurred. A motion *in limine* should be filed to prevent such testimony from being presented to the jury

If a failure to warn claim will be a central theme in the case, this area needs to be explored with prospective members of the jury during *voir dire*. If the case is in federal court, defense counsel will likely have a very limited amount of time within which to do so. Nevertheless, the

panel member's attitudes towards warnings and their proven ineffectiveness in the "real world" should be examined. There are a myriad of ways to do so, but every-day examples that are known to the prospective jury members, perhaps through their employment, probably work as well as any other approach.

Finally, placing a warning on a product may not be enough to render it non-defective under the Restatement (Third) of Torts: Products Liability. See Sec. 2(c), official comment l ("In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks.") This is a subtle change in the law from the Restatement (Second), § 402A, which held that a product that is safe for use if the warning is followed, is not defective and unreasonably dangerous. Thus, in a failure to warn case, the defendant will be requesting an instruction consistent with the Restatement (Second) of Torts, §402A, while the knowledgeable plaintiff's attorney will be requesting the approach of the Restatement (Third) of Torts: Products Liability be used.

5. DESIGN DEFECT CLAIMS.

A. The law of design defect.

To be successful on a design defect claim under Iowa law, a Plaintiff must establish that the designer or manufacturer produced a product that was unreasonably dangerous because it failed to use reasonable care in its design. Wernimont v. International Harvester Corp., 309 N.W.2d 137, 140 (Iowa App. 1981). "Unreasonably dangerous" refers to a consumer's reasonable expectations concerning the product's characteristics. Id.; see also Aller v. Rogers Mach. Mfg. Co., 268 N.W.2d 830, 835 (Iowa 1978) (recognizing that the risk-utility balancing

test also provides a basis to measure whether a product is defective).

Currently, Iowa law permits claimants to pursue design defect claims under both negligence and strict liability theories, although it is likely that only one such claim can be advanced. Lovick v. Wil-Rich, 588 N.W.2d 688, 699 (Iowa 1999). However, only a negligence, or "reasonable care" inquiry is appropriate to evaluate these decisions. See Restatement (Third) of Torts: Products Liability § 2; Morales v. American Honda Motor Co., 71 F.3d 531, 536 (6th Cir. 1995); see also Hillrichs v. Avco Corp., 478 N.W.2d 70, 76 n.2 (Iowa 1991) (citing authority). This is because there is no practical or principled distinction between design defect claims premised on strict liability and negligence theories. E.g., Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960. Design claims should only be submitted to the jury under a negligence theory. See Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994) (finding that negligent and strict liability failure to warn claims are judged under a reasonableness standard and should only be considered by the jury under a negligence theory). The Iowa Supreme Court agreed with this analysis in Hillrichs v. Avco Corp., when it held that an enhanced injury design defect claim should only be submitted on a negligence theory. 478 N.W.2d at 75-76. Further, the court has recognized the substantial similarity or overlap between negligent and strict liability design defect claims. Lovick, 588 N.W.2d at 699; Hillrichs, 478 N.W.2d at 76 n.2. Many jurisdictions agree with this analysis, holding that when a product's design is in issue, only a negligence standard applies. See, e.g., Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66 (Ky. 1973); Prentis, 365 N.W.2d at 184-86; Lancaster Silo & Block Co. v. Northern Propane Gas Co., 427 N.Y.S.2d 1009 (N.Y. App. 1980); Foley v. Clark Equip. Co., 523 A.2d 379 (Pa. Super.),

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appeal denied, 531 A.2d 780 (Pa. 1987).

B. Strategy and practice considerations.

Defense counsel should employ motions for summary judgment and pretrial motions *in limine* in order to delimit and narrow plaintiff's claims for defective design. Even if the motions are denied pretrial, they will serve to educate the trial judge on the issues that will be confronted in the case. The net effect will be that only one defect claim will be submitted. This argument can be presented to the trial court in convincing fashion by emphasizing the havoc that would be created by an inconsistent verdict by the jury. For example, what if the jury finds for the plaintiff on negligent design, but for the defendant on strict liability design defect: is not negligence supposed to be more difficult to prove than strict liability? Submitting only one design defect claim prevents the possibility of an inconsistent jury verdict and a complete retrial of the case.

The timing of such motions is a matter for consideration. If filed too soon, they may serve to educate your adversary as to which claim is the best claim. If filed too late, you risk a hasty, incorrect ruling from the trial court.

Defense counsel may push plaintiff's counsel to focus on a negligent design claim in lieu of a "strict liability in tort" design claim. If successful, defense counsel may then urge that application of Iowa R. Evid. 407 (relating to the admissibility of subsequent remedial measures) does not apply to post-accident design changes, since the nature of the design claim is one based on negligence, and not strict liability.

The Iowa Supreme Court in Leaf v. Goodyear Tire & Rubber Corp., 590 N.W.2d 525 (Iowa 1999) made it clear that the factors enunciated in Daubert v. Merrell Dow may be considered by Iowa trial courts in order to evaluate the admissibility of expert witness testimony

under Iowa R. Evid. 702. Defense counsel involved in defending a design defect case should take advantage of this invitation. These factors are: (1) can the theory be tested, and has it been tested? (2) has the theory or technique been subjected to peer review or publication? (3) what is the known or potential rate of error? (4) are there controlling standards? (this element was mentioned in Daubert, but left out (most likely inadvertently) by the Iowa Supreme Court in Leaf) (5) is it generally accepted within the relevant scientific community? (6) has the expert done scientific research on this subject, or is the opinion merely given by this person in the context of litigation? (this element comes out of the Ninth Circuit's opinion on remand of Daubert, and was not mentioned in Leaf) In addition, to the fullest extent possible, defense counsel in a design defect case should absolutely require plaintiff's expert to specify an alternative reasonable design as required by the Restatement Third of Torts, Section 2(b), and absent that, seek summary dismissal of the case.

Iowa defines "defective and unreasonably dangerous" by using a "hybrid" which incorporates both the consumer expectations test and risk-utility test. The recently-adopted Restatement (Third) of Torts, Products Liability has adopted the risk-utility test of defect, with the additional requirement for plaintiff to prove an "RAD" (reasonable alternative design) See § 2(b). Whether the Iowa Supreme Court adopts the Restatement Third's approach remains to be seen. Certainly the test set forth in § 2(b) is more straightforward and easier for a lay-person jury to understand than the antiquated "hybrid" test used in Iowa courts.

6. MANUFACTURING DEFECT CLAIMS.

A. The law of manufacturing defects.

To be successful on a manufacturing defect claim pursuant to Iowa law, a plaintiff must

demonstrate, among other things, that: the product was defectively manufactured; the manufacturing defect existed at the time the product left the manufacturer's control; the manufacturing defect rendered the product unreasonably dangerous; and the manufacturing defect was a proximate cause of the plaintiff's injuries. See Burke v. Deere & Co., 6 F.3d 497, 503 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994). Most importantly, for the purposes of a manufacturing defect claim, it must be established that a manufacturing defect existed and that the manufacturing defect rendered the product unreasonably dangerous. E.g., Momen v. U.S., 946 F. Supp. 196, 206 (N.D.N.Y. 1996); Dico Tire, Inc. v. Cisneros, 953 S.W.2d 776, 783 (Tex. Ct. App. 1997).

A manufacturing defect exists when a product, as distributed, deviates from the plans, specifications, design, standards or blueprints established by the manufacturer. E.g., Momen, 946 F. Supp. at 206; Spectron Development Lab. v. American Hollow Boring Co., 936 P.2d 852, 856 (N.M. Ct. App. 1997); Lombard v. Centrico, Inc., 557 N.Y.S.2d 627, 628 (N.Y. App. 1990); Dico, 953 S.W.2d at 783; Sims v. Washex Mach. Corp., 932 S.W.2d 559, 562 (Tex. Ct. App. 1995). Consequently, the manufacturer's design or specifications establish the standard from which a manufacturing defect claim must be evaluated.

B. Strategy and practice considerations.

In discovery, through contention interrogatories or requests for admissions, and at the deposition of plaintiff's liability expert, defense counsel should make the plaintiff identify whether they are proceeding on a manufacturing defect claim. If they are, and there is some proof of such defect in the case, then the client needs to be advised that plaintiff will likely get to the jury, notwithstanding the fact that defendant has taken all reasonable precautions to prevent an error

from occurring. This is also true even if plaintiff cannot show how the defect occurred. This is because a manufacturing defect case is the only "true" strict liability case. Plaintiff can establish liability without showing fault in this circumstance. Since liability will be established once the manufacturing defect is proven, in such a case the only defense will be lack of causation or damages.

Since this is a true strict liability claim, and by virtue of the particular wording of Iowa R. Evid. 407 regarding subsequent remedial measures, the client must be advised that any and all subsequent remedial measures by the defendant will be admissible into evidence. Thus, in a manufacturing defect case in Iowa subsequent remedial measures are admissible to prove liability. If the case is removed to federal court, subsequent remedial measures will not be admissible, even if the claim is based on strict liability in tort, and even if the claim involves one for manufacturing defect.

Many plaintiffs attorneys allege, in conclusory fashion, that the product was "defective and unreasonably dangerous" and that its defect was one of "manufacture and design." In such a case, plaintiff must be made to specify exactly and in what manner the product is claimed to be defective in "manufacture." It may be that what was intended by plaintiff was a design defect, rather than manufacturing defect, claim, and that the "manufacturing defect" nomenclature found its way into the petition without much thought being given to same. At any rate, defense counsel should focus on making plaintiff's counsel identify the exact nature of the manufacturing defect alleged, so that improper application of Iowa R. Evid. 407 is avoided.

7. FEDERAL COURT REMOVAL.

A. The law of removal.

Removal of an action filed in state court to federal court is governed by federal statutory law. See 28 U.S.C. §§ 1331, 1332, 1441 and 1446 (1999). Generally, actions filed in state court may be removed to federal court if the case involves a federal question, 28 U.S.C. § 1331, or if there is diversity between the parties and the amount in controversy exceeds $75,000, 28 U.S.C. § 1332. When removal of an action is premised upon the diversity jurisdiction of federal courts, the party attempting to remove the action must establish that there is "complete" diversity, i.e. that no defendants have the same citizenship as any plaintiff. For individuals, citizenship is determined by place of domicile (residence with a present intention of remaining there). For corporations, citizenship is determined by state of incorporation and principal place of business. 28 U.S.C. § 1332(c)(1). A defendant who is a citizen of the state where the action was initially filed cannot seek to remove the action to federal court. 28 U.S.C. § 1441(b).

To remove an action to federal court, the defendant must file a Notice of Removal within thirty (30) days after receipt of the Petition or Summons setting forth the cause of action. 28 U.S.C. § 1446(b). The Notice of Removal must specifically set forth the grounds for removal and have all documents filed in the state court action attached. 28 U.S.C. § 1446(a). If the matter is not initially removable to federal court, based upon the allegations contained in the Petition, the defendant may seek removal on diversity of citizenship grounds for up to one year after the action was initially filed, if the defendant seeks removal within thirty days after the pleading which would permit removal is received by the defendant. 28 U.S.C. § 1446(b). Concurrently upon filing the Notice of Removal, the defendant seeking removal must file a copy of the Notice of

Removal with the applicable state court and provide notice to all parties to the action. 28 U.S.C § 1446(d).

To remove an action from Iowa state court to the applicable federal court (28 U.S.C. § 95 lists the appropriate federal court for removal of a cause of action filed in an Iowa state court), a defendant must file the following documents with the federal court.

1. Civil Cover Sheet;

2. Notice of Removal

3. Certification Pursuant to Local Rule 81.1.

4 Clerk's Receipt (signed by the state court clerk, showing that the Notice of Removal has been filed in the state court).

5. $150 filing fee.

At the same time, the defendant must file the Notice of Removal with the state court where the action is pending.

B. Strategy and practice considerations.

In order to invoke the federal court's removal jurisdiction in a diversity case, it will be necessary for defense counsel to allege that the "amount in controversy" in the case exceeds $75,000, exclusive of interest and court costs. In small cases where plaintiff's counsel absolutely does not want to proceed in federal court, it is possible that plaintiff's counsel could oppose the removal by filing a stipulation with the court that there is, in fact, less than $75,000 in controversy, and that they will stipulate to a judgment (if any) for an amount less than the jurisdictional minimum. Another possibility is that a plaintiff, in filing the initial petition, sets forth in the petition itself that the amount in controversy in the case "is less than $75,000,

exclusive of interest and court costs." Such an allegation would likely render a removal by defendant ineffective in order to invoke federal court jurisdiction in the case based on diversity. However, this discussion only applies to smaller products cases, which are definitely the exception and not the rule.

In Iowa, two distinct legal issues argue for federal court removal in an appropriate case: (1) The Eighth Circuit's interpretation of Daubert and its progeny to seriously limit expert witness opinion testimony in product liability cases; and (2) Fed. R. Evid. 407, relating to the admissibility of subsequent remedial measures. Rule 407 has already been discussed. Regarding Daubert, the Eighth Circuit has issued several opinions whereby the opinion testimony of plaintiff's experts has been ruled inadmissible, resulting in a dismissal of the case. See Weisgram v. Marley Co., 169 F.3d 514, 518 (8th Cir. 1999), aff'd, 120 S.Ct. 1011 (2000); Concord Boat Corp. v. Brunswick Corp., 2000 U.S. App. LEXIS 4673 (March 24, 2000); Blue Dane Simmental Corp. v. American Simmental Ass'n, 178 F.3d 1035 (8th Cir. 1999; Jaurequi v. Carter Mfg. Co., 173 F.3d 1076 (8th Cir. 1999); Dancy v. Hyster, 127 F.3d 649 (8th Cir. 1997); Peitzmeier v. Hennessy Industries, 97 F.3d 293 (8th Cir. 1996); and Pestel v. Vermeer Mfg. Co., 64 F.3d 382 (8th Cir. 1995).

Practice in federal court may be unfamiliar to Plaintiff's counsel, and this may well be why Plaintiff's counsel chose initially to file in state court. This may be a good reason for Defendant to remove the action to federal court, especially if defense counsel is comfortable there and familiar with the procedures, Judges and Magistrates.

Other factors may militate in favor of federal court removal. Those factors may include: (1) jurors drawn from a wider, non-urban and more agricultural area, and thought to be more

conservative as a whole; and (2) judges who have full-time law clerks at their disposal to fully and completely research dispositive motions based on subtle legal principles filed by defendants in personal injury, product liability cases Generally speaking, some defense counsel believe that the federal court enforces deadlines more strictly that do the Iowa district courts, and this may be an additional reason for a defendant to wish to proceed in federal, as opposed to state, court.

8. COMPLIANCE WITH STANDARDS.

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A. The law of standards.

Compliance with an applicable design or safety standard is generally relevant and admissible evidence in a product liability action Specifically, compliance with an applicable standard may be used to demonstrate due care by a manufacturing defendant. See Clausen v. R. W. Gilbert Constr. Co., Inc., 309 N.W 2d 462, 468 (Iowa 1981); Porter v. Iowa Power & Light Co., 217 N W.2d 221, 236-37 (Iowa 1974); see also Iowa Uniform Civil Jury Instruction Nos. 700 10, 700.11. Further, a trial court's refusal to give a requested jury instruction respecting compliance with an applicable standard, whether advisory or mandatory, may constitute reversible error Specifically, parties are entitled to the submission of instructions which fairly and correctly state Iowa law. See Sonnek v. Warren, 522 N.W.2d 45, 47 (Iowa 1994) (holding that trial court must give requested jury instruction if it correctly states applicable law and is not embodied in other instructions); Olson v. Prosoco, Inc., 522 N.W.2d 284, 287 (Iowa 1994) (same). It is reversible error for the trial court to refuse to instruct the jury in this manner. Benn v. Thomas, 512 N.W.2d 537, 539 (Iowa 1994) (failing to submit jury instructions which correctly define the applicable law entitles the affected party to a new trial)

The admissibility of OSHA standards, for example, is more complex. The admissibility of OSHA standards or violations generally depends upon the particular case and use sought for

this piece of evidence. For example, if plaintiff is intending to argue that the manufacturer's design "violated OSHA," and wishes to use that allegation as a basis for tort liability, that effort should be denied. This is because OSHA applies to employers in the workplace, not product manufacturers. On the other hand, a plaintiff's expert might be allowed to opine that the manufacturer's design should take into account the OSHA requirements, and if the design does not permit compliance with OSHA (which should be a rare circumstance indeed), the expert may be permitted to give that opinion. Since OSHA does not apply to manufacturers it should be excludable from evidence based on Iowa R. Evid. 401, 401 and 403. Obviously, in a non-products case involving a personal injury to an employee of a subcontractor, OSHA standards or an OSHA violation by the employer in charge of the work site may be admissible. See, e.g., Koll v. Manatt's Transp. Co., 253 N W 2d 265 (Iowa 1977).

B. Strategy and practice considerations.

The applicability and effect of statutory and industry standards is a recurring issue in product liability litigation. Standards may be mandatory, with the full force and effect of law, or voluntary, such as industry consensus standards. Standards also come in various forms, cover numerous subjects and are established by diverse entities. Occupational Safety and Health Act (OSHA) regulations, Federal Motor Vehicle Safety Standards (FMVSS), American National Standards Institute (ANSI) standards and Society of Automotive Engineers (SAE) standards are just a few examples.

Written standards are unique evidentiary items. The written words set forth a "standard of care" and define, in actual words and detailed descriptions, the precise measure against which a manufacturing defendant's conduct may be judged. Even where a written provision does not

define the standard of care in specific terms, it is admissible evidence on the issues of negligence and proper standard of care.

Compliance with a mandatory standard may, in certain circumstances, be a complete defense against an allegation of negligence. See "Revisiting Statutory Compliance as a Complete Defense," BNA Product Liability & Safety Reporter, Schoettinger & Boyd, p. 346 (Apr 1, 1994); Restatement (Second) of Torts, §288C, Comment a; Restatement (Third) of Torts, §4(b)

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In discovery defense counsel should elicit, through interrogatories or requests for admissions, any and all standards which plaintiff claims were violated by the subject design. If none are identified, then a convincing argument can be made to the jury: "the design of this product meets and exceeds all relevant standards." If plaintiff identified standards that they believe were violated, this helps serve to focus the follow-up discovery efforts. What standard? How was it violated? Does anyone else hold this opinion? Has he ever published such an opinion outside of the litigation context? Has the plaintiff's expert ever served on a committee that promulgated engineering standards?

When considering standards, defense counsel should be ready to show those written standards that plaintiff violated in the subject accident. Such violations should be admissible on the issue of plaintiff's comparative fault. Most standards have requirements for operators, workers or employees as well as employers and/or manufacturers. Changing the focus to those written standards that plaintiff himself has violated may help blunt the attack on defendant.

9. DAUBERT AND THE ADMISSIBILITY OF EXPERT OPINION EVIDENCE.

A. The law of Daubert in Iowa.

Pursuant to Iowa R. Evid. 702, if expert opinions will assist the jury, an expert with

sufficient expertise, based on knowledge, skill, experience, training or education, may provide opinions in the area of his or her expertise. Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 533 (Iowa 1999).

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

Iowa R. Evid. 702. Iowa Rule 702 is identical to Fed. R. Evid. 702 and was based on the federal rule, so to the extent there are federal cases on the subject, they may be persuasive authority.

In 1993, the United States Supreme Court refined and defined the standard to be applied when evaluating the admissibility of expert testimony under Rule 702. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L.Ed.2d 469 (1993). The standard established in Daubert was intended to thoroughly evaluate the admissibility of expert testimony by establishing the trial judge as a "gatekeeper" who must closely examine proffered expert testimony to determine if it satisfies the requisites of Rule 702. See Daubert, 125 L.Ed.2d at 482-84. Specifically, the trial judge must evaluate the expert's credentials and the methodology used to ensure that the foundation for the testimony is reliable and relevant to the facts of the case. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); Blue Dane Simmental Corp. v. American Simmental Ass'n, 178 F.3d 1035, 1040 (8th Cir. 1999); Weisgram v. Marley Co., 169 F.3d 514, 518 (8th Cir. 1999), aff'd, 120 S.Ct. 1011 (2000).

While it has not specifically adopted Daubert, the Iowa Supreme Court has endorsed the Daubert standard, recognizing that trial courts must examine proffered expert opinions to assure that they are relevant, reliable and of assistance to a jury. See Leaf v. Goodyear Tire & Rubber,

590 N W 2d 525 (Iowa 1999); Schlader v. Interstate Power Co., 591 N W 2d 10 (Iowa 1999); Johnson v. Knoxville Community Sch. Dist., 570 N W 2d 633 (Iowa 1997); Mensink v. American Grain, 564 N W 2d 376, 380-81 (Iowa 1997); Williams v. Hedican, 561 N W 2d 817 (Iowa 1997); Carolan v. Hill, 553 N W 2d 882 (Iowa 1996); Hutchison v. American Family Mut. Ins. Co., 514 N W 2d 882 (Iowa 1994)

> The trial judge has the task to assess whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue We are confident that Iowa judges have the capacity to undertake this review

Hutchison, 514 N W 2d at 888; Guidichessi v. ADM Milling Co., 554 N W 2d 563, 566 (Iowa Ct App 1996) (quoting Hutchison, 514 N W 2d at 888)

In Daubert, the Court examined the admissibility of expert testimony and the sufficiency of the underlying basis for proffered testimony 125 L Ed 2d at 480 When expert testimony, purportedly premised upon scientific, technical or specialized grounds, is offered for the jury's consideration, the court must critically examine two factors First, is the evidence relevant to any facts at issue in the dispute? Second, is the proffered testimony premised upon reliable grounds? Kumho, 526 U S at 141; Daubert, 125 L Ed 2d at 480-82; Blue Dane, 178 F 3d at 1040; Weisgram, 169 F 3d at 518; Hose v. Chicago Northwestern Transp. Co., 70 F 3d 968, 972 (8th Cir 1995) To be reliable, proposed testimony must be "derived by the scientific method" and "supported by appropriate validation " Daubert, 125 L Ed 2d at 481 To be relevant, proposed testimony must have a "valid scientific connection" to the issues of the case Id at 482 If proposed testimony or evidence fails to satisfy either the relevancy or reliability requirement, it must be excluded because it will not assist the jury

> Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Daubert, 125 L.Ed.2d at 482.

To determine if proffered testimony or its underlying basis is reliable, the court should consider, among other things, the following factors:

1. whether the theory has been tested;

2. whether the theory has been subjected to peer review;

3. the potential rate of error;

4. the existence of any applicable standards governing the subject; and

5. whether the theory, opinion or methodology is generally accepted in the expert's field of expertise.

Daubert, 125 L.Ed.2d at 483-84; Sorensen v. Shaklee Corp., 31 F.3d 638, 648-49 (8th Cir. 1994) If, after considering the foregoing factors, a valid basis for the testimony or opinion is lacking, it should be excluded. Daubert, 125 L.Ed.2d at 483-84; see also State v. Murphy, 451 N.W.2d 154, 156 (Iowa 1990) (finding that unreliable expert evidence does not assist the jury).

> [Under Rule 702 the] overarching subject is the scientific validity - and thus the evidentiary relevance and reliability - of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not the conclusions that they generate.

Daubert, 125 L.Ed.2d at 484; see also Leaf, 590 N.W.2d at 532 (citing Daubert); Williams v. Hedican, 561 N.W.2d 817 (Iowa 1997). This evaluation function is part of the court's responsibility as a "gatekeeper" for judicial and evidentiary integrity. See Daubert, 125 L.Ed.2d at 485.

Expert testimony is only reliable if it is premised upon a valid foundation. Daubert, 125

L.Ed.2d at 481. Pursuant to the analysis utilized by the Iowa Supreme Court, if the methodology is unacceptable or lacking in sufficient factual foundation, the expert opinion is inadmissible. Kirk v. Union Pacific R.R., 514 N.W.2d 734 (Iowa 1994). Accordingly, the testimony must be grounded upon the types of facts or information that other experts in the particular field would rely upon when reaching a conclusion on the facts at issue. In other words, the reasoning and/or methodology must be scientifically valid. Daubert, 125 L.Ed.2d at 482. If there is an insufficient scientific basis for the opinions and conclusions, they do not qualify as the type of evidence which will assist the jury and must be excluded. Id. at 481; Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384 (8th Cir. 1995); see also Kirk, 514 N.W.2d at 734.

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Similarly, the relevance of proffered expert evidence must be evaluated. When determining the potential relevance of expert testimony evidence, the court must assess whether the evidence will enhance the jury's understanding of the evidence or assist the jury to determine any facts in issue. Daubert, 125 L.Ed.2d at 481. Evidence is only relevant if it will advance the jury's ability to understand pertinent evidence or determine a fact in issue. Daubert, 125 L.Ed.2d at 481; Iowa R. Evid. 401. Evidence which is not premised upon valid scientific precepts, accepted methodology or which is not clearly connected to the issues of the case, however, is neither relevant nor of any assistance to the factfinder. Daubert, 125 L.Ed.2d at 482. In essence, the "relevance" prong requires that the proffered expert testimony "fit" the facts and circumstances of a particular matter. United States v. Shay, 57 F.3d 126, 133 n.5 (1st Cir. 1995); Kearney v. Philip Morris, Inc., 916 F. Supp. 61, 65-66 (D. Mass. 1996). In sum, expert opinion evidence is only relevant where it will assist the trier of fact to understand the evidence or determine a factual issue. Iowa R. Evid. 702.

B. Strategy and practice considerations.

The proper timing of a Daubert hearing is a critical issue in a products case. If done too early, plaintiffs may jettison their weak expert and simply go out and retain a substitute expert who is more qualified. Opposing counsel may use the "education" that you have offered and shore up his expert and make him or her ready for the Daubert inquiry. Opposing counsel may use your attack to fashion an attack of his own on your expert. If a Daubert challenge is made too late, the court may not be inclined to allow a fulsome hearing, and may be reticent to grant a motion which might effectively terminate plaintiff's case on the eve of trial.

The elements set forth in Daubert, and approved of by the Iowa Supreme Court in Leaf, create a nice "recipe" list for defense counsel to use in the deposition of Plaintiff's expert. Has the expert tested his or her theory? If so, what was the rate of error? How was it measured? If the theory has not been tested, why not? Could it be tested? If it can't be tested, does the expert admit that his or her opinion is not based on verifiable science? How do we know it is correct and not wrong? Has the expert done research on this subject outside of and apart from the litigation context? Has the expert published on the subject in a peer reviewed publication? Questions like these provide the starting point; follow up questions will necessarily follow from the responses.

Defense counsel should also prepare its own expert witnesses to confront a Daubert attack from a well-prepared plaintiff's counsel. Several examples exist of cases where defense experts have been subjected to Daubert attacks. See, e.g., Hutchison v. American Fam. Mut. Ins. Co., 514 N.W.2d 882 (Iowa 1994)(defense psychologist subjected to "Daubert attack" (albeit unsuccessful) by plaintiff's counsel). Defending a products case without an expert is no different

than trying to prosecute a products case without an expert.

10. POST-SALE DUTIES TO RECALL, RETROFIT AND THE "CONTINUING DUTY TO WARN."

A. The law of post-sale duties.

A clear majority of courts, including Iowa, have clearly and unmistakably ruled that there is no legal duty to "recall" or "retrofit" a product. See, e.g., Burke v. Deere & Co., 6 F.3d 497, 508-10 (8th Cir. 1993) (applying Iowa law), cert. denied, 510 U.S. 1115 (1994); Lovick v. Wil-Rich, 588 N.W.2d 688, 696 (Iowa 1999) (citing Burke, 6 F.3d at 509); Gregory v. Cincinnati, Inc., 538 N.W.2d 325 (Mich. 1995).

Plaintiffs experts frequently advance claims based upon an amorphous "duty" to "recall or retrofit" the product involved in a case. However, there is no "common law" duty to retrofit or recall a product. Burke, 6 F.3d at 508-10; Lovick, 588 N.W.2d at 696; see, e.g., Horstmyer v. Black & Decker, Inc., 151 F.3d 765, 773 (8th Cir. 1998); Romero v. International Harvester Co., 979 F.2d 1444, 1449-50 (10th Cir. 1992); Habecker v. Copperloy Corp., 893 F.2d 49 (3rd Cir. 1990), appeal after remand, 942 F.2d 210 (3rd Cir. 1991); Syrie v. Knoll Int'l, 748 F.2d 304 (5th Cir. 1984); Zettle v. Handy Mfg. Co., 837 F. Supp. 222, 224 (E.D. Mich. 1992), aff'd, 998 F.2d 358 (6th Cir. 1993); Eschenburg v. Navistar Int'l Transp. Corp., 829 F. Supp. 210, 214 (E.D. Mich. 1993); Estate of Kimmel v. Clark Equip. Co., 773 F. Supp. 828 (W.D. Va. 1991); Modelski v. Navistar Int'l Transp. Co., 707 N.E.2d 239, 246-47 (Ill. Ct. App. 1999); Gregory, 538 N.W.2d at 336-37; Zychowski v. A.J. Marshall Co., Inc., 590 N.W.2d 301, 302 (Mich. Ct. App. 1998); Morrison v. Kubota Tractor Corp., 891 S.W.2d 422, 430 (Mo. Ct. App. 1994). Section 11 of the Restatement (Third) also adopts this position, finding that there is no

independent duty to recall a product. Under this standard, a manufacturer is liable for failing to recall a product only if it fails to: 1) conduct a recall that was mandated by governmental order or legislation; or 2) act reasonably when conducting a voluntary recall. Restatement (Third) of Torts: Products Liability § 11 (1998). Accordingly, claims that the manufacturer should have "recalled" or "retrofitted" a given product are best contested through motions for partial summary judgment and motions *in limine* preventing any reference to this position (by the lawyers or experts) at trial.

Plaintiffs also contend that a manufacturing defendant has a "post-sale" or "continuing duty to warn," which is often undefined and virtually limitless. See Lovick, 588 N.W.2d at 693-96. The pervasive danger inherent in post-sale "duty" claims, particularly the post-sale duty to warn, mandates a clear understanding of the salient legal issues and potential defense strategies.

A continuing duty to warn claim is troublesome because it is premised on a negligence theory and courts generally place responsibility for fault findings in negligence cases with the jury. The Restatement (Third), however, advocates a post-sale duty to warn only in certain limited circumstances.

> (a) One engaged in the business of selling or otherwise distributing products 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 or distribution of a product when a reasonable person in the seller's position would provide such a warning.
>
> (b) A reasonable person in the seller's position would provide a warning after the time of sale when:
>
> (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
>
> (2) those to whom a warning might be provided can be

identified and may reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Restatement (Third) of Torts: Products Liability § 10 (emphasis added). The Iowa Supreme Court has specifically recognized the existence of a post-sale duty to warn and expressly adopted the standard promulgated in the Restatement (Third) as the benchmark for evaluating these types of claims.

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B. Strategy and practice considerations.

The existence and extent of post-sale duties is a troublesome issue because "hindsight is always 20-20 vision." Specifically, with technological advances that have occurred, many twenty-year-old products cannot withstand the effect of being compared to similar products made in 2000. The fundamental unfairness which results from judging a product design against subsequent events and technological advances cannot be overestimated. Plaintiffs, however, have taken full advantage of this inequity and, in recent times, claims for "failure to retrofit," "failure to recall" or breach of the "continuing duty to warn" have increased.

When defending a post-sale warnings or "continuing duty to warn" claim, several issues should be kept in mind. First, defense strategies employed when defending failure to warn claims are, in general, equally applicable to post-sale or continuing duty to warn claims. For example, the complete absence of causation may be a compelling argument. Numerous decisions have held that a claimant has failed to establish the necessary causal link for a failure to warn claim if: 1)

the warning would not have prevented the accident; 2) the claimant was knowledgeable of the danger and would not have modified his or her behavior; or 3) the risk was open or obvious. Jaurequi v. Carter Mfg. Co., Inc., 173 F.3d 1076, 1084 (8th Cir. 1999); Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 300 (8th Cir. 1996); Ramstad v. Lear Siegler Div. Holdings Corp., 836 F. Supp. 1511, 1516 (D. Minn. 1993); DeLoach v. Rovema Corp., 214 Ga.App. 802, 2000 Ga. App. LEXIS 25, at *5 (Ga. Ct. App. 2000); Liriano v. Hobart Corp., 700 N.E.2d 303, 308 (N.Y. 1998). Second, the duty only arises when a "reasonable" seller would provide a post-sale warning. Restatement (Third) § 10. To determine if a "reasonable" seller would provide a warning, the court must balance several factors, including the ability to identify and communicate with product owners and users. See, e.g., Lovick, 588 N.W.2d at 694; Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1314-15 (Kan. 1993); Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 409 (N.D. 1994). Third, mere technological advances or safety improvements do not establish a continuing duty to warn. See, e.g., Williams v. Monarch Mach. Tool Co., 26 F.3d 228, 232 (1st Cir. 1994); Estate of Kimmel, 773 F. Supp. at 831; Patton, 861 P.2d at 1311 (finding no duty to notify customers of changes in state of the art).

Similar to standard warning claims, post-sale duty to warn claims are and should only be considered under a negligence standard. See, e.g., Lovick, 588 N.W.2d at 694-95. In addition to the prevalent legal authority, this position is supported by the "reasonable" seller standard adopted by sections 10 and 11 of the Restatement (Third). This also means that Iowa R. Evid. 407 should be applied to render any post-accident remedial repairs to be inadmissible in evidence.

Finally, if claims for post-sale failure to warn are made, the jury must be given a limiting instruction which advises that "there is no duty to recall or retrofit [the product] in this case."

In addition, it must be explained that having the manufacturer physically attach new warnings to the product is a product "retrofit," an action not required by law. Tabieros v. Clark Equip. Co., 944 P.2d 1279, 1296 (Hawaii 1997) (recognizing the distinction between a post-sale warning and a post-sale retrofit which involves actual modifications or physical attachments to the product). Otherwise, the jury may improperly speculate regarding possible recall or retrofit actions during deliberations.

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CONCLUSION

Every products case has some of the troublesome issues discussed in this paper. Most have more than one, and many have multiple "problem" issues. A successful defense of the case often depends upon how defense counsel handles these critical issues.

DEFENSE OF TRADE NAME AND TRADEMARK SUITS

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Defense of Trade Name and Trademark Suits

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1. What is a trademark?
   A. Types of marks (15 USC 1127)
      1) Trademark: includes any word, name, symbol, device, or any combination thereof used by a person to identify and distinguish that person's goods, including a unique product, from those manufactured or sold by other and to indicate the source of the goods, even if that source is unknown.
      2) Service Mark: same as trademark, except applies to services instead of goods
      3) Certification Mark: any word, name, symbol device, or any combination thereof used by a person other than the certification mark's owner to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's good or services or that the work or labor on the goods or services was performed by members of a union or other organization.
      4) Collective Mark: a trademark or service mark indicating membership in a union, an association, or other organization.
      5) Trade Name: any name used by a person or company to identify that person or company's business or vocation.
   B. Basic right protected is the right to prevent the likelihood of confusion among customers or prospective customers as to the source of goods or services.
   C. Trademarks are creatures of Common-law, but can be supplemented with statutory rights by registering Federally or with one or more States.
   D. How does one obtain legal trademark rights?
      1) Unlike patent rights and statutory copyrights, a trademark is not created by state or federal statute. Ownership of a mark is based upon common-law concepts and arises from use of the mark in connection with the goods or services. United Drug Co. v. Theodore Rectanus Co., 248 US 90 (1918).

2) After having begun using a mark, a person may obtain a trademark registration, but even after having obtained a registration, that person may only enforce the mark in geographic areas where it has been used. Sweetarts v. Sunline, Inc., 380 F. 2d 923 (8th Cir. 1967).

3) Must continue using a mark to keep the legal rights associated with the mark. Use it or lose it.

E. The strength of a mark can vary.

1) Generic, merely descriptive, suggestive, and arbitrary marks.

2) Significance of secondary meaning

3) Volume, consistency, and geographic extent of use.

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2. Why register a trademark?

A. Both common-law and registered marks are enforceable.

B. Common-law rights

1) Damages: lost profits

2) Injunction

C. Additional rights given by registration.

3) Constructive Notice: cuts off innocent infringers who start after date of registration.

4) Prima Facia and, under certain circumstances, conclusive evidence of the exclusive right to use the mark in commerce in commerce.

5) Federal Jurisdiction of infringement suits

6) Additional Remedies: Defendant's profits, trebling of damages, attorney fees. 15 USC 1117

7) Destruction of infringing articles.

D. The life and times of a Registration

1) Federal Registration

a. Between fifth and sixth anniversaries: must file Declaration of Use

b. Between fifth and sixth anniversaries: Optional Section 15 Declaration making registration conclusive evidence of exclusive right to use the mark in commerce.

c. Tenth anniversary: Must renew registration. Can be renewed indefinite number of times so long as the mark is still in use.

2) Iowa Registration must be renewed every 5 years. See Iowa Trademark Statute, Chapter 548, Iowa Code.

3. Suits for Common-law or statutory trademark infingement.

A. The elements for a cause of action for trademark infringement are essentially the same for seeking to enforce common-law rights or statutory rights. The plaintiff must show (a) Ownership of the trademark and (b) likelihood of confusion between the defendant's mark and the plaintiff's mark.

B. Ownership. Commercial Savings Bank v. Commercial Federal Bank, 592 N.W. 2d 321 (Iowa 1999)

1) Must show use of the mark in all cases to establish ownership. Use must be in the same or overlapping geographic area as where the defendant is using its mark.

2) If the mark is merely descriptive, or geographically descriptive, must show secondary meaning in the mark. Evidence such as sales volume, advertising expenses and samples, surveys, customer testimonials are often used.

C. Likelihood of Confusion. In determining the likelihood of confusion, the courts have considered the numerous factors. Mutual of Omaha Ins. Co. v Novak, 836 F.2d 397 (8th Cir. 1987); Squirt Co. v. Seven-Up, 628 F.2d 1086 (8th Cir. 1980); First National Bank, Souix Falls v. First Nat'l Bank, South Dakota, 153 F. 3d 885(8th Cir. 1998). Restatement Section 21.

1) Similarity of sound, meaning, and appearance of the two marks. Vornado, Inc. v. Breuer Electrical Manufacturing Co., 390 F.2d 724 (CCPA 1968); Krim-Ko Corp. v. Coca-Cola, 390 F.2d 728 (CCPA 1968); S.C. Johnson & Son, Inc. v. Drop Dead Co., 210 F. Supp. 816 (S.D. Cal. 1962).

2) Similarity of marketing environment and channels of trade. California Fruit Growers Exchange v. Sunkist Baking Co., 177 F.2d 971 (7th Cir. 1948). Pure Foods, Inc. v. Minute Maid Corp., 214 F.2d 792 (5th Cir. 1954)

3) Similarity of goods or service of the two parties. One may enforce a trademark against use of similar marks on similar goods, and also against use on other goods or services that might naturally be supposed to emanate from the

same source. Yale Elec. Corp. v. Robertson, 26 F.2d 972 (2nd Cir. 1928); Landers Frary & Clark v. Universal Cooler Corp., 85 F.2d 46 (2nd Cir. 1936)

4) Strength of the mark. Commercial Savings Bank v. Commercial Federal Bank, 592 N.W.2d 321 (1999)

5) Incidents of actual confusion. Life Technologies Inc. v. Gibbco Scientific, Inc., 826 F.2d 775 (8th Cir. 1987)

6) Whether or not the purchasers are discriminating in their selection of brands. Commercial Savings Bank v. Commercial Federal Bank, **id**.

7) The Restatement of Torts sets forth the following factors for determining whether confusion is likely between non-competitive goods or services:

   a. the likelihood that the actor's goods, services or business will be confused with or mistaken for those of the other.

   b. the likelihood that the other may expand his business so as to compete with the actor

   c. the extent to which the goods or services are sold by the same marketing methods and marketed through the same channels.

   d. the extent to which the goods or services have common purchasers or users;

   e. the relation between the functions and uses of the goods or services;

   f. the degree of distinctiveness of the mark or trade name;

   g. the degree of attention usually given to trade symbols in the purchase of the goods or services involved;

   h. the length of time the plaintiff and the defendant have used their respective marks.

   i. the intent of the defendant in adopting the accused mark

   j. the celebrity of the mark or trade name involved.

4. Defenses to Trademark Infringement Cases
   A. Prior use of the trademark by the defendant. Sweetarts v. Sunline, Inc. 380 F.2d 923 (8th Cir. 1967)
   B. No likelihood of confusion exists. (See factors listed above).
   C. Attacking the ownership of the mark.
      1) No secondary meaning attached to a merely descriptive or geographically descriptive mark.
      2) No use of the mark or diminimus use of the mark by Plaintiff. Note: Registering or preserving a Corporate Name with the Secretary of State or registering a fictitious name do not create trademark rights without the mark being used. Only **use** establishes the right to enforce a mark or name.
      3) The mark is generic and not enforceable as a trademark.
   D. Abandonment of the mark (15 USC 1127)
      1) Abandonment by nonuse coupled with intent to abandon. Under the Federal Trademark Act (Lanham Act), three years of nonuse creates a presumption of abandonment.
      2) Abandonment by improper licensing. Licensing a trademark without retaining control over the nature and quality of the goods or services provided under the mark can constitute abandonment of the mark.
      3) Abandonment by improper assignment of the mark. A mark that is assigned without also assigning the good will of the business associated with the mark is an "assignment in gross" that extinguishes the rights in the mark and constitutes abandonment. The assignee receives nothing.
   E. Laches, Acquiescence, or Estoppel. Laches is a defense to damages, but not an injunction. Estoppel is a complete defense to the cause of action. Elements of laches are:
      1. Laches elements are: knowledge of infringing activity, inexcusable delay, resulting in damage to the defendant. Laches is a defense to damages before filing suit, but not to an injunction or damages after filing suit.
      2. Estoppel elements are: Plaintiff's knowledge of infringing activity; acts, failure to act, or representations by the Plaintiff indicating

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the plaintiff will not enforce the mark; reliance by the defendant on the plaintiff's acts, failure to act, or representations; resulting in damage or detrimental change of position of the defendant.

F. Fair Use:

1) Comparative advertising such as "Cadillac Seville gets better mileage than Lincoln Continental".

2) Fair use of another's mark without creating an impression of being sponsored by the owner of the mark: "We sell front end loaders that can be mounted on John Deere tractors."

5. Federal Trademark Statute provides for a cause of action for dilution (15 USC 1125(c)).

A. The term "dilution" means the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of

1) Competition between the owner of the famous mark and other parties,or

2) likelihood of confusion, mistake, or deception. (15 USC 1127).

B. The mark must be "famous", and the factors for determining if a mark is "famous" are:

1) the degree of inherent or acquired distinctiveness of the mark;

2) The duration and extent of use of the mark in connection with the goods or services with which the mark is used;

3) the duration and extent of advertising and publicity of the mark;

4) the geographical extent of the trading area in which the mark is used;

5) the channels of trade for the goods or services with which the mark is used;

6) the degree of recognition of the mark in the trading areas and channels of trade of the mark's owner and the person against whon the injunction is sought;

7) the nature and extent of use of the same or similar marks by third parties; and

8) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20 1905, or on the principal register.

C. Entitled only to an injunction unless the dilution was "willfully intended to trade on the owner's reputation or cause dilution of the famous mark"

6. General unfair competition for false designation of origin or false description of goods or services. 15 USC 1125(a).
   A. Has become basis for Federal Jurisdiction for common-law trademark infringement as well as many forms of the broader tort of unfair competition.
   B. Same remedies under 15 USC 1117 as for infringement of registered trademarks.
   C. Often joined as a separate count in a complaint for infringement of a registered mark.

7. Anti-Cybersquatting Act. 15 USC 1125(d)
   A. A person shall be liable in a civil action if, without regard to the goods or services of the parties, that person:
      1) has a bad faith intent to profit from the protected mark or name, and
      2) registers, traffics in, or use a domain name that:
         a. in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;
         b. in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or
         c. is a trademark, work, or name protected b reason of 18 USC 706 or 36 USC 220506.
   B. Provides a right to bring an <u>in rem</u> action in the judicial district where there is a domain name registrar, registry, or other domain name authority that registered or assigned the domain name.
   C. Remedies include a court order directed to the registrar of the domain name for forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

8. Note Arbiter of Domain Name disputes: ICANN has a web page located at <u>www.icann.org</u>.

9. Monetary Recovery in trademark infringement actions is governed by 15 USC 1117.
   A. Can recover defendants profits, plaintiff's damages and costs of the action.

H

B. In proving defendant's profits the plaintiff need only prove sales; the defendant must prove all elements of cost or deduction claimed.

C. The Court may, according to the circumstances of the case, increase damages up to three times the actual amount.

D. The Court may adjust the amount of recovery based on profits either upwardly or downwardly if the Court finds the amount to be either excessive or inadequate.

E. Any adjustment of either damages or profits by the Court shall constitute compensation and not a penalty.

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F. In "exceptional cases" the Court may award reasonable attorney fees to the prevailing party.

G. While the measure for damages is usually lost sales, a measure of damages based upon the cost of making advertising to correct the confusion caused by the infringement is appropriate. Gave 25% of what the defendant had spent for advertising the infringing mark. West Des Moines State Bank v. Hawkeye Bancorp., 217 U.S.P.Q. 1066 (S.D. Iowa 1982)

9. Insurance coverage for "advertising injury" may cover the insured for trademark infringement suits.

10. The Iowa Supreme Court has over the years issued a number of decisions in trademark and unfair competition suits. They are listed on the syllabus below.

Syllabus

Principal Decisions of the Iowa Supreme Court on Trademark Infringement and Unfair Competition

Shaver v. Shaver, 6 N.W. 188, 54 Iowa 208 (1880)

Grand Lodge of Iowa v. Graham, 96 Iowa 592 (1896)

Red P.C.C. v. Red P.C.C., 108 Iowa 105 (1899)

Sartor v. Schaden, 101 N.W. 511, 125 Iowa 696 (1904)

Atlas Assur. Co. v. Atlas Ins. Co., 112 N.W. 232, 138 Iowa 228 (1907)

Dyment v. Lewis, 123 N.W. 244, 144 Iowa 509 (1909)

Dunshee v. Std. Oil Co., 132 N.W. 371, 152 Iowa 618 (1911)

Boggs v. Duncan-Schell Furniture Co., 143 N.W. 482, 163 Iowa 106 (1913)

Motor Accessories Mfg. Co. v. Marshalltown Motor Materials Mfg. Co., 149 N.W. 184, 167 Iowa 202 (1914)

Lennox Furnace Co. v. Wrot Iron Heater Co., 160 N.W. 356, 181 Iowa 1331 (1916)

Dubuque German College and Seminary v. St Joseph's College, 169 N.W. 405 (1918)

Brown Garage Co. v. Brown Auto & Supply Co., 195 N.W. 514 (Iowa 1923)

H

Iowa Auto Market v. Auto Market & Exchange, 197 N.W. 321, 197 Iowa 420 (1924)

Lytle v. Smith, 215, N.W. 668, 204 Iowa 619 (1927)

Roggensack v. Winona Monument Co., 233 N.W. 493, 211 Iowa 1307 (1930)

Farmers Co-op Ass'n v. Quaker Oats Co., 7 N.W.2d 906 (Iowa 1943)

Johnson Gas Appliance Co. v. Reliable Gas Products Col, 10 N.W. 2d 23, 233 Iowa 641 (1943)

Bankers Life & Cas. Co v. Alexander, 45 N.W.2d 258 (1950)

OK Tire and Rubber Co. v. Oswald, 166 N.W.2d 749 (Iowa, 1969)

Pundzak, Inc. v. Cook, 500 N.W. 2d 424 (Iowa 1993)

Commercial Savings Bank v. Commercial Federal Bank, 592 N.W. 2d 321 (Iowa 1999)

2000 LEGISLATIVE REPORT

Robert M. Kreamer
IDCA Legislative Lobbyist
Des Moines, Iowa

2000 LEGISLATIVE REPORT

BY

ROBERT M. KREAMER

The 2000 legislative session was marked by a high level of political partisanship and jockeying for the general election to be held in November with the Republicans controlling the Iowa House of Representatives by a 56-44 margin and the Iowa Senate by a 30-20 margin and Democrat Tom Vilsack occupying the governor's office. Most legislative proposals with any controversy attached were either avoided or left unfinished.

At its December 1999 meeting, the Iowa Defense Counsel Association adopted a four-point legislative program. Included in this program were the following:

1. Opposition to any efforts that would require mandatory mediation in civil cases.

2. Repeal the current 5% cap on the reduction of a plaintiff's damage for failure to use a seatbelt/safey harness as provided in Iowa Code Section 321.445(4)(b)(2).

3. Repeal Iowa Code Section 228.9 so that psychological records and test data would be discoverable, as are other medical records as provided in the Iowa Rules of Civil Procedure and Iowa Code Section 622.10.

4. Amend Iowa Code Chapter 677 to stop the running of all pre-judgment interest from the date that a successful Offer to Confess Judgment is served.

Addtionally, it was determined that monitoring of any omnibus tort legislation that might be introduced, such as House File 114 from t 1999 legislative session, should continue.

Legislation of interest that was introduced during the 2000 legisla session included the following:

1. House File 2031 was initially referred to as the "pay to play" legislation since it required a plaintiff to have liability insurance on his vehicle before he could recover non-economic damages as a result of a motor vehicle accident. This legislation was referred to the House Judiciary Committee where it was substantially revised. The revision only prohibited the recovery of non-economic damages by a motor vehicle operator or passenger while in the commission of a felony or fleeing therefrom. This revision then became known as HF 2525 and was then approved by the Iowa House and Iowa Senate and then signed into law by Governor Vilsack. The Iowa Defense Counsel Association took no position on this bill.

2. House Study Bill 568 and Senate Study Bill 3150 were omnibus tort-reform bills that were introduced that included our proposals to eliminate the 5% cap on the amount that damages can be reduced for failure to wear a seatbelt and the stopping of pre-judgment interest from the date a successful Offer to Confess Judgment is served. These bills also included provisions that were opposed by the Iowa Defense Counsel Association relating to payment of attorney fees and codifying the foundation that a trial court must consider before an expert witness may testify. There were numerous meetings held and attended on HSB 568 and SSB 3150 with Judiciary Committee members, legislative leaders, and other interest groups, but no formal legislative action was ever taken on these bills. The Iowa Defense Counsel Association's position on these bills was to monitor until such time that their exact content became more definite.

3. House Study Bill 572 was introduced and would have amended Iowa Code Section 553.12 to allow persons indirectly harmed by anti-competitive practices to make claims. This legislation would have given standing not only to the State but also to "affected parties". Because this legislation would have allowed the possible recovery for damages so remote that there would be no causation between the offensive act and any identifiable damage, the Iowa Defense Counsel Association opposed this legislation. House Study Bill 572 never advanced in the legislative process.

4. House Study Bill 564 was legislation relating to the disclosure of experts in civil litigation against licensed professionals. The purpose of this legislation was to amend Iowa Code Section 668.11 to specifically define who are "licensed professionals" falling within the statute. Because it was believed that this legislation was unnecessary since it solved no problem currently existing in the civil trial system, the Iowa Defense Counsel Association took no position on this legislation. HSB 564 never advanced in the legislative process.

A final issue of concern throughout the 2000 session was the mandatory mediation in civil litigation that was promoted by Attorney General Tom Miller. This issue never advanced far enough in the process to receive a bill number, but it was the subject of several meetings, one of which was attended by Mike Weston and me. It is anticipated that this issue will probably become more prominent in the 2001 legislative session.

In addition to the above legislative activity, my daily presence at the Capitol representing the Iowa Defense Counsel Association gave me numerous opportunities to answer legislators' inquiries on what the Iowa Defense Counsel Association's position might be on a given legal issue. It is important that the Iowa Defense Counsel Association has a daily presence and is available to provide legislators these answers, materials and direction to authorities in helping them become better informed on various issues of concern to them and their constituents.

Finally, I want to thank the Iowa Defense Counsel Association for allowing me to represent it this past year and to Mike Weston for his continued fine leadership and support as chair of the IDCA Legislative Committee. I am very proud to be able to represent such a distinguished organization as the Iowa Defense Counsel Association. Thank you!

RMK:cc

Bob Kreamer

JAN 11 2000

JUDICIARY

HOUSE FILE 2031
BY BRADLEY

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to limitations on recoverable noneconomic damages in legal actions arising out of motor vehicle accidents.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

HF 2031

TLSB 5211YH 78

Section 1. NEW SECTION. 613.20 LIMITATION ON LIABILITY OF MOTOR VEHICLE OPERATORS.

1. Except as provided in subsection 3, in an action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover noneconomic losses including, but not limited to, pain and suffering if any of the following circumstances apply:

a. The injured person was operating a motor vehicle involved in the accident, was in violation of any provision of chapter 321J at the time of the accident, and was convicted of that offense.

b. The injured person was the owner of an uninsured or underinsured motor vehicle involved in the accident and is unable to produce proof of financial responsibility, in effect at the time of the accident, as required by section 321.20B and chapter 321A.

c. The injured person was the operator of a motor vehicle involved in the accident and was operating the motor vehicle with an operator's license which was canceled, suspended, or revoked at the time of the accident.

d. The injured person was the operator of a motor vehicle, a passenger in a motor vehicle, or a pedestrian and the person's injuries were proximately caused by the person's commission of any felony, or immediate flight therefrom, and the injured person was duly convicted of that felony.

2. Except as provided in subsection 3, an insurer shall not be liable directly or indirectly under a policy of motor vehicle liability insurance or uninsured or underinsured motorist insurance to indemnify for the noneconomic losses of any person injured as described in subsection 1.

3. If a person described in subsection 1, paragraph "b" or "c", was injured by a motorist who at the time of the accident was operating a motor vehicle in violation of any provision of chapter 321J and was convicted of that offense, the injured person shall not be precluded from recovering noneconomic

losses including, but not limited to, pain and suffering.

4. If a person injured in a motor vehicle accident has been formally charged with the violation of a felony, a provision of chapter 321J, or operating a motor vehicle while the operator's license is canceled, suspended, or revoked in connection with the accident, but a final determination regarding guilt has not been made, liability and uninsured and underinsured motorist insurers, to whom a claim for damages has been presented, shall advise the injured party that settlement of the claim will not be resolved until a final judgment is rendered on the charges. The injured party claiming damages shall provide evidence of the outcome of any criminal charges.

EXPLANATION

This bill provides a person shall not recover noneconomic losses including, but not limited to, pain and suffering, in an action to recover damages arising out of the operation or use of a motor vehicle if any of the following circumstances apply:

1. The injured person was operating a motor vehicle involved in the accident, was in violation of Code chapter 321J at the time of the accident, and was convicted of that offense.

2. The injured person was the owner of an uninsured or underinsured motor vehicle involved in the accident and was unable to produce proof of financial responsibility.

3. The injured person was the operator of a motor vehicle involved in the accident and was operating the motor vehicle with an operator's license which was canceled, suspended, or revoked at the time of the accident.

4. The injured person was the operator of a motor vehicle, passenger in a motor vehicle, or a pedestrian and the injuries were caused by the person's commission of a felony.

The bill also provides that if the injured person was the owner of an uninsured or underinsured motor vehicle and unable

to produce proof of financial responsibility or was operating a motor vehicle involved in the accident with an operator's license which was canceled, suspended, or revoked, and was injured by a motorist who was in violation of any provision of Code chapter 321J at the time of the accident, then the injured person shall not be precluded from recovering noneconomic losses.

The bill provides that if a person injured in a motor vehicle accident has been formally charged with a violation of a felony, any provision of Code chapter 321J, or operating a motor vehicle with an operator's license which is canceled, suspended, or revoked in connection with the accident, motor vehicle liability and uninsured and underinsured motorist insurers shall advise the injured party that settlement of the claim will be pending a judgment on the charges.

FEB 2 9 2000

Place On Calendar

HOUSE FILE 2525

BY COMMITTEE ON JUDICIARY

(SUCCESSOR TO HF 2031)

Passed House, Date _____ Passed Senate, Date _____

Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____

Approved _____

A BILL FOR

An Act relating to limitations on recoverable noneconomic damages in legal actions arising out of motor vehicle accidents.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

HF 2525

TLSB 5211HV 78

S.F. _____ H.F. 2525

Section 1. NEW SECTION. 613.20 LIMITATION ON LIABILITY OF MOTOR VEHICLE OPERATORS.

1. Except as provided in subsection 2, in an action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover noneconomic losses including, but not limited to, pain and suffering if the injured person was the operator of a motor vehicle, a passenger in a motor vehicle, or a pedestrian and the person's injuries were proximately caused by the person's commission of any felony, or immediate flight therefrom, and the injured person was duly convicted of that felony.

2. This section does not apply if the injured person is found to have no fault in the accident.

3. If a person injured in a motor vehicle accident has been formally charged with a violation of a felony, but a final determination regarding guilt has not been made, liability and uninsured and underinsured motorist insurers, to whom a claim for damages has been presented, shall advise the injured party that settlement of the claim will not be resolved until a final judgment is rendered on the charges. The injured party claiming damages shall provide evidence of the outcome of any criminal charges.

EXPLANATION

This bill provides that a person shall not recover noneconomic losses including, but not limited to, pain and suffering, in an action to recover damages arising out of the operation or use of a motor vehicle if the injured person was the operator of a motor vehicle, passenger in a motor vehicle, or a pedestrian and the injuries were caused by the person's commission of a felony.

The bill provides that these provisions shall not apply if the injured person is found to have no fault in the accident.

The bill provides that if a person injured in a motor vehicle accident has been formally charged with a violation of a felony in connection with the accident, motor vehicle

liability and uninsured and underinsured motorist insurers shall advise the injured party that settlement of the claim will be pending a judgment on the charges.

HOUSE FILE 2525

AN ACT

RELATING TO LIMITATIONS ON RECOVERABLE NONECONOMIC DAMAGES IN LEGAL ACTIONS ARISING OUT OF MOTOR VEHICLE ACCIDENTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. NEW SECTION. 613.20 LIMITATION ON LIABILITY OF MOTOR VEHICLE OPERATORS.

1. Except as provided in subsection 2, in an action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover noneconomic losses including, but not limited to, pain and suffering if the injured person was the operator of a motor vehicle, a passenger in a motor vehicle, or a pedestrian and the person's injuries were proximately caused by the person's commission of any felony, or immediate flight therefrom, and the injured person was duly convicted of that felony.

2. This section does not apply if the injured person is found to have no fault in the accident.

3. If a person injured in a motor vehicle accident has been formally charged with the violation of the felony referred to in subsection 1, but a final determination regarding guilt has not been made, liability and uninsured and underinsured motorist insurers, to whom a claim for damages has been presented, shall advise the injured party that settlement of the claim will not be resolved until a final

judgment is rendered on the charges. The injured party claiming damages shall provide evidence of the outcome of any criminal charges.

_____

BRENT SIEGRIST
Speaker of the House

_____

MARY E. KRAMER
President of the Senate

I hereby certify that this bill originated in the House and is known as House File 2525, Seventy-eighth General Assembly.

_____

ELIZABETH ISAACSON
Chief Clerk of the House

Approved _____, 2000

_____

THOMAS J. VILSACK
Governor

HSB 568

JUDICIARY

Sukup, Chair
Larson
Shey
Parmenter
Kreiman

HOUSE FILE _____
BY (PROPOSED COMMITTEE ON JUDICIARY BILL BY CHAIRPERSON LARSON)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to civil actions by limiting the use of evidence regarding the failure to wear a safety belt; providing for offers of settlement; providing immunity due to misuse, failure to maintain, or alteration of a product; limiting the admissibility of expert testimony; limiting certain multiple or exemplary awards; and including an applicability provision.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

S.F. _____ H.F. _____

Section 1. Section 321.445, subsection 4, paragraph b, Code 1999, is amended to read as follows:

b. In a cause of action arising on or after July 1, 1986, brought to recover damages arising out of the ownership or operation of a motor vehicle, the failure to wear a safety belt or safety harness in violation of this section ~~shall not~~ may be considered evidence of comparative fault under section 668.3, subsection 1. ~~However, except as provided in section 321.446, subsection 6,~~ when there is evidence that the failure to wear a safety belt or safety harness in violation of this section ~~may be admitted to mitigate damages, but only under the following circumstances:~~

~~(1) Parties seeking to introduce evidence of the failure to wear a safety belt or safety harness in violation of this section must first introduce substantial evidence that the failure to wear a safety belt or safety harness~~ contributed to the injury or injuries claimed by the plaintiff.

~~(2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt or safety harness in violation of this section contributed to the plaintiff's claimed injury or injuries, and may reduce the amount of plaintiff's recovery by an amount not to exceed five percent of the damages awarded after any reductions for comparative fault.~~

Sec. 2. NEW SECTION. 625.30 OFFER OF SETTLEMENT -- ASSESSMENT OF COSTS AND ATTORNEY FEES.

1. Any party to a civil action may serve upon any other party a written offer, designated as an offer of settlement under this section, to settle a claim for the money, property, or relief specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly.

a. The offer may be served at any time more than twenty days after the original service of process in the action but not less than thirty days before trial, or twenty days before

trial if it is a counter offer.

b. A party shall not file an offer made under this section with the court. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this section.

2. The offer shall remain open for thirty days unless withdrawn by a writing served on the offeree prior to acceptance.

3. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror.

4. An offer that is neither withdrawn nor accepted within thirty days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer.

5. a. In cases where the complaint sets forth a claim for money, if the offeree rejects an offer made under this section, and the judgment finally obtained by the offeree is not at least ten percent more favorable than the last offer made by the offeror, the offeree shall pay the offerors's reasonable attorney fees and costs that are incurred after the rejection of the last offer.

b. In cases where the complaint sets forth a claim for property or other nonmonetary relief, if the offeree rejects an offer made under this section, and the judgment finally obtained by the offeree is not more favorable than the last offer, the offeree shall pay the offeror's reasonable attorney fees and costs that are incurred after rejection of the last offer.

6. In all cases under this section, if an offer of settlement is made and is not accepted, and a subsequent trial results in a judgment which is less favorable than the last offer of settlement, prejudgment interest shall not be calculated or be subject to recovery for any period of time after the date of the last offer.

7. This section shall not apply to class or derivative actions.

Sec. 3. NEW SECTION. 668.3A IMMUNITY DUE TO MISUSE, FAILURE TO MAINTAIN, OR ALTERATION.

1. In an action seeking recovery of damages for personal injury, death, or property damage alleged to have been caused by a product, an assembler, lessor, designer, supplier of specifications, distributor, manufacturer, or seller shall not be assigned a percentage of fault if any of the following was a substantial factor in causing the injury, death, or property damage:

a. A misuse of the product by the plaintiff or a third person.

b. A failure to properly maintain, service, or repair the product.

c. An alteration, modification, or change in the product made by a person other than, and without the direction or consent of, the assembler, lessor, designer, supplier of specifications, distributor, manufacturer, or seller from whom recovery of damages is being sought.

2. This section shall apply whether or not any of the conduct described in subsection 1 was foreseeable.

Sec. 4. NEW SECTION. 668.17 ADMISSIBILITY OF EXPERT TESTIMONY.

In an action brought pursuant to this chapter, the court shall not permit testimony in the form of an expert opinion involving scientific, technical, or specialized knowledge unless the court first makes an affirmative determination regarding both of the following:

1. The witness is qualified on the specific subject matter of the testimony.

2. The testimony is reliable. In determining whether the testimony is reliable, the court shall consider the following factors relating to the testimony to be offered:

a. Whether the theory or technique has been tested or is capable of being tested.

b. Whether the theory or technique has been subject to

peer review.

c. If the testimony is based on a particular technique, the known or potential rate of error related to the technique.

d. Whether the theory or technique has been generally accepted in the scientific or technical community to which the testimony pertains.

Sec. 5. NEW SECTION. 668A.2 MULTIPLE PUNITIVE OR EXEMPLARY AWARDS FOR SAME ACT OR COURSE OF CONDUCT.

1. A defendant against whom punitive or exemplary damages have been awarded pursuant to section 668A.1 may file a separate written motion with the court seeking to have the amount of such damages reduced by the court when all of the following facts exist:

a. The defendant was previously sued in one or more actions in state or federal court arising from the same act or course of conduct as the present action. Allegations of substantially the same manufacturing defect, unsafe design, or inadequate warning or labeling of similar units of the same product in both the present and a previous action shall be deemed to arise from the same act or course of conduct.

b. Punitive or exemplary damages were awarded against the defendant in a previous action described in paragraph "a".

2. The motion shall be filed within the time permitted for the filing of a motion for new trial, and shall include and set forth all of the following:

a. The facts and theories of liability involved in any previous action.

b. The amount of punitive or exemplary damages awarded in any previous action.

c. The reason why and amount by which the present award of punitive or exemplary damages duplicates the punitive damages awarded in any previous action.

d. Any other evidence relevant to the determination of the court in reducing punitive or exemplary damages.

e. Certified copies of judgments in any previous action

and relevant pleadings and other documents that demonstrate the duplicative nature of the punitive or exemplary damages awarded in the present action.

3. The party awarded the punitive or exemplary damages may file a responsive motion prior to the hearing on the defendant's motion.

4. Upon the proper filing of a motion under this section, the court shall schedule a hearing, and shall determine whether the liability for the punitive or exemplary damages arose out of the same act or course of conduct as in any previous action, and the extent, if any, to which the present award of punitive or exemplary damages duplicates the total amount of punitive or exemplary damages awarded in any previous action.

a. The court may consider the facts of any previous action, the basis of liability for the previous punitive or exemplary damages awards, the purposes for which the awards were made, how the awards were determined or calculated, and any other evidence offered by the parties that is relevant to the issue of whether the defendant is subject to duplicative awards of punitive or exemplary damages.

b. If the court finds that the present punitive damage award arose from the same conduct as previous punitive damage awards, based on application of the factors set forth in this section, the court shall set aside or reduce the present punitive damage award in an amount necessary to eliminate the duplication.

c. If the court reduces the present award of punitive or exemplary damages in accordance with this section, the court shall enter its findings and the basis for its decision in the record.

5. The decision of the trial court on the issue of reduction of punitive or exemplary damages may be appealed according to the rules of appellate procedure. If the appellate court determines that the decision of the trial

court, in reducing or failing to reduce the award of punitive or exemplary damages, was clearly erroneous in light of the record, the appellate court shall reverse the decision of the trial court, and enter appropriate orders.

6. The court may stay entry of judgment or execution on the award of punitive or exemplary damages pending a hearing and decision under subsection 4 and enter any other orders as necessary to avoid prejudice or delay. The court may enter a similar stay of execution on the award of punitive or exemplary damages, in addition to any appropriate conditions, pending appeal of the issue if the defendant has made a prima facie showing of the facts in subsection 1.

7. The possibility of reduction of an award of punitive or exemplary damages pursuant to this section shall not be disclosed to the jury.

Sec. 6. APPLICABILITY. Section 5 of this Act, relating to multiple punitive or exemplary awards for the same conduct, applies to any civil action, the trial of which commences on or after the effective date of this Act, which civil action shall be considered the present action in order to compare the present action with previous actions. All other sections of this Act apply to civil actions filed on or after the effective date of this Act.

EXPLANATION

This bill amends Code section 321.445 relating to the use of evidence regarding the failure to wear a safety belt. The bill provides that such evidence may be considered evidence of comparative fault when there is evidence that the failure to wear a safety belt contributed to the injury claimed by the plaintiff.

The bill creates new Code section 625.30, and provides that any party may make an offer of settlement to another party at any time after 20 days after the original service of process, but at least 30 days prior to trial. The offer remains open for 30 days unless withdrawn, and must be accepted in writing.

An offer that is not accepted within the 30 days is deemed rejected. The offer is not filed with the court, and evidence relating to such an offer is admissible only if necessary to enforce a settlement.

If an offer is not accepted, and a subsequent judgment does not result in a verdict at least 10 percent more favorable (or simply more favorable, in cases where nonmonetary relief is sought) than the offer of settlement that was not accepted, the court shall award to the offeror those attorney fees and costs incurred after the date of the offer. In addition, if an offer of settlement is not accepted, and a subsequent trial results in a judgment which is less favorable than the offer of settlement, prejudgment interest shall not be calculated or be subject to recovery for any period of time after the date of the offer.

The bill creates new Code section 668.3A to provide that, in an action for personal injury, death, or property damage alleged to have been caused by a product, an assembler, lessor, designer, supplier of specifications, distributor, manufacturer, or seller will have no percentage of fault assigned to them where one of three factors is determined to be a substantial cause of the injury, death, or property damage. These factors include misuse, failure to maintain, or alteration of the product. The bill provides that this defense is not affected by whether the conduct was foreseeable.

The bill creates new Code section 668.17 to provide requirements for the admission of testimony in the form of expert opinion involving scientific, technical, or specialized knowledge in a civil action. The bill provides that, in order to be admitted, the court must affirmatively determine that the witness is qualified on the specific subject matter of the testimony and the testimony is reliable.

The bill creates new Code section 668A.2 to provide that a defendant who is presently subject to an award of punitive or

exemplary damages may file a motion to have the damages reduced when punitive or exemplary damages were awarded against the defendant in a previous action arising out of the same act or course of conduct. The bill provides that, in determining whether to reduce the award, the court may consider the facts of the previous actions, the basis of liability for the previous awards, the purposes for which the awards were made, how the awards were determined or calculated, and any other relevant evidence. The court may reduce or set aside the award, as necessary to eliminate duplication. The decision by the court may be appealed. The bill provides that the court may stay entry of judgment or execution on the award pending a hearing and decision on a motion to reduce the award or pending an appeal of the issue. The bill provides that the possibility of reduction of an award of punitive or exemplary damages shall not be disclosed to the jury. This provision of the bill applies to any civil action, the trial of which commences on or after the effective date of the bill.

The bill provides that the bill, except for the provisions relating to multiple punitive or exemplary awards for the same conduct, applies to civil actions filed on or after the effective date of the bill.

LSB 5813YC 78

McKibben
Lambert
Hansen

SSB 3150
Judiciary

SENATE FILE _____
BY (PROPOSED COMMITTEE ON
JUDICIARY BILL BY
CHAIRPERSON McKEAN)

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to civil actions by limiting the use of evidence regarding the failure to wear a safety belt; providing for offers of settlement; providing for recovery of prejudgment interest in relation to an offer to confess judgment; providing immunity due to misuse, failure to maintain, or alteration of a product; limiting the admissibility of expert testimony; limiting certain multiple or exemplary awards; and including an applicability provision.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

TLSB 6683XC 78

S.F. _____ H.F. _____

Section 1. Section 321.445, subsection 4, paragraph b, Code 1999, is amended to read as follows:

b. In a cause of action arising on or after July 1, 1986, brought to recover damages arising out of the ownership or operation of a motor vehicle, the failure to wear a safety belt or safety harness in violation of this section ~~shall not~~ may be considered evidence of comparative fault under section 668.3, subsection 1. ~~However, except as provided in section 321.446, subsection 6,~~ when there is evidence that the failure to wear a safety belt or safety harness in violation of this section ~~may be admitted to mitigate damages, but only under the following circumstances:~~

~~(1) Parties seeking to introduce evidence of the failure to wear a safety belt or safety harness in violation of this section must first introduce substantial evidence that the failure to wear a safety belt or safety harness~~ contributed to the injury or injuries claimed by the plaintiff.

~~(2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt or safety harness in violation of this section contributed to the plaintiff's claimed injury or injuries, and may reduce the amount of plaintiff's recovery by an amount not to exceed five percent of the damages awarded after any reductions for comparative fault.~~

Sec. 2. NEW SECTION. 625.30 OFFER OF SETTLEMENT -- ASSESSMENT OF COSTS AND ATTORNEY FEES.

1. Any party to a civil action may serve upon any other party a written offer, designated as an offer of settlement under this section, to settle a claim for the money, property, or relief specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly.

a. The offer may be served at any time more than twenty days after the original service of process in the action but not less than thirty days before trial, or twenty days before

trial if it is a counter offer.

b. A party shall not file an offer made under this section with the court. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this section.

2. The offer shall remain open for thirty days unless withdrawn by a writing served on the offeree prior to acceptance.

3. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror.

4. An offer that is neither withdrawn nor accepted within thirty days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer.

5. a. In cases where the complaint sets forth a claim for money, if the offeree rejects an offer made under this section, and the judgment finally obtained by the offeree is not at least ten percent more favorable than the last offer made by the offeror, the offeree shall pay the offerors's reasonable attorney fees and costs that are incurred after the rejection of the last offer.

b. In cases where the complaint sets forth a claim for property or other nonmonetary relief, if the offeree rejects an offer made under this section, and the judgment finally obtained by the offeree is not more favorable than the last offer, the offeree shall pay the offeror's reasonable attorney fees and costs that are incurred after rejection of the last offer.

6. In all cases under this section, if an offer of settlement is made and is not accepted, and a subsequent trial results in a judgment which is less favorable than the last offer of settlement, prejudgment interest shall not be calculated or be subject to recovery for any period of time after the date of the last offer.

7. This section shall not apply to class or derivative actions.

Sec. 3. NEW SECTION. 677.10A PREJUDGMENT INTEREST.

If any offer of judgment is made under this chapter and is not accepted, and a subsequent trial results in a judgment which is less than the offer of judgment, prejudgment interest shall not be calculated or be subject to recovery after the date of the offer.

Sec. 4. NEW SECTION. 668.3A IMMUNITY DUE TO MISUSE, FAILURE TO MAINTAIN, OR ALTERATION.

1. In an action seeking recovery of damages for personal injury, death, or property damage alleged to have been caused by a product, an assembler, lessor, designer, supplier of specifications, distributor, manufacturer, or seller shall not be assigned a percentage of fault if any of the following was a substantial factor in causing the injury, death, or property damage:

a. A misuse of the product by the plaintiff or a third person.

b. A failure to properly maintain, service, or repair the product.

c. An alteration, modification, or change in the product made by a person other than, and without the direction or consent of, the assembler, lessor, designer, supplier of specifications, distributor, manufacturer, or seller from whom recovery of damages is being sought.

2. This section shall apply whether or not any of the conduct described in subsection 1 was foreseeable.

Sec. 5. NEW SECTION. 668.17 ADMISSIBILITY OF EXPERT TESTIMONY.

In an action brought pursuant to this chapter, the court shall not permit testimony in the form of an expert opinion involving scientific, technical, or specialized knowledge unless the court first makes an affirmative determination regarding both of the following:

1. The witness is qualified on the specific subject matter of the testimony.

2. The testimony is reliable. In determining whether the testimony is reliable, the court shall consider the following factors relating to the testimony to be offered:

a. Whether the theory or technique has been tested or is capable of being tested.

b. Whether the theory or technique has been subject to peer review.

c. If the testimony is based on a particular technique, the known or potential rate of error related to the technique.

d. Whether the theory or technique has been generally accepted in the scientific or technical community to which the testimony pertains.

Sec. 6. NEW SECTION. 668A.2 MULTIPLE PUNITIVE OR EXEMPLARY AWARDS FOR SAME ACT OR COURSE OF CONDUCT.

1. A defendant against whom punitive or exemplary damages have been awarded pursuant to section 668A.1 may file a separate written motion with the court seeking to have the amount of such damages reduced by the court when all of the following facts exist:

a. The defendant was previously sued in one or more actions in state or federal court arising from the same act or course of conduct as the present action. Allegations of substantially the same manufacturing defect, unsafe design, or inadequate warning or labeling of similar units of the same product in both the present and a previous action shall be deemed to arise from the same act or course of conduct.

b. Punitive or exemplary damages were awarded against the defendant in a previous action described in paragraph "a".

2. The motion shall be filed within the time permitted for the filing of a motion for new trial, and shall include and set forth all of the following:

a. The facts and theories of liability involved in any previous action.

b. The amount of punitive or exemplary damages awarded in any previous action.

c. The reason why and amount by which the present award of punitive or exemplary damages duplicates the punitive damages awarded in any previous action.

d. Any other evidence relevant to the determination of the court in reducing punitive or exemplary damages.

e. Certified copies of judgments in any previous action and relevant pleadings and other documents that demonstrate the duplicative nature of the punitive or exemplary damages awarded in the present action.

3. The party awarded the punitive or exemplary damages may file a responsive motion prior to the hearing on the defendant's motion.

4. Upon the proper filing of a motion under this section, the court shall schedule a hearing, and shall determine whether the liability for the punitive or exemplary damages arose out of the same act or course of conduct as in any previous action, and the extent, if any, to which the present award of punitive or exemplary damages duplicates the total amount of punitive or exemplary damages awarded in any previous action.

a. The court may consider the facts of any previous action, the basis of liability for the previous punitive or exemplary damages awards, the purposes for which the awards were made, how the awards were determined or calculated, and any other evidence offered by the parties that is relevant to the issue of whether the defendant is subject to duplicative awards of punitive or exemplary damages.

b. If the court finds that the present punitive damage award arose from the same conduct as previous punitive damage awards, based on application of the factors set forth in this section, the court shall set aside or reduce the present punitive damage award in an amount necessary to eliminate the duplication.

c. If the court reduces the present award of punitive or exemplary damages in accordance with this section, the court

shall enter its findings and the basis for its decision in the record.

5. The decision of the trial court on the issue of reduction of punitive or exemplary damages may be appealed according to the rules of appellate procedure. If the appellate court determines that the decision of the trial court, in reducing or failing to reduce the award of punitive or exemplary damages, was clearly erroneous in light of the record, the appellate court shall reverse the decision of the trial court, and enter appropriate orders.

6. The court may stay entry of judgment or execution on the award of punitive or exemplary damages pending a hearing and decision under subsection 4 and enter any other orders as necessary to avoid prejudice or delay. The court may enter a similar stay of execution on the award of punitive or exemplary damages, in addition to any appropriate conditions, pending appeal of the issue if the defendant has made a prima facie showing of the facts in subsection 1.

7. The possibility of reduction of an award of punitive or exemplary damages pursuant to this section shall not be disclosed to the jury.

Sec. 7. APPLICABILITY. Section 6 of this Act, relating to multiple punitive or exemplary awards for the same conduct, applies to any civil action, the trial of which commences on or after the effective date of this Act, which civil action shall be considered the present action in order to compare the present action with previous actions. All other sections of this Act apply to civil actions filed on or after the effective date of this Act.

EXPLANATION

This bill amends Code section 321.445 relating to the use of evidence regarding the failure to wear a safety belt. The bill provides that such evidence may be considered evidence of comparative fault when there is evidence that the failure to wear a safety belt contributed to the injury claimed by the

plaintiff.

The bill creates new Code section 625.30, and provides that any party may make an offer of settlement to another party at any time after 20 days after the original service of process, but at least 30 days prior to trial. The offer remains open for 30 days unless withdrawn, and must be accepted in writing. An offer that is not accepted within the 30 days is deemed rejected. The offer is not filed with the court, and evidence relating to such an offer is admissible only if necessary to enforce a settlement.

If an offer is not accepted, and a subsequent judgment does not result in a verdict at least 10 percent more favorable (or simply more favorable, in cases where nonmonetary relief is sought) than the offer of settlement that was not accepted, the court shall award to the offeror those attorney fees and costs incurred after the date of the offer. In addition, if an offer of settlement is not accepted, and a subsequent trial results in a judgment which is less favorable than the offer of settlement, prejudgment interest shall not be calculated or be subject to recovery for any period of time after the date of the offer.

This bill limits recovery of prejudgment interest in any pending or proposed action where an offer to confess judgment is made, but is not accepted, and a subsequent trial results in a judgment that is less than the amount in the offer of judgment. In such a case, no prejudgment interest is to be calculated or is recoverable after the date of the offer of judgment.

The bill creates new Code section 668.3A to provide that, in an action for personal injury, death, or property damage alleged to have been caused by a product, an assembler, lessor, designer, supplier of specifications, distributor, manufacturer, or seller will have no percentage of fault assigned to them where one of three factors is determined to be a substantial cause of the injury, death, or property

damage. These factors include misuse, failure to maintain, or alteration of the product. The bill provides that this defense is not affected by whether the conduct was foreseeable.

The bill creates new Code section 668.17 to provide requirements for the admission of testimony in the form of expert opinion involving scientific, technical, or specialized knowledge in a civil action. The bill provides that, in order to be admitted, the court must affirmatively determine that the witness is qualified on the specific subject matter of the testimony and the testimony is reliable.

The bill creates new Code section 668A.2 to provide that a defendant who is presently subject to an award of punitive or exemplary damages may file a motion to have the damages reduced when punitive or exemplary damages were awarded against the defendant in a previous action arising out of the same act or course of conduct. The bill provides that, in determining whether to reduce the award, the court may consider the facts of the previous actions, the basis of liability for the previous awards, the purposes for which the awards were made, how the awards were determined or calculated, and any other relevant evidence. The court may reduce or set aside the award, as necessary to eliminate duplication. The decision by the court may be appealed. The bill provides that the court may stay entry of judgment or execution on the award pending a hearing and decision on a motion to reduce the award or pending an appeal of the issue. The bill provides that the possibility of reduction of an award of punitive or exemplary damages shall not be disclosed to the jury. This provision of the bill applies to any civil action, the trial of which commences on or after the effective date of the bill.

The bill provides that the bill, except for the provisions relating to multiple punitive or exemplary awards for the same conduct, applies to civil actions filed on or after the

effective date of the bill.

HSB 572

JUDICIARY

Jager, chair
Sunderbruch
Parmenter

SENATE/HOUSE FILE _____
BY (PROPOSED ATTORNEY GENERAL BILL)

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act providing for recovery of remedies by persons directly or indirectly injured by certain anticompetitive acts prohibited by law.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

TLSB 5288DP 78

S.F. _____ H.F. _____

Section 1. Section 553.12, unnumbered paragraph 1, Code 1999, is amended to read as follows:

The state or a person who is directly or indirectly injured or threatened with injury by conduct prohibited under this chapter may bring suit to:

EXPLANATION

This bill amends Code section 553.12, pertaining to remedies for violations of the Iowa competition law, to make such remedies available to persons both directly and indirectly injured, or threatened with injury by the anticompetitive practices prohibited under Code chapter 553.

LSB 5288DP 78
jj/as/5

HSB 564
JUDICIARY

Myers, chair
Shirley
Boddicker

HOUSE FILE _____
BY (PROPOSED COMMITTEE ON JUDICIARY BILL BY CHAIRPERSON LARSON)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to licensed professionals subject to professional liability actions.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

TLSB 5563YC 78

S.F. _____ H.F. _____

Section 1. Section 668.11, subsection 1, Code 1999, is amended to read as follows:

1. a. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications, and the purpose for calling the expert within the following time period:

~~a.~~ (1) The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time of disclosure.

~~b.~~ (2) The defendant within ninety days of plaintiff's certification.

b. For purposes of this section, "licensed professional" means a professional registered, certified, or licensed, and admitted to practice or otherwise legally authorized to practice a profession under the laws of this state pursuant to any of the following chapters: 147, 147A, 148, 148A, 148B, 148C, 148D, 148E, 149, 150, 150A, 151, 152, 152A, 152B, 152C, 152D, 153, 154, 154A, 154B, 154C, 154D, 155, 155A, 156, 157, 158, 169, 542B, 542C, 543B, 543D, 544A, 544B and 602.

EXPLANATION

This bill amends Code section 668.11, relating to disclosure of expert witnesses in civil actions alleging liability against licensed professionals. The bill defines which professions are covered by the requirements of this subsection, and refers to chapters governing certified public accountancy, architecture, chiropractic, dentistry, physical therapy, occupational therapy, psychology, professional engineering, land surveying, landscape architecture, law, medicine and surgery, optometry, osteopathy, osteopathic medicine and surgery, acupuncture, accounting practitioner, podiatry, speech pathology, audiology, hearing aid sales, veterinary medicine, pharmacy, nursing, nursing home administration, mental health counseling, marriage and family

therapy, mortuary science, emergency medical care, real estate sales and appraisals, social work, dietetics, respiratory care, massage therapy, cosmetology, barbering, athletic training, and practice as a physician's assistant.

SUBROGATION ISSUES ARISING OUT OF THE DEFENSE OF PERSONAL INJURY CASES

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SUBROGATION ISSUES ARISING OUT OF THE DEFENSE OF PERSONAL INJURY CASES

John B. Grier
CARTWRIGHT, DRUKER & RYDEN

I. Introduction

A. Most subrogation issues in personal injury litigation arise out of the payment of medical expenses. This paper will be primarily directed to those issues. Obviously, the amount that can be recovered from the tortfeasor is related to the subrogation issues that arise from the payment of medical services by others.

II. What may be recovered for medical expenses under existing Iowa law?

A. The general rule in Iowa appears to be the "reasonable value" of necessary medical charges may be recovered. Worez v. Des Moines City Railroad Co., 175 Iowa 1, 156 N.W. 867 (1916); Elzig v. Balls, 135 Iowa 208, 112 N.W. 540 (1907). Uniform Jury Instruction 200.6 relies on the above two cases for the concept of "reasonable value of necessary (medical) services".

B. Later cases in Iowa suggest that the correct standard is that the plaintiff must prove the medical expenses were made necessary by the negligent act of the defendant and that the amount charged represents the reasonable fair value of the services. See, Stanley v. State, 197 N.W.2d 599 (Iowa 1972); Wood v. Branning, 215 Iowa 59, 62, 244 N.W. 658 (1932); Melsha v. Dillon, 214 Iowa 13, 24, 243 N.W. 295 (1932); Ege v. Born, 212

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Iowa 1138, 236 N.W. 75 (1931).

C. Iowa adheres to the rule that reasonableness may be established by formal proof such as opinion evidence or by evidence of payment of the bill. Arnold v. Fort Dodge, Des Moines & Southern Railroad Co., 186 Iowa 538, 173 N.W. 252 (1945); Stanley v. State, 197 N.W.2d 599, 607 (Iowa 1972). See generally, Annotation, 12 ARL3rd 1347.

D. The problems. What if the medical provider charged X dollars, but accepted Y dollars in full payment? (Y dollars is less than X dollars).

1. May the plaintiff recover more than the amount actually paid?

2. Is the amount actually paid admissible on the question of reasonable and fair value?

3. What is the effect of 668.14?

4. What is the effect if the medical provider is precluded from collecting any more than actually paid, even though the original bill was for more? What if the medical provider is not so precluded?

III. The prevailing practice by hospitals.

A. Determining the standard charge.

B. Discounts from the standard charge.

C. Acceptance of payments in full payment.

D. Acceptance of payments, but with right to proceed against the patient for additional charges.

IV. The law.

A. Damages are limited to the actual loss. Dealers Hobby, Inc. v. Marie Ann Linn Rlty. Co., 255 N.W.2d 131, 134 (Iowa 1977).

B. No injured party should receive more than what has been lost as a result of another's wrongdoing. U.S. Borax & Chemical v. Archer, 506 N.W.2d 456 (Iowa Ct. of App. 1993).

C. When evidence shows that a sum certain has been paid or incurred for past medical care or services, that is the amount plaintiff is limited to recover. Hanif v. Housing Authority, 246 Cal.Rptr. 192, 200 C.A.3rd 635 (1988).

D. The reasonable value of services is the price usually and customarily paid for such services or like services at a time and locality where services were rendered. Baker v. Brown Estate, 294 S.W.2d 22, 365 Mo. 1159 (Mo. 1956). As to amount paid as limiting recovery, see also, Andersen v. Muniz, 515 P.2d 52 (Ariz. Ct. of App. 1973) and Pabon v. Cotton State Mutual Ins. Co., 196 F.Supp. 586 (D.C. of Puerto Rico 1961).

V. Treatment and government hospitals.

A. There is a division of authority as to whether or not a tortfeasor is liable for the value of services received gratuitously from government hospitals. See generally, 77 ALR3d 366. However, under the Federal Medical Care

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Recovery Act, 42 U.S. Code §2651, the federal government has the right to recover from the tortfeasor the "reasonable value of medical services lawfully furnished by the United States." There is authority, however, that only the United States may assert this claim and not the tortfeasor. See Smith v. Foucha, 172 S.2d 318.

VI. Some jurisdictions only allow expenditures that are actually incurred. See, Evans v. Pennsylvania Railroad Co., 255 F.2d 205 (3rd Cir. Dela. Law); Peterson v. Lou Bachrodt Chev. Co., 76 Ill.2d 353, 391 N.E.2d 1 (1979).

VII. It appears that most jurisdictions allow recovery for gratuitous services rendered by family members or other volunteers. See generally, Annotation, 77 ALR3d 366.

THE OBLIGATION TO HONOR SUBROGATION INTERESTS

Under Iowa law, every action must be prosecuted in the name of the real party in interest. Iowa R.C.P. 2. Kimmel v. Iowa Realty Co., 339 N.W.2d 374, 380-81 (Iowa 1983). "A party is to be regarded as the real party in interest whenever a payment to him would protect the defendant from the claims of third persons." Connor v. Thompson Const. & Development Co., 166 N.W.2d 109, 114 (Iowa 1969) (quoting Hunt v. Wright, 256 Iowa 1378, 1380, 131 N.W.2d 268 (1964)).

An insurer who has not paid the full amount of its insured's loss is not the "real party in interest" and may not bring an action against a tortfeasor for that loss. United Sec. Ins. Co.

v. Johnson, 278 N.W.2d 29, 31 (Iowa 1979). Where the insurance covers only a portion of an insured's loss, the "right of action remains in the insured for the entire loss, the insured becoming a trustee for the insurer (to the extent of the loss paid by the insurer) in the recovery secured by it; that the right of action for the entire loss is single and cannot be split and separately maintained by the owner and the various insurers who have paid parts of the loss." Id. at 31 (quoting Firemen's Ins. Co. v. Bremmer, 25 F.2d 75, 76 (8th Cir. 1928)). A partially subrogated insurer is not a necessary party that the defendant may have forcibly brought into an action because the insured is the real party in interest and a cause of action may not be split. Rursch v. Gee, 25 N.W.2d 312, 315-16 (Iowa 1946). A defendant does not have the right to bring in the insurer into an action because "against him the defendant needs no protection." Id.

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Recent decisions of the Iowa Supreme Court have clarified the role to be played by a partially subrogated insurance carrier in an action against or settlement with a tortfeasor. See Krapfl v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 877, 879 (Iowa 1996) (holding a cause of action cannot be split and separately maintained by the owner and various insurers who have paid parts of the loss.); Ahlers v. Emcasco Insurance Co., 548 N.W.2d 892 (Iowa 1996) (stating that a subrogated workers compensation carrier's "subservient legal status" requires payment of entire legal fee of subrogor's attorney if 100% of recovery goes to it); Bride v. Heckart, 556 N.W.2d 449 (Iowa 1996) (holding an

intervening subrogated insurer to have no right to actively participate in a trial of subrogation claim); and Aspelmeier, et al. v. Allied Group Ins. Co., 556 N.W.2d 805, 808 (Iowa 1996) (stating that subrogated insurer has no right to obtain a judgment in its own name). In general, these decisions make clear that a partially subrogated insurer has a quite subservient role to the subrogor in matters of settlement and litigation--even though the insurance carrier may, in reality, have a bigger monetary interest in the litigation.

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These recent decisions of the Iowa Supreme Court demonstrate that a partially subrogated insurer has no right to sue an alleged tortfeasor for its damages. One who has no right to get a judgment in its own name has no right to sue in its own name. With no right to sue, a release from a partially subrogated subrogee is of no value to a tortfeasor. Such a release does not affect the subrogor's rights to sue for the whole cause of action. Without the ability to give an effective release, a partially subrogated insurer obviously has no right to "veto" a settlement made by a subrogor with an alleged tortfeasor.

In Employers Mut. Cas. Co. v. Hanshaw, 176 N.W.2d 653 (Iowa 1970) a partially subrogated insurance carrier brought an action against an alleged tortfeasor to reimburse the money it had paid out to its insured. The defendant alleged as a defense a dismissal with prejudice entered in a previous action on the same operative facts in which a cross-claim had been made against the insurance carrier's insured. Id. at 654. The Court held that

(1) the insured should have asserted any cause of action against the tortfeasor in the previous action as a compulsory counterclaim; (2) the rights of the carrier arose no higher than its insured's rights; and (3) the dismissal with prejudice entered that included plaintiff's insured in the previous action barred the insurance carrier's present action. Id. at 655-56. The Court did not reach the question of whether the subrogee was the real party in interest. Id. at 656.

Hanshaw illustrates the law in Iowa that a release in favor of an insured is, in fact, binding on a subrogee.

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Iowa courts have long realized that disputes between partially subrogated insurers and their insureds do not affect an alleged tortfeasor's liability. In Russell v. Chicago M. & St. P. Ry. Co., 195 Iowa 993, 191 N.W. 806, 809 (1923), as modified upon rehearing; 192 N.W. 267 (1923), the Iowa Supreme Court stated that a court's apportionment of a judgment between a partially subrogated insurer and a plaintiff is "more of a matter between [the plaintiff] and the insurance companies than it is between the defendant and the insurance companies and [the plaintiff]."

In affirming that no duty exists on the tortfeasor's insurance carrier to protect a subrogation interest the Supreme Court stated:

> "Farm Bureau contends that Allied's failure to protect its interest is a violation of industry practices. We are convinced that these rules of comity, to the extent that they exist, are simply a recognition that an insurer's self-interest transcends the exigencies of a particular transaction. The insurer of the tortfeasor

in one transaction may, in another transaction, be the subrogated party seeking recoupment of its subrogation interest. Consequently, cooperation within the industry in protecting the interests of subrogated insurers is to be expected. But, these expectations do not rise to the level of legal duties that can be enforced by common-law decree. If these principles of comity are to be made legally biding, that is a task for the legislature to undertake rather than the courts." Farm Bureau v. Allied, 580 N.W.2d 788, 790 (Iowa 1998)

Beware of legislation possibly changing general rule: § 252A.5(2) Minors; § 249A.6 Medicaid.

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RECENT DEVELOPMENTS IN EMPLOYMENT LAW

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I. CASE OF THE YEAR: Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097 (2000).

Reeves decided two important issues. First, Reeves held that a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for discrimination. This practically means that more employment law cases will go to a jury. Second, the Court addressed the standards of granting a judgment as a matter of law under Rule 50 (which, by extension, effects summary judgment motions under Rule 56).

The facts of the case are relatively straightforward. When Roger Reeves was 57 years old, he had spent 40 years in the employ of Sanderson Plumbing Products, a manufacturer of toilet seats and covers. Reeves worked in a department known as the "Hinge Room," where he supervised the "regular line." Oswalt, in his mid-thirties, supervised the Hinge Room's "special line," and Caldwell, at age 45, was the manager of the Hinge Room and supervised both Reeves and Oswalt. Reeve's responsibilities included recording the attendance and hours of those under his supervision, and reviewing a weekly report that listed the hours worked by each employee.

In 1995, Caldwell informed his supervisor, Chesnut, the director of manufacturing and the husband of the company president, that "production was down" in the Hinge Room because employees were often absent and were "coming in late and leaving early." Because the monthly attendance reports did not indicate a problem, Chesnut ordered an audit of the Hinge Room's timesheets for July, August, and September of that year. According to Chesnut's testimony, that investigation revealed "numerous time keeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt." Following the audit, Chesnut, along with Jester, vice president of human resources, and Whitaker, vice president of operations, recommended to company president Sanderson that Reeves and Caldwell be fired. In October 1995, Sanderson followed the recommendation and discharged both Reeves and Caldwell. Oswalt, the youngest employee, was not terminated.

In June 1996, Reeves filed suit in the United States District Court for the Northern District of Mississippi, contending that he had been fired because of his age in violation of the Age Discrimination in Employment Act ("ADEA"). At trial, Sanderson Plumbing contended that it had fired Reeves due to his failure to maintain accurate attendance records, while Reeves tried to demonstrate that explanation was a mere pretext for age discrimination. Reeves introduced evidence that he had accurately recorded the attendance and hours of the employees under his supervision, and that Chesnut, whom Oswalt described as wielding "absolute power" within the company, had demonstrated age-based animus in his dealings with Reeves.

During the trial, the District Court twice denied oral motions by Sanderson Plumbing for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure, and the case went to the jury. The court instructed the jury that "[i]f the plaintiff fails to prove age was a determinative or motivating factor in the decision to terminate him, then your verdict shall be for the defendant." The jury returned a verdict in favor of Reeves. Sanderson Plumbing then renewed its motion for judgment as a matter of law and alternatively moved for a new trial, which were denied.

On appeal, the Fifth Circuit reversed, holding that Reeves had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination. The appellate court acknowledged that Reeves "very well may" have offered sufficient evidence for "a reasonable jury [to] have found that [Sanderson Plumbing's] explanation for its employment decision was pretextual." The court explained, however, that this was "not dispositive" of the ultimate issue -- namely, "whether Reeves presented sufficient evidence that his age motivated [Sanderson Plumbing's] employment decision." Addressing this question, the court weighed Reeves's additional evidence of discrimination against other circumstances surrounding his discharge. Specifically, the court noted that Chesnut's age-based comments "were not made in the direct context of Reeves's termination"; there was no allegation that the two other individuals who had recommended that Reeves be fired (Jester and Whitaker) were motivated by age; two of the decision makers involved in Reeves's discharge (Jester and Sanderson) were over the age of 50; all three of the Hinge Room supervisors were accused of inaccurate record keeping; and several management positions were filled by persons over age 50 after Reeves was fired. On this basis, the Fifth Circuit concluded that Reeves had not introduced sufficient evidence for a rational jury to conclude that he had been discharged because of his age.

The United States Supreme Court granted certiorari, to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in McDonnell Douglas Corp. v. Green), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for discrimination. The Court answered this question in the affirmative.

The Court believed that Reeves established a prima facie case and made a substantial showing that Sanderson Plumbing's legitimate, nondiscriminatory explanation, i.e., shoddy record keeping, was false. The Court noted Reeves offered evidence showing that he had properly maintained the attendance records in question and that cast doubt on whether he was responsible for any failure to discipline late and absent employees. "This Court need not--and could not--resolve all such circumstances here. In this case, it suffices to say that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of

fact to conclude that the employer unlawfully discriminated." Sanderson Plumbing, therefore, was not entitled to judgment as a matter of law.

Rule 50 requires a court to render judgment as a matter of law when a party has been fully heard on an issue, and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. "The standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56." The Supreme Court declared that, in holding that the record contained insufficient evidence to sustain the jury's verdict, the Fifth Circuit misapplied the standard of review dictated by Rule 50. According to the Supreme Court, the lower court disregarded evidence favorable to Reeves--the evidence supporting his prima facie case and undermining Sanderson Plumbing's nondiscriminatory explanation--and failed to draw all reasonable inferences in his favor. The Court gave the example that while the Fifth Circuit acknowledged the potentially damning nature of Chesnut's age-related comments, the Fifth Circuit discounted them on the ground that they were not made in the direct context of Reeves's termination. The Supreme Court also found that the Fifth Circuit discredited Reeves's evidence that Chesnut was the actual decision maker by giving weight to the fact that there was no evidence suggesting the other decision makers were motivated by age. Moreover, the Court believed that the other evidence on which the Fifth Circuit relied--that Caldwell and Oswalt were also cited for poor record keeping, and that Sanderson Plumbing employed many managers over age 50--although relevant, was certainly not dispositive. "Given that Reeves established a prima facie case, introduced enough evidence for the jury to reject [Sanderson Plumbing] explanation, and produced additional evidence that Chesnut was motivated by age-based animus and was principally responsible for Reeves' firing, there was sufficient evidence for the jury to conclude that [Sanderson Plumbing] had intentionally discriminated."

K

II. PUNITIVE DAMAGES

Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999).

In order to support a claim for punitive damages, in a discrimination lawsuit, the employer must have acted with "malice or with reckless indifference to [the plaintiff's] federally protected rights." The terms "malice" or "reckless indifference" pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. The Court further defined this (vague) standard by stating that "an employer must at least discriminate in the face of a perceived risk that it s actions will violate federal law to be liable in punitive damages." Intentional discrimination will not necessarily give rise to punitive damages. For example, the theory of discrimination may be novel or poorly recognized, or an employer may reasonably believe that its "discrimination" satisfies an exception to liability.

The Kolstad court also addressed the proper legal standard for imputing liability to an employer for punitive damages purposes. The Court held that an employer may not be vicariously liable for punitive damages, when the discriminatory employment decisions are contrary to the employer's "good faith efforts to comply with Title VII." = policy (written) = no tolerance - complaint procedure - training - anti-retaliation - investigation

Lower courts have struggled with interpreting the Kolstad standards:

Blackmon v. Pinkerton Sec. & Investigative Serv., 182 F.3d 629 (8th Cir. 1999).

Four co-workers frequently engaged in graphic, sexual conversation in Plaintiff's presence. Plaintiff repeatedly requested the behavior cease. After the conduct continued, Plaintiff took her complaints up the chain of command, and began to suffer adverse employment actions; in fact, she was ultimately terminated. The Court found Defendant acted with malice and reckless indifference when it (1) failed to investigate Plaintiff's complaints and institute prompt remedial action even after the Plaintiff complained to three successive levels of supervision; (2) repeatedly retaliated against the Plaintiff for complaining of sexual harassment by reprimanding her, demoting her, and fostering an environment in which her co-workers were openly hostile to her; (3) attempted to escape legal liability be soliciting information against Plaintiff to provide she caused the harassment; and (4) attempted to escape legal liability for terminating the Plaintiff by firing another employee at the same time. The Blackmon Court also noted that physical injury and duration of harassment are not required to prove an employer acted with malice or reckless indifference. As to lack of physical injury, Plaintiff's substantial mental and emotional anguish was sufficient injury to warrant submission of the issue of punitive damages. Additionally, the fact that the harassment did not occur over a "shockingly long period of time" doesn't preclude punitive damages. A durational requirement is simply inappropriate, particularly where retaliation is also alleged.

Dhyne v. Meiners Thriftway, Inc., 184 F.3d 983 (8th Cir. 1999).

Plaintiff in sex harassment case recovered one dollar in compensatory damages. The district court refused to instruct on punitive damages. The Eighth Circuit affirmed, deciding that while the management may have excessively delayed, the employer was not guilty of acting "with malice or with reckless indifference." The harasser was terminated after the second complaint.

Kimbrough v. Loma Linda Dev., Inc., 183 F.3d 782 (8th Cir. 1999).

The Court affirmed an award of punitive damages. The harassment by a supervisor was ignored by the general manager. Testimony showed that when the harasser used flour on his hands to put hand prints on Plaintiff's butt, Plaintiff showed prints to general manager who remarked that he liked the way they looked.

III. MISCELLANEOUS CASES

A. Federal Caselaw

Allen v. Interior Constr. Servs., 214 F.3d 978 (2000).

"Allen's back injury did not hinder his ability to telephone or otherwise communicate with Interior regarding employment and thus did not give rise to a duty on Interior's part to contact him about any available work." After all, "both at Interior and within much of the construction industry an individual employed on an as-needed basis generally must initiate contact with a contractor in order to obtain employment." Since the disability had nothing to do with communication ability, there was no need to alter this usual practice as an accommodation.

Belk v. SW Bell Tele. Co., 194 F.3d 946 (8th Cir. 1999).

Plaintiff wears a full-length leg brace from the residual effects of polio. He applied internally for a promotion to Customer Service Technician. The company administered a test for the position, including a physical performance test. Plaintiff was unable to pass the left leg portion of the test. The Eighth Circuit reversed a jury verdict for Plaintiff. The Court held it was error to reject a jury instruction that an employer may use a selection device that tends to screen out persons with disabilities "as long as the standard test, or other selection criteria, as used by the employer, is job related for the position in question, is consistent with business necessity, and performance cannot be accomplished by reasonable accommodation."

K

Cravens v. Blue Cross,

"[We] conclude that the definition of 'qualified individual with a disability' includes a disabled employee who cannot do his or her current job, but who desires and can perform with or without reasonable accommodation, the essential functions of a vacant job within the company to which he or she could be reassigned." In other words, under the ADA, a person with a disability who is unable to perform their current job even with reasonable accommodation may still request a transfer to a vacant position, so long as they are qualified for the position.

Lepique v. Hove, 217 F.3d 1012 (8th Cir. 2000).

A refusal to transfer to another city in retaliation for testifying before Congress about allegedly rampant sex harassment is not actionable "adverse employment action."

Malone v. Eaton Corp., 187 F.3d 960 (8th Cir. 1999).

Plaintiff claimed it was discrimination to terminate him for having a consensual affair with a subordinate in violation of policy, but not to terminate the subordinate. The court dismissed, noting that the company may reasonably place most of the burden of enforcing its policy on supervisors who are to blame.

Regel v. K-Mart Corp., 190 F.3d 876 (8th Cir. 1999).

"When a company exercises its business judgment in deciding to reduce its work force, it need not provide evidence of financial distress to make it a 'legitimate' reduction-in-force."

Schmedding v. Tnemec Co., 187 F.3d 862 (8th Cir. 1999).

The district court had sustained a motion to dismiss because sexual orientation and "perceived" sexual orientation are not protected from discrimination. The Eighth Circuit reversed, holding that although the case was not well plead, it could be construed as alleging same sex harassment. "We do not think that, simply because some of the harassment alleged by Schmedding includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation."

Scusa v. Nestle U.S.A., 181 F.3d 958 (8th Cir. 1999).

Plaintiff alleged sex harassment by her co-workers. The putative harassment consisted largely of being rude and cursing, including calling Plaintiff a "f---ing b---h." The Court granted summary judgment to the employer on several grounds. First, the court found no evidence that the harassment was based on gender – profanity was common among men and women alike. Second, the Court pointed to Plaintiff's own use of profanities as evidence the alleged harassment could not be considered "unwelcome." Finally, the court found that ostracism by co-workers did not by itself amount to an adverse employment action.

Taylor v. Nimock's Oil Co., 214 F.3d 957 (8th Cir. 2000).

"During the time period of January to March of 1996, Taylor was limited in the life activity of working only to the extent of her restrictions, which were that she could work only 40 hours per week and lift no more than 10 pounds. Although overtime hours may be normal practice for many jobs, we conclude that Taylor's limitations on working were not substantially limiting within the meaning of the ADA."

Treanor v. MCI, 200 F.3d 570 (8th Cir. 2000).

Summary judgment for the employer affirmed, because the ADA does not require the creation of a new part-time job for an applicant, under the circumstances of the case.

B. State Caselaw

Balmer v. Hawkeye Steel, 604 N.W.2d 639 (Iowa 2000).

In a case of first impression, the Iowa Supreme Court held that constructive discharge, standing alone, is not an actionable tort.

Godar v. Edwards, 558 N.W.2d 701 (Iowa 1999).

The Court recognized the tort of negligent hiring. The Court set out the following elements: (1) that the employer knew, or in the exercise of ordinary care should have known, of its employees unfitness at the time of hiring; (2) that through the negligent hiring of the employee, the employee's incompetence, unfitness, or dangerous characteristics, proximately caused the resulting of injuries; and (3) that there is some employment or agency relationship between the tortfeasor and the defendant employer. The claim failed here because of insufficient evidence on the first element.

K

Schoff v. Combined Ins. Co. of Am., 604 N.W.2d 43 (Iowa 1999).

The Court found for the first time that the doctrine of promissory estoppel can apply in an employment-at-will context. The elements of promissory estoppel are (1) a clear and definite promise, (2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act; (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and (4) injustice can be avoided only be enforcement of the promise. Plaintiff failed in this case, however, to prove the first element.

Vivian v. Madison, 601 N.W.2d 872 (Iowa 1999).

Plaintiff filed suit against her employer and supervisor in federal court, charging them with race and sex discrimination under the Iowa Civil Rights Act and Title VII. The supervisor Madison moved to dismiss on the grounds that the ICRA does not impose individual liability on supervisory employees. Judge Longstaff certified the question to the Iowa Supreme Court.

The Court initially noted that Iowa courts traditionally turn to federal law when interpreting the ICRA. But in doing so, "[the courts] look simply to the analytical

framework utilized by the federal courts and not to a substitution of the language of the federal statutes for the clear words of the ICRA." Indeed, the plain language of the two statutes is very different – Title VII refers to discrimination by "employers" and the ICRA speaks of "persons" who discriminate. Title VII is therefore not persuasive on the issue.

Oddly enough, Madison's primary argument was also based on the language of the ICRA. The ICRA's plain language states that it does not cover employers with fewer than four employees. Madison argued that it made no sense for the ICRA to exempt small employers, but to cover supervisors who employ no one. The Court did not directly address this argument, but simply stated that courts should be "guided by what the legislature actually said, rather than what it could or should have said." Id. at 878.

The Court analyzed the literal terms of the ICRA. The ICRA makes it illegal for any "person" to discriminate, Iowa Code § 216.6(1)(a), and authorizes a right-to-sue letter to be issued regarding any person alleged to have discriminated. Id. § 216.15(1). Further, the Iowa Code defines the word "person" to include any "individual." The term "employer" is separately defined and is used in other sections of the ICRA. Therefore, the Court reached the conclusion that the Legislature had a "clear perception of [the] separate meanings" of these two terms, and intended that persons other than employers be prohibited from discriminating in employment. Vivian, 601 N.W.2d at 878.

"Co-workers"? (who discriminate) > don't know for sure.

ICRA — only 4 or more employees.

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"By that demand of $154 billion, Mr. Rosenblatt does not seek truth, he does not seek fairness, and he does not seek justice. He only seeks money. Money in an amount so far beyond anything that the law and the evidence allows, beyond anything, anything at all that any industry or government could ever pay.

It does nothing more -- it invites you to become a runaway, out-of-control jury. And that is what Mr. Rosenblatt has done. He's invited you to ignore the law, he's invited you to ignore the evidence by making that demand, and that was wrong . . .

Ladies and gentlemen, that's not a request for a reasonable amount of punitive damages. That's a request for a death warrant for each of these five companies."

Dan Webb, Counsel for Philip Morris Incorporated,
Engle v. R.J. Reynolds Tobacco Co., et al
In the Circuit Court for Dade County, Florida
Tr. at 57186-87 (July 11, 2000)

I. OVERVIEW

This outline offers suggestions for defending punitive damage claims governed by Iowa substantive law[2] and marshalls caselaw to assist the practitioner in related motion practice.

[2] Although choice of law issues are beyond the scope of this outline, practitioners should be alert for opportunities to argue in appropriate cases that the punitive damage claims are governed by the substantive law of another state where punitive damages are disallowed or additional defenses may be available. See, e.g., Jackson v. Travelers Ins. Co., 26 F.Supp.2d 1153 (S.D. Iowa 1998)(analyzing choice of law issues and noting Nebraska constitution prohibits punitive damage claims, but concluding Iowa law governed first party insurance bad faith and punitive damage claims against workers' compensation insurer whose Iowa adjuster handled claims arising from Nebraskan's workplace injury in Nebraska)

Punitive damage claims complicate litigation because awards may be uninsured,[3] nondischargeable in bankruptcy, and potentially ruinous to defendants whether truck drivers, small business owners, or large manufacturers. These can be "bet your company" cases, particularly when the conduct or allegedly defective product is blamed for numerous injuries. Punitive damage claims are tougher to prove but pose the specter of enormous open-ended verdicts.

"Punitive damages serve 'as a form of punishment and to deter others from conduct which is sufficiently egregious to call for the remedy.'" McClure v. Walgreen Co., 613 N.W.2d 225, 230 (Iowa 2000)(quoting Coster v. Crookham, 468 N.W.2d 802, 810 (Iowa 1991)). Punitive damage claims are governed by Iowa Code Section 668A.1,[4] which allows a punitive damage award if plaintiff establishes "by a preponderance of clear, convincing and satisfactory

[3] Misconduct giving rise to punitive damage claims may fall under liability policy exclusions for intentional acts or fall outside the definition of "occurrence" under standard policy language providing coverage for damages neither expected nor intended by the insured. The Iowa Supreme Court has rejected arguments that liability coverage for punitive damages should be voided on public policy grounds. Skyline Harvestor Systems, Inc. v. Centennial Ins. Co., 331 N.W.2d 106, 108 (Iowa 1983). Moreover, in the absence of an express exclusion of coverage for punitive damages, the "all sums" clause of general liability policies is sufficiently broad to provide coverage for punitive damage claims. Id. at 107

[4] Iowa Code Chapter 668A.1 provides in its entirety:

> 1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:
>
> a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.
>
> b. Whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived.
>
> 2. An award for punitive or exemplary damages shall not be made unless the answer or finding pursuant to subsection 1, paragraph "a", is affirmative. If such answer

evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." § 668A.1(1)(a); McClure, 613 N.W.2d at 230 (§668A.1(a) "sets the standard for awarding punitive damages"). The McClure Court elaborated:

> We have defined "willful and wanton" in the context of this statute to mean that
>
> > the actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.
>
> Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 919 (Iowa 1990)(quoting W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 34, at 213 (5th ed. 1984)).

* * * *

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or finding is affirmative, the jury, or court if there is no jury, shall fix the amount of punitive or exemplary damages to be awarded, and such damages shall be ordered paid as follows:

a. If the answer or finding pursuant to subsection 1, paragraph "b", is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.

b. If the answer or finding pursuant to subsection 1, paragraph "b", is negative, after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.

3. The mere allegation or assertion of a claim for punitive damages shall not form the basis for discovery of the wealth or ability to respond in damages on behalf of the party from whom punitive damages are claimed until such time as the claimant has established that sufficient admissible evidence exists to support a *prima facie* case establishing the requirements of subsection 1, paragraph "a".

> Mere negligent conduct is not sufficient to support a claim for punitive damages. Beeman v. Manville Corp. Asbestos Disease Compensation Fund, 496 N.W.2d 247, 256 (Iowa 1993). Such damages are appropriate only when actual or legal malice is shown. Schultz v. Security Nat'l Bank, 583 N.W.2d 886, 888 (Iowa 1998).
>
> Actual malice is characterized by such factors as personal spite, hatred, or ill will. Id. Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another's rights. Id.

McClure, 613 N.W.2d at 230-31.

The McClure Court rejected Walgreen's federal constitutional due process challenge to Iowa Uniform Civil Jury Instruction No. 210.1. Justice Lavorato analyzed the constitutional requirements for jury instructions on punitive damages set forth in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and concluded that IUCJI 210.1 passed muster. McClure, 613 N.W.2d at 232-33. Accordingly, practitioners can expect that trial courts submitting punitive damage claims will continue to give that instruction, which states in its entirety:

> Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing and satisfactory evidence the defendant's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.
>
> Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the defendant and others from like conduct in the future.
>
> There is no exact rule to determine the amount of punitive damages, if any, you should award. In fixing the amount of punitive damages, you may consider all the evidence including:
>
> 1. The nature of defendant's conduct.
>
> 2. The amount of punitive damages which will punish and discourage like conduct by the

defendant in view of [his] [her] [its] financial condition.

3. The plaintiff's actual damages.

IUCJI 210.1.

In Briner v. Hyslop, 337 N.W.2d 858 (Iowa 1983), the Iowa Supreme Court held that corporate liability for punitive damages for the acts of an employee are to be governed by Restatement (Second) of Torts Section 909, which provides:

> Punitive damages can be properly awarded against a master or other principal because of an act by an agent if, but only if:
>
> (a) the principal authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal was reckless in employing him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or the managerial agent of the principal ratified or approved the act.

337 N.W.2d at 861, 867.[5]

Defendants should resist as untimely motions to amend to assert punitive damage late in a case. See Bremicker v. MCI Telecommunications Corp., 420 N.W.2d 427, 428 988)(affirming denial of motion to amend to join punitive damage claim to action for unpaid ssions under wage loss statute, on grounds attempted amendment three weeks before trial imely and would substantially change the issues).

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aji v. Perket, 452 N.W.2d 399 (Iowa 1990), the Court stated that a corporate employer could be able for punitive damages even if "the act of the employee which gave rise to the tort claim was negligent." Id. at 401. That statement is *dicta* because the Seraji Court held the evidence in that s insufficient to support a punitive damage award against a trucking company for reckless hiring ntion of a driver with a spotty driving record. Id. at 402.

II. LEGAL LIMITATIONS ON THE RECOVERABILITY OF PUNITIVE DAMAGES

Defense counsel should determine whether punitive damages are recoverable under the liability theories advanced by plaintiff. For example, punitive damages are not recoverable from liquor licensees sued under the Dram Shop Act. Haafke v. Mitchell, 347 N.W.2d 381, 389 (Iowa 1984). Punitive damages generally are not recoverable against the State of Iowa in common law tort actions. See Iowa Code § 25A.4; Swanger v. State, 445 N.W.2d 344, 348 (Iowa 1989). Iowa municipalities are immunized from tort liability for punitive damages except to the extent covered by liability insurance. Iowa Code § 670.4; City of Westbranch v. Miller, 546 N.W.2d 598, 603 (Iowa 1996); Fettkether v. City of Readlyn, 595 N.W.2d 807, 813 (Iowa Ct.App. 1999).

Plaintiffs suing under a statute providing for treble damages cannot recover punitive damages in addition to the statutory multiplier. Johnson v. Tyler, 277 N.W.2d 617, 618 (Iowa 1979)(holding plaintiff suing for willful damage to trees under Iowa Code Section 658.4 limited to statutory treble damages). The Tyler Court in *dicta* stated plaintiff "could have brought a common law action for trespass instead of suing under § 658.4" to recover punitive damages. Id at 618-19. Defendants should nevertheless argue that a plaintiff who joins common law and statutory claims arising from the same alleged misconduct can not recover common law punitive damages in excess of the statutory multiplier. Courts elsewhere have held such plaintiffs are limited to the statutory multiplier. See generally, Perez v. Z. Frank Oldsmobile, Inc., ___ F.3d ____, 2000 WL 1049185 (7th Cir. 7/31/2000)(holding car buyer suing asserting both common law and statutory claims for odometer fraud is limited to statutory treble damages and could not recover additional punitive damages under common law fraud claim based upon same misrepresentations regarding car's mileage; surveying caselaw rejecting

common law punitive damage claims in excess of statutory multipliers).

Notwithstanding Justice LaGrand's *dicta* in Tyler, where plaintiff pleads solely common law claims challenging conduct also actionable under a statute providing for treble damages or other prescribed penalties in addition to recovery of actual damages, defense counsel should consider whether the statutory penalties can be held to preempt or preclude common law punitive damages.[6]

Plaintiffs recovering punitive damages are not entitled to pre-verdict interest thereon. Wilson v. IBP, Inc., 589 N.W.2d 729, 733 (Iowa 1999). Plaintiff's comparative fault, however, does not reduce a punitive award under Iowa Code Chapter 668. Godbersen v. Miller, 439 N.W.2d 206, 208 (Iowa 1989).

Although a plaintiff's punitive damage claim survives his or her death, Berenger v. Frink, 314 N.W.2d 388, 390-91 (Iowa 1982), punitive damage claims are extinguished by the wrongdoer's death. Rowen v. Le Mars Mut. Ins. Co., 282 N.W.2d 639, 661 (Iowa 1979)(estate of wrongdoer "is not subject to punitive damages because such an award is not made against one deceased."); Wolder v. Rahm, 249 N.W.2d 630, 632 (Iowa 1977)(citing Stevenson v. Stoufer, 237 Iowa 513, 517, 21 N.W.2d 287, 288 (1946)). This has been the law in Iowa for centuries. See Sheik v. Hobson, 64 Iowa 146, 19 N.W. 875, 876 (1884); but cf. Berenger, 314 N.W.2d at 393 n. 4 ("We are not asked to pass on whether claims for punitive damages survive the death of

[6] Cf. Bremicker v. MCI Telecommunications Corp., 420 N.W.2d 427, 428 (Iowa 1988); noting Iowa Code § 91A.8 liquidated damage provision "smacks of punishment. It could be argued, therefore, that an additional claim for punitive damages is not permitted under chapter 91A"; but declining to decide that issue); but see Landon v. Mapco, Inc., 405 N.W.2d 825, 828 (Iowa 1987)(affirming punitive damage award on common law claim joined with statutory action under Iowa Consumer Credit Code; stating "we are not called upon to determine whether if the only claims presented were ICCC violations, an award of punitive damages might be allowed in addition to the statutory penalties").

the tortfeasor.").[7] Although the dead defendant may no longer care whether the punitive damage claim survives, the matter is of keen interest to his heirs and liability insurer (see footnote 2 above), and of course, to plaintiffs.

Defendants which have settled claims asserted by the State of Iowa may be able to argue that the settlement extinguishes liability for up to 75 percent of any punitive damage award in a private plaintiff's action based on the same misconduct, when the jury finds defendant's conduct was not "specifically directed at the [private] plaintiff." Under § 668A.1(2)(b), 75 percent of such an award is to be allocated to the state civil reparations trust fund, (see part VI below), and the State, rather than the private litigant, is the post-verdict real party in interest controlling that portion of the punitive award.[8] A prior settlement releasing the State's claims against the defendant for the same conduct should in turn bar enforcement or collection of the "State's share" of the punitive award.

Iowa courts have not addressed whether a defendant's diminished mental capacity is a defense to a punitive damage claim in a civil lawsuit. Punitive damages require a finding of "actual or legal malice." McClure v. Walgreen Co., 613 N.W.2d 225, 231 (Iowa 2000). "Actual malice is characterized by such factors as personal spite, hatred, or ill will." Id. "Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another's rights." Id. A defendant suffering from a mental impairment may be incapable of the

[7] The rule that the tortfeasor's death extinguishes punitive damage claims has been eroded in other jurisdictions. See, e.g., Penberthy v. Price, 666 N.E.2d 352 (Ill. Ct.App. 5 Dist. 1996)(allowing plaintiff-motorist to proceed with punitive damage claim against estate of intoxicated driver killed in the collision). The Penberthy Court observed that the tortfeasor's death defeated several of the rationales for awarding punitive damages -- punishment of the wrongdoer and deterring that wrongdoer from further misconduct -- but concluded that "allowing punitive damages to survive against the deceased defendant would serve as a deterrent to others. This deterrent effect justifies, in our opinion, allowing the punitive action to survive, particularly in view of the strong public policy against mixing alcohol and automobiles." Id. at 356-57.

[8] See generally, Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 771-72 (Iowa 1999).

mental state of "malice" required to support a punitive damage award. Other jurisdictions recognize mental impairment as a defense to a civil punitive damage claim. In Preferred Risk Mutual Ins. Co. v. Saboda, 489 So.2d 768 (Fla. Dist. Ct App. 1986), the estate of a police SWAT team member sued his killer for wrongful death. The Court held that because the jury found that the killer was mentally deranged to the extent he could not form any rational intent, the killer could not be found liable for punitive damages. Id. at 771. The Court stated:

> Obviously, a deranged person who cannot form a rational intent cannot be guilty of a wanton tort requiring a specific state of mind (actual or constructive malice) - the same "wanton negligence" required by the "firemen's rule." The liability for compensatory damages of insane persons for their acts or omissions is based on public policy rather than traditional tort concepts of fault - but that liability does not extend to punitive damages nor can it be extended to any tort requiring wanton misconduct. (citations omitted)

Preferred Risk, 489 So.2d at 770-71. See also, 53 Am.Jur.2d Mentally Impaired Persons § 169 at p. 106 ("It is generally said, however, that the liability of insane persons does not extend to punitive damages, which depend on a showing of malice."); Delahanty v. Hinckley, 799 F.Supp.184, 186 (D.D.C. 1992)("Insane tortfeasors are not liable for punitive damages to the victims of their torts"); J.A. Bryant Jr., "Liability of Insane Person for His Own Negligence," 49 ALR3d 189,202 ("[I]he rule seems well settled that since an insane person can form no design or intent, he is not liable for punitive damages, since they depend upon a showing of malice on his part, but is liable only for compensatory damages.")

III. PRESERVATION OF CONSTITUTIONAL DEFENSES

Constitutional challenges to punitive damage claims in Iowa have not fared well

to date.[9] Nevertheless, defense counsel should be careful to preserve potential constitutional challenges to punitive damage verdicts to keep those defenses alive for post trial motions and

[9] See, e.g., McClure v. Walgreen Co., 613 N.W.2d 225, 231-33 (Iowa 2000)(holding Iowa Uniform Civil Jury Instruction No. 210.1 met constitutional due process requirements for jury instructions on punitive damages set forth in Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); and that it is proper for a jury to consider evidence of defendant's nationwide or worldwide financial resources in awarding punitive damages under BMW of North America, Inc. v. Gore, 517 U.S. 559, 580-81, 116 S.Ct. 1589, 1601-02, 134 L.Ed.2d 809, 829-30 (1996)); Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 866-69 (Iowa 1994)(rejecting arguments that exposure to multiple punitive damage awards in product liability actions is per se violation of due process; or violation of double jeopardy or excessive fines clauses of United States or Iowa constitutions, notwithstanding that State of Iowa receives part of punitive award pursuant to Iowa Code § 668A.1)(2)(b)).

The Eighth Circuit, however, in Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993), declined to address the constitutionality of Iowa Code § 668A.1 because it vacated the punitive damage award on other grounds, but stated:

> We further express concern that the trust fund component of the Iowa statute may implicate questions of standing and justiciability as well as constitutional issues of due process and excessive fines, but again, we need not reach the issue

Id. at 512 n. 26. Significantly, in a recent decision difficult to reconcile with Spaur, State v. Izzolena, 609 N.W.2d 541 (Iowa 2000), the Iowa Supreme Court held that the Excessive Fines Clause applies to crime victim restitution awards even though they are payable to the victim rather than the State. Id. at 549. The Izzolena Court observed:

> In rejecting a claim that the Excessive Fines Clause applied to an award of punitive damages in a civil case between private parties, the Supreme Court stated "The Excessive Fines Clause was intended to limit those fines only directly imposed by, and payable to, the government." Browning-Ferris, 492 U.S. at 268, 109 S.Ct. at 2916, 106 L.Ed.2d at 234. Although most monetary sanctions in criminal cases are payable to the government, the greater concern of the Excessive Fines Clause was not the financial gain of the government, but to prevent the government from abusing its power to punish an offender. Id. at 266-67, 109 S.Ct. at 2915-16, 106 L.Ed.2d at 232-33; Austin, 509 U.S. at 606-07, 113 S.Ct. at 2804, 125 L.Ed.2d at 495. The idea was to limit government power to punish an individual, not necessarily limit its power to raise revenue. Thus, the focus of the clause is on the impact of the punishment to the individual. See Browning-Ferris, 492 U.S. at 275, 109 S.Ct. at 2920, 106 L.Ed.2d at 238. We do not believe the State can make an end run around the Excessive Fines Clause by simply making a punishment payable to a victim.
>
> Even though a sanction may serve a remedial purpose, it is still subject to the Excessive Fines Clause if it can only be explained as serving in part

appellate review. This effort should begin no later than pleading constitutional defenses in the Answer to Plaintiff's Petition or Complaint, thereby avoiding an argument that Defendant waived the defense by failing to plead it. Here are excerpts from a sample "Answer" alleging potential constitutional defenses to punitive damage claims under the United Sates and Iowa Constitutions:

1. Plaintiff's claims for punitive damages against Defendant are barred, in whole or in part, because an award of punitive damages under Iowa law would violate Defendant's due process rights and equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and by Article I, Sections 6 and 9 and Article III, Section 30 of the Iowa Constitution.

2. Plaintiff's claims for punitive damages cannot be sustained because Iowa laws regarding the standards for determining liability for and the amount of punitive damages fail to give Defendant prior notice of the conduct for which punitive damages may be imposed, and the severity of the penalty that may be imposed, and are void for vagueness in violation of Defendant's due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and by Article I, Section 9 of the Iowa Constitution.

> to punish. Austin, 509 U.S. at 621-22, 113 S.Ct. at 2812, 125 L.Ed.2d at 505. Accordingly, we conclude the restitution award under Section 910.3B does not only serve a remedial purpose but also serves other purposes normally associated with punishment such as retribution and deterrence. The award is a "fine" within the Eighth Amendment of the United States Constitution and Article I, Section 17 of the Iowa Constitution.

Izzolena, 609 N.W.2d at 549 (emphasis added). This analysis invites reconsideration of the Spaur Court's conclusion that the Excessive Fines Clause did not apply to punitive damage awards recovered in civil litigation but allocated to the state civil reparations trust fund for the benefit of crime victims. Once a punitive damage verdict is obtained by a private plaintiff against whom defendant's conduct was found not specifically directed, the State Attorney General intervenes to protect, enforce and collect the State's share. See generally, Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 771-72 (Iowa 1999); Iowa Code § 668A.1(2)(b). Punitive damage awards in civil litigation by definition serve purposes "normally associated with punishment such as retribution and deterrence." As the Izzolena Court noted, constitutional protections of the Excessive Fines Clause should not be evaded "by simply making a punishment payable to a victim" -- and the result should not be different when judgments are paid to a state-administered reparations trust fund benefiting crime victims instead of to the individual victim of a particular criminal defendant.

3. Plaintiff's claims for punitive damages against Defendant cannot be sustained, because an award of punitive damages under Iowa law, subject to no predetermined limit, such as a maximum multiple of compensatory damages, or a maximum amount on the amount of punitive damages that may be imposed, would violate Defendant's due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and by Article I, Section 9 of the Iowa Constitution.

4. Plaintiff's claims for punitive damages against Defendant cannot be sustained, because an award of punitive damages in this case, combined with any prior, contemporaneous, or subsequent judgments against Defendant for punitive damages arising out of the design, development, manufacture, fabrication, distribution, supply, marketing, sale, and/or use of Defendant's products, would constitute impermissible multiple punishments for the same wrong, in violation of Defendant's due process and equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and by Article I, Sections 6 and 9 and Article III, Section 30 of the Iowa Constitution.

5. Plaintiff's claims for punitive damages against Defendant cannot be sustained, because any award of punitive damages under Iowa law, without the apportionment of the award separately and severally between or among the alleged joint tortfeasors, as determined by the alleged percentage of the wrong committed by each alleged tortfeasor, would violate Defendant's due process and equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and by Article I, Sections 6 and 9 and Article III, Section 30 of the Iowa Constitution.

6. Plaintiff's claims for punitive damages against Defendant cannot be sustained, because an award of punitive damages under Iowa law which allows Plaintiff to prejudicially emphasize the corporate status of Defendant violates Defendant's due process and equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and by Article I, Sections 6 and 9 and Article III, Section 30 of the Iowa Constitution.

7. Plaintiff's claims for punitive damages against Defendant cannot be sustained, because an award of punitive damages made under a process which fails to bifurcate the issue of punitive damages from the remaining issues would violate Defendant's due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and by Article I, Section 9 of the Iowa Constitution.

8. Plaintiff's claims for punitive damages are subject to the prohibitions against excessive fines set forth in the Eighth Amendment to the United

States Constitution and Article I, Section 17 of the Iowa Constitution, and the statutory limitations set forth in Iowa Code Chapter 668A.

Some of these defenses may be subject to a motion to strike, but even if stricken the issue is preserved for appellate review, provided the constitutional argument is reiterated in motions for directed verdict and JNOV (or motion for judgment on the pleadings in federal court) and asserted in a timely appeal. The author believes that even those constitutional defenses which have been explicitly rejected per se by the Iowa Supreme Court should be pleaded in the Answer. Federal courts have the final word on interpreting the federal constitution and constitutional law governing punitive damages is evolving in both state and federal courts. New appointments to the United States Supreme Court could result in more favorable precedent. It is better to be on the losing end of a motion [illegible] second guessed after a record punitive damage verdict and appellate rejection of a potential constitutional defense because it had not been preserved below. There is at least a good faith basis for arguing for the modification of existing law, such that pleading the foregoing defenses complies with Iowa R. Civ. P. 80(a) and Fed. R. Civ. P. 11.

IV. DISPOSITIVE MOTIONS TO CHALLENGE THE SUFFICIENCY OF PLAINTIFF'S EVIDENCE

Defense counsel should consider in appropriate cases a motion for summary judgment to dismiss punitive damage claims on grounds that the plaintiff lacks evidence to generate a jury question on whether defendant's alleged misconduct was sufficiently egregious to permit a punitive award. While each case turns on its own facts, defendants have enjoyed good success in dismissing punitive claims in certain types of cases, most notably first party insurance bad faith claims. Even if the summary judgment motion is denied, the brief could be readily

converted to a written motion for directed verdict or JNOV, or appellate brief seeking a reversal of a punitive damage judgment.

Most insurance first party bad faith claims for extra-contractual punitive damages have been rejected as a matter of law on grounds that the insurer had an objectively reasonable basis for disputing the claim. See, e.g., Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988)(recognizing tort of first party insurance bad faith, but holding the insurer is entitled to debate a "fairly debatable" claim); Seastrom v. Farm Bureau Life Ins. Co., 601 N.W.2d 339, 346-48 (Iowa 1999)(affirming trial court order vacating punitive damage award and reversing bad faith judgment against insurer, stating, "when an objectively reasonable basis for denying a claim exists, the insurer can not be held liable for bad faith as a matter of law", and "has no duty to investigate further before denying the claim ")[10] In Thompson v. United States Fidelity & Guarantee Co., 559 N.W.2d 288 (Iowa 1997), the Iowa Supreme Court responded to criticism from federal courts that it had been inconsistent in addressing whether it was for the court or jury to decide whether the insurer had a reasonable basis for denying a claim. Id. at 290 (citing, inter alia, Chadima v. National Fidelity Life Ins. Co., 55 F.3d 345, 345 (8th Cir. 1995), cert. denied, 116 S.Ct. 186 (1995)). In attempting to harmonize its caselaw, the Iowa Supreme Court concluded, "the question of whether the fairly debatable issue was one for the court or the jury depends on the facts of the individual case." Thompson, 559 N.W.2d at 290. The Thompson

[10] See also, Sampson v. American Standard Ins. Co., 582 N.W.2d 146, 149 (Iowa 1998)(affirming summary judgment dismissing bad faith claim against insurer arising from denial of UM and medpay claims deemed fairly debatable as a matter of law); Johnson v. Farm Bureau Mut. Ins. Co., 533 N.W.2d 203, 207 (Iowa 1995)(affirming summary judgment dismissing bad faith claim against insurer); Morgan v. American Family Mut. Ins. Co., 534 N.W.2d 92 (Iowa 1995)(reversing judgment on jury verdict for bad faith and holding insurer entitled to dismissal of bad faith claim because it had an objectively reasonable basis to deny UIM claim); Central Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 263 (Iowa 1991)(reversing summary judgment for insured on fire insurance appraisal award and holding insurer entitled to summary judgment dismissing bad faith claim).

Court elaborated as follows:

> In first-party bad-faith claims, the plaintiff must show (1) the absence of a reasonable basis for denying the claim, and (2) that the defendant knew or had reason to know that its denial was without a reasonable basis. Morgan, 534 N.W.2d at 96; Wetherbee, 508 N.W.2d at 661-62; Kiner, 463 N.W.2d at 12-13. Whether evidence is sufficient to generate a jury question is an issue of law for the court. Morgan, 534 N.W.2d at 96.
>
> Applying these principles in bad-faith cases, a court should direct a verdict for the defendant only when, viewing the record in the light most favorable to claimant, there is no substantial evidence to support the elements of the claim, *i.e.*, that the insurer lacked a reasonable basis for denial and that it knew or should have known it lacked such a basis. See id. at 96. Wetherbee, 508 N.W.2d at 661-62.

Thompson, 559 N.W.2d at 291 (emphasis added). The author suggests that most first-party insurance bad faith cases remain good candidates for dispositive motions after Thompson.

Certain products liability cases also are good candidates for dispositive motions. Plaintiffs are not entitled to recover punitive damages unless they prove, by a preponderance of clear, convincing and satisfactory evidence, that Defendant's conduct "constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a); Hillrichs v. Avco Corp., 514 N.W.2d 94, 100 (Iowa 1994); Beeman v. Manville Corp. Asbestos Disease Comp. Fund, 496 N.W.2d 247, 255 (Iowa 1993); Burke v. Deere & Co., 6 F.3d 497, 511 (8th Cir. 1993)(applying Iowa law); cert. denied 114 S.Ct. 1063, 510 U.S. 1115 (1994). The determination of whether plaintiff's evidence is sufficient to submit the issue of punitive damages to the jury is a question of law for the court. Burke, 6 F.3d at 511. Conduct is only willful and wanton "when the actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." Burke, 6 F.3d at 511; McClure, 613 N.W.2d at 230.

It is difficult for plaintiffs to establish a *prima facie* case for punitive damages in a products liability action. The Fell Court stated:

> [a] legal basis for punitive damages is established in product liability cases where the manufacturer is shown to have knowledge that its product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death, but nevertheless continues to market the product without making feasible modifications to eliminate the danger or make adequate disclosure and warning of such danger. Especially is this so when the evidence is susceptible to the inference that the manufacturer not only refused to warn for the user's protection, but intentionally took steps to cover up the known danger in order to protect continued marketing of the product for its own economic advantage.

Fell, 457 N.W.2d at 919. The Fell Court held that plaintiff was not entitled to submit her punitive damages to the jury because the evidence was insufficient to establish defendant's failure to change product design was willful and wanton. Id. at 920. The Court noted defendant had manufactured and sold "thousands" of the product at issue without a similar incident occurring. Id. Thus, the Court concluded that the "risk of injury . . . was not so great as to make it highly probable that any injury would occur." Id. Compare Lovick v. Wil-Rich, 588 N.W.2d 688, 699 (Iowa 1999)(affirming punitive damage judgment where defendant "failed to institute a warning campaign for numerous years despite knowledge of numerous similar incidents involving its cultivator and knowledge of the efforts of Deere & Company to warn their users of the danger.").

Several other decisions applying Iowa law in products liability actions have also held that plaintiffs were not entitled to punitive damages as a matter of law. See, e.g., Burke, 6 F.3d at 512 (holding error to submit punitive damages where defendant's delay in implementing safety improvement to save costs was regarded by appellate court as not the type of "calculated decision-making" required to justify punitive damages); Beeman, 496 N.W.2d at 256 (plaintiff

not entitled to punitive damages "even though reasonable jurors could find that the manufacturers had enough knowledge to trigger a duty to warn of the potential hazards of their products, and that such failure amounted to negligence [because] the real issue is conduct [and] [f]or punitive damages, a defendant's conduct must be more egregious than mere negligence"); Hillrichs, 514 N.W.2d at 97 (where plaintiff argued that manufacturer's knowledge of possible danger created by product, as well as manufacturer's failure to test alternative design, generated a jury question as to punitive damages, Court held "[w]e believe this evidence supports precisely the opposite conclusion -- namely, that an award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue.")

Although driving while intoxicated justifies punitive damages, a motorist's carelessness alone is insufficient In Kuta v. Newburg, 600 N.W.2d 280 (Iowa 1999), the defendant driver struck and killed a highway construction worker he failed to see wearing an orange vest standing on the center line in a construction zone. Id. at 289. The Iowa Supreme Court affirmed a directed verdict dismissing the punitive damage claim, despite plaintiff's evidence regarding warning signs, rotating beacon and flashers, and the absence of adverse weather. Id. The Kuta Court noted that defendant had not been speeding and was not shown to have been drinking; that his view was partially blocked by a van traveling ahead of him, and that other witnesses had trouble seeing the warning signs and workers. Id.

Punitive damages must be rejected as a matter of law if plaintiff fails to show actual damages. Schlegel v. Ottumwa Courier, 585 N.W.2d 217, 226 (Iowa 1998)("Some actual damages must be shown to support a claim for punitive damages")(citing Sundholm v. City of Bettendorf, 389 N.W.2d 849, 853 (Iowa 1986)); see also, Pringle Tax Service, Inc. v. Knoblauch,

282 N.W.2d 151, 154 (Iowa 1979)(holding that "a failure to award actual damages will not bar exemplary damages when actual damage has in fact been shown.").

V. MOTIONS IN LIMINE AND FOR BIFURCATED TRIAL TO EXCLUDE OR DEFER EVIDENCE PREJUDICIAL TO DEFENDANTS ON LIABILITY AND COMPENSATORY DAMAGE ISSUES

Certain evidence, most notably that of defendant's financial condition, is relevant to determining the appropriate amount of punitive damages to be awarded, but is irrelevant and prejudicial to defendant and would normally be excluded from evidence in a trial of liability and compensatory damages alone. Although in some cases it may be advantageous to the defendant to try punitive damage issues together with other issues,[11] in most cases the defendant is better off in a bifurcated trial with the prejudicial evidence excluded at least until the jury has decided liability and compensatory damage issues.

"In Iowa, '[e]vidence of a defendant's financial worth is one relevant factor for the jury to consider when setting a punitive damage award.'" McClure v. Walgreen Co., 613 N.W.2d 225, 233 (Iowa 2000)(quoting Lara v. Thomas, 512 N.W.2d 777, 783 (Iowa 1994)).[12] The McClure Court rejected Walgreen's argument that "in awarding punitive damages for conduct occurring in Iowa, the jury may only consider the financial worth deriving from its business in Iowa." McClure, 613 N.W.2d at 233. Justice Lavorato distinguished BMW of North America Inc. v. Gore, 517 U.S. 559, 572-73 (1996), as follows:

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[11] The punitive damage claim opens the door for the impecunious defendant to offer evidence of lack of wealth as well as evidence of good conduct which could help defendant prevail on liability and compensatory damage issues. Moreover, a jury that is awarding both actual and punitive damages might award a lower amount for actual damages than if the punitive damage claim had not been submitted, and yet the plaintiff may be stuck with the verdict for actual damages if the punitive damage verdict is set aside on post-trial motions or on appeal, leaving the defendant better off.

[12] Defendants may elect to resist discovery of their "wealth or ability to respond in damages," on grounds that such discovery is not permitted "until such time as the claimant has established that sufficient admissible evidence exists to support a *prima facie* case for recovering punitive damages." Iowa Code § 668A.1(3).

> In [Gore], the Supreme Court held state sovereignty and comity mandated that, in fixing punitive damages, only the wrongful conduct that occurred within the state where the damages occurred could be considered in determining the amount of punitive damages. Gore, 517 U.S. at 572-73, 116 S.Ct. at 1597-98, 134 L.Ed.2d at 824-25.
>
> Gore does not stand for the proposition that a jury may not consider nationwide or worldwide financial resources in awarding punitive damages for conduct that occurred solely within the borders of a particular state.

McClure, 613 N.W.2d at 233.

Thus, plaintiffs will contend that their claim for punitive damages entitles them to offer evidence of defendants' "nationwide or worldwide financial resources." Such evidence typically is relevant solely on the issue of the amount of punitive damages to be awarded, yet may prejudice defendants by influencing the jury's determination of liability and compensatory damage issues. Accordingly, defendants should consider seeking a bifurcated trial with evidence of defendants' financial worth excluded from the initial phase while the jury determines liability, the amount of compensatory damages if liability is established, and answers a special interrogatory deciding whether defendant was guilty of willful and wanton misconduct. Only if the jury finds for plaintiff would the trial proceed to the next phase where financial evidence is introduced and the same jury determines the amount of punitive damages, if any, to be awarded.

Evidence of the financial condition of the defendants is irrelevant to and inadmissible on the issues of liability and compensatory damages. See Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 109 (Iowa 1986); Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir. 1977); Channel 20, Inc. v. World Wide Towers Services, Inc., 607 F. Supp. 551, 565 (D.C. Tex. 1985). In Hoekstra, the Iowa Supreme Court stated, "[e]ven when punitive damages are involved, the evidence [of defendant's financial condition] is admissible only when

'plaintiff seeks and the evidence supports exemplary damages.'" Hoekstra, 382 N.W.2d at 110 (quoted citation omitted). The Hoekstra Court further noted that some courts have held that evidence of net worth is admissible only after the trier of fact determines that there is liability for punitive damages. Id. (emphasis added)(citing Varriale v. Saratoga Harness Racing, Inc., 76 A.2d 991, 992 (N.Y. 1980); Campen v. Stone, 635 P.2d 1121, 1132 (Wyo. 1981); Annot., 32 A.L.R. 4th 432 (1984)(discussing the necessity of showing liability for punitive damages before evidence of defendant's net worth is admitted).

The court should exclude evidence if it is irrelevant, or its probative value is substantially outweighed by the danger of undue prejudice. R. Evid. 402, 403. Thus, even if such financial evidence were relevant, it should be excluded at the liability stage because it could divert the minds of the jury to improper considerations and create a substantial danger of undue prejudice. See Geddes, 559 F.2d at 560 ("the ability of a defendant to pay the necessary damages injects into the damage determination a foreign, diverting, and distracting issue which may effectuate a prejudicial result."). The Iowa Supreme Court has recognized that insurance evidence can improperly influence juror's liability findings and result in larger verdicts to the prejudice of defendants. Handley v. Farm Bureau Mut. Ins. Co., 467 N.W.2d 247, 249-50 (Iowa 1991); Waits v. United Fire & Cas. Co., 572 N.W.2d 565, 570-71 (Iowa 1997). Similarly, evidence of a wealthy defendant's own net worth is likely to improperly influence juror findings and therefore should be excluded as unfairly prejudicial.

A bifurcated trial is the answer to plaintiffs' argument that evidence of defendants' financial worth must be admitted as relevant to determine the amount of punitive damages. Bifurcation avoids prejudice to defendants while preserving plaintiffs' right to introduce the financial worth evidence for the only proper purpose allowed -- determining the amount of

punitive damages -- after liability and compensatory damages have been determined. State and federal courts have discretion to bifurcate trials to avoid undue prejudice. Iowa R. Civ. P. 186; Handley, 467 N.W.2d at 249; Fed. R. Civ. P. 42(b); Scheufler v. General Host Corp., 895 F.Supp. 1411, 1414-15 (D. Kan. 1995)(bifurcating trial of liability/compensatory damages and punitive damage claims), aff'd. 126 F.3d 1261 (10th Cir. 1997). The Scheufler Court observed:

> Bifurcation would also prevent possible prejudice to the defendant. As noted above, some evidence which is irrelevant to determination of actual damages is highly relevant to the issue of punitive damages. Presentation of such evidence only after a determination of actual damages would eliminate any possibility that the jury could consider the evidence for an improper purpose. . . . There is no reason to believe that bifurcation would prejudice the plaintiffs.

895 F.Supp. at 1414.[13]

In Briner v. Hyslop, 337 N.W.2d 858 (Iowa 1983), the Iowa Supreme Court held the district court did not abuse its discretion in denying a motion to sever the punitive damage claim under Iowa R. Civ. P. 186, when defendant first made the motion after trial commenced. The Briner Court stated:

> The trial court reasonably could have concluded that severance of the issues would result in two trials. It could also have concluded that Hyslop's request for severance was made at the eleventh hour -- after the completion of the voir dire, but prior to the opening statements. Moreover, the trial court could have reasonably assumed that the jury instruction would adequately protect Hyslop from any potential prejudice. We notice also that the jury arrived

[13] See also, Baker v. Equifax Credit Information Services, Inc., 1998 WL 101829, *2 (D. Kan. 1998)(granting bifurcation under Fed. R. Civ. P. 42(b) in employment discrimination case due to prejudicial impact of net worth evidence; with first trial phase to "determine defendant's liability for both actual and punitive damages; and that if the jury finds liability for punitive damages, the parties will present . . . evidence which will assist the jury in determining the amount . . ."). The Eighth Circuit has held it was not an abuse of discretion for district courts to deny bifurcation of punitive damage issues in employment discrimination cases, largely because the challenged evidence was also admissible on liability issues such as racial animus. See, e.g., E.E.O.C. v. HBE Corp., 135 F.3d 543, 551 (8th Cir. 1998); Thorne v. Welk Investment, Inc., 197 F.3d 1205, 1213-14 (8th Cir. 1999).

> at a compensatory damage award that was substantially less than that suggested by plaintiff's expert economist.

Id. at 870-71. Briner should not be fatal to timely motions to sever or bifurcate punitive damage claims. That Court obviously was concerned with the untimeliness of defendant's motion, a concern avoided by filing the motion well in advance of trial. The "two-trial" concern is avoided by having the same jury decide the (bifurcated) issue of the amount of punitive damages to be awarded, receiving in the second phase only new evidence relevant to the amount of punitive damages to be awarded (i.e. evidence of defendant's financial condition) which was excluded from the initial phase of the trial as prejudicial or irrelevant. Clearly, Briner does not indicate it would be an abuse of discretion to grant a timely motion to bifurcate or sever the punitive damage claim. Compare Handley, 467 N.W.2d at 249-50 (holding district court abused its discretion by failing to sever claims against UIM insurer from insured's tort claim against other driver; severance necessary to avoid prejudice).

Bifurcation should also result in a fairer trial when there is other evidence relevant to punitive damages which will be irrelevant and prejudicial to liability and compensatory damage determinations. As discussed in part VII below, defendants in a punitive damage trial phase may want to show they have already been "punished enough" by prior verdicts and settlements, yet such evidence ordinarily would be inadmissible at trial to determine liability. Conversely, plaintiffs may seek to introduce evidence of defendants' prior bad acts to obtain a larger punitive award; a bifurcated trial would allow such evidence to be deferred to the punitive phase if it were inadmissible on liability issues alone.

VI. MOTIONS IN LIMINE TO EXCLUDE REFERENCE TO THE CIVIL REPARATIONS TRUST FUND

Seventy-five percent of a punitive damages award (after payment of attorneys fees) is to be allocated to a state civil reparations trust fund under Iowa Code Section 668A.1(2) if the jury finds that defendant's willful and wanton misconduct was not directed specifically at the claimant. Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 771-72 (Iowa 1999). Some jurors may be more willing to award punitive damages in the first instance, or award larger amounts, if informed where the money is going. For example, jurors may dislike a particular plaintiff and believe he is undeserving of a punitive damage windfall after compensation for his actual injuries, yet also believe a defendant's misconduct warrants punishment through a forced contribution to a fund benefiting deserving crime victims. In Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994), plaintiff's counsel in closing argument noted "75 percent [of a punitive award] will go into a civil trust fund . . . to be administered by the courts for others than Burke. . . ." Id. at 513. Moreover, the verdict form told the jury that if they answered "no" to the question whether defendant's conduct was directed at plaintiff, "a portion of the punitive damage award to be fixed by the Court will be paid into a civil trust fund administered by this Court." Id. at 512. The Eighth Circuit held it was improper under Iowa law to inform the jury of the effect of its finding, id. at 512-13, and held that reversal was required given the size of the jury verdict and plaintiff's closing argument referring to the trust fund and other objectionable comments. Id. at 513. The Burke Court noted that Deere had objected to the jury instruction as "an improper indication to the jury of the effect of their finding and as an appeal to their charitable instincts." Id. at 512. The Eighth Circuit concluded:

> [T]he size of the verdict leads us to conclude that the jury indeed sought to create some sort of injury fund or to improperly engage

> in a social reallocation of resources for the benefit of parties not properly before the court.

Id. at 513.

Notably absent from Iowa Code Chapter 668A.1 is any legislative authorization for informing the jury of the effect of their answering the special interrogatory as to whether defendant's misconduct was specifically directed at plaintiff. As the Burke Court noted, under Iowa common law it is improper to inform the jury of the effect of their findings on special interrogatories. Burke, 6 F.3d at 512-13 (citing Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985)). The Iowa legislature knows how to prescribe a different result, as it did under the Comparative Fault Act. See Iowa Code § 668.3(5)("If the claim is tried to a jury, the court shall give instructions and permit evidence and argument with respect to the effects of the answers...."). The absence of a comparable provision in the subsequently enacted Chapter 668A, the separate statute governing punitive damages, indicates the legislature did not intend jurors to be informed of the effect of their findings on allocation of a punitive damage award.

Accordingly, defense counsel should object to any jury instruction informing jurors of the effect of their finding on punitive damage allocation. Defense counsel also should seek an order in limine precluding plaintiffs' counsel from referring to the civil reparations trust fund. This is particularly important given the surprising latitude Iowa courts have given to jury findings that defendant's conduct was not specifically directed at the plaintiff. See Sandford v. Meadow Gold Dairies, Inc., 534 N.W.2d 410, 413 (Iowa 1995)(affirming judgment on special verdict finding that defendant's conduct in discharging plaintiff in retaliation for filing a workers' compensation claim was not directed specifically at the plaintiff); Shepherd Components v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612, 618 (Iowa 1991)(affirming judgment on special verdict that defendant's conduct was not directed specifically at plaintiff; holding, without

him of use of the building was nevertheless not specifically directed at that plaintiff); see also, Chadima v. National Fidelity Life Ins. Co., 894 F.Supp. 1300, 1304-09 (S.D. Iowa 1995)(Bennett, J.; criticizing the Sandford Court's interpretation of Section 668A.1(2)(b)).

VII. SUGGESTED TRIAL STRATEGIES FOR AVOIDING OR MINIMIZING PUNITIVE DAMAGE AWARDS

The following are some ideas which, depending on the facts of particular cases, may help reduce or avoid a punitive award in a bifurcated trial after the jury has found your client guilty of willful and wanton misconduct and is now hearing evidence on the amount of punitive damages to award. Some of these strategies also may work in nonbifurcated trials, but counsel must carefully consider the impact on liability and compensatory damage issues

- **Note that the jury has discretion to award "zero" in punitive damages.** Highlight the "if any" language in IUCJI 210.1 ("There is no exact rule to determine the amount of punitive damages, if any, you should award") as well as the "if any" language on the special verdict form. See Central Life Assurance Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 259-60 (Iowa 1991)(jury found willful and wanton misconduct but awarded zero in punitive damages; bad faith reversed on appeal).

- **Highlight plaintiff's own wrongdoing.** Although plaintiff's comparative fault[14] or "reverse bad faith"[15] are not legal defenses to punitive damage claims, defendant's conduct should not be judged in a vacuum, but rather should be put in proper perspective and judged in context with plaintiff's

[14] See Godbersen v. Miller, 439 N.W.2d 206, 208 (Iowa 1989)(plaintiff's comparative fault under Chapter 668 does not reduce punitive award).

[15] See Johnson v. Farm Bureau Mut. Ins. Co., 533 N.W.2d 203, 207-08 (Iowa 1995)(refusing to recognize "reverse bad faith" tort against insured).

behavior.[16] Note that plaintiff has already been made whole through the compensatory damage award, and is undeserving of a "windfall."

- **Argue defendant has already been punished enough.** In a bifurcated trial where liability issues have already been lost, consider submitting evidence of prior punitive damage judgments punishing the same conduct, and/or criminal or regulatory penalties or settlements. If your client has been incarcerated, argue his prison sentence is sufficient to punish and deter that conduct.

- **Argue no punitive award is needed for deterrence.** Note (if applicable) that the challenged conduct has already ceased; the product has been discontinued or modified; the wrongdoer terminated; the drunk driver learned his lessen through inpatient therapy and is now on the wagon and attending AA meetings; etc. such that a punitive damage award is not necessary to prevent a reoccurrence. Also argue market forces (i.e. competing products and the need for consumer acceptance) already provide adequate incentives for safety; and that criminal or regulatory penalties and compensatory damage liability already provide an adequate deterrent.

- **Compare criminal or regulatory fines for the same conduct** Argue those fines represent the collective wisdom of Iowans through our elected public officials as to the appropriate penalty.

- **Argue a punitive award would punish the "wrong people."** Note the effect of a punitive award may be to punish "innocent" shareholders (which may include teacher or union pension funds, retirees, etc.); consumers (through higher prices), innocent current employees (where the "guilty" persons are no longer employed).

- **Argue a punitive award would chill beneficial activity or product development.** A punitive award may divert resources that otherwise could be devoted to research and development of safer products. Moreover, innovation is discouraged to the extent punitive damage liability increases the financial risks of pursuing new product development, medical treatments, etc.

- **Put financial evidence in the best light.** Plead poverty, if applicable. Expose flaws in plaintiff's evidence regarding defendant's financial value; consider offering lower numbers through defendant's CFO, outside accountant or appraiser; counter nationwide or worldwide financial worth evidence with smaller numbers attributable to the particular product or activity at issue or the

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[16] See, e.g., Wilson v. IBP, Inc., 558 N.W.2d 132, 147 (Iowa 1996)(in reviewing punitive damage award, "we shall consider all circumstances surrounding the conduct and relationship between the parties. Any provocation of the conduct by plaintiff will be a factor. We take the provocation to include participation in the conduct complained of.")(citing Ezzone v. Riccardi, 525 N.W.2d 388, 399 (Iowa 1994)).

locality or state where the claim arose (i.e. "profits from Iowa sales of this widget were only . . .").

- **Note the lack of insurance for a punitive award (if applicable).**

- **Offer evidence of defendant's "good citizenship."** This can include charitable contributions and sponsorships; public service ads; positive economic impact through payroll, amount of taxes paid; leadership in community service activities; and any other evidence that puts defendant in a positive light undeserving of punishment.

VIII. CHALLENGES TO THE AMOUNT OF PUNITIVE DAMAGE AWARDS

Assuming all the suggestions in the preceding pages of this outline failed you, and your client remains on the wrong end of a sizeable punitive damage award, you may still challenge the amount as excessive. Notwithstanding the wide latitude given jury determinations as to the amount of punitive damages, and trial court discretion in ruling on motions for new trials or remittiturs, punitive damage judgments are indeed subject to common law and due process review for excessiveness. Factors governing such review and application of the guidelines prescribed by the United States Supreme Court are discussed in Watkins v. Lundell, 169 F.3d 540, 545-47 (8th Cir. 1999) and Wilson v. IBP, Inc., 558 N.W.2d 132, 144-48 (Iowa 1996). The appellate court is obligated to review the propriety of the size of the punitive damage award even if "neither party mounts a constitutional challenge." Wilson, 558 N.W.2d at 144.

The Eighth Circuit in Watkins noted the United States Supreme Court has set forth three "guideposts" to determine whether punitive damages are grossly excessive:

1. The degree of reprehensibility of the parties' actions;

2. The ratio between the actual harm inflicted and the punitive damages; and

3. The difference between the punitive damages and the civil penalties authorized or imposed in comparable cases.

Watkins, 169 F.3d at 545 (citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)). The Eighth Circuit further emphasized that:

> The degree of reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." The degree of reprehensibility is also indicative of the constitutionally permissible size of the punitive damage award. The higher the degree of reprehensibility, the larger the punitive damages award it can support. Therefore, the punitive damages should be roughly proportionate to the enormity or gravity of the offense.

169 F.3d at 545-46 (quoting BMW, 517 U.S. at 575-76) The Iowa Court of Appeals recently recited a somewhat different list of factors also utilized by the Eighth Circuit to determine the reasonableness of a punitive damage award, as follows:

1. The harm inflicted on a plaintiff;
2. The reprehensibility of defendant's conduct;
3. The likely potential harm to others; and
4. The wealth of the defendant.

Reed Cadillac-Olds, Inc. v. Habhab, 2000 WL 1157819, *4 (Iowa Ct.App Aug. 16, 2000)(citing Pulla v. Amoco Oil Co., 72 F.3d 648, 658-59 (8th Cir. 1995). "A proper assessment of the damages is left to the discretion of the Court." Habhab, at *4(citing S & W Agency, Inc. v. Foremost Ins. Co., 51 F.Supp.2d 983, 994 (N.D. Iowa 1998))

> The Iowa Supreme Court described its review process as follows:
>
> Awards will be tested with a view of the extent and nature of the outrageous conduct, the amount necessary for future deterrence, and with deference to the relationship between the punitive award and plaintiff's injury, as reflected in any award for compensatory damages. In addition to these traditional factors, we shall consider all circumstances surrounding the conduct and relationship between the parties. Any provocation of the conduct by plaintiff will be a factor. We take the provocation to include participation in the conduct complained of.

Wilson, 558 N.W.2d at 147 (quoted citation omitted). The Wilson Court "expressly rejected the use of a mathematical ratio in examining punitive damages," id., and stated, "[o]f minor significance is the ratio between the compensatory and punitive damages assessed." Id. at 148. The Court further observed "that legal precedent is of limited value in evaluating the damage award of a specific case." Id. at 147. The Court emphasized that its "primary focus . . . . is the relationship between the punitive damage award and the wrongful conduct of the offending party." Id. (quoted citation omitted). The Wilson Court found that a punitive damage judgment of $15 million against IBP for interfering with an injured employee's medical treatment was excessive, and ordered a remittitur to $2 million while affirming a compensatory damage award of merely $4,000. Wilson, 588 N.W.2d at 148.

Conversely, the ratio is given greater attention when defendant's conduct is less reprehensible. See Watkins, 169 F.3d at 546-47. There, the Eighth Circuit noted there must be a "reasonable relationship" between the actual and punitive damages awarded, and described the ratio of 14 to 1 in that case as "very high." Id. at 546. Noting the Haslip Court had "found that a 4 to 1 ratio was 'close to the line' of constitutional propriety in a case involving fraud by an insurance agent," the Watkins Court ordered a remittitur down to a 4 to 1 ratio. Id. at 546-47 (citing Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 23, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)).

The Wilson Court observed that consideration should be given to the "financial position of the defendant. This bears on the factor of deterring like conduct in the future[.]" Id. at 148 (citations omitted). In Olson v. Nieman's, Ltd., 579 N.W.2d 299 (Iowa 1998), the Iowa Supreme Court affirmed the district court's refusal to award any punitive damages despite a jury finding that defendant acted with willful and malicious misconduct in misappropriating a trade

ecret, because the compensatory damage judgment "of almost half the company's net worth is evere enough punishment, which is the object of exemplary damages." Id. at 316.

Plaintiffs should not be able to support a punitive damage award on grounds that he jury awarded less than plaintiff's counsel requested See Honda Motor Co. v. Oberg, 512 U.S. 415, 433, 114 S.Ct., 2331, 2341, 129 L.Ed 2d 336, 350 (1994)("the limitation of punitive damages to the amount specified is hardly a constraint at all, because there is no limit to the amount the plaintiff can request.").

These cases teach the importance of getting into the record evidence that would help show a "runaway" verdict is excessive. Courts reviewing the size of punitive damages awards are unsympathetic to defendants who claim inability to pay without having introduced evidence of their financial condition. See, e.g., Economy Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641, 654 (Iowa 1995)("Because [defendant] did not introduce evidence of his lack of resources to pay punitive damages, he cannot now complain because of the lack of such evidence."). The Zumaris Court rejected defendant's argument that plaintiff is required to prove a defendant's financial worth before it can recover punitive damages. Id. at 653-54. Similarly, the Watkins Court noted that defendant on appeal "vigorously disputed" the finding at trial that his net worth was $11 million. 169 F.3d 546-47. The Court nevertheless concluded it must accept that figure as true given his refusal "to provide any contrary evidence." Id at 547 (but finding that punitive award of $3.5 million compared to net worth of $11 million is excessive, and remitting award to $940,000). Defense counsel should take pains to get into the trial court record any evidence they would want a reviewing court to consider in challenging the propriety of the punitive award. If the trial court has denied a motion to bifurcate and the tactical decision is made that defendant is better off not presenting certain evidence to the jury, defense counsel

should consider a conditional offer of proof to get into the record for purposes of review the evidence it would have presented to the jury in the separate punitive phase if bifurcation had been allowed. Such an offer of proof may be necessary to enable the reviewing court to consider the evidence to overcome plaintiff's argument that any error in denying bifurcation was harmless.

PAT OLIPHANT/UNIVERSAL PRESS SYNDICATE

NEW MODEL RULES OF PROFESSIONAL CONDUCT

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NEW MODEL RULES OF PROFESSIONAL CONDUCT

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I. Background

A. The Iowa State Bar Association appointed a committee to consider the adoption of the American Bar Association's Model Rules of Professional Conduct. The Bar Association Committee recommended adoption of the model rules. In response, the Iowa Supreme Court appointed a commission to consider possible adoption of the model rules. That Commission is still under appointment and is considering the rules as well as monitoring the currently proposed changes to the model rules.

B. The ABA Model Rules of Professional Conduct were adopted in 1983. Some 39 states and the District of Columbia have adopted some version of the model rules with variations particular to that jurisdiction. The American Bar Association felt that a more comprehensive update of the model rules was appropriate in light of the many changes in the legal profession and in light of the American Law Institute's Restatement of the Law Governing Lawyers. Consequently, the American Bar Association Commission on Evaluation of the Rules of Professional Conduct known as the "Ethics 2000" Commission was established in 1997. The Commission is still meeting and addressing the entire range of rules set forth in the model code. The rules are being addressed specifically in groups of five to ten rules and are being publicized for comment.

C. DRI is one of the members of the advisory council to the Ethics 2000 Commission and is monitoring their progress with specific reference to proposed rule changes affecting defense lawyers and their practice.

II. Effect of the Rules

A. The "scope" section of the model rules is proposed to be modified so as to explain that a violation of the rules should not "of itself" give rise to a cause of action for malpractice or "necessarily" warrant disciplinary remedy, but rather "may be evidence of a breach of the applicable standard of conduct." That proposal was made in response to what was perceived to be the weight of judicial opinion in malpractice cases concerning the effect of the rules.

III. Representative Specific Rule Proposals

A. Scope of Representation

1. The Commission proposes to clarify the allocation of decision-making authority between the lawyer and the client by modifying Rule 1.2. The Commission has expressed the belief that the current Rule 1.2 is flawed and that it could be read to require consultation with the client before the lawyer acts. It has also been said that the current Rule 1.2 suggests too strongly that the lawyer does not have to abide by the client's decisions with respect to "means" as opposed to "objectives" of the representation. The proposed amendment will clarify that the lawyer may take such action to carry out the objectives of the Representation as is "impliedly authorized."

B. Assisting Client Crime or Fraud

1. Several proposed rule changes are intended to deal with the lawyer's obligations to third parties when a lawyer becomes aware that they are being used to further a client's crime or fraud. Rule 1.2 currently prohibits a lawyer from "assisting" the client in conduct the lawyer knows is criminal or fraudulent. Such conduct is also related to Rule 4.1 which has to do with "truthfulness in statements to others," Rule 1.6 which has to do with the lawyer's duty of confidentiality, and Rule 3.3 which has to do with "candor toward the tribunal." There are a number of proposed changes to these various rules, all of which are intended to permit disclosure in a wider variety of circumstances involving client crime or fraud. Basically, however, disclosure to third parties is reserved for the extreme case where other remedial measures (including withdrawal) are insufficient to distance the lawyer from the client's wrongful conduct.

C. Fees

1. The proposed changes to Rule 1.5 would require a lawyer to communicate the basis or rate of the fee in writing before or shortly after commencing the representation, except in the case of continuous representation. Such written communication would also be required with respect to any changes in the method of computing the fee. In addition, a further definition the "reasonable" requirement is proposed. It has also been proposed that the fees for client referral should be permitted without requiring "joint responsibility" or a division of the actual work.

D. Confidentiality

1. Rule 1.6 is proposed to be amended to expand the grounds for permissive disclosure of client information in conformity with the Restatement. Such disclosure would be permitted, for example, in order to prevent "substantial financial injury." Such disclosure would not however be mandatory under Rule 1.6.

E. Conflict of Interest

1. Rule 1.7 of the model rules deals with conflict of interest. It has, under the Commission's proposals, been substantially revised but not significantly changed from a substantive standpoint. The rule will specifically define what constitutes a conflict of interest and will define specifically the "informed consent" needed under such circumstances. The proposed changes would require confirmation in writing. The rule recognizes conflicts in the case of "direct adversity" and also recognizes that there are circumstances in which there is a "significant risk" that the lawyer's ability to carry out appropriate action for one client would be "materially limited" as a result of the lawyer's responsibilities to another client. The basis of analysis of such "material limitation" conflicts will be spelled out more specifically. Likewise, the rule will address "positional conflicts" in which the lawyer is taking inconsistent legal positions with respect to different tribunals or on behalf of different clients. Such "positional conflicts" will be dealt with under the "material limitation" conflicts analysis.

2. Paragraph (b) of Rule 1.7 will deal specifically with those circumstances under which a lawyer may not even ask the client for consent. Rules 1.7, 1.9 and 1.10 will also address the issue of the imputation of conflicts to other lawyers in the firm. Rule 1.9 will address conflicts of interest arising out of former clients or former representation.

F. Prospective Clients

1 Under proposed Rule 1.18, a lawyer would have the same duty of confidentiality to a prospective client by whom confidential information has been shared as the lawyer would have after acceptance of representation.

G. Transactions with Clients

1. Rule 1.8 will seek to clarify the conflicts of interest that arise when lawyers transact business with their clients. It would require, for example, informed consent and would require written advice to the client as to the desirability of seeking independent legal counsel on the transaction.

2. There has been discussion with respect to whether Rule 1.8(f) should address not only third party payment (as the current rule does) but also third party "direction" and whether such direction would interfere with a lawyer's independent professional judgment.

H. Withdrawal from Representation

1. The lawyer's ability to withdraw from representation will be dealt with by changes to Rule 1.16. The changes are intended to make it clear that the lawyer may withdraw for any reason if that can be accomplished "without material adverse effect on the interest of the client." If there will be adverse effects, however, withdraw will be permitted only when the lawyer has a "fundamental disagreement" with the client's objectives or intended action as opposed to simply considering the client's wishes "imprudent." The changes would also suggest that a lawyer should not be permitted to withdraw on the grounds of "unreasonable financial burden" if the financial burden was in fact foreseeable at the outset of representation.

I. Third Party Neutrals

1. The Commission is proposing to address the proliferation of third party neutrals in ADR settings by adopting a rule which is currently designated Rule 2.x. The basic thrust of the rule is to require lawyers serving as neutrals to make clear the nature of their role in the proceedings and to make it clear that they are not providing "legal advice" to the respective parties.

J. Meritorious Claims and Contentions

1. The Commission has proposed in addition to Rule 3.1 which would require a lawyer to retract a claim or contention that the lawyer has subsequent "reason to believe" is frivolous or whose primary purpose is "to harass or maliciously injure a person."

K. Candor to the Tribunal

1. Proposed changes to Rule 3.3 are intended to amplify the lawyer's obligation of candor to a tribunal to include an arbitrator in binding arbitration and a legislative or administrative body acting in an adjudicatory capacity. The Rule also addresses the lawyer's duty to correct a false statement of material fact or law previously made to the tribunal. The Rule also addresses remedial measures to be taken by the lawyer when the lawyer knows that evidence or testimony offered by the client was false.

If the lawyer does not "know" of the falsity of the evidence but merely "reasonably believes" the evidence to be false, the lawyer may, but is not required to, refuse to offer the evidence.

L. Truthfulness in Statements to Others

1. Rule 4.1 covers the matter of the lawyer's statements to others. It has generally provided that a lawyer may not knowingly "fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure would be prohibited by Rule 1.6." The Commission is considering consolidating that statement with the more general rule against providing assistance to client crime or fraud in Rule 1.2(d)

M. Communications with Represented Persons

1. The Commission has spent a great deal of time considering possible amendments to Rule 4.2 which deal with communications with represented persons. Thus far, the only solid change has to do with clarifying the fact that otherwise prohibited communications may be authorized by court order. The commentary to the rule is proposed to make clear that the "no-contact rule" applies even if the communication is initiated by or consented to by the represented party.

M

N. Inadvertent Disclosures

1. A proposed change to Rule 4.4 will deal with the proverbial problem of the "aberrant fax." It will provide that a lawyer who receives a document and has reason to believe that it was inadvertently sent, must promptly notify the sender. The rule as currently proposed does not attempt to resolve the lawyer's further duties with respect to the document.

O. Law Firm Management and Discipline

1. Rule 5.3 deals with the responsibility of partners and "supervisory lawyers" to ensure that other lawyers and non-lawyers comply with the rules. A proposed amendment to Rule 5.1 would elaborate on the duty of such supervisory lawyers to establish internal policies and procedures, to provide "reasonable assurance" that all lawyers in the firm conform to the rules. Such internal policies would include policies designed to detect and resolve conflicts of interest, to account for client funds, and to ensure proper supervision of inexperienced lawyers and non-lawyers.

P. Multidisciplinary Practice

1. Thus far the Ethics 2000 Commission has deferred action on Rules 5.4 ("Professional Independence of a Lawyer") and 5.7 ("Responsibilities Regarding Law-Related Services") pending the completion of the work by the ABA Commission on Multidisciplinary Practice.

Q. Unauthorized Practice and Choice of Law

1. There have been significant changes approved to Rule 5.5 ("Unauthorized Practice of Law") and Rule 8.5 ("Disciplinary Authority: Choice of Law") which address the matter of lawyers license in one jurisdiction and practicing in another. A proposed amendment would provide "safe harbors" for such lawyers practicing outside their licensing jurisdiction when (1) preparing for a proceeding in which the lawyer expects to be admitted pro hac vice; (2) where the lawyer is acting on behalf of a client of which he or she is an employee; (3) where the lawyer is handling a matter which is "reasonably related" to their practice on behalf of a client in the jurisdiction where the lawyer is licensed; and (4) where the lawyer is "associated in a particular matter" with a lawyer admitted in that jurisdiction. The proposed change to Rule 8.5 would make the lawyer that is acting in another jurisdiction subject to the disciplinary rules of that jurisdiction.

IV. Reference and Credit

A. Much of the foregoing paper was summarized from a document entitled Update on Ethics 2000 Project and Summary of Recommendations to Date, prepared by Margaret Colgate Love. That document and the text of proposed rule changes may be found on the ABA's website at http://www.abanet.org/cpr.

PANEL DISCUSSION

NEW DEVELOPMENTS FOR THE DEFENSE

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HYPOTHETICAL

RESTATEMENT OF THE LAW, THIRD, THE LAW GOVERNING LAWYERS, CHAPTER 8 (CONFLICT OF INTERESTS, TOPIC 5 (LAWYER'S OBLIGATION TO THIRD PERSON), SECTION 215 (COMPENSATION OR DIRECTION BY THIRD PERSON)).

COMMENT ON RESTATEMENT SECTION 215

PROPOSED FLORIDA RULE 4-1.8: STATEMENT OF CLIENT'S RIGHTS

HYPOTHETICAL

You have been retained by an insurance company to defend an insured involved in a serious motor vehicle accident. Liability is questionable and there is a substantial factual dispute as to how the accident occurred. The damages are significant and substantial. You have written your standard engagement letter to the insured when the file was first sent to you by the insurance carrier. Initial discovery has been partially concluded. You have taken the plaintiff's deposition and they have taken your insured's deposition. You have also deposed the primary treating physician and they have deposed your independent medical examiner. However, the parties are far apart in any settlement discussions, and based on the liability questions, the resulting verdict could be anywhere from a defense verdict to a verdict of a substantial amount.

The plaintiff has been unreasonable in his settlement overtures from the beginning. With the second round of discovery, numerous additional witnesses have been identified. The plaintiff's lawyer wants to take an additional six depositions. The billings to the insurance company have been substantial and ongoing for the last year and a half. You had been provided with standard billing guidelines from your carrier when the case was assigned to you. These guidelines have never been a problem in the past. You have never been restricted from taking depositions or performing research or hiring experts with this carrier at any time in the last ten to fifteen years. However, because of the large number of additional depositions that the plaintiff's lawyer wants to take, your carrier has indicated to you that they do not want you to take any additional fact witness depositions at this time. Because of the questionable liability issues and the substantial damages involved, you are concerned that not taking these additional fact witness depositions may have an adverse or prejudicial impact on your ability to defend the case. For purposes of this hypothetical, assume that the attorney has informed the insurer that certain specific depositions are reasonably necessary to defend the insured and has provided reasons to the insurer as to why the attorney believes that is the case. However, even with the information provided to the insurer, the insurer continues to deny authorization for the depositions. What should you do? Should you take the depositions and stand the expense yourself; should you inform the insured of the situation and suggest that he or she pay for the additional depositions; should you withdraw; or should you forego the depositions and hope for the best?

1 of 1 DOCUMENT

RESTATEMENT OF THE LAW, THIRD, THE LAW GOVERNING LAWYERS

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RULES AND PRINCIPLES

CHAPTER 8 - CONFLICT OF INTEREST

TOPIC 5 - LAWYER'S OBLIGATION TO THIRD PERSON

§ 215 Compensation or Direction by Third Person

(1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 202, with knowledge of the circumstances and conditions of the payment

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202.

COMMENTS & ILLUSTRATIONS: a Scope and cross-references This Section applies the general conflicts prohibition of § 201 to the various situations in which a third person pays a lawyer's fee for representing a client or directs a lawyer's work for a client. The third person might be interested as a relative or friend or have obligations to the client because of indemnification or similar arrangements, or be interested directly in the matter because of a co-client, such as a corporation sued along with one or more of its employees (see § 212, Comment e) The risk of adverse effect on representation of the client is inherent in any such payment or direction Accordingly, this Section, following the standard rule of the lawyer codes, requires informed consent of the client and imposes limitations on the control that a third person may exercise over the lawyer's work.

While discussion in the following Comments (see Comment f) will consider issues of the law governing a lawyer representing an insured person, the relationship between the insured person and the insurer or indemnitor will be controlled by other law, such as the law of insurance or of contract. Similarly, other law may govern other relationships between a client and a third person who pays or directs the lawyer, such as when the government pays a lawyer to represent a client in a criminal or civil matter (see Comment g). Issues relating to all such relationships are beyond the scope of the Restatement

The prohibition imposed by this Section applies to all affiliated lawyers (see § 203). Sanctions and remedies listed in § 4 [Chapter 1], are available for violation of this Section. Where a violation of this Section has caused actionable harm to a client, the remedy of professional malpractice (see [Chapter 4]) is available.

Issues relating to payment of legal fees generally are considered in Chapter 3. Chapter 5 examines a lawyer's duty to protect confidential information of a client.

b. Initial client consent As stated in the Section, under § 202 a client must consent to a lawyer's accepting either a third person's payment of the fee for a client or a third person's direction in a matter. In particular, the client must have knowledge of the circumstances and conditions under which the fee payment or direction is to be provided and any substantial risks to the client thereby created (see § 202, Comment c). In insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent other than that implicit in the action of the insured in forwarding the claim to the insurer is not required The lawyer should either

withdraw or consult with the client-insured (see § 202) when a substantial risk that the client-insured will not be fully covered becomes apparent (see § 201, Comment c(iii)) In an emergency situation in which the lawyer must take action to protect the interests of the client, as in filing an answer to avoid default, the lawyer may take such action even if a conflict appears to exist, but must also promptly take action to address the conflict

c. Third-person fee payment. This Section accommodates two values implicated by third-person payment of legal fees. First, it requires that a lawyer's loyalty to the client not be compromised by the third-person source of payment. The lawyer's duty of loyalty is to the client alone, although it may also extend to any co-client when that relationship is either consistent with the duty owing to each co-client or is consented to in accordance with § 202 Second, however, the Section acknowledges that it is often in the client's interest to have legal representation paid for by another. Most liability insurance contracts, for example, provide that the insurer will provide legal representation for an insured who is charged with responsibility for harm to another (see also Comment f hereto) Lawyers paid by civil rights organizations have helped citizens pursue their individual rights and establish legal principles of general importance Similarly, lawyers in private practice or in a legal services organization may be appointed or otherwise come to represent indigent persons pursuant to arrangements under which their fees will be paid by a governmental body (see Comment g)

d. Third-person direction of representation. The principle that a lawyer must exercise independent professional judgment on behalf of the client generally requires that no third person control or direct a lawyer's professional judgment on behalf of a client, as the lawyer codes require Consistent with that requirement, a third person may, with the client's consent and otherwise in the circumstances and to the extent stated in Subsection (2), direct the lawyer's representation of the client in the circumstances and to the extent stated in Subsection (2) When the conditions of the Subsection are satisfied, the client has, in effect, transferred to the designated third person the client's prerogatives of directing the lawyer's activities (see § 32(2)). The third person's directions must allow for effective representation of the client, and the client must give informed consent to the exercise of the power of direction by the third person The direction must be reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer Such directions are reasonable in scope and character if, for example, the third party will pay any judgment rendered against the client and makes a decision that defense costs beyond those designated by the third party would not significantly change the likely outcome. Informed client consent may be effective with respect to many forms of direction, ranging from informed consent to particular instances of direction, such as in a representation in which the client otherwise directs the lawyer, to informed consent to general direction of the lawyer by another, such as an insurer or indemnitor on whom the client has contractually conferred the power of direction (see Comment f)

1 Resettle, a non-profit organization, works to secure better living conditions for refugees Resettle's board of directors believes that a case should be filed to test whether a federal policy of detaining certain refugees is legally justified Client is a refugee who has recently been detained under the federal policy, and Resettle has offered to pay Lawyer to seek Client's release from detention. With the informed consent of Client, Lawyer may accept payment by Resettle and may agree to make contentions that Resettle wishes to have tested by the litigation.

Just as there are limits to client consent in § 202, there are limits to the restrictions on scope of the representation permitted under this Section. In general, unless the third person who is paying the lawyer bears substantially all of the consequences of the result in litigation, the third person may not direct or restrict the lawyer's decisions except with the client's informed consent

2 Client is charged with the crime of illegally selling securities. Client's employer, Brokerage, has offered to pay Lawyer to defend Client on the condition that Client agree not to implicate Brokerage or any of its other employees in the crimes charged against Client Lawyer may not accept the representation on those terms Whether to accept a plea bargain, for example, and whether to implicate others in the wrongdoing are matters about which the client, not the person paying for the defense, must have the authority to make decisions (see § 33).

3 Same facts as stated in Illustration 2, except that Client consents to accept Lawyer's representation on the condition stated by Brokerage under the limitations and conditions provided in § 202, including knowledge that Brokerage has stated the condition, and except that there is no substantial factual or legal basis for implicating Brokerage or any of its other employees Under such circumstances, Client's consent authorizes Lawyer to accept payment from Brokerage and adhere to the described conditions.

e. Preserving confidential client information. Although a legal fee may be paid or direction given by a third person, a lawyer must protect the confidential information of the client. Informed client consent to the third-person payment

or direction does not by itself constitute informed consent to the lawyer's revealing such information to that person. Consent to reveal confidential client information must meet the separate requirements of § 114.

4. Employer has agreed to pay for representation of Employee in defending a claim involving facts arguably arising out of pursuit of Employer's business. Employer asks Lawyer what Employee intends to testify about the circumstances of his actions. Without consent of Employee as provided in § 114, Lawyer may not give Employer that information.

f. Representing insured. A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The law governing the relationship between the insured and the insurer is, as stated in Comment a, beyond the scope of the Restatement. Certain practices of designated insurance defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in non-insurance arrangements with significantly different characteristics.

It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 26. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. Similarly, because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer. Compare § 73, Comment g [Chapter 4].

The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment d hereto. On consent, see Comment b hereto.

5. Insurer, a liability insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of $5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the duty of competent representation owed by Lawyer to Policyholder (see § 74 [Chapter 4]), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured. If the lawyer knows or should be aware of such an excess claim, the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage. Such occasions for conflict may exist at the outset of the representation or may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent (see § 202(2)(c)), the lawyer may proceed after obtaining client consent under the limitations and conditions stated in § 202.

When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (see § 112) without explicit informed consent of the insured (see § 114). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a reservation of rights" with respect to its defense of the insured (compare § 112, Comment l (confidentiality in representation of co-clients in general)).

With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud (see § 151 [Chapter 6]) and, if applicable, consistent with the lawyer's duties to the insurer as co-client (see § 112, Comment l). If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided in § 44 (see also § 112, Comment l). The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such

matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement.

g. Legal service and similarly funded representation. Lawyers who provide representation to indigent persons may do so pursuant to various arrangements under which their fees or other compensation will be paid by a governmental agency or similar funding organization. For example, a lawyer may represent clients as a staff attorney of a legal aid, military legal assistance, or similar organization, with compensation in the form of a salary paid by the organization. Lawyers in private practice may be appointed by a court, defender or legal-service organization, or bar association to represent a person accused of crime or a person involved in a civil matter (see § 26, Comment g), with the lawyer's fee to be paid by the government or organization, often pursuant to a schedule of fees. Certain for-profit legal service arrangements have also been approved, under which individual private practitioners provide assistance to participants who pay a flat charge to the legal service organization for limited legal services. Regardless of the method of appointment, the form of compensation or the nature of the paying organization (for example, whether governmental or private or whether non-profit or for-profit), the lawyer's representation of and relationship with the individual client must proceed as provided for in this Section.

REPORTERS NOTES: *Comment b. Rationale.* The traditional rule on third-person fee payments is expressed in Rule 1.8(f) of the ABA Model Rules of Professional Conduct (1983):

A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client consents after consultation;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by [the duty of confidentiality]

See also ABA Model Code of Professional Responsibility, DR 5-107(A) and (B) (1969) (similar).

Comment c. Initial client consent. See, e.g., *Arrington v. Nat'l Broadcasting Co., 531 F. Supp. 498 (D. D.C. 1982)* (union may pay costs of lawsuit on behalf of its members seeking overtime compensation where full disclosure and consent shown). On consent in policyholder-insured relationships, see Comment *f*, Reporter's Note.

Comment d. Third-person direction of representation. On cases involving insurer control of litigation, see Comment *f*, Reporter's Note. Cases involving lawyers for public interest causes have proceeded on a different rationale, typically founded on the basic right of a public interest organization to provide legal services. In upholding that right, courts have implicitly sustained the right of the organizations to specify the legal issues to be tested. See, e.g., *American Civil Liberties Union v. State of Tennessee, 496 F. Supp. 218 (M.D. Tenn. 1980)* (state barratry statute, which forbade groups paying legal fees in public interest cases, ruled unconstitutional); *In re Education Law Center, 429 A.2d 1051 (N.J. 1981)* (general state rule against corporate practice of law held not to apply to not-for-profit corporation representing persons without charge on issues relating to equal educational opportunity). But cf. *In re Primus, 436 U.S. 412, 447-448 (1978)* (Rehnquist, J., dissenting) (overreaching of private client can occur even if organization has best of motives).

The risk of outside control by third-person payers in criminal cases has led to results consistent with Illustration 2. See, e.g., *United States v. Bernstein, 533 F.2d 775* (2d Cir.), cert. denied, *429 U.S. 998 (1976)* (appropriate to require separate counsel where individual defendants might have tried to place blame for crime on corporation alone while corporation might have tried to blame crime on them); *In re Abrams, 266 A.2d 275 (N.J. 1970)* (lawyer reprimanded for accepting payment from illegal lottery organization to defend employees who might be charged with lottery violations). See also *Wood v. Georgia, 450 U.S. 261 (1981)* (when employer set up test case putting employees at risk and employees expected employers to pay fines as well, but they did not do so, case remanded for investigation of conflicts because of counsel's possible divided loyalties).

In some of the reported criminal cases, the government has succeeded in disqualifying a lawyer whose fee was being paid by someone else, asserting that the common payment scheme interfered with its investigation or with the rights of the defendants to turn state's evidence. See, e.g., *Pirillo v. Takiff, 341 A.2d 896*, opinion reinstated on rehearing, *352 A.2d 11 (Pa. 1975)*, appeal dism'd, *423 U.S. 1083 (1976)* (proper to disqualify single lawyer being

paid by police fraternal order and representing all 12 policemen called before grand jury investigating police department corruption). But see, e g., *In re Special Grand Jury, 480 F. Supp. 174 (E.D. Wis. 1979)* (when target company was paying for lawyer for its past and present employees, government could show no reason why employer should be denied counsel of choice). Cf. *Polk County v. Dodson, 454 U.S. 312 (1981)* (although state that prosecutes also pays public defender, defender represents only defendant and thus no improper conflict of interest).

A similar issue can arise in civil cases. E g., *Purdy v. Pacific Auto Ins. Co., 203 Cal. Rptr. 524 (Cal. Ct. App. 1984)* (when conflict arises over settlement strategy, insurer must provide new counsel for insured at insurer's expense); *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 131 N.Y.S.2d 393 (N.Y. Sup. Ct. 1954)* (insurer seeking in settlement negotiations to shift greater portion of risk to parties other than insurer improperly put insured at higher risk of liability); see also Comment *f*, Reporter's Note.

Comment e. Preserving confidential client information. *See* Comment f, Reporter's Note.

Comment f. Representing insured. See generally 1 G. Hazard &; W. Hodes, The Law of Lawyering § 1.8:700 (2d ed. 1990); R. Keeton &; A. Widiss, Insurance Law 824-41, 846-47, 853-57 (1988) (consideration of multiple issues from perspectives of both insurance law and law governing lawyers); C. Wolfram, Modern Legal Ethics § § 8.4, 8.8 (1986); Hazard, Triangular Lawyer Relationship: An Exploratory Analysis, 1 Geo. J. Leg. Ethics 15 (1987); Leubsdorf, Pluralizing the Client-Lawyer Relationship, *77 Cornell L. Rev. 825 (1992)*; Richmond, Lost in the Eternal Triangle of Insurance Defense Ethics, 9 Geo. J. Leg. Ethics 475 Neumier, Serving Two Masters: Problems Facing Insurance Defense Counsel, 77 Mass. L., Rev. 66 (1992); Hall, Confusion Over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?, *41 Drake L. Rev. 731 (1992)* Statements in the Comment are limited to aspects of the triangular relationship" set of problems that directly concern the legal constraints under which the designated defense counsel must operate. Nothing stated there about the substantive law of insurance necessarily reflects the policy of the Institute.

On whether a defense lawyer designated for an insured by an insurer represents only the insured or both insured and insurer as co-clients, compare, e.g., O'Malley, Ethics Principles for the Insurer, the Insured and Defense Counsel: the Eternal Triangle Reformed, *66 Tulane L. Rev. 511 (1991)* (arguing for insured-as-sole-client position), with, e g., Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, *72 Tex. L. Rev 1583 (1994)* (arguing for dual-client view). The Comment take the position that whether only the insured or the both insured and insurer (as co-clients) enter into a client-lawyer relationship with the designated lawyer is a question to be determined on the facts of the particular case, employing the approach indicated in § 26. For acceptance of such a view, see, e g., ABA Formal Opin. 96-403, at 2, 3 (1996) (. Provided there is appropriate disclosure, consultation, and consent, any of these arrangements would be permissible. . For purposes of this opinion, nothing fundamental turns on whether the lawyer represents the insured alone or both the insurer and the insured. . "); cf. Silver &; Syverud, The Professional Responsibilities of Insurance Defense Lawyers, *45 Duke L. J. 255 (1995)*. The requirements of third-party payor rules such as ABA Model Rule 1.8(f), quoted Note a, supra, apply whether or not the insurer is also regarded as a client. Cf., e g., *Wood v. Georgia, 450 U.S. 261 (1981)* (conflict when lawyer, paid by co-client employer, represented employee); but see 3 R. Mallen &; J. Smith, supra § 28.18, at 566 (asserting, without citation of authority, that Model Rule 1.9(f) is inapplicable when the third-party payor is a co-client). The role of designated defense counsel who is an employee of the insurer is considered in, e g., Keeton &; Widiss, supra at 827-28; see also Mallen, A New Definition of Insurance Defense Counsel, 1986 Def. Counsel J. 108. On judicial attitudes toward such arrangements, compare, e g., *In re Youngblood, 895 S.W.2d 322 (Tenn. 1995)* (approving such arrangements when properly structured and operated); *In re Allstate Ins. Co., 722 S.W.2d 947 (Mo. 1987)*, In re Rules Governing Conduct of Attorneys in *Florida, 220 So. 2d 6 (Fla. 1969)* (same), with *Gardner v. North Carolina St. Bar, 341 S.E.2d 517 (N.C. 1986)* (lawyers may not enter such arrangements); *American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996)* (same).

On application of the attorney-client privilege to communications between an insured and an agent of the insurer, see § 120, Comment *g*, Reporter's Note. On the ability of the insurer to maintain against insurance defense counsel an action for legal malpractice in the absence of a conflict with the insured, see, e g., Unigard Ins. Group v. O'Flaherty &; *Belgum, 45 Cal. Rptr. 2d 565 (Cal. Ct. App. 1995)*, see generally § 73, Comment *g*, Reporter's Note.

On consent by the insured to the lawyer's role, see, e g., ABA Formal Opin. 96-403, at 3 (1996) (If the lawyer is to proceed with the representation of the insured at the direction of the insurer, the lawyer must make appropriate disclosure sufficient to apprise the insured of the limited nature of [the lawyer's] representation as well as the insurer's right to control the defense in accordance with the terms of the insurance contract. "); see also id. at 3-5 (appropriate disclosure and consent can be accomplished in short letter; client-insured's acceptance is sufficiently

manifested by accepting defense after being advised of its limitations) As a matter of insurance law, courts have found policyholder consent to the role of the insurer in designating counsel and controlling the defense through execution of an insurance contract containing a duty-of-cooperation clause E.g , *Crum v. Anchor Ins. Co., 119 N.W 2d 703 (Minn. 1963)* (insurer obliged to defend where pleadings showed incident within terms of policy) Closer questions about the adequacy of consent arise when the complaint alleges one or more claims not covered by the policy, or when (for whatever reason) the insurer defends under a reservation of rights As a matter of insurance law, the majority of jurisdictions hold that, if the insurer timely asserts non-coverage, either the insurer must pay for separate counsel for the insured or the insured must specifically give informed consent to defense by a lawyer selected by the insurer E.g , *N.Y State Urban Dev Corp v VSL Corp., 738 F 2d 61 (2d Cir 1984)* (insurer may participate in selection of the insured's independent counsel); *San Diego Federal Credit Union v Cumis Ins Soc'y Inc , 208 Cal Rptr 494 (Cal Ct App. 1984)* (consent to insurer's choice of counsel deemed withdrawn when insured retained independent counsel); *Nandorf, Inc v CNA Ins Cos , 479 N E 2d 988 (Ill App Ct 1985)* (insurer obliged to pay for separate counsel for insured)

Most of the case law on control of litigation strategy by the insurer turns on questions of who controls the decision to settle, particularly when the insured need not expect to bear the financial risk of loss As a matter of insurance law, the ability of the insurer to control the defense is ceded by the insured under a policy so providing. E g , *Buchanan v. Buchanan, 160 Cal Rptr 577 (Cal Ct App 1979)* (insurer may assert claim of non-liability in face of insured's wish to concede liability to victim-relative); *Feliberty v. Damon, 527 N E 2d 261 (N.Y. 1988)* (malpractice insurer not liable to doctor for settlement within policy limits despite adverse publicity) When a dispute between insured and insurer exists over settlement, the duties of a defense lawyer representing the insured are controlled, not by the policy, but by the lawyer's professional duties See, e g., ABA Formal Opin 96-403, at 5-6 (1996) (dispute may require lawyer's withdrawal; thereafter, former-client conflict rule precludes lawyer from assisting insurer in reaching settlement objected to by insured); Rogers v. Robson, Masters, Ryan, Brummund &; *Belom, 407 N E 2d 47 (Ill 1980)* (lawyers designated by medical-malpractice insurer to defend doctor had duty to tell insured doctor of insurer's intent to settle claim within policy limits contrary to doctor's insistence against settlement)

Decisions based on the law of insurance have resolved the settlement problem consistent with the rule in this Section in the case of an insurer's bad-faith refusal to settle within policy limits The insurance company is typically held liable for any damages awarded in excess of the policy limits. See, e.g., *Parsons v Continental Nat'l American Group, 550 P.2d 94 (Ariz 1976); Crisci v Security Ins Co , 426 P 2d 173 (Cal. 1967), Gibson v. Western Fire Ins Co., 682 P 2d 725 (Mont 1984)*. Where the lawyer behaves improperly in such cases, there is potential malpractice exposure to the insurer or the insured for any resulting loss E g., *Lysick v. Walcom, 65 Cal Rptr 406 (Cal Ct App 1968)* (lawyer who failed to tell insurer of settlement offer within policy limits required to pay insurer amount by which eventual judgment exceeded settlement offer); *Lieberman v Employers Ins of Wausau, 419 A 2d 417 (N J 1980)* (in medical malpractice case settled after doctor had withdrawn consent, lawyer's duty was to insured, and malpractice claim lies against lawyer for so settling). See also *Betts v Allstate Ins Co., 201 Cal Rptr 528 (Cal Ct App 1984)* (in case involving bad-faith refusal to settle, judgment against lawyer upheld for negligent infliction of emotional distress on insured).

Most of the decisions involving the question whether a lawyer designated by the insurer may use information obtained in the client-lawyer relationship against the interests of the client-insured (typically to enable the company to deny coverage) have arisen under the substantive law of insurance They typically find such use impermissible. See, e g , *Parsons v Continental Nat'l American Group, 550 P.2d 94 (Ariz 1976)* (when lawyer learned confidential medical information that child's assault had been intentional and thus not covered by the policy, lawyer was required to keep information confidential but should withdraw from representation; where lawyer used information to benefit insurance company, company was estopped to deny coverage); *Employers Casualty Co v. Tilley, 496 S.W 2d 552 (Tex. 1973)* (because insurer did not tell insured that it might deny coverage and even interviewed insured's employees without revealing that it was building case against liability, prejudice to insured shown, so insurer estopped to deny coverage)

Comment g. Legal service and similarly funded representation E g , *42 U.S.C. § 2996e*(b)(B)(3) (provision of Legal Services Corporation act prohibiting corporation from interfer[ing] with any attorney in carrying out" professional responsibilities to client); cf., e g., *Ferri v Ackerman, 444 U.S. 193 (1979)* (defense counsel court-appointed in federal criminal trial not entitled to absolute immunity under federal law in subsequent state malpractice action by former client because, among other things, lawyer's primary allegiance is to client); *Jackson v Salon, 614 F 2d 15 (1st Cir 1980),* and authority cited (defense counsel court-appointed in state criminal case not

acting under color of state law for purposes of *28 U.S.C. § 1983* action; lawyer works primarily for benefit for and at the instruction of client and not that of state). On limited imputation of conflicts within a non-profit legal services agency, see § 203, Comment *d(v)*.

On for-profit legal service organizations, see, e.g., ABA Formal Opin. 87-355 (1987) (lawyer may practice in for-profit legal service plan under Model Rules, provided plan complies with guidelines in opinion relating to allowing participating lawyer to exercise independent professional judgment on behalf of individual client, to maintain client confidences, to avoid conflicts of interest, and to practice competently); Miss Formal Opin 199 (1992) (following ABA opinion).

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RESTATEMENT OF THE LAW, THIRD, THE LAW GOVERNING LAWYERS COMPENSATION OR DIRECTION BY THIRD PERSON: ETHICAL ISSUES

The following outline was derived from a review of a presentation provided to the Iowa Defense Counsel Association by William T. Barker, a partner in the Chicago office of Sonnenschein, Nath & Rosenthal. Mr. Barker was a member of the American Law Institute and had input into the formulation and passage of the Restatement of the Law, Third, The Law Governing Lawyers, Section 215--Compensation or Direction by Third Person. Mr. Barker authored a comprehensive article on this issue, which was presented at the 1998 Iowa Defense Counsel annual seminar and can be found in the seminar book at Section H, pages 1-75. In addition, Mr. Barker authored an article for the Insurance Litigation Reporter--"The Tripartite Relationship: Who is the Client and to Whom Does the Attorney Owe Ethical Duties," October 1, 1998, pages 729-745. In addition, Mr. Barker authored "The Tripartite Relationship and Protection of the Insured: Is there a Problem?" It appears in the Insurance Litigation Reporter, October 1, 1999, pages 533-542. The following outline is provided merely as a brief review of some of the comments authored by Mr. Barker as referred to above.

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RESTATEMENT SECTION 215

The recent adoption of § 215 may have a significant impact on the analysis of the relationship between attorneys, insurers and insureds. The Restatement, with selected comments, is set forth below:

RESTATEMENT OF THE LAW, THIRD, THE LAW GOVERNING LAWYERS
(Copyright 1998, American Law Institute)

§ 215 Compensation or Direction by Third Person

(1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 202, with knowledge of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202.

Pertinent to our discussion, the Restatement provides lawyers guidance on how to represent an insured when the insurer provides some direction in defending a case, and provides guidance on necessary disclosures to the client.

Comment b states, in part, as follows:

> b. Initial client consent. ... In insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent other than that implicit in the action of the insured in forwarding the claim to the insurer is not required. The lawyer should either withdraw or consult with the client-insured (see § 202) when a substantial risk that the client-insured will not be fully covered becomes apparent (see § 201, Comment c(iii)) ....

Comment d--Third-person direction of representation, states as follows:

> The principle that a lawyer must exercise independent professional judgment on behalf of the client generally requires that no third person control or direct a lawyer's professional judgment on behalf of a client, as the lawyer codes require ....

Comment d allows for a certain direction of the lawyer's representation, with client's consent, when certain conditions are satisfied. However, the third person's directions must allow for effective representation of the client, and the client must give informed consent to the exercise of the power of direction by the third person. The direction must be reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer. Such directions are reasonable in scope and character if, for example, the third party will pay any judgment rendered against the client and makes a decision that defense costs beyond those designated by the third party would not significantly change the likely outcome.

Comment f is perhaps the most important Comment giving insight into what parts of the tripartite relationship are governed by the Restatement. Comment f states, in pertinent part:

> Representing insured. A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The law governing the relationship between the insured and the insurer is, as stated in Comment a, beyond the scope of the Restatement. . . .
>
> It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 26.

The following illustration may be helpful:

> 5. Insurer, a liability insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of $5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contact confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the duty of competent representation owed by Lawyer to Policyholder (see § 74 [Chapter 4]), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

The remainder of Comment f and the Comments relative to Illustration 5 address conflicts of interest when a claim substantially in excess of policy limits is asserted against an insured. Those Comments also address confidential client information of the insured and when that information may or may not be divulged. Not surprisingly, the Comment directs that with

respect to events or information that create a conflict of interest between the insured and the insurer, the lawyer must proceed in the best interests of the insured. If the designated lawyer finds it impossible to proceed, the lawyer must withdraw from representation of both clients. The Comments also give guidance to what type of advice the attorney may provide to the insured concerning coverage matters, claims against other persons insured by the same insurer, and the need to obtain outside assistance from other counsel with respect to such matters.

As addressed in Illustration 5 under Comment f of § 215, many times the lawyer is faced with a decision as to expending certain resources in order to adequately prepare the case for trial. In Illustration 5, the attorney believes that taking extra depositions would increase the policyholder's chances of prevailing. Only if the lawyer reasonably believes that the additional depositions can be forgone without violating his duty of competent representation could a lawyer comply with the insurer's direction that taking the depositions would not be worth the cost.

Thus, the insurer's opportunity to have some control over how the defense is handled would be permitted pursuant to he Restatement. In contrast, the Montana Supreme Court rejected letting the insurer have any control, and specifically refused to apply the then unratified Restatement Section 215. In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, ____ P.2d ____, 2000 WL 502545 (Mont. 72000).

It is also imperative for the lawyer to advise the insured as to the usefulness of extra depositions. There have to be communications by and between the lawyer and the insured as to what the defense will entail. Questions have been raised as to whether the lawyer is under an obligation to honor some reasonable expectation as to the extent of the defense being provided by taking the extra deposition or depositions. Accordingly, early consultation with the insured concerning the limits of the defense offered by the insurer needs to be explained. The insureds would then have the opportunity to reject a limited defense. Any time an attorney raises the question of offering less than a full defense, the attorney should then advise the insured that he or she has the right to seek an independent opinion from another attorney if they so choose.

Some of the difficulties in the question as to who has the right to control the defense may be softened by earlier communication by the lawyer to the insured concerning the nature of the representation. If, in fact, the lawyer is to proceed with representation of the insured at the direction of the insurer, the lawyer must make appropriate disclosure sufficient to apprise the insured of the limited nature of his representation, as well as the insurer's right to control the defense. This can be accomplished in a lawyer's consultation with the insured or through letters written to the insured or a combination of the two methods. Those arguing in favor of

providing information to the insured through an oral communication. I point out that this provides a more effective opportunity for the insured to ask questions and to seek clarification from the lawyer concerning anything that the insured might not understand. By merely sending a letter to the insured, there is no way of knowing whether or not the insured truly comprehended the nature of the content of the communication.

The ABA Committee on Professional Ethics, Formal Opin. 96-403, addresses the content of the required disclosure and states that a letter should include language communicating the fact "that the lawyer intends to proceed at the direction of the insurer in accordance with the terms of the insurance contract and what this means to the insured." The opinion goes on to state that all that is necessary is "that the insured be clearly apprised of the limitations of the representation offered by the insurer and that the lawyer intends to proceed in accordance with the directions of the insurer." Generally, the attorney should not advise either the insured or insurer regarding the rights and duties between them. Thus, it may be that even if it were entirely clear that the insured is obligated to consent to everything which is presented in a particular situation, counsel could not take that position in advising the insured about the consent. One solution may be for the attorney to communicate to the insured the terms of the representation offered by the insurer without commenting on whether those terms conform to the terms of the policy. Counsel could state the substance of the insurer's position on any potentially disputed issue and could state that counsel could not advise the insured on that issue. Counsel could then point out the utility of consulting other counsel about the subject and indicate that any disagreements must be resolved between the insurer and the insured without involving defense counsel.

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Such communications should be provided to the insured at the earliest practicable time. This could include the initial notice to the insured from the lawyer advising the insured that the lawyer has been retained to represent him or her. However, the primary need is that the communication be done promptly.

The following are examples of language that has been suggested by William T. Barker, a member of the American Law Institute and a frequent author of articles concerning the tripartite relationship and the newly adopted Restatement:

> [Insurer] has asked me to defend you against the claim asserted by [plaintiff]. You should understand that I will be working only to defeat or minimize that claim, and that is the only thing [insurer] has agreed to pay me to do. I will not be representing or advising either you or [insurer] as to any questions which may arise [or have arisen] regarding your respective rights and duties under the insurance policy. I also will not be representing or advising you as to any claim you may have against [plaintiff].

> When any questions arise where I think you might find assistance or other counsel useful, I will point that question out to you and explain its significance and, if not apparent, the reasons you might wish to obtain such assistance. If you want me to, I will offer suggestions about who you might wish to consult. But, as I understand [insurer's] position, it will not agree to pay for the services of counsel you might consult on such issues. So you will either have to make arrangements to pay such counsel yourself or, if you think [insurer] is obliged to pay for such counsel, you will have to take that question up with [insurer] yourself, possibly with the assistance of counsel you personally retain.

The Florida Bar Association Committee on Insurance has formulated a "Statement of Client's Rights" as a prototype for the type of information that could be sent to the insured-clients and a copy is attached to this outline for reference purposes.

IMPLEMENTATION RULE

[MODIFY THE TITLE OF RULE 4-1.8 BY INSERTING THE FOLLOWING UNDERSCORED LANGUAGE:]

RULE 4-1.8 CONFLICT OF INTERESTS; PROHIBITED AND OTHER TRANSACTIONS

[CREATE NEW SUBSECTION (e) TO RULE 4-1.8 AS FOLLOWS:]

(e) **Representation of Insureds.** When a lawyer undertakes the defense of an insured in regard to an action or claim for personal injury or for property damages, or for death or loss of services resulting from personal injuries based upon tortious conduct, including product liability claims, the Statement of Insured Client's Rights shall be provided to the insured at the commencement of the representation. The lawyer shall sign the statement certifying the date the statement was provided to the insured. The lawyer shall keep a copy of the signed statement in the client's file, and shall retain a copy of the signed statement for six years after the representation is completed. The statement shall be available for inspection at reasonable times by the insured, or by the appropriate disciplinary agency. Nothing in the Statement of Insured Client's Rights shall be deemed to augment or detract from any substantive or ethical duty of a lawyer, nor affect the extra-disciplinary consequences of violating an existing substantive legal or ethical duty; nor shall any matter set forth in the Statement of Insured Client's Rights give rise to an independent cause of action or create any presumption that an existing legal or ethical duty has been breached.

N

STATEMENT OF INSURED CLIENT'S RIGHTS

[Statement]

COMMENT

OR255358;1

Proposed

STATEMENT OF CLIENT'S RIGHTS

An insurance company has selected a lawyer to defend a lawsuit or claim against you. This Statement of Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation. This disclosure statement highlights many, but not all, of your rights when your legal representation is being provided by the insurance company.

1. Your Lawyer. If you have questions concerning the selection of the lawyer by the insurance company, you should discuss the matter with the insurance company and the lawyer. As a client, you have the right to know about the lawyer's education, training and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours and give you this information in writing, if you request it. Your lawyer is responsible to keep you reasonably informed regarding the case and promptly comply with your reasonable requests for information. You are entitled to be informed of the final disposition of your case within a reasonable time.

2. Fees and Costs. Usually the insurance company pays all of the fees and costs of defending the claim. If you are responsible for directly paying the lawyer for any fees or costs, your lawyer must inform you.

3. Directing the Lawyer. If your policy, like most insurance policies, provides for the insurance company to control the defense of the lawsuit, the lawyer will be taking instructions from the insurance company. Under such policies, the lawyer cannot act solely on your instructions, and at the same time, cannot act contrary to your interests. Your preferences should be communicated to the lawyer.

4. Litigation Guidelines. Many insurance companies establish guidelines governing how lawyers are to proceed in defending a claim. Sometimes such guidelines affect the range of actions the lawyer can take, and may require authorization of the insurance company before certain actions are undertaken. You are entitled to know the guidelines affecting the extent and level of legal services being provided to you. Upon request, the lawyer or the insurance company should either explain such guidelines to you or provide you with a copy. If the lawyer is denied authorization to provide a service or undertake an action the lawyer believes necessary to your defense, you are entitled to be informed that the insurance company has declined authorization for the service or action.

5. Confidentiality. Lawyers have a general duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you may also have a duty to share with the insurance company information relating to defense or settlement of the claim. If the lawyer learns information indicating that the insurance

company is not obligated under the policy to cover the claim or provide a defense, the lawyer's duty is to maintain that information in confidence. If the lawyer cannot do so, the lawyer may be required to withdraw from the representation without disclosing to the insurance company the nature of the conflict of interest which has arisen. Whenever a waiver of the lawyer-client confidentiality privilege is needed, your lawyer has a duty to consult with you and obtain your informed consent. Some insurance companies retain auditing companies to review the billings and files of the lawyers they hire to represent policyholders. If the lawyer believes a bill review or other action releases information in a manner that is contrary to your interests, the lawyer should advise you regarding the matter.

6. Conflicts of Interest. Most insurance policies state that the insurance company will provide a lawyer to represent your interests as well as those of the insurance company. The lawyer is responsible for identifying conflicts of interest. If at any time you believe the lawyer provided by the insurance company cannot fairly represent you because of conflict of interests between you and the company (such as over coverage of the claim), you should discuss this with the lawyer and explain why you believe there is a conflict. If an actual conflict of interest arises that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. Settlement. Many policies state the insurance company alone may make a final decision regarding settlement of a claim, but under some policies your agreement is required. If you want to object to or encourage a settlement within policy limits, you should discuss your concerns with your lawyer to learn your rights and possible consequences. No settlement of the case requiring you to pay money in excess of your policy limits can be reached without your agreement, following full disclosure.

8. Your Risk. If you lose the case, there might be a judgment entered against you for more than the amount of your insurance, and you might have to pay it. Your lawyer has a duty to advise you about this risk and other reasonably foreseeable adverse results.

9. Hiring Your Own Lawyer. The lawyer provided by the insurance company is representing you only to defend the lawsuit. If you desire to pursue a claim against the other side, or desire legal services not directly related to the defense of the lawsuit against you, you will need to make your own arrangements with this or another lawyer. You may also hire another lawyer, at your own expense, to monitor the defense being provided by the insurance company. If there is a reasonable risk that the claim made against you exceeds the amount of coverage under your policy, you should consider consulting another lawyer.

10. Reporting Violations. If at any time you believe that your lawyer has acted in violation of your rights, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar call (850) 561-5839 or you may access the Bar at www.FlaBar.org

N

OR244136:2

Proposed

IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS, PLEASE ASK FOR AN EXPLANATION.

CERTIFICATE

The undersigned hereby certifies that this Statement of Client's Rights has been provided to [name of insured/client(s)] by [mail] [hand delivery] at [address of insured/client(s) to which mailed or delivered] this ____ day of _____, 20___.

[Signature of Attorney]

[Print/Type Name]

Florida Bar No :

OR244136;2

WENDY N. MUNYON

GRINNELL MUTUAL REINSURANCE COMPANY

4215 Highway 146
P.O. Box 790
Grinnell, Iowa 50112

HYPOTHETICAL

ETHICS OPINION, IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT, INSURANCE GUIDELINES, OPINION NO. 99-01 (SEPTEMBER 8, 1999)

DRI RECOMMENDED CASE HANDLING GUIDELINES FOR LAW FIRMS

DRI RECOMMENDED CASE HANDLING GUIDELINES FOR INSURERS

Hypothetical: Compliance with Insurer Guidelines and Ethics Opinion 99-01

An attorney retained by an insurer to defend its insured receives, with the insurer's investigative file and the assignment letter, a document entitled "Guidelines for Insurance Counsel" that provides, in part, as follows:

- Our company philosophy is that we hire lawyers and not law firms. We have particular confidence in your competence and professionalism. Therefore, any changes in the staffing of this matter require our prior approval. If a substitution becomes necessary, we will not pay for the time required to familiarize new counsel with the case.

- We will not pay for the attendance of more than one lawyer at a deposition or motion hearing without prior approval.

- We expect that you will consult with us before undertaking any legal research project of more than 4 hours' duration. We ask that you notify us before incurring charges for electronic research.

- We will not pay for "round table" conferences among you and others in your firm as to the trial strategy in the litigation or the value of the case.

- We will reimburse you for travel time at one-half your hourly rate. We will pay for regular coach air fare on trips we approve in advance.

- You must consult with us before retaining any expert witness, and we must concur in the choice of the expert and compensation arrangements.

Will compliance with these guidelines cause you to run afoul of Ethics Opinion 99-01? If so, must you refuse the assignment? Notify the insured and obtain consent? Negotiate with the insurer for amendments?

Ethics Opinions
Iowa Supreme Court Board of
Professional Ethics and Conduct

Date of Opinion: 09/08/99 Opinion Number: 99-01
Title: INSURANCE GUIDELINES

Opinion: You state that in cases where an insurance company ("Insurer") has engaged a lawyer or law firm to represent its insured, the Insurer frequently requests the lawyer to agree to a variety of requirements, usually called "Guidelines," as a condition of the engagement. These Guidelines sometimes include requirements which: 1) specifically control how a law firm staffs a file, provide that a non-lawyer claims representative can perform tasks traditionally performed by a lawyer, set forth when and to whom the lawyer may assign various legal tasks (such as to legal assistants); determine who in the law firm can perform legal research, require a lawyer to rely upon research by an unsupervised paralegal, require prior approval for depositions or pleadings, curtail interoffice meetings of lawyers working on the file, limit written communication with the insured to a minimum, or dictate how and when specific legal tasks may be performed such as the use and type of discovery; and 2) require the lawyer to keep a time based service-log describing in detail the specific legal services rendered by the lawyer to the client and the amount of time it took to perform the service, etc. The service-log is for review by the Insurer or a third party, outside auditor in determining whether, in their judgment, the services were necessary and the time charged reasonable.

You ask whether it is proper for an Iowa lawyer to agree to, or accept or follow an engagement that requires following such Guidelines.

1) Control of Work - The Iowa Supreme Court has held that when an Insurer retains an attorney to represent an insured, the lawyer has an attorney-client relationship with the insured. See Henke v. Iowa Home Mutual Cas. Co., 87 N.W. 2d 920, 249 Iowa 614 (1958); see also Formal Opinions 87-16 and 88-14. The primary question concerns who can direct and control legal services rendered by a lawyer to a client and how those services are to be delivered. The Iowa Code of Professional Responsibility for Lawyers answers the question. Only the lawyer and the client can direct and control the legal services rendered to the client. "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the professional judgment in rendering such legal services." DR 5-107(B). See also EC 5-1,

5-21, and 5-23. Determining the legal services necessary to represent the client and who, within the lawyer's office renders them, are and must be solely within the province of the lawyer. In making those decisions, the lawyer must comply with DR 3-104 as well as EC 3-6 of the Iowa Code of Professional Responsibility.

2) Outside Auditors - Guidelines which direct and require the lawyer to keep and reveal a detailed narrative legal service-log raise both the issue of control of the lawyer's professional judgment in violation of DR 5-107(B); and whether the attorney-client privilege is jeopardized. A lawyer is required to protect the confidences and secrets of a client and they may not generally be revealed without the client's consent, after full disclosure. DR 4-101. Any requirement that the lawyer obtain the insured's consent to such a disclosure creates an ethical dilemma for the lawyer. As the Washington State Bar Association has stated, "This is because it is almost inconceivable that it would ever be in the client's best interests to disclose confidences or secrets to a third party." WSBA Formal Opinion 195, 6/24/99. "If there is the slightest risk of embarrassment to the client or waiver of privileged information, independent counsel could have an affirmative duty to recommend against disclosure." Id.

It is the opinion of the Board that:

1) it would be improper for an Iowa lawyer to agree to, accept or follow Guidelines which seek to direct, control or regulate the lawyer's professional judgment or details of the lawyer's performance; dictate the strategy or tactics to be employed; or limit the professional discretion and control of the lawyer.

2) it would be improper for an Iowa lawyer to agree to, accept or follow such proposed service-log requirements in any form that causes the attorney-client privilege to be placed in jeopardy, if the service-log is sent to a third party. An Insurer may require a lawyer to identify the services rendered and time spent, so long as it does not control the lawyer's professional judgment or undermine the attorney-client privilege.

Lawyers also should review DR 1-102(A), DR 5-105(C) and (D), DR 6-101(A), DR 7-101(A) and Canon 9, and their pertinent Ethical Considerations.

DRI Recommended Case Handling Guidelines for Law Firms

I. Philosophy

[The law firm] expects to work with the insurer and the insured to achieve the best result for the insured in an efficient and cost-conscious manner consistent with the firm's ethical obligations. Nothing contained herein is intended to nor shall restrict counsel's exercise of professional judgment in rendering legal services for the insured

II. Case Development

An effective and strategically sound legal defense is the responsibility of counsel in consultation with the insurer and should be developed in a timely manner.

A. A goal is to identify, in a timely manner, those claims for which there is liability, and to discuss settlement opportunities early. The activities necessary to defend a given claim and bring it to appropriate resolution should be addressed early and the steps necessary to achieve that resolution should be jointly agreed upon between the insurer and defense counsel

B. An early resolution of lawsuits is generally desirable and the use of alternative dispute resolution is encouraged

If counsel is requested to be involved in settlement negotiations, settlement authority must be obtained from the insurer and requests for authority should be made in a timely manner.

III. Staffing Philosophy

[The firm] will designate one attorney to have primary responsibility for each case on which its services are requested. The case should be staffed economically and effectively. Obviously, a balance must be struck between the efficiency a more experienced lawyer brings to a given task and the advantages of having the task performed by a junior lawyer or a paralegal. Duplication of effort within the firm should be avoided.

To achieve the best efficiency and value, the role and responsibilities of the law firm staff members should be clearly defined and appropriate to each individual's qualifications, level of experience, and billing rate. Lead counsel should delegate work to subordinates wherever possible to achieve efficiency and cost-effectiveness without compromising quality.

IV. Reporting Requirements

A. Reports

Unless otherwise requested, reporting is required for three events: Acknowledgment; Initial Evaluation; and Significant Developments. Reports should be provided to both the insurer and the insured.

1. Acknowledgment

Upon receipt of a new case, counsel should send an acknowledgment letter regarding receipt of the file and designating the legal team assigned to the case. Any matters of immediate concern or information that may result in early resolution of the case should be addressed in the acknowledgment letter.

2. Initial Report

Within ___ days after receipt of the assignment, counsel should send an initial report with the following information:

a. A summary of the allegations in the complaint, the factual basis for the litigation, a summary of the information developed during the preliminary investigation, and a preliminary evaluation of liability and damages.

b. A Litigation Plan providing the following:

(1) Identify each significant activity counsel proposes to initiate (*e.g.*, investigation, motion, discovery, legal research, etc.)

(2) Identify discovery and motions which have been or are likely to be initiated by other parties.

(3) Estimate the completion date for each activity.

(4) State the estimated expenses of each activity.

c. Discussion of the potential for early disposition of the case by settlement, and recommendations with respect to arbitration, mediation, or direct settlement negotiations.

d. Discussion of the potential success of dispositive motions prior to, or after, the commencement of discovery and when motions to dismiss or for summary judgment are appropriate.

e. An estimate of the probable trial date.

3. Significant Development Report

Defense counsel should communicate and apprise of significant developments as soon as practicable. This will include reports on summaries of depositions and pre-trial reports, and if applicable, the following.

a. Settlement options and/or dispositive motions

b. Updated evaluation of the client's liability and damages.

c. An updated Litigation Plan.

d. Trial Report: If it is anticipated the case will proceed to trial, 30 days before the scheduled trial date a detailed report should be submitted, detailing the issues and an analysis of same and any other information requested by the insurer.

B. Documentation

Reporting shall not include copies of the following documents, unless specifically requested

1. Research memoranda, motion papers, and legal briefs

2. Deposition transcripts.

3. Expert reports.

4. Medical reports.

Counsel should provide copies of all pleadings and amended pleadings filed by or against the insured client, along with releases, orders of dismissal, or final judgments. Counsel should consult with the insurer on the appropriate means of communication, whether by e-mail, fax, or regular mail, to avoid duplication.

Counsel should comply with all reasonable requests for information and documents, provided however, that any documents or information that are privileged or intended by the insured to be confidential shall not be disclosed, absent consent from the insured client.

C. Consultation

After submission of the Initial Report, counsel welcomes discussion with and input and comment from the insurer. Counsel and the insurer will endeavor to agree on the proposed activities outlined in the Litigation Plan, but in no event shall the Litigation Plan interfere with the independent professional judgment of defense counsel.

V. Billing

A. Billing Procedure

1. Frequency of Billing

a. Bills should be issued at intervals to be agreed upon by counsel and the insurer.

2. Billing Format

a. Heading. The first page of the bill must state: (1) the law firm's IRS number; (2) the caption of the case; (3) the name of the insured; and (4) the claim number.

b. Body. The bill must be prepared with daily entries showing: (1) the date the work was performed; (2) the initials of the person providing the service; (3) a description of the work performed (single activities); and (4) the actual time in tenths of an hour.

c. End of Bill Summary. The bill must include: (1) the full name of each attorney/paralegal; (2) the status of each timekeeper (*i.e.*, partner, associate, paralegal); (3) the hourly rate of each

timekeeper; and (4) the total hours and total amount charged for each timekeeper during the billing period

d. Task Codes. Task coding is not required, unless requested. Where requested, the uniform billing codes as currently endorsed by the American Bar Association shall be used

B. Charges for Service

1. Time Charges. All charges for services by attorneys and paralegals should be recorded daily, based upon their actual time in one-tenth hour increments.
2. Single Entry Timekeeping. Unless otherwise directed, the time for each activity should be separately stated. Grouping multiple activities under a single time charge greater than one-tenth of an hour ("block billing") should not be employed, absent authorization from the insurer.
3. Information Descriptions of Services. Descriptions of services should inform of the nature, purpose or subject of the work performed, and the specific activity or project to which it relates.
4. Compensation. Counsel should consult with the insurer regarding any increase in the rate of compensation.
5. In-Firm Conferences. When an attorney consults with another attorney in the firm to obtain specific advice or counsel on substantive or procedural aspects of the case that result in a more effective defense, said reasonable and necessary conference time will be reimbursed, provided that sufficient detail of the subject of the communication is set forth to demonstrate its relevance and value.
6. Multiple Attendance. Unless otherwise agreed, only one attorney should attend trial, court appearances, meetings, depositions, witness interviews, inspections, and other functions.
7. Depositions. Counsel should consult with the insurer before initiating and attending depositions other than that of the plaintiff(s), the insured, and other depositions already approved in the initial Litigation Plan or supplement thereto.
8. Legal Research. Counsel should consult with the insurer before undertaking a legal research project requiring over three hours of research time. Copies of all research memoranda shall be provided to the insurer upon request.
9. Motions. Counsel should consult with the insurer before filing any motions not previously identified and approved in the initial Litigation Plan or supplement thereto.
10. Revising Standardized Forms/Pleadings. Only the actual time spent in personalizing standardized pleadings, documents, or discovery responses or requests to the case at hand should be billed, rather than the time originally spent drafting standard language.

C. Disbursement

1. Internal Expenses. Counsel should request the insurer to advise counsel of its guidelines as to reimbursement of internal expenses.
2. External Expenses. Charges for service by outside vendors will be reimbursed at their actual cost. Expenses over $ ____ may be forwarded to the insurer for payment. Disbursements should be itemized on the law firm's statement with the following information, unless back-up documentation is provided: (a) the name of the vendor; (b) the date incurred; and (c) a specific description of the expense. Where back-up documentation is provided, the law firm statement need only set forth a description of the expense and amount incurred.
3. Travel Expenses. Counsel should consult with the insurer prior to incurring travel expenses. Counsel should secure agreement that the insurer will reimburse defense counsel for reasonable travel expenses. All expenditures of $25 or more must be supported with receipts attached to the law firm's statement.
4. Professional Services. Counsel should consult with the insurer prior to incurring expenses for experts, consultants, investigators, temporary attorneys or outside paralegals, or other professional services.
5. Secretarial and clerical activities. Secretarial and clerical work are not billable to the insurer. As examples and not as a complete list, secretarial and clerical work includes receipt and distribution of mail, new file set up, maintenance of office and attorney calendars, transcribing, copying, posting, faxing, e-mailing, inserting documents into and retrieving documents from the file, maintaining order in the file, stamping documents, tabbing subfiles, and assembling materials.

VI. Bill And File Review

[The firm] recognizes that the insurer has the right to review all legal bills for services and disbursements pertaining to the matter for which the firm has been engaged by the insurer, and, further, that the insurer has the right to review counsel's file. However, such bill and file review, including the review of documents, must be done in a manner that does not compromise the attorney-client privilege, reveal client confidences, or diminish the protection afforded counsel's work product unless appropriate written consent is first obtained from the insured. If the insurer declines to pay or seeks reductions and/or refunds with respect to charges made by [the firm], full explanation for such action shall be given by the insurer, and [the firm] shall be given the opportunity to explain the disputed items and appeal such declinations to a representative of claim management of the insurer. It is expected that the insurer will pay the undisputed portion of any legal bill received from [the firm] within ____ days.

The above is an example of case handling guidelines which promote effective and efficient case management, consistent with the defense attorney's professional responsibilities. The guidelines are designed for use by a law firm's attorneys in their representation of an insured client, in the absence of other controlling guidelines. Nothing contained in the guidelines constitutes or shall be construed as a standard of care.

DRI Recommended Case Handling Guidelines for Insurers

I. Philosophy

[Insurer] expects to work with your law firm and the insured to achieve the best result for the insured in an efficient and cost-conscious manner consistent with the firm's ethical obligations. Nothing contained herein is intended to restrict counsel's exercise of professional judgment in rendering legal services for the insured

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B. An early resolution of lawsuits is desirable and the use of alternative dispute resolution is encouraged.

C. If defense counsel is involved in settlement negotiations, settlement authority must be obtained from [Insurer] and requests for authority should be made in a timely manner.

III. Staffing Philosophy

Your firm should designate one attorney to have primary responsibility for each case on which your services are requested. The case should be staffed economically and effectively. Obviously, a balance must be struck between the efficiency a more experienced lawyer at your firm brings to a given task and the advantages of having the task performed by a junior lawyer or a paralegal. Duplication of effort within the firm should be avoided.

To achieve the best efficiency and value, the role and responsibilities of the law firm staff members should be clearly defined and appropriate to each individual's qualifications, level of experience, and billing rate. Defense counsel should delegate work to subordinates wherever possible to achieve efficiency and cost-effectiveness without compromising quality.

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Reporting shall not include copies of the following documents, unless specifically requested

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Counsel should comply with all reasonable requests for information and documents, provided however, that any documents or information that are privileged or intended by the insured to be confidential shall not be disclosed, absent consent from the insured client.

C. Consultation

After submission of the Initial Report, counsel welcomes discussion with and input and comment from the insurer. Counsel and [Insurer] will endeavor to agree on the proposed activities outlined in the Litigation Plan. However, in the event of disagreement, the final decision will remain the independent professional judgment of defense counsel.

V. Billing

A. Billing Procedure

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a. Heading. The first page of the bill must state: (1) the law firm's IRS number; (2) the caption of the case; (3) the name of the insured; and (4) the claim number.

b. Body. The bill must be prepared with daily entries showing: (1) the date the work was performed; (2) the initials of the person providing the service; (3) a description of the work performed (single activities); and (4) the actual time, in tenths of an hour.

c. End of Bill Summary. The bill must include: (1) the full name of each attorney/paralegal; (2) the status of each timekeeper (*i.e.*, partner, associate, paralegal); (3) the hourly rate of each timekeeper; and (4) the total hours and total amount charged for each timekeeper during the billing period.

d. Task Codes. Task coding is not required, unless requested. Where requested, the uniform billing codes as currently endorsed by the American Bar Association shall be used

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2. Single Entry Timekeeping. Unless otherwise directed, the time for each activity should be separately stated. Grouping multiple activities under a single time charge greater than one-tenth of an hour ("block billing") is not acceptable, absent authorization from [Insurer].
3. Information Descriptions of Services. Descriptions of services should inform of the nature, purpose or subject of the work performed, and the specific activity or project to which it relates.
4. Compensation. Counsel should consult with [Insurer] regarding any increase in the rate of compensation.
5. In-Firm Conferences. When an attorney consults with another attorney in the firm to obtain specific advice or counsel on substantive or procedural aspects of the case that result in a more effective defense, said reasonable and necessary conference time will be reimbursed, provided that sufficient detail of the subject of the communication is set forth to demonstrate its relevance and value.
6. Multiple Attendance. Unless otherwise agreed, only one attorney should attend trial, court appearances, meetings, depositions, witness interviews, inspections, and other functions.
7. Depositions. Counsel should consult with [Insurer] before initiating and attending depositions other than that of the plaintiff(s), the insured, and other depositions already approved in the initial Litigation Plan or supplement thereto.
8. Legal Research. Counsel should consult with [Insurer] before undertaking a legal research project requiring over three hours of research time. Copies of all research memoranda shall be provided to [insurer] upon request.
9. Motions. Counsel should consult with [Insurer] before filing any motions not previously identified and approved in the initial Litigation Plan or supplement thereto.
10. Revising Standardized Forms/Pleadings. Only the actual time spent in personalizing standardized pleadings, documents, or discovery responses or requests to the case at hand should be billed, rather than the time originally spent drafting standard language.

C. Disbursement

1. Internal Expenses. [Insurer] shall advise counsel of its guidelines as to reimbursement of internal expenses.
2. External Expenses. Charges for service by outside vendors will be reimbursed at their actual cost. Expenses over $ ____ may be forwarded to [Insurer] for payment. Disbursements should be itemized on the law firm's statement with the following information, unless back-up documentation is provided: (a) the name of the vendor; (b) the date incurred; and (c) a specific description of the expense. Where back-up documentation is provided, the law firm statement need only set forth a description of the expense and amount incurred.
3. Travel Expenses. Counsel should consult with [Insurer] prior to incurring travel expenses. [Insurer] will reimburse defense counsel for reasonable travel expenses. All expenditures of $25 or more must be supported with receipts attached to the law firm's statement.
4. Professional Services. Counsel should consult with [Insurer] prior to incurring expenses for experts, consultants, investigators, temporary attorneys or outside paralegals, or other professional services.
5. Secretarial and clerical activities. Secretarial and clerical work is not billable to [Insurer]. As examples and not as a complete list, secretarial and clerical work includes receipt and distribution of mail, new file set up, maintenance of office and attorney calendars, transcribing, copying, posting, faxing, e-mailing, inserting documents into and retrieving documents from the file, maintaining order in the file, stamping documents, tabbing sub-files, and assembling materials.

VI Bill and File Review

[Insurer] reserves the right to review all charges for services and disbursements pertaining to litigation, including without limitation all charges paid by the insured with respect to such litigation, whether pursuant to self-insured retentions or deductibles under [Insurer's] insurance policies or otherwise. [Insurer] reserves the right to conduct on-site audits and to review the defense file and/or defense bills, consistent with the defense attorney's ethical obligations, and in a manner that will not compromise the attorney-client or work product protection accorded material in the file or communications by and between counsel, the client, and [Insurer]. Counsel agrees to comply with all reasonable requests for information and documents, provided that such documents or information are not privileged or intended by the insured to be confidential. In such instance, [Insurer] must obtain the consent of the insured. [Insurer] fully reserves all rights to decline to pay or to seek reductions and/or refunds with respect to charges that fail to comply with the requirements set forth herein, and which are not fully explained or documented by the firm after reasonable inquiry. [Insurer] shall allow the law firm to appeal any declination of payment by [Insurer]. [Insurer] agrees to pay the undisputed portion of bills received from counsel within ____ days.

The above is an example of case handling guidelines which promote uniformity in reporting and billing and effective and efficient case management, consistent with the defense attorney's professional responsibilities. Nothing contained in the guidelines constitutes or shall be construed as a standard of care

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IN THE MATTER OF THE RULES OF PROFESSIONAL CONDUCT AND INSURER IMPOSED BILLING RULES AND PROCEDURES, UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C., AND JAMES, GRAY, BRONSON & SWANBERG, P.C., PETITIONERS,

IN THE SUPREME COURT OF THE STATE OF MONTANA (NO. 98-612) (APRIL 28, 2000)

How Will the Montana Decision Affect Our Practice in Iowa

Alanson K. Elgar
207 East Washington Street
Mt. Pleasant, IA 52641

I. How Will Ethics Opinion 99-01 Fit Into the Picture?

II. Further Review of Henkle v Iowa Home Mutual Casualty Company, 87 NW 2d 920, 249 Iowa 614 (1958)

III. Review of "In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures", No. 98-612, 2000 MT 110, Commonly known as the "Montana Case."

IV. How Will our Iowa Court Treat the Montana Case?

No. 98-612

IN THE SUPREME COURT OF THE STATE OF MONTANA

2000 MT 110

IN THE MATTER OF THE RULES OF

PROFESSIONAL CONDUCT AND INSURER

IMPOSED BILLING RULES AND PROCEDURES

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.,

and JAMES, GRAY, BRONSON & SWANBERG, P.C.,

Petitioners

ORIGINAL PROCEEDING: Declaratory Relief

COUNSEL OF RECORD:

For Petitioners:

Neil E. Ugrin (argued) Gary M. Zadick (argued); Ugrin, Alexander, Zadick & Higgins, Great Falls, Montana

Robert James (argued) , Bert Fairclough (argued); James, Gray, Bronson & Swanberg, Great Falls, Montana

For Respondents:

Ronald F. Waterman, Thomas E. Hattersley, III; Gough, Shanahan, Johnson & Waterman, Helena, Montana

Lloyd E. Williams, Jr. (argued), David E. Morgans; Williams & Montgomery, Chicago, Illinois

Lawrence R. Samuels, Jacquelyn F. Kidder, Robert L. Carter; Ross & Hardies, Chicago, Illinois (for St. Paul Fire and Marine Insurance Company, USF&G Company, TIG Insurance Company)

Thomas M. Welsch; Poore, Roth & Robinson, Butte, Montana

William T. Barker, Jeffrey P. Lennard, Tracy T. Segal; Sonnenschein, Nath & Rosenthal, Chicago, Illinois (for Allstate Insurance Company, Zurich American Insurance Company, Universal Underwriters Insurance Company)

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Steven H. Gurnee, Esq., San Francisco, California (for Association of Defense Counsel of Northern California); Robert A. Davidson, Esq., Los Angeles, California (for Association of Southern California Defense Counsel)

Mark L. Stermitz, Esq., Missoula, Montana (for Montana Appleseed Center for Law & Justice, Inc.)

Brian M. Morris; Goetz, Gallik, Baldwin & Dolan, Bozeman, Montana; Elizabeth Brennan; Rossbach Brennan, Missoula, Montana; Patricia O'Brien Cotter (argued); Cotter & Cotter, Great Falls, Montana (for Montana Trial Lawyers Association)

For Amicus Curiae Supporting Respondents:

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Allen B. Chronister; Chronister, Moreen & Larson, Helena, Montana; John S. Piece, David J. McMahon, Gary A. Bresee; Barger & Wolen, San Francisco, California (for Legalguard, Inc.)

Mark D. Parker; Parker Law Firm, Billings, Montana (for National Association of Independent Insurers)

Argued and Submitted: September 28, 1999

Decided: April 28, 2000

Filed:

Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

¶1 In an original application for declaratory judgment, Petitioners assert that insurer-imposed billing rules and procedures violate the Rules of Professional Conduct.

¶2 We address the following issues:

¶3 1. May an attorney licensed to practice law in Montana, or admitted pro hac vice, agree to abide by an insurer's billing and practice rules which impose conditions limiting or directing the scope and extent of the representation of his or her client, the insured?

¶4 2. May an attorney licensed to practice law in Montana, or admitted pro hac vice, be required to submit detailed descriptions of professional services to outside persons or entities without first obtaining the informed consent of his or her client and do so without violating client confidentiality?

Factual and Procedural Background

¶5 In June, 1985 we adopted the Rules of Professional Conduct "as rules governing the conduct of persons admitted to practice law before this Court and all state courts in the State of Montana." In November, 1998 Petitioners filed an application for original jurisdiction and declaratory relief. Petitioners requested a declaratory ruling on two issues: 1. May an attorney licensed to practice law in Montana, or admitted pro hac vice, agree to abide by an insurer's billing and practice rules which impose conditions limiting or directing the scope and extent of the representation of his or her client, the insured? 2. May an attorney licensed to practice law in Montana, or admitted pro hac vice, be required to submit detailed descriptions of professional services to outside persons or entities without first obtaining the informed consent of his or her client and do so without violating client confidentiality?

¶6 We accepted original jurisdiction. We ordered that Petitioners identify insurers doing business in Montana whom they sought to have bound by this Court's determination of the issues, that the insurers (Respondents) file copies of the billing rules that they enforce in Montana, directly or through an auditing agency, and that the parties advise the Court whether they needed an evidentiary hearing.

¶7 Respondents moved this Court for an evidentiary hearing and Petitioners filed a brief in opposition. In March, 1999 we issued an order denying the request for an evidentiary hearing but allowing Respondents to jointly file an expert opinion. In September, 1999 this matter was argued before the Court.

Discussion

¶8 As a preliminary matter, we note that Respondents argue that this Court erred in accepting original jurisdiction of this case and in denying their request for an evidentiary hearing. Respondents argue in part that there is no justiciable case, that the Petitioners lack

standing, and that there is no issue of statewide importance.

¶9 Respondents' arguments are wholly without merit. We have a constitutional mandate to fashion and interpret the Rules of Professional Conduct. *See* Article VII, Section 2 of Montana's Constitution, providing that "[the supreme court] may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members." Art. VII, Sec. 2(3), Mont. Const. *Compare* §§ 37-61-101, MCA, et. seq (providing procedures for licensing and regulation of members of Montana's bar). Further, whether insurers' billing and practice rules conflict with the Rules of Professional Conduct is a question of law that requires no evidentiary hearing. The tension between insurers' billing and practice rules and the Rules of Professional Conduct presents an appearance of impropriety that is a sufficient basis for this Court to exercise its inherent powers and its Constitutional mandate to address the issues presented here. *Compare* Bergeron v. Mackler (Conn. 1993), 623 A.2d 489, 494 (recognizing that "considering the appearance of impropriety may be part of the inherent power of the court to regulate the conduct of attorneys"); First American Carriers v. Kroger Co. (Ark. 1990), 787 S.W.2d 669, 671 (concluding "fact that Canon 9 [which provided that lawyers should avoid appearance of impropriety] is not in the Model Rules does not mean that lawyers no longer have to avoid the appearance of impropriety"); Matter of Weinroth (N.J. 1985), 495 A.2d 417, 421 (citations omitted) (concluding " 'even the appearance of impropriety' that casts doubt upon the integrity of the legal process must be avoided").

¶10 Moreover, Respondents' contentions that the issues presented in this case are not of statewide importance and that no urgency attends them are belied by the numerous amici briefs and expert opinions that Respondents have submitted. Nor is Respondents' contention that Petitioners lack standing tenable. Petitioners clearly have a personal stake in the issue whether their compliance with insurers' billing and practice rules violates the Rules of Professional Conduct. Finally, Respondents' claim that they have not had notice and an opportunity to respond are flatly contradicted by the more than 1000 pages of affidavits, expert opinions, and billing and practice rules that they have filed with this Court, not to mention the numerous supporting amicus curiae briefs that also have been filed.

¶11 May an attorney licensed to practice law in Montana, or admitted pro hac vice, agree to abide by an insurer's billing and practice rules which impose conditions limiting or directing the scope and extent of the representation of his or her client, the insured?

¶12 In addressing this issue, there are several Rules of Professional Conduct that we keep in mind.

¶13 Rule 1.1 provides: **"Competence**. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and

preparation reasonably necessary for the representation." Rule 1.1, M.R.Prof.Conduct.

¶14 Rule 1.8 provides in pertinent part:

> **Conflict of Interest, Prohibited Transactions**
>
> . . . .
>
> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents after consultation;
>
> (2) there is *no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship*; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

Rule 1.8, M.R.Prof.Conduct (emphasis added).

¶15 Rule 2.1 provides in part: "**Advisor**. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Rule 2.1, M.R.Prof.Conduct. Rule 5.4 provides in pertinent part: "**Professional Independence of a Lawyer** . . . . (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Rule 5.4, M.R.Prof.Conduct.

¶16 In the present case, the parties do not dispute that insurers' billing and practice rules typically "impose conditions [upon an attorney appointed by an insurer to represent an insured] limiting or directing the scope and extent of the representation of his or her client." The Petitioners have focussed on the requirement of prior approval in insurers' billing and practice rules. We therefore address that condition of representation while recognizing that other conditions limiting or directing the scope and extent of representation of a client may also implicate the Rules of Professional Conduct.

¶17 As a representative set of litigation guidelines, we briefly consider the guidelines submitted by the St. Paul Companies (hereafter, St. Paul). The declared policy of St. Paul's Litigation Management Plan (hereafter, the Plan) is to "[p]rovide a systematic and appropriate defense for St. Paul and its insureds, and to vigorously defend nonmeritorious claims and claims where the demands are excessive."

¶18 St. Paul promotes a "team" approach to litigation in which each member has distinct responsibilities. The claim professional is "responsible for disposition of claims, whether in suit or not. We expect the St. Paul claim professional to take the lead in initiating settlement negotiations . . . . We also expect the claim professional to have significant input into development of the litigation strategy (i.e., settle or try)." The Plan also "recognizes that defense counsel's primary responsibility and obligation are to protect and further the interests of the insured in the conduct of the litigation. Our goal is to cooperate with the insured and defense counsel to achieve the best result possible."

¶19 However, the Plan states that "[m]otion practice, discovery and research are items that have historically caused us some concern and which we plan to monitor closely. While we foresee very few differences of opinion, *we require that defense counsel secure the consent of the claim professional prior to scheduling depositions, undertaking research, employing experts or preparing motions*" (emphasis added).

¶20 Thus, the Plan expressly requires prior approval before a defense attorney may undertake to schedule depositions, conduct research, employ experts, or prepare motions. The Plan concludes that "[w]e understand that any conflicts between the St. Paul Litigation Management Plan and the exercise of your independent judgment to protect the interests of the insured must be resolved in favor of the insured. We expect, however, to be given an opportunity to resolve any such conflicts with you before you take any action that is in substantial contravention of the Plan."

A. Whether Montana has recognized the dual representation doctrine under the Montana Rules of Professional Conduct.

¶21 Petitioners assert that the insured is the sole client of a defense attorney appointed by an insurer to represent an insured pursuant to an insurance policy (hereafter, defense counsel) and that a requirement of prior approval in insurance billing and practice rules impermissibly interferes with a defense counsel's exercise of his independent judgment and his duty of undivided loyalty to his client. Petitioners argue that because the relationship of insurer and insured is permeated with potential conflicts, they cannot be co-clients of defense counsel.

¶22 Respondents argue that under Montana law, the rule is that in the absence of a real conflict, the insurer and insured are dual clients of defense counsel. From this fundamental premise, Respondents argue that as a co-client of defense counsel, the insurer may require pre-approval of attorney activities to assure adequate consultation. Respondents argue further that defense counsel must abide by a client's decisions about the objectives of representation and that defense counsel are obliged to consult with a client about the means for the objectives of representation. Respondents also argue that under Montana law, an insurer is vicariously liable for the conduct of defense counsel and that an insurer's

control of litigation justifies holding an insurer vicariously liable for the conduct of defense counsel.

¶23 We conclude that Respondents have misconstrued our past decisions. This Court has not held that under the Rules of Professional Conduct, an insurer and an insured are co-clients of defense counsel. The Montana decisions chiefly relied upon by Respondents are inapposite because each one concerns situations where the insurer had "absolute" control of the litigation. None of the Montana decisions cited by Respondents addresses whether an insurer is a co-client under the Rules of Professional Conduct.

¶24 The central case underlying the Montana decisions cited by Respondents is Jessen v. O'Daniel (D.Mont. 1962), 210 F.Supp. 317. *Jessen* concerned a bad faith action brought by an insured against his insurer following underlying litigation in which the insurer had hired an attorney to represent its interests and those of its insured. Further, there was "the unique situation of the insured paying a fee to the attorney selected by the insurer, to do what in effect the attorney was already required to do under his contract of employment by the insurance company." *Jessen*, 210 F.Supp. at 331. In the course of negotiations between the parties in the underlying litigation, the insurer's attorney failed to communicate all of the offers that the parties made to each other. The court in *Jessen* found that "[h]ad [the attorney] communicated the respective offers to the other parties, the case would probably have been settled." *Jessen*, 210 F.Supp. at 324.

¶25 The insurer in *Jessen* argued that the attorney was "acting as a mutual attorney or agent for both [the insurer] and [the insured], and accordingly 'neither party can be held accountable for knowledge that the mutual attorney had, but did not transfer to the other parties or to either of them.' " *Jessen*, 210 F.Supp. at 330. The court in *Jessen* acknowledged a conflict in the authorities regarding whether "the insurance carrier becomes an agent of the insured with respect to settlement and trial, or is in the nature of an independent contractor." *Jessen*, 210 F.Supp. at 331 (citations omitted). However, the court concluded that

> The *precise relationship is unimportant*. The authorities agree that *these provisions of the contract* have the effect of placing absolute and exclusive control over the litigation in the insurance carrier, with "the correlative duty to exercise diligence, intelligence, good faith, honest and conscientious fidelity to the common interests of the parties."

Jessen, 210 F.Supp. at 331 (citation omitted) (emphasis added). The Jessen court concluded that "[t]here can be no question that in the absence of the special fee arrangement[1] with [the insured], [the attorney's] conduct and knowledge would be imputed to [the insurer]. Under the circumstances here, the special [fee] arrangement cannot relieve [the insurer] from its responsibility for [the attorney's] conduct in failing to disclose the various offers to the respective parties." Jessen, 210 F.Supp. at 332.

¶26 The court in *Jessen* emphasized the complete control over litigation that the insurer held under the insurance contract. *Jessen* did not address whether the attorney's compliance with that contract violated the Rules of Professional Conduct. Nor did *Jessen* determine whether the insured and the insurer were co-clients under the Rules of Professional Conduct.

¶27 As Respondents point out, subsequent Montana decisions have recognized *Jessen's* conclusion that an insurance contract may place absolute control of litigation in the hands of the insurer. In Safeco Ins. Co. v. Ellinghouse (1986), 223 Mont. 239, 725 P.2d 217, the Court rejected an insurer's claim that because the attorney it hired was an independent contractor, the insurer was not responsible for the mistakes of the attorney. Relying on *Jessen*, the Court in *Ellinghouse* concluded that "[t]he provisions of an insurance contract which give the insurance company the right and impose a correlative duty to defend suits against the insured have the effect of placing absolute and exclusive control over the litigation in the insurance carrier." *Ellinghouse*, 223 Mont. at 252-53, 725 P.2d at 226 (citations omitted).

¶28 Similarly, in State v. Second Judicial Dist. Court (1989), 240 Mont. 5, 783 P.2d 911, the Court considered whether communication between an insurer and its attorneys, which occurred after litigation began, was privileged from disclosure in a bad faith action. Citing *Jessen* and *Ellinghouse*, the Court determined that "[a]bsent a conflict of interest, the attorney hired by the insurance company to defend its insured, represents both." *Second Judicial Dist. Court*, 240 Mont. at 10, 783 P.2d at 914. We note, however, that the Court considered client identity only in determining whether insurer-defense counsel communications were privileged.

¶29 In Tigart v. Thompson (1990), 244 Mont. 156, 796 P.2d 582, the district court granted plaintiff's motions for a new trial and attorney fees and costs under § 37-61-421, MCA. The insurer appealed the award of attorney fees and costs, arguing in part that it was not a "party" under § 37-61-421, MCA. The Court in *Tigart* noted the *Jessen* court's determination that insurance contracts place exclusive control of the litigation in the insurer and concluded that "[i]f an insurer may be held liable for the actions of its attorney, as was the case in *Ellinghouse*, under a theory of agency, it is axiomatic that the insurer may be responsible for costs, expenses and attorney fees when the insurer 'multiplies the proceedings in any case unreasonably and vexatiously.' " *Tigart*, 244 Mont. at 160, 796 P.2d at 585. Thus, relying on *Jessen*, the *Tigart* Court concluded that the insurer was liable for the conduct of its attorney because of the insurer's complete control over the litigation.

¶30 In Palmer By Diacon v. Farmers Ins. (1993), 261 Mont. 91, 861 P.2d 895, the insured brought suit against the insurer, arguing that the insurer's denial of his claim for uninsured motorist benefits was made in bad faith. The insured claimed that an unidentified truck ran

his motorcycle off a road. When the insurer denied his claim based on the statement of a witness that the truck was in its own lane, the insured filed suit. The district court ordered the insurer to produce all claim file materials dated before the time when the insured indicated that he would bring a bad faith action against the insured. Those materials "included confidential reports sent to [the insurer] by the attorneys who represented it in the uninsured motorist case." *Palmer*, 261 Mont. at 100, 861 P.2d at 900. Subsequently, the district court ruled for the insured. On appeal, the insurer raised the issue whether the attorney-client privilege applied in "first-party bad faith cases in which the insurer's attorney did not represent the insured's interests in the underlying case." *Palmer*, 261 Mont. at 107, 861 P.2d at 905.

¶31 Defining first-party bad faith actions as cases where the plaintiff is the insured, the *Palmer* Court distinguished two kinds of first-party bad faith cases. The Court determined that one kind "involves dual representation by the attorney." *Palmer*, 261 Mont. at 108, 861 P.2d at 905. Such cases often arise when "a third-party claimant obtains a judgment in excess of policy limits and the insured later sues the insurance company for failure to settle within policy limits." *Palmer*, 261 Mont. at 108, 861 P.2d at 905. Quoting *Jessen*, the *Palmer* Court determined that in such first-party bad faith cases, "[u]nder an insurance contract . . . the insurer initially employs the attorney to represent the interests of *both* the insured and the insurer." *Palmer*, 261 Mont. at 108, 861 P.2d at 905. The *Palmer* Court recognized that other courts have held that under that kind of first-party bad faith action, "the insured is entitled to the entire claim file prepared for the underlying lawsuit, because the insurer created the file primarily on behal of the insured." *Palmer*, 261 Mont. at 108, 861 P.2d at 905 (citation omitted).

¶32 However, under the facts in *Palmer*, the Court concluded that the action was a distinct kind of first-party bad faith action and that when the insurer denied the insured his uninsured motorist coverage, the insurer stepped into the shoes of the unidentified third-party motorist. *Palmer*, 261 Mont. at 108, 861 P.2d at 905-06. The *Palmer* Court further concluded that "[t]he attorneys who represented [the insurer] in the uninsured motorist case have not represented [the insured], therefore the dual representation reasoning does not apply in this case." *Palmer*, 261 Mont. at 108, 861 P.2d at 906. Like the Court in *Second Judicial Dist. Court*, the *Palmer* Court recognized the dual representation doctrine only in determining whether the communications between an insurer and its attorneys are subject to the attorney-client privilege.

¶33 As the foregoing decisions demonstrate, we have followed *Jessen* in holding insurers responsible for the conduct of defense counsel and we have applied the attorney-client privilege to communications between insurers and defense counsel in cases where by contract the insurer was deemed to have assumed absolute control of the litigation. None of these decisions addressed whether insurers and insureds are co-clients under the Rules of Professional Conduct, and none of them addressed whether defense counsels'

mpliance with insurance contracts that repose "absolute" control of litigation in insurer olated the Rules of Professional Conduct.

34 We note that Respondents argue that insurance contracts effectively place absolute ntrol of litigation with insurers. However, Respondents' claim of absolute control of igation cannot be reconciled with their insistence that whenever a conflict may arise etween their litigation guidelines and an attorney's ethical obligations, the attorney is to ollow the ethical course of action. Respondents' assertion that defense counsel are not nly free to but must follow their independent judgment is inconsistent with their claim that insurers have absolute control of litigation.

B. Whether insurers and insureds are co-clients under Montana's Rules of Professional Conduct.

¶35 We turn to the question whether an insurer is a client of defense counsel under the Rules of Professional Conduct. We note that some other courts have concluded that the insurer is not a client of defense counsel. In Atlanta Int. Ins. Co. v. Bell (Mich. 1991), 475 N.W.2d 294, the court addressed whether defense counsel retained by an insurer to defend its insured may be sued by the insurer for professional malpractice. Recognizing the general rule that an attorney will only be held liable for negligence to his client, the court determined that "the relationship between the insurer and the retained defense counsel [is] less than a client-attorney relationship." *Bell*, 475 N.W.2d at 297. The court further determined, however, that although the insurer is not a client of defense counsel, the defense counsel nevertheless "occupies a fiduciary relationship to the insured, as well as to the insurance company." *Bell*, 475 N.W.2d at 297. Recognizing further that "the tripartite relationship between insured, insurer, and defense counsel contains rife possibility [sic] of conflict," *Bell*, 475 N.W.2d at 297, the court reasoned that "[t]o hold that an attorney-client relationship exists between insurer and defense counsel could indeed work mischief, yet to hold that a mere commercial relationship exists would work obfuscation and injustice." *Bell*, 475 N.W.2d at 297.

¶36 Nor is Michigan unique in concluding that the insured is the sole client of defense counsel. *See* Jackson v. Trapier (Sup. Ct. 1964), 247 N.Y.S.2d 315, 316 (concluding that once defense undertaken, "defendant is the client and not the insurance carrier even though the latter may have chosen the counsel and may be paying his fee"); Continental Cas. v. Pullman, Comley, et al. (2nd Cir. 1991), 929 F.2d 103, 108 (citation omitted) (concluding "[i]t is clear beyond cavil that in the insurance context the attorney owes his allegiance, not to the insurance company that retained him but to the insured defendant"); Point Pleasant Canoe Rental v. Tinicum Tp. (E.D. Pa. 1986), 110 F.R.D. 166, 170 (concluding "[w]hen a liability insurer retains a lawyer to defend an insured, the insured is considered the lawyer's client"); First American Carriers v. Kroger Co. (Ark. 1990), 787 S.W.2d 669, 671 (citation omitted) (concluding that " 'when a liability insurer retains a lawyer to defend an insured,

the insured is the lawyer's client'").

¶37 Respondents argue vigorously that the interests of an insurer and an insured usually coincide and that most litigation is settled within an insured's coverage limits. These arguments gloss over the stark reality that the relationship between an insurer and insured is permeated with potential conflicts. *Compare* Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 Conn. Ins. L.J. 1, 7-8, 1997 (concluding that designating insurer "a second client . . . would routinely create the potential for conflicts of interest"); Kent D. Syverud, *What Professional Responsibility Scholars Should Know About Insurance*, 4 Conn. Ins. L.J. 17, 23-24, 1997 (recognizing "[b]oth insurance companies and insureds have important and meaningful stakes in the outcome [of] a lawsuit against the insureds, stakes that include not just the money that the insurance company must pay in defense and settlement, but also the uninsured liabilities of the insured, which include not just any judgment in excess of liability limits, but also the insured's reputation and other non-economic stakes. The history of liability insurance suggests that unbridled control of the defense of litigation by either the insurance company or the insured creates incentives for the party exercising that control to take advantage of the other"). *Compare also* Restatement (Third) of the Law Governing Lawyers § 215, Comment f(5) (Proposed Final Draft No. 2, 1998) (emphasis added) (recognizing "[m]aterial divergence[s] of interest might exist between a liability insurer and an insured . . . . Such occasions for conflict may exist at the outset of the representation *or may be created by events that occur thereafter*"). In cases where an insured's exposure exceeds his insurance coverage, where the insurer provides a defense subject to a reservation of rights, and where an insurer's obligation to indemnify its insured may be excused because of a policy defense, there are potential conflicts of interest.

¶38 We reject Respondents' implicit premise that the Rules of Professional Conduct need not apply when the interests of insurers and insureds coincide. The Rules of Professional Conduct have application in all cases involving attorneys and clients. Moreover, whether the interests of insurers and insureds coincide can best be determined with the perfect clarity of hindsight. Before the final resolution of any claim against an insured, there clearly exists the potential for conflicts of interest to arise. Further, we reject the suggestion that the contractual relationship between insurer and insured supersedes or waives defense counsels' obligations under the Rules of Professional Conduct. We decline to recognize a vast exception to the Rules of Professional Conduct that would sanction relationships colored with the appearance of impropriety in order to accommodate the asserted economic exigencies of the insurance market. *Compare Kroger*, 787 S.W.2d at 671 (concluding "[w]e have consistently taken strong positions in situations where the public's confidence in attorneys might be eroded by the appearance of a conflict of interest"). We hold that under the Rules of Professional Conduct, the insured is the *sole* client of defense counsel.

¶39 We caution, however, that this holding should not be construed to mean that defense counsel have a "blank check" to escalate litigation costs nor that defense counsel need not ever consult with insurers. Under Rule 1.5, M.R.Prof.Conduct, for example, an attorney must charge reasonable fees. *See* Rule 1.5, M.R.Prof.Conduct (providing in part that "[a] lawyer's fees shall be reasonable"). Nor, finally, should our holding be taken to signal that defense counsel cannot be held accountable for their work.

¶40 Respondents argue further, however, that even if an insurer is not a co-client of defense counsel, an insurer's control of litigation is necessary and appropriate. Respondents argue that the insurer must control the litigation in order to meet its duties to the insured to indemnify and to provide a defense. Further, Respondents argue that the insured has a good faith duty to cooperate with the insurer in defense of a claim that warrants an insurer's control of litigation, and that in any event insureds agree to insurers' control of litigation. Respondents also argue that insureds typically contract for a limited defense that does not protect their reputational interests and that they are not entitled to unlimited expenditures on their behalf. Further, Respondents assert that insurers and insureds have "aligned" interests in minimizing litigation costs and settlements.

¶41 None of these arguments is persuasive. Animating them is the deeply flawed premise that by contract insurers and insureds may dispense with the Rules of Professional Conduct.

¶42 Respondents also argue that insurers' control of litigation is justified under the Restatement and that, for example, under the proposed draft for § 215 of the Restatement (Third) of the Law Governing Lawyers, an insurer's direction of a defense is justified regardless whether the insurer is a co-client "when the insurer 'will pay any judgment rendered against the [insured] client and [the insurer] makes a decision that defense costs beyond those designated by [the insurer] would not significantly change the likely outcome.' " We decline to join the parties' arguments over the Restatement. We note that in the draft cited by Respondents, the Restatement states that it "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. Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 2, 1998). More importantly, we are in no way bound by the Restatement in interpreting Montana's Rules of Professional Conduct.

¶43 Respondents also suggest that the billing and practice rules' requirement of prior approval is not as strict as it appears, that insurers employ it to ensure that they are consulted, and that they "rarely" withhold approval. They contend that preapproval is permissible because the insurer "is entitled not to pay for services that are overpriced or unnecessary to the case."

¶44 We conclude that whether the requirement of prior approval seldom results in denials

of authorization for defense counsel to perform legal services begs the question whether the requirement of prior approval violates the Rules of Professional Conduct. Without reaching the issue here, moreover, we caution further that a mere *requirement* of consultation may be indistinguishable, in its interference with a defense counsel's exercise of independent judgment and ability to provide competent representation, from a requirement of prior approval. Further, the entitlement of insurers not to pay for overpriced or unnecessary services, which Petitioners do not dispute, also begs the question whether the requirement of prior approval violates the Rules of Professional Conduct.

¶45 Finally, Respondents argue that their billing and practice rules do not interfere with defense counsels' freedom of action. As previously discussed, they suggest that when an insurer denies approval for particular actions that defense counsel propose, nothing prevents defense counsel from exercising their independent judgment and doing the very thing for which the insurer has denied approval. We reject Respondents' underlying dubious premise that the threat of withholding payment does not interfere with the independent judgment of defense counsel. The very action taken by Petitioners in seeking declaratory relief in the present case is a blunt repudiation of that speculative premise. Further, if the threat of withholding payment were quite as toothless as Respondents suggest, we doubt that they would make such a threat, let alone that they would expressly incorporate it in their billing and practice rules.

C. Whether the requirement of prior approval violates the Rules of Professional Conduct.

¶46 Having concluded that the insured is the sole client of defense counsel, we turn to the fundamental issue whether the requirement of prior approval in billing and practice rules conflicts with defense counsels' duties under the Rules of Professional Conduct. The parties appear to agree that defense counsel may not abide by agreements limiting the scope of representation that interfere with their duties under the Rules of Professional Conduct. *Compare* Annotated Model Rules of Professional Conduct (Fourth ed. Center for Professional Responsibility American Bar Association) Rule 1.2, p. 12, Comment [4] (concluding "[t]he objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. . . . [5] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1").

¶47 We conclude that the requirement of prior approval fundamentally interferes with defense counsels' exercise of their *independent* judgment, as required by Rule 1.8(f), M.R.Prof.Conduct. Further, prior approval creates a substantial appearance of impropriety in its suggestion that it is insurers rather than defense counsel who control the day to day details of a defense.

¶48 Montana is not alone in rejecting arrangements that fetter lawyers' undivided duty of loyalty to their clients and their independence of professional judgment in representing their clients. In Petition of Youngblood (Tenn. 1995), 895 S.W.2d 322, the court determined that for inhouse attorney employees of an insurance company to represent insureds was not a *per se* ethical violation. However, the *Youngblood* court emphasized the loyalty that an attorney owes an insured and concluded that

> Some of the usual characteristics incident to [the employer-employee] relationship cannot exist between the insurer and the attorney representing an insured. The employer cannot control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion with regard to the representation. Any policy, arrangement or device which effectively limits, by design or operation, the attorney's professional judgment on behalf of or loyalty to the client is prohibited by the Code, and, undoubtedly, would not be consistent with public policy.

Youngblood, 895 S.W.2d at 328. The court went to conclude that "[t]he same loyalty is owed the client whether the attorney is employed and paid by the client, is a salaried employee of the insurer, or is an independent contractor engaged by the insurer." Youngblood, 895 S.W.2d at 328.

¶49 In addressing whether an insurer is vicariously liable for the malpractice of defense counsel, the Texas Supreme Court was similarly critical of insurer directions to defense counsel that interfere with their independent judgment and undivided loyalty to insureds. *See* State Farm Mut. Auto. Ins. Co. v. Traver (Tex. 1998), 980 S.W.2d 625. In *Traver*, the court held that an insurer is not vicariously liable for the malpractice of an independent attorney whom it chooses to defend an insured. The court in *Traver* reasoned that in evaluating whether a principal is vicariously responsible for the actions of its agent, "the key question is whether the principal has the right to control the agent with respect to the details of that conduct." *Traver*, 980 S.W.2d at 627 (citation omitted). The court determined that "even assuming that the insurer possesses a level of control comparable to that of a client, this does not meet the requisite for vicarious liability." *Traver*, 980 S.W.2d at 627. The *Traver* court went on to conclude:

> A defense attorney, as an independent contractor, has discretion regarding the day-to-day details of conducting the defense, and is not subject to the client's control regarding those details. While the attorney may not act contrary to the client's wishes, the attorney "is in complete charge of the minutiae of court proceedings and can properly withdraw from the case, subject to the control of the court, if he is not permitted to act as he thinks best." Moreover, because the lawyer owes unqualified loyalty to the insured, *the lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions*.

Traver, 980 S.W.2d at 627-28 (citations omitted) (emphasis added). In a concurring and dissenting opinion, Justice Gonzalez criticized the court for a "perhaps naive view of the current status of insurance defense practice." Traver, 980 S.W.2d at 632 (J. Gonzalez, concurring and dissenting). Justice Gonzalez cautioned that

> measures designed to produce a no-frills defense can easily result in only a token defense. I am concerned that defense lawyers may be reluctant to resist cost-cutting measures that detrimentally affect the quality of the insured's defense. There is a real risk that these efforts at cost containment compromise a lawyer's autonomy and independent judgment on the best means for defending an insured. . . . The lawyers are under tremendous pressure trying to serve two masters.

Traver, 980 S.W.2d at 634 (J. Gonzalez, concurring and dissenting).

¶50 Moreover, in American Ins. Ass'n v. Kentucky Bar Ass'n (Ky. 1996), 917 S.W.2d 568, the court affirmed an Advisory ethics opinion that proscribed insurers' use of inhouse attorneys to represent insureds. The court in *Kentucky Bar Ass'n* also affirmed an Advisory ethics opinion concluding that a lawyer may not "enter into a contract with a liability insurer in which the lawyer or his firm agrees to do all of the insurer's defense work for a set fee." *Kentucky Bar Ass'n*, 917 S.W.2d at 569. The court concluded that

> the pressures exerted by the insurer through the set fee interferes [sic] with the exercise of the attorney's independent professional judgment, in contravention of Rule 1.8(f)(2). The set fee arrangement also clashes with Rule 1.7(b) in that it creates a situation whereby the attorney has an interest in the outcome of the action which conflicts with the duties owed to the client: quite simply, in easy cases, counsel will take a financial windfall; in difficult cases, counsel will take a financial loss.

Kentucky Bar Ass'n, 917 S.W.2d at 572. The Kentucky Bar Ass'n court stressed that "the mere appearance of impropriety is just as egregious as any actual or real conflict. Therefore, [the Advisory opinion] acts as a prophylactic device to eliminate the potential for a conflict of interest or the compromise of an attorney's ethical and professional duties." Kentucky Bar Ass'n, 917 S.W.2d at 573 (emphasis added). Recognizing that set fee arrangements are "ripe with potential conflicts," the court concluded that the insurer and insured are "subject to complete divergence at any time. Inherent in all of these potential conflicts is the fear that the entity paying the attorney, the insurer, and not the one to whom the attorney is obligated to defend, the insured, is controlling the legal representation." Kentucky Bar Ass'n, 917 S.W.2d at 573 (emphasis added).

¶51 We hold that defense counsel in Montana who submit to the requirement of prior approval violate their duties under the Rules of Professional Conduct to exercise their independent judgment and to give their undivided loyalty to insureds. *Compare* Rule 1.7(b) (providing "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person"); Annotated Model Rules of Professional Conduct, Comment [4] to Rule 1.7

(concluding "[t]he critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client"); State v. Jones (1996), 278 Mont. 121, 125, 923 P.2d 560, 563 (concluding "[t]he duty of loyalty is 'perhaps the most basic of counsel's duties' ") (citation omitted).

¶52 2. May an attorney licensed to practice law in Montana, or admitted pro hac vice, be required to submit detailed descriptions of professional services to outside persons or entities without first obtaining the informed consent of his or her client and do so without violating client confidentiality?

¶53 Rule 1.6 provides in pertinent part:

> **Confidentiality of Information**
>
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.

Rule 1.6(a), M.R.Prof.Conduct.

¶54 As a representative set of guidelines concerning the disclosure of detailed descriptions of professional services to third-party auditors, we consider the guidelines submitted by the Zurich-American Insurance Group (hereafter, Zurich). Zurich's litigation guidelines regarding audits provide in pertinent part:

> **Audits**
>
> Zurich-American reserves the right to examine and audit books, records, other documents, and supporting material for the purpose of evaluating compliance with its litigation management guidelines, the billing requirements set forth therein, and the reasonableness of the firm's charges. The books, records, and documents we may examine include, without limitation: original time sheets from attorneys and staff; explanations of billing methods and practices; attorney work product and other contents of open and closed files involving the defense of Zurich-American customers; phone message records; and diaries, etc.
>
> All requested books and records must be made available to us during business hours for examination, audit, or reproduction. We shall employ, at our discretion, internal auditors or independent outside auditors for purposes of accomplishing audits.

¶55 Petitioners argue that Respondents' billing and practice rules require the disclosure of confidential detailed descriptions of professional services. These disclosures are not impliedly authorized and do not further representation. Nor does an insured's contractual consent to disclosure of confidential information cure such disclosures, as an insured cannot know in advance of litigation what will be disclosed. Petitioners argue further that third-party auditors are different from insurers and that they do not fall within a protective "magic circle." Petitioners argue that under the Rules of Professional Conduct, disclosures of detailed billing statements to third-party auditors are only permissible if the client gives his informed consent after consultation.

¶56 Respondents respond that third-party auditors are agents of insurers. Because they share "common interests" with insureds in reducing costs of litigation, third-party auditors are part of a privileged community. Further, insureds' consent is implied for disclosures that are reasonably necessary for representation. Thus, disclosures to third-party auditors are like disclosures to secretaries and computer technicians. Moreover, insureds have consented to disclosure by contract. Respondents also argue that whether a disclosure to a third-party auditor breaches the attorney-client privilege is a question of fact. Further, Respondents argue that much of the information in billing statements is neither confidential nor privileged. Finally, Respondents contend that the obligation of defense attorneys to charge reasonable fees is meaningless if insurers cannot monitor their services.

¶57 Underlying the parties' positions is a fundamental disagreement regarding whether third-party auditors are part of a privileged community or magic circle within which confidential information may be shared without waiver of attorney-client or work product privilege. Respondents argue that in United States v. Mass. Inst. of Technology (1st Cir. 1997), 129 F.3d 681, the court recognized insurer and insured as a relationship within which parties share a common interest that protects privileged communications. Respondents argue further that in Indian Law Resource Ctr. v. Dept. of Interior (D. D.C. 1979), 477 F.Supp. 144, the court concluded that an auditor was a confidential agent of a privileged party and that disclosure of attorney fee information did not waive any privilege.

¶58 *Mass. Inst. of Technology* does not support Respondents' claims. In *Mass. Inst. of Technology*, the IRS requested the billing statements of law firms that had represented MIT. MIT had apparently disclosed the very same billing statements to the Defense Contract Audit Agency (the audit agency), which "help[ed] entities in the Department of Defense review contract performance to be sure that the government [was] not overcharged for services." *Mass. Inst. of Technology*, 129 F.3d at 683. MIT gave IRS the documents it requested but redacted information that it claimed was covered by the attorney-client privilege, the work product doctrine, or both. In turn, the audit agency refused to give the IRS those documents without the consent of MIT. The IRS also

requested minutes of the MIT corporation and its executive and auditing committees. The district court ruled that MIT's disclosure of legal bills to the audit agency forfeited its attorney-client privilege. However, concluding that three of the minutes contained privileged material that MIT had not been shown to have disclosed to the audit agency the district court declined to order their production.

¶59 On appeal, MIT argued that its disclosure of the billing statements to the audit agency did not forfeit its attorney-client privilege. Further, while conceding that it could not prove that it had withheld the three minutes from the audit agency, MIT argued that the minutes were protected by the attorney-client privilege and the work product doctrine. On cross-appeal, the IRS argued that the district court erred in concluding that the three minutes contained privileged material.

¶60 The court in *Mass. Inst. of Technology* concluded that "decisions do tend to mark out, although not with perfect consistency, a small circle of 'others' with whom information may be shared without loss of the privilege (*e.g.*, secretaries, interpreters, counsel for a cooperating co-defendant, a parent present when a child consults a lawyer)." *Mass. Inst. of Technology*, 129 F.3d at 684. The court emphasized that "the underlying concern is functional: that the lawyer be able to consult with others needed in the representation and that the client be allowed to bring closely related persons who are appropriate, even if not vital, to a consultation." *Mass. Inst. of Technology*, 129 F.3d at 684 (citation omitted). The court acknowledged that "[i]n a rather abstract sense, MIT and the audit agency do have a 'common interest' in the proper performance of MIT's defense contracts and the proper auditing and payment of MIT's bills." *Mass. Inst. of Technology*, 129 F.3d at 686. However, the court determined that

> this is not the kind of common interest to which the cases refer in recognizing that allied lawyers and clients-who are working together in prosecuting or defending a lawsuit or in certain other legal transactions-can exchange information among themselves without loss of the privilege. To extend the notion to MIT's relationship with the audit agency, which on another level is easily characterized as adversarial, would be to dissolve the boundary almost entirely.

Mass. Inst. of Technology, 129 F.3d at 686.

¶61 Turning to MIT's disclosure of its minutes to the audit agency, the court concluded that its treatment of the billing statements disposed of MIT's claim that its attorney-client privilege survived disclosure of the minutes to the audit agency, and the court focused on MIT's work product claim. The court concluded that the prevailing rule is that "disclosure to an adversary, real or potential, forfeits work product protection." *Mass. Inst. of Technology*, 129 F.3d at 687. The court went on to conclude that

> MIT's disclosure to the audit agency was a disclosure to a potential adversary. The disclosures did not take place in the context of a joint litigation where the parties shared a common legal interest. The audit agency was reviewing MIT's expense submissions. MIT doubtless hoped that there would be no actual controversy between it and the Department of Defense, *but the potential for dispute and even litigation was certainly there.*

Mass. Inst. of Technology, 129 F.3d at 687 (emphasis added).

¶62 In the present case we note Respondents' claim that the court in *Mass Inst. of Technology* recognized insurers and insureds as a relationship within which parties share a common interest that protects their privileged communications. Their claim is misguided. First, in *Mass Inst. of Technology*, MIT argued that its disclosure to the audit agency was like other cases where "disclosure has been allowed, without forfeiting the privilege, among separate parties similarly aligned in a case or consultation (*e.g.*, codefendants, insurer and insured, patentee and licensee)." *Mass. Inst. of Technology*, 129 F.3d at 685. In other words it was MIT, not the court, who made the analogy to the insurer-insured relationship. Second, in a footnote, the court in *Mass. Inst. of Technology* cited several decisions that have considered insurer-insured relationships.

¶63 In the first of these decisions, Roberts v. Carrier Corp. (N.D. Ind. 1985), 107 F.R.D. 678, the court addressed whether the company, Carrier, in passing on arguably privileged communications between itself and its attorney and between its attorney and its insurer to another company, Hamilton, waived any privilege that might otherwise have attached to those communications. The court recognized that under Indiana law, a statement by a "client to his attorney for communication to a third person is not considered confidential." *Carrier*, 107 F.R.D. at 686 (citations omitted). However, the court found that Carrier and Hamilton were sister subsidiaries of United Technologies and concluded that when "a corporation with a legal interest in an attorney-client communication relays it to another related corporation, the attorney-client privilege is not thereby waived." *Carrier*, 107 F.R.D. at 687 (citation omitted). Further, the court found that "Carrier and Hamilton do share an identical legal interest: defense of a claim based upon a malfunction of valve #242." *Carrier*, 107 F.R.D. at 688. Under those particular facts, the court concluded that Indiana's rule concerning communications to third parties was not violated. *Carrier*, 107 F.R.D. at 688.

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¶64 In the second of these decisions, Linde Thomson Langworthy Kohn & Van Dyke v. RTC (D.C. Cir. 1993), 5 F.3d 1508, the court noted that "[f]ederal courts have never recognized an insured-insurer privilege as such." *Linde Thomson*, 5 F.3d at 1514 (citations omitted). The court went on to

> firmly reject any sweeping notion that there is an attorney-client privilege in

> insured-insurer communications. . . . Certainly, where the insured communicates with the insurer for the express purpose of seeking legal advice with respect to a concrete claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case, the law would exalt form over substance if it were to deny application of the attorney-client privilege. However, a statement betraying neither interest in, nor pursuit of, legal counsel bears only the most attenuated nexus to the attorney-client relationship. . . . *[I]f what is sought is not legal advice, but insurance, no privilege can or should exist.*

Linde Thomson, 5 F.3d at 1515 (citations omitted) (emphasis added).

¶65 *Carrier* and *Linde Thomson* clearly do not support Respondents in the present case. Respondents have not suggested that third-party legal auditors "share an identical *legal* interest" with insureds. *Carrier*, 107 F.R.D. at 688 (emphasis added). Nor have Respondents suggested that "what is sought [from third-party auditors] is . . . legal advice." *Linde Thomson*, 5 F.3d at 1515. Moreover, *Carrier* and *Linde Thomson* do not address the disclosure of confidential information to third-party auditors under Montana's Rules of Professional Conduct.

¶66 Respondents rely on the court's decision in *Indian Law Resource Center* to argue that third-party auditors are confidential agents of insureds and that disclosure of billing statements to them therefore does not waive any privilege. We conclude that their reliance on *Indian Law Resource Center* is also misplaced. In *Indian Law Resource Center*, the plaintiff, a nonprofit corporation, brought an action under the Freedom of Information Act (FOIA), seeking disclosure of documentation regarding payments from funds under federal control to attorneys who served the Hopi tribe. The plaintiff requested documents that included "(1) Tribal resolutions reflecting the names of the lawyers chosen and the fee amounts endorsed; (2) periodic law firm statements to the Tribal Council, with attached vouchers describing in detail legal services provided and travel expenses incurred." *Indian Law Resource Center*, 477 F.Supp. at 146. Plaintiff's request was first sent to the Bureau of Indian Affairs (BIA); the Department of Interior (Interior) denied that request. The court in *Indian Law Resource Center* noted that "[a]s part of its general trust responsibility to the Indians, Interior reviews and approves the choice of counsel and fixing of fees by Indian tribes." *Indian Law Resource Center*, 477 F.Supp. at 145.

¶67 The "only issue" in *Indian Law Resource Center* was whether, under an exemption in FOIA, the "withheld information is either confidential or privileged." *Indian Law Resource Center*, 477 F.Supp. at 146. Interior argued that the information withheld should be deemed confidential under FOIA because the information was received pursuant to "the agency's fulfillment of its trust responsibilities." *Indian Law Resource Center*, 477 F.Supp. at 146. Interior argued further that as a trustee it should "not be required to divulge whatever material The Hopi Tribe as beneficiary declares to be confidential, so long as the

material otherwise qualifies under [FOIA] exemption four." *Indian Law Resource Center*, 477 F.Supp. at 147.

¶68 The court concluded that there was substantial evidence of future harm from disclosure of the detailed law firm statements and that the law firm statements were entitled to protection as attorney work product. Finding no evidence that the vouchers had been disclosed to any party other than Interior, "which is acting as a confidential agent of the Tribe," *Indian Law Resource Center*, 477 F.Supp. at 148, the court concluded that the law firm statements are "exempt from disclosure under [FOIA] exemption four, on grounds of both privilege and confidentiality." *Indian Law Resource Center*, 477 F.Supp. at 149.

¶69 In the present case, Respondents compare Interior to third-party auditors and argue that because third-party auditors act as confidential agents, disclosure of billing information to them does not waive "the privilege." Respondents' reading of *Indian Law Resource Center* is incorrect. Third-party auditors are not confidential agents of insureds but function rather as agents of insurers. Moreover, to compare third-party auditors to Interior, the confidential agent in *Indian Law Resource Center*, is to ignore the specific trust responsibilities that Interior has for the Hopi tribe, trust responsibilities that Respondents do not claim that third-party auditors similarly bear for insureds. Further, *Indian Law Resource Center* is readily distinguishable from the present case as the court there addressed a specific exemption under FOIA but did not address Rule 1.6 of the Rules of Professional Conduct.

¶70 We conclude that a third-party auditor is not within the "magic circle" or community of interest that the court in *Mass. Inst. of Technology* recognized. Respondents, again, claim that the purpose of third-party auditors complements the interests of insureds and that third-party auditors merely seek to control the costs of defense in order to keep insurance premiums down for insureds. This asserted common interest in keeping litigation costs and premiums down is not sufficient to bring third-party auditors within the magic circle. The Rules of Professional Conduct do not vary according to commercial exigencies. Nor are third-party auditors "confidential agent[s]" of insureds. *Indian Law Resource Center*, 477 F.Supp. at 148. We further conclude that disclosure of detailed billing statements to a third-party auditor is "disclosure to a potential adversary." *Mass. Inst. of Technology*, 129 F.3d at 687. In third-party auditors' review of confidential information, there is always the possibility of disputes between auditors, defense counsel and their clients that could result in litigation.

¶71 Nor are third-party auditors "needed in the representation" or "appropriate, even if not vital, to a consultation," as secretaries and computer technicians may well be. *Mass. Inst. of Technology*, 129 F.3d at 684. Disclosure to persons needed in the representation or appropriate to a consultation does not also justify disclosure "to a potential adversary." *Mass. Inst. of Technology*, 129 F.3d at 687.

¶72 We note Respondents argue that because the attorney-client privilege extends to the insurer and because an insurer can only act through its employees and agents, the attorney-client privilege applies to an insurer's agents as well, citing United States v. Schwimmer (2nd Cir. 1989), 892 F.2d 237. In *Schwimmer*, the court recognized that the attorney-client privilege "is held to cover communications made to certain agents of an attorney," *Schwimmer*, 892 F.2d at 243, and the court also recognized the "common interest" rule as protecting "the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *Schwimmer*, 892 F.2d at 243 (citation omitted). *Schwimmer* does not support Respondents' argument. Third-party auditors are not agents of defense counsel, nor are disclosures to them "communications passing from one party to the attorney for another party." *Schwimmer*, 892 F.2d at 243.

¶73 In determining that third-party auditors fall outside the "magic circle," however, we do not hold that the disclosure of detailed descriptions of professional services to a third-party auditor necessarily violates any privilege that may attach to them. Resolution of that issue would clearly entail findings of fact that we have not made in the present case.

¶74 Having determined that insurers are not clients of defense counsel and that third-party auditors are potential adversaries of defense counsel, we turn to the issue whether the disclosure of billing statements to third-party auditors is "impliedly authorized in order to carry out the representation." Rule 1.6., M.R.Prof.Conduct.

¶75 Petitioners do not dispute that disclosures of billing information to *insurers* are impliedly authorized to carry out representation. It does not follow, however, that disclosing billing information to third-party auditors is also impliedly authorized. As previously discussed, third-party auditors lie outside the "magic circle" and do not share a community of interest with insureds. Their mission, as characterized in part by Respondents, is to find fault with legal charges, not to further the representation of insureds. Further, unlike secretaries and computer technicians who are engaged to assist defense counsel, third-party auditors are not employed by defense counsel and as noted they are potential adversaries of defense counsel. As such, third-party auditors stand in potential conflict with the interests of insureds in competent representation by defense counsel who exercise their independent professional judgment.

¶76 Further, we reject Respondents' argument that insureds' consent by contract to disclosure of detailed professional billing statements comports with Rule 1.6, M.R.Prof.Conduct. An insured executing a liability policy with an insurer cannot know at the time he enters the contract what kind of claim will be brought against him, what the issues will be, or what kinds of services will be undertaken by his defense attorney. Nor can an insured know, at the time he contracts for insurance, the legal consequences that

may result from the disclosure of billing information to a third-party auditor. Depending on the facts and circumstances, such disclosure may waive a specific privilege. Thus, under Rule 1.6, M.R.Prof.Conduct, for an insured to make a fully informed consent to disclosure of detailed professional billing statements, the consent must be contemporaneous with the facts and circumstances of which the insured should be aware.

¶77 We emphasize that by its plain language, Rule 1.6, M.R.Prof.Conduct, extends to *all* communications between insureds and defense counsel and that this rule is therefore broader in both scope and protection than the attorney-client privilege and the work product doctrine. *Compare* In re Advisory Opinion No. 544 of N.J. (N.J. 1986), 511 A.2d 609, 612 (citation omitted) (emphasis added) (concluding "this Rule [of Confidentiality] expands the scope of protected information to include *all* information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether the disclosure of the information would be embarrassing or detrimental to the client"); Damron v. Herzog (9th Cir. 1995), 67 F.3d 211, 215 (citation omitted) (concluding "[a]n integral purpose of the rule of confidentiality is to encourage clients to fully and freely disclose to their attorneys all facts pertinent to their cause with absolute assurance that such information will not be used to their disadvantage").

¶78 We hold that disclosure by defense counsel of detailed descriptions of professional services to third-party auditors without first obtaining the contemporaneous fully informed consent of insureds violates client confidentiality under the Rules of Professional Conduct.

/S/ W. WILLIAM LEAPHART

We concur:

/S/ J. A. TURNAGE

/S/ KARLA M. GRAY

/S/ JIM REGNIER

/S/ TERRY N. TRIEWEILER

/S/ WILLIAM E. HUNT, SR.

/S/ JAMES C. NELSON

1. As previously noted, the insured also paid a fee to the attorney whom the insurer hired

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ABA MODEL RULES 1.6, 1.7 and 1.8

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Proposed Rule 1.6 - Public Discussion Draft

Ethics 2000 Commission
March 23, 1999

Material added to the current Model Rule has been underlined; deletions from the current Model Rule have been ~~struck through~~

CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client or a former client unless the client ~~consents after consultation, except for disclosures that are~~ gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, ~~and except as stated in~~ or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal ~~such~~ information relating to the representation of a client or a former client to the extent the lawyer reasonably believes necessary:

(1) to prevent ~~the client from committing a criminal act that the lawyer believes is likely to result in imminent~~ reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is likely to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to rectify or mitigate substantial injury to the financial interests or property of another resulting from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules; or

~~(2)~~ (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

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(c) A lawyer shall reveal information relating to the representation of a client or a former client to the extent required by law or court order or when necessary to comply with these Rules. ' '

Comment

~~[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.~~

~~[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.~~

~~[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's~~ confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client both during and after the lawyer's representation of the client. See Rules 1.8(b) and 1.9(c) with respect to the use of such information to the disadvantage of clients and former clients.

~~[4]~~ [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer ~~maintain confidentiality of~~ must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

~~[5]~~ [3] The principle of client-lawyer confidentiality is given effect ~~in two~~ by related bodies of law, the attorney-client privilege, ~~(which includes~~ the work product doctrine~~) in the law of evidence~~, and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The

confidentiality rule, for example, applies not ~~merely~~ only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

~~[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.~~

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of hypotheticals to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

~~[7]~~ [5] ~~A~~ Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation~~, except to the extent that the client's instructions or special circumstances limit that authority~~. In ~~litigation~~ some situations, for example, a lawyer may ~~disclose information by admitting~~ be impliedly authorized to admit a fact that cannot properly be disputed or~~, in negotiation by making~~ to make a disclosure that facilitates a satisfactory conclusion to a matter. ~~[8]~~ Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

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Disclosure Adverse to Client

~~[9]~~ [6] ~~The~~ Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. ~~In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.~~ Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm includes life-threatening or debilitating injuries and illnesses and the consequences of child sexual abuse. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person

will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

~~[10] Several situations must be distinguished.~~

~~[11] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.~~

~~[12] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.~~

~~[13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.~~

~~[14] The lawyer~~'s exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

~~Withdrawal~~

~~[15] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).~~

~~[16] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or~~

~~disaffirm any opinion, document, affirmation, or the like.~~

~~[17]~~ [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that enables the lawyer to reveal information to the extent necessary to prevent the client from committing a crime or fraud that is likely to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer 's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client 's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer 's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b)

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client 's crime or fraud until after it has been consummated and substantial loss has been suffered by the victim. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to attempt to recoup their losses.

[9] A lawyer 's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer 's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer 's compliance with the Rules of Professional Conduct.

~~Dispute Concerning a Lawyer 's Conduct~~

~~[18]~~ [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)~~(2)~~(5) does not require the lawyer to

await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. ~~Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.~~

~~[19]~~ [11] ~~If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together.~~ A lawyer entitled to a fee is permitted by paragraph (b)~~(2)~~(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. ~~As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.~~

[12] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[13] Paragraph (b) permits but does not require the disclosure of information relating to a client 's representation to accomplish the purposes specified in paragraphs (b)(1) - (5). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule.

Disclosure Otherwise Required or Authorized

~~[20] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.~~

~~[21]~~ [14] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules ~~2.2,~~ 2.3, 3.3, and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

[15] A lawyer must also comply with lawful orders of a tribunal, an administrative or executive agency, or a legislative body. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client 's representation, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all non-frivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer should consult with the client about the possibility of appeal. See Rule 1.4. Unless an appeal is taken, the lawyer must comply with the order.

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or by other persons who are participating in the representation of the client or who are subject to the lawyer 's supervision. See Rules 1.1, 5.1, and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

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Former Clients

~~[22]~~ [18] The duty of confidentiality continues after the client-lawyer relationship has terminated. Thus, Rule 1.6(a) prohibits the disclosure of information relating to the representation of a former client. See Rule 1.9(c) for the prohibition against using such information to the disadvantage of the former client.

Proposed Rule 1.7 - Public Discussion Draft

Ethics 2000 Commission
March 23, 1999

Ethics 2000
Advisory Council and Members
Testimony and Minutes from Previous Meetings
Commission Documents
The Center
Legal Ethics
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Material added to the current Model Rule has been underlined; deletions from the current Model Rule have been ~~struck through~~.

CONCURRENT CONFLICT OF INTEREST: GENERAL RULE

~~(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:~~

~~(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and~~

~~(2) each client consents after consultation.~~

~~(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer~~'s responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) ~~the lawyer reasonably believes the representation will not be adversely affected; and~~

~~(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.~~

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's duties to another client or to a former client or by the lawyer's own interests or duties to a third person.

(b) Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent in writing and

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected

~~provide competent and diligent representation to each affected~~ client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation.

Comment

Loyalty ~~to a Client~~ and Independent Judgment

[1] Loyalty ~~is an~~ and independent judgment are essential ~~element~~ elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's own interests or from the lawyer's responsibilities to another client, a former client, or a third person. Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent in writing. For specific rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9.

[2] ~~An impermissible~~ A conflict of interest may exist before representation is undertaken, in which event the representation ~~should~~ must be declined, unless the lawyer obtains the informed written consent of each client under the conditions of paragraph (b). ~~The~~ To determine whether a conflict of interest exists, a lawyer ~~should~~ must adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the ~~parties~~ persons and issues involved and to determine whether there are ~~actual or potential~~ conflicts of interest. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

~~[2]~~ [3] If ~~such~~ a conflict arises after representation has been undertaken, the lawyer ~~should~~ must withdraw from the representation, unless the lawyer obtains the informed written consent of each client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved and the lawyer withdraws ~~because a conflict arises after representation~~, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. ~~See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.~~

Identifying Conflicts of Interest: Direct Adversity and Material

Limitation

~~[3]~~ [4] ~~As a general proposition, loyalty~~ Loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. ~~Paragraph (a) expresses that general rule.~~ Thus, absent consent, a lawyer ~~ordinarily~~ may not act as an advocate in one matter against a person the lawyer represents in some other matter, even ~~if it is~~ when the matters are wholly unrelated. The client being sued is likely to feel betrayed, and the resulting damage to the lawyer-client relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a lawyer acts directly adversely to a client if it will be necessary for the lawyer to cross-examine a client who appears as a witness in a lawsuit against another client. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only ~~generally~~ economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not constitute a conflict of interest and thus does not require consent of the respective clients. ~~Paragraph (a) applies only when the representation of one client would be directly adverse to the other.~~

~~[4]~~ [5] ~~Loyalty to a client is also impaired when~~ Even where there is no direct adversity, a conflict of interest exists if there is a significant risk that a ~~lawyer cannot~~ lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client ~~because~~ will be materially limited as a result of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. ~~Paragraph (b) addresses such situations. A possible conflict~~ The mere possibility of subsequent harm does not itself ~~preclude the representation~~ require disclosure and consent. The critical questions are the likelihood that a ~~conflict~~ difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. ~~Consideration should be given to whether the client wishes to accommodate the other interest involved.~~

~~Consultation and Consent~~ Prohibited Representations

~~[5]~~ [6] ~~A client~~ Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in ~~paragraph (a)(1) with respect to representation directly adverse to a client, and~~ paragraph (b)~~(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances~~, some conflicts are non-consentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client ~~is involved~~, the question of ~~conflict~~

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consentability must be resolved as to each client ~~Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.~~

[7] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence). The concern is that a client who is asked to consent in such a matter, particularly one who is unsophisticated in retaining lawyers, may not be adequately informed or may not adequately appreciate the risks of the conflict. In determining whether a multiple client conflict is non-consentable, one factor to be considered is whether the representation will be provided by a single lawyer or by different lawyers in the same firm. *Cf.* Rule 1.10.

[8] Paragraph (b)(2) describes conflicts that are non-consentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes, certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[9] Paragraph (b)(3) describes conflicts that are non-consentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the litigation.

Informed Consent

[10] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.4(c) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty and confidentiality, and the advantages and risks involved. See Comments [29] and [30] (effect of joint representation on confidentiality). Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different

clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

[11] Paragraph (b) requires the lawyer to obtain the informed consent of the client in writing. If it is not feasible to obtain the writing at the time the client gives informed consent, then the lawyer must obtain it within a reasonable time thereafter. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client an opportunity to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to resolve disputes or ambiguities that might later occur by virtue of there being no writing. The writing need not take any particular form; it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as the client's agreement to the representation despite such risks.

[12] Like any other client, a client who has given consent to a conflict may revoke the consent and terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, and whether material detriment to the other clients or lawyer would result.

[13] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). If the consent is general and open-ended (i.e., the client agrees to consent to any future conflict that might arise), then the consent ordinarily will be ineffective because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is a sophisticated user of the legal services involved and agrees to consent to a particular type of conflict with which the client is already familiar, then the consent should be effective with regard to that type of conflict. For example, a bank that hires a lawyer to defend it in litigation might be willing to agree in advance to have the lawyer represent borrowers in loan transactions but not in resisting collection proceedings brought by the bank. The propriety of the client's consent must be determined not only at the time it is first given but also at the time when the waiver is sought to be implemented to determine if the circumstances at the time of the conflict are what were earlier expected.

Lawyer's Own Interests and Duties to Third Persons

[14] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by duties owed to former clients under Rule 1.9, by the lawyer's own interests, or by the lawyer's duties to other persons, such as fiduciary duties arising from a lawyer's service as a

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trustee, executor, or corporate director

~~[6]~~ [15] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, ~~a lawyer~~'s need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. ~~A~~ Similarly, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients.

[16] Although most personal interest conflicts are consentable, some are not. For example, if the lawyer has a 50% ownership in a company the client wants to sue and the client's recovery is likely to affect significantly the value of the lawyer's investment, then the lawyer cannot reasonably conclude that the representation will be competent and diligent; therefore, under paragraph (b) the lawyer may not request the client to consent to the conflict.

[17] Lawyers are prohibited from engaging in sexual relationships with clients unless the sexual relationship predates the formation of the lawyer-client relationship. See Rule 1.8(k).

Interest of Person Paying for a Lawyer's Service

~~[10]~~ [18] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). ~~For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel~~'s professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients give their consent after consultation and the arrangement ensures the lawyer's professional independence. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's duties to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b), as well as the requirements of Rule 1.8(f), before accepting the representation, including determining that the conflict is consentable and that the client has adequate information about the material risks of the representation.

Organizational Clients

[19] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, or there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[20] Unforeseeable developments, such as changes in corporate and other organizational affiliations, may create direct adversity conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. In these circumstances the lawyer may withdraw from one of the representations in order to avoid the direct adversity conflict. Ordinarily, the lawyer should withdraw from the representation of the client who will be least harmed by the lawyer's withdrawal. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.6.

~~[14]~~ [21] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise.

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~~**Conflict Charged by an Opposing Party**~~

~~[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.~~

Conflicts in Litigation

~~[7]~~ [22] Paragraph ~~(a)~~ (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. ~~Simultaneous~~ On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is ~~governed by paragraph (b)~~ not uncommon. ~~An impermissible~~ A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if ~~the risk of adverse effect is minimal and~~ the requirements of paragraph (b) are met. ~~Compare Rule 2.2 involving intermediation between clients.~~

~~[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer~~'s relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] ~~A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.~~

[23] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action in behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the

significance of the issue to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[24] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class who the lawyer represents in an unrelated matter.

~~Other Conflict Situations~~ Non-Litigation Conflicts

~~[11]~~ [25] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is significant potential for ~~adverse effect~~ material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that ~~actual conflict~~ disagreements will arise, and the likely prejudice to the client from the conflict ~~if it does arise~~. The question is often one of proximity and degree.

~~[13]~~ [26] ~~Conflict~~ For example, conflict questions may ~~also~~ arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may ~~arise~~ be present, as when one spouse owns significantly more property than the other or has children by a prior marriage. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. ~~The~~ In order to comply with conflict of interests rules, the lawyer should make clear the lawyer's relationship to the parties involved.

~~[12]~~ [27] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication,

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or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Joint Representation

[28] In considering whether to represent clients jointly in the same matter, a lawyer should be mindful that if the joint representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the joint representation fails. In some situations the risk of failure is so great that joint representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, joint representation is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adjusted by joint representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[29] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the attorney-client privilege. With regard to the evidentiary attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[30] As to the duty of confidentiality, joint representation will almost certainly be inadequate if one client attempts to keep something in confidence between the lawyer and that client, which is not to be disclosed to the other client. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the joint representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[31] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the joint representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[32] Subject to the above limitations, each client in the joint representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

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Ethics 2000
Advisory Council and Members
Testimony and Minutes from Previous Meetings
Commission Documents
The Center
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Proposed Rule 1.8 - Public Discussion Draft

Ethics 2000 Commission
March 23, 1999

Material added to the current Model Rule has been underlined; deletions from the current Model Rule have been ~~struck through~~.

CONCURRENT CONFLICT OF INTEREST:

~~PROHIBITED TRANSACTIONS~~ SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing ~~to the client~~ in a manner ~~which~~ that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel ~~in~~ on the transaction; and

(3) the client ~~consents~~ gives informed consent in writing ~~thereto~~ to the essential terms of the transaction and the lawyer's role in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client ~~consents after consultation~~ gives informed consent, except as permitted or required by Rule 1.6 [or Rule 3.3].

(c) A lawyer shall not solicit any substantial gift from a client or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer ~~as parent, child, sibling, or spouse~~ any substantial gift ~~from a client, including a testamentary gift, except where the client~~ unless the lawyer or other recipient of the gift is related to the ~~donee~~ client.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection

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(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation or direction for representing a client from one other than the client unless:

(1) the client ~~consents after consultation~~ gives informed consent in writing under the conditions stated in Rule 1.7;

(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client ~~consents after consultation, including~~ gives informed consent in writing that includes disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice ~~unless permitted by law and the client is independently represented in making the agreement,~~; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client ~~without first advising~~ unless that person is advised in writing ~~that~~ of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent ~~representation is appropriate~~ legal counsel in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse or by a cohabitating relationship closely approximating marriage shall not represent

a client in a representation directly adverse to a person whom the lawyer knows is represented in the same or in a substantially related matter by the other lawyer ~~except upon~~ unless each affected client gives informed consent ~~by the client after consultation regarding the relationship~~ in writing under the conditions stated in Rule 1.7

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien ~~granted~~ authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case

(k) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

Comment

Business Transactions between Client and Lawyer

[1] ~~As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client~~ 's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) A lawyer 's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client, for example, loan and sales transactions and lawyers making investments for clients. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. The Rule applies to lawyers engaged in the sale of goods or services ancillary to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5 7 It also applies to lawyers purchasing property from

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estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client 's business as payment of all or part of a fee.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client 's informed consent, in writing, both to the essential terms of the transaction and the lawyer 's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including risk presented by the lawyer's involvement, and the existence of reasonably available alternatives, and should explain why the advice of independent legal counsel is desirable. See Rule 1.4 (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer 's financial interest otherwise poses a significant risk that the lawyer 's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer 's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer 's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client 's consent to the transaction.

Use of Information Related to Representation

[4] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.

Gifts to Lawyers

~~[2]~~ [5] A lawyer may accept a gift from a client, if the transaction meets

general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer 's benefit, except where the lawyer is related to the client. For purposes of this Rule, persons related to the lawyer include a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the lawyer maintains a close, familial relationship.

[6] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, ~~however,~~ the client should have the detached advice that another lawyer can provide. ~~Paragraph (c) recognizes an~~ The sole exception to this Rule is where the client is a relative of the donee ~~or the gift is not substantial~~, as described in [5] above.

[7] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed written consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

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Literary Rights

~~[3]~~ [8] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and ~~paragraph~~ paragraphs (a) and (j).

Financial Assistance

[9] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not

warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help insure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

~~Person Paying for a Lawyer's Services~~ Third-Party Payment or Direction

[4] ~~Paragraph (f) requires disclosure of the fact that the lawyer~~'s services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

[10] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company), or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests in conflict with the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless there is informed consent from the client and the lawyer reasonably determines that the representation will be competent and diligent and that the lawyer's loyalty to the client will not be compromised. See Rule 1.7.

[11] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if the lawyer's representation of the client may be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third party-payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-consentable under that paragraph. Under Rule 1.7(c), the informed consent must be confirmed in a writing signed by the client.

[12] Just as when the client is paying his or her own legal fees, the client can always designate an agent to make decisions on the client 's behalf, and that agent could be the person compensating the lawyer. For example, a client planning to be out of the country could designate a close relative to make decisions on the client 's behalf, regardless of whether the relative is a third-party payer. In these situations both the lawyer and the agent are obligated to act solely in the client's interests; thus, the lawyer may not accept

direction from the agent that would disadvantage the client or interfere with the lawyer 's exercise of independent professional judgment on the client's behalf.

[13] In some cases, the third party may have assumed obligations to the client, such as the obligation to indemnify the client against any judgment rendered, that give the third party an interest in the outcome of a matter. In such cases, the lawyer may accept direction from the third party that is reasonable in scope and character and consistent with the client's interests.

[14] It is not always easy for the lawyer to determine when following the direction of a third party protecting its own interests will interfere with the lawyer's independent professional judgment on behalf of the client. For example, an insurance company that pays the lawyer to defend an insured in an action under a liability policy may direct the lawyer not to take an additional deposition. If the lawyer reasonably believes that failure to take the deposition will not harm the client's interests, then the lawyer may comply with the direction without further consultation with the client. If, however, the lawyer has reason to believe that the client may be harmed, as when the deposition is critical and there is significant risk of a judgment in excess of the policy limits, then the lawyer must refuse to comply with the direction unless the client gives informed consent under the conditions stated in Rule 1.7(b).

[15] Similar problems arise when an employer agrees to pay for the legal expenses of an employee, particularly when the employer is also a client. Before agreeing to representation under these circumstances, the lawyer must consider whether the fee arrangement is likely to undermine the lawyer's ability to provide competent and diligent representation, as when the lawyer believes there is a significant likelihood that the employer will want to avoid criminal liability by providing information incriminating to the employee. Even when the potential liability is civil and the employer has agreed to indemnify the employee, the lawyer should consider whether the employee's interests in reputation or continued employment may conflict with the employer's desire to settle the case or terminate the employment relationship. Once the lawyer determines that the representation is consentable under the conditions stated in Rule 1.7, the lawyer should obtain the informed consent of both employer and employee. If, as the representation proceeds, circumstances pose additional significant risks to the employee, then the lawyer must withdraw when required or consult further with the client before continuing the representation under the direction of the employer.

Aggregate Settlements

[16] Differences in willingness to make or accept an offer of settlement are among the risks of joint representation of multiple clients by a single lawyer. Under Rule 1.7 this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients ' informed consent. In addition, Rule 1 2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and

in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.4 (keeping the client informed). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

~~[5] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.~~

[17] Agreements prospectively limiting a lawyer 's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[18] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Lawyer's Family Relationships ~~between Lawyers~~

~~[6]~~ [19] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rule 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated unless there is a

significant risk that the representation of one or more of the clients may be materially limited as a result of the conflict. See Rule 1.10.

[20] When lawyers on opposite sides of a dispute are closely related by blood or marriage or by a cohabitating relationship closely approximating marriage there is a significant risk that client confidences may be revealed and that the lawyers' personal relationship may interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to accept the representation. In some cases, the risk may be so severe that the representation is prohibited even with the clients' consent. See Rule 1.7.

[21] Similar concerns may arise in circumstances not covered by Rule 1.8(i). For example, related lawyers may be asked to represent clients with interests that differ, although they are not directly adverse, as when the prospective clients are forming a business. Or, a lawyer representing a client in litigation may be involved in a dating relationship with a lawyer representing the opposing client. Even if Rule 1.8(i) does not apply, if there is a significant risk that the representation of a client will be materially and adversely affected by the lawyer's own interests, then the representation is governed by Rule 1.7.

~~Acquisition of~~ Acquiring Proprietary Interest in Litigation

~~[7]~~ [22] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. ~~This~~ Like paragraph (e), the general rule~~, which~~ has its basis in common law champerty and maintenance~~,~~ and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules~~, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e)~~. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (j) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. There are two types of liens that are authorized by law. The first are liens granted by law, in which the lawyer need take no further action. The second are those that a lawyer acquires by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[23] The relationship between lawyer and client is a fiduciary one in which the

lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer 's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment to the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationship may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client 's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client

[24] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7.

NEW DEVELOPMENTS UNDER THE AMERICANS WITH DISABILITIES ACT

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he author would like to thank Mackenzie Flynn, a summer law clerk at Simmons, Perrine, Albright & Ellwood, P.L.C., for her assistance in preparing this outline

1.

MOTION TO COMPEL

Where is I.R.Civ.P. 122(e)? Yes, we know it's at 134(e) – but where is it?

622.10(3)(2), Code of Iowa – epidemic.

I.R.Civ.P. 134(e) provides:

> **"(e) Motions Relating to Discovery.** No motion relating to depositions or discovery shall be filed with the clerk or considered by the court unless the motion alleges that counsel for the moving party has made a good faith but unsuccessful attempt to resolve the issues raised by the motion with opposing counsel without intervention of the court."

The following words were stricken effective January 24, 1998:

> "If said motion relates to an interrogatory, a request for admission, or a request for production, the disputed interrogatory or request with the answer or response, if any, shall be attached to the motion."

2.

MOTION TO ADJUDICATE – I.R.Civ.P. 116 (f/n/a I.R.Civ.P. 105)

Law

Heine v. Allen Memorial Hospital, 549 N.W.2d 821, 823 (Iowa 1996)

Text

TRIAL HANDBOOK, Third Edition, §§ 532.03 et seq.

Any issue of fact defeats this motion – travel to 3 below.

Courts have no discretion to duck here – this motion must be ruled upon.

No evidence is taken, only the record and stipulations are considered.

Caveat: No Rule 179(b) motion lies after ruling on motion to adjudicate as its purpose is to dispose of case (not always true with summary judgment motions.)

Easter Lake States, Inc. v. Polk County, 444 N.W.2d 72, 74 (Iowa 1989)

IN THE IOWA DISTRICT COURT
DUBUQUE COUNTY

DAVID B. CLEMENTS, Plaintiff, vs ALTERNATIVE WORKFORCE, INC., Defendant.	NO. 01311 LACV 051879

IOWA RULE OF CIVIL PROCEDURE 116 MOTION FOR ADJUDICATION OF LAW POINTS

COMES NOW Defendant and states:

COUNT I

1. Plaintiff's Petition at Law sets out the claim that he was an employee of Defendant, that he has elected to proceed under § 87.21, Code of Iowa, claiming workers compensation benefits and that the Defendant has failed to pay those benefits which has damaged Plaintiff and exposes Defendant to punitive damages as well.

2. Plaintiff in his Petition at Law claims that Defendant is guilty of bad faith.

3. Plaintiff seeks monetary recovery from Defendant while theorizing that Defendant is akin to an insurance company which has coverage but fails to timely pay

under that coverage and is therefore guilty of "bad faith."

4. "Bad faith" is actionable, and its genesis is Chapter 516, Code of Iowa, under which chapter an insurer may be sued.

5. Plaintiff has not claimed Defendant is an insurer.

WHEREFORE, Defendant demands Plaintiff's Petition at Law be dismissed at Plaintiff's costs.

COUNT II

1. Plaintiff's Petition at Law sets out the claim that he was an employee of Defendant, that he has elected to proceed under § 87.21, Code of Iowa, claiming workers compensation benefits and that the Defendant has failed to pay those benefits which has damaged Plaintiff and exposes Defendant to punitive damages as well.

2. Plaintiff is Defendant's employee and Defendant was obligated by law to comply with the insurance requirements of Chapter 87, Code of Iowa, and Defendant failed to comply.

3. Because Plaintiff is an employee and his employer, the Defendant, failed omply with the insurance requirements of Chapter 87, Code of Iowa. Plaintiff's nedy is found in Chapters 85, 86 and 87, Code of Iowa.

4. Section 87.21, Code of Iowa, sets forth the Plaintiff's rights given the

Defendant did not comply with Chapter 87, Code of Iowa. Plaintiff has claimed in his Petition at Law that he in fact has elected to pursue a remedy available under § 87.21 and collect workers compensation benefits that are appropriate.

5. Nowhere in Chapters 85, 86 or 87 can there be found any language to support the claim set out in the Plaintiff's Petition at Law.

6. Section 87.21 explicitly allows Plaintiff to claim workers compensation benefits or to file a lawsuit for damages for personal injury. Section 87.21 does not allow a claim for "bad faith."

WHEREFORE, Defendant demands Plaintiff's Petition at Law be dismissed at Plaintiff's costs.

COUNT III

1. Plaintiff's Petition at Law sets out the claim that he was an employee of Defendant, that he has elected to proceed under § 87.21, Code of Iowa, claiming workers compensation benefits and that the Defendant has failed to pay those benefits which has damaged Plaintiff and exposes Defendant to punitive damages as well.

2. Plaintiff here seeks punitive damages, a remedy without basis in Iowa law. He is an employee, he is claiming workers compensation benefits and that they were delayed unreasonably

3 Plaintiff's remedy for unreasonable delay is found in § 86.13, Code of Iowa, which allows:

> "If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied."

4 The legislature has provided Plaintiff a remedy for unreasonable delay of payment of workers compensation benefits, it did not provide for punitive damages to be claimed in a lawsuit.

WHEREFORE, Defendant demands that Plaintiff's Petition at Law claiming punitive damages be dismissed at Plaintiff's costs.

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3.

MOTION FOR SUMMARY JUDGMENT

Law

I.R.Civ.P. 237 and I.R.Civ.P. 238

F.R.Civ.P. 56.1

Burton v. UIHC, 566 N.W.2d 182 (Iowa 1997)

Mettel v. DB&I, 566 N.W.2d 863 (Iowa 1997)

Orr v. Iowa Public Service Co., 277 N.W.2d 899 (Iowa 1979)

Text

TRIAL HANDBOOK, Third Edition, Iowa Academy of Trial Lawyers § 532.04 seq.

The sum and substance of this beast is set forth in Burton v. UIHC, at 185:

> "The UIHC's appeal is from a summary judgment ruling. Our review is therefore at law. Iowa R.App. P. 4. The district court must render summary judgment
>
> > if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> Iowa R. Civ. P. 237(c). The parties agree there are no

> disputed facts. The case essentially involves an interpretation of several statutes and therefore presents solely legal issues. Summary judgment, therefore, is the appropriate remedy. *Central Nat'l Ins. Co. v. Insurance Co. of N. Am.*, 522 N.W.2d 39, 42 (Iowa 1994)."

For those who like black letter rules, we have Mettel v. DB&T, at 864:

> "We review the district court's grant of summary judgment on error. [citations omitted] We uphold such judgment when the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits show there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. [citations omitted]

Innovative uses of this motion are on the horizon:

(1) Plaintiff uses summary judgment in obvious liability case to secure order of defendants' liability and proximate causation of collision.

(2) Plaintiff in property damage fire loss moves for judgment fixing the amount of damage, its fairness and reasonableness and value of the real estate.

IN THE IOWA DISTRICT COURT
DUBUQUE COUNTY

BETTY FALADA, Executor of the Estate of James Falada, Deceased, Plaintiff, vs. TRINITY INDUSTRIES, INC., a Delaware Corporation, Defendant.	NO. LACV 051482

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, Trinity Industries, Inc. ("Trinity"), and moves pursuant to Iowa Rules of Civil Procedure 237, et seq., for entry of judgment in its favor dismissing Plaintiff's Petition at Plaintiff's costs, and in support hereof states:

1. Plaintiff has made claim against Trinity under a crashworthiness/ enhanced injury theory of liability. Plaintiff claims that a tanker/trailer manufactured by Trinity in 1971 was defective for failing to survive a crash when it overturned while being hauled by Plaintiff's decedent and a crack allowed the cargo to escape.

2. The physical evidence demonstrates conclusively that the tanker had sustained a prior accident, resulting in a material alteration of its design and manufacture, which had not been repaired before this accident. Accordingly, as a matter of law:

A. Trinity owed no legal duty to Plaintiff's decedent to make its

anker crashworthy for consecutive accidents without intervening repair.

B. Public policy requires that any defect in original manufacture is not the proximate cause of the failure of the tanker to survive this crash.

3. The undisputed facts also demonstrate that the tanker was manufactured signed in accordance with the state of the art as it existed in 1971. Accordingly, has established a state of the art defense pursuant to Iowa Code section 668.12 atter of law.

4. A Statement of Material Facts and a Memorandum of Authorities are d in support of this Motion, demonstrating that Trinity is entitled to judgment as ter of law.

WHEREFORE, Defendant, Trinity Industries, Inc., respectfully requests of the t enter summary judgment in its favor dismissing Plaintiff's Petition at Plaintiff's

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IN THE IOWA DISTRICT COURT
DUBUQUE COUNTY

BETTY FALADA, Executor of the Estate of James Falada, Deceased, Plaintiff, vs. TRINITY INDUSTRIES, INC., a Delaware Corporation, Defendant.	NO. LACV 051482

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Manufacture. Defendant Trinity Industries, Inc. ("Trinity") manufactured a tank in 1971 which was "trailerized" (made into a trailer/tanker) by Gorbitt (Gorbitt Bros. Tank Mfg., Inc., Fort Worth, Texas), with serial number 375395 [Stene deposition, p. 7, 22-23; Gorbitt certificate in Stene Deposition Exhibit 2]

2. Ownership. Said tanker was purchased by Cenex, Inc. on October 6, 1992, from Land-O'-Lakes Felco. [Stene deposition, p. 22]

3 Cenex maintenance personnel. Thomas Stene ("Stene") was the supervisor of maintenance for Cenex, Inc. ("Cenex"), beginning December 1, 1992. and was subsequently promoted to regional manager of maintenance and purchasing. Part of his duties included maintaining records of maintenance upon vehicles owned by Cenex. [Stene deposition, p. 6] David Olivier ("Olivier") is a certified cargo tank

indicating that the dents were caused by impacts prior to painting. [Cox Affidavit] The painted area outside of and around the dents, by contrast, showed substantial abrasion. [photograph, Olivier Deposition Exhibits 7, 8 and 9] The abrasions on the tank had not been painted indicating that the paint in the dents had been placed there prior to the accident. [Cox Affidavit] The physical evidence concerning the accident site indicated no source which could have inflicted such dents without leaving evidence of the impact. [Cox Affidavit]

ii. The third dent was located along the head to shell weld connection. There were no abrasions within this dent, indicating that it was induced damage, folding the surface inward, rather than contact damage, and resulted from the impact which caused the two large, off-center dents in the head. [Cox Affidavit] There were substantial abrasions outside and around this dent but not within the deformed portion of the dent. There were, however, crack patterns in the paint indicating that the third dent sustained additional deformation in the accident. [Cox Affidavit] This is consistent with the road-abrasion pattern and more flattened area around the third dent [photographs, Stene Deposition Exhibits 5 & 6], as well as the fact of the rupture at the weld.

8. Failure to repair. Such dents were required to be inspected before use of

the tanker. 49 CFR section 180.407 (b). Had those dents existed at the time the tank was inspected, it would not have passed inspection. [Stene deposition, p. 35; Olivier deposition, p. 28] Repair would have required that the tank be returned to its original design and construction specification. 49 CFR section 180.403. The dents rendered the tanker less crashworthy. [Cox Affidavit]

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Attorneys for DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was served upon the persons listed below by personal service by United States mail postage prepaid to the address, or by fax to the fax number of the person as disclosed in the pleadings on the 12th day of August, 1996

Joseph P. Braun
217 North Elm Street
P O Box 377
Cresco IA 52136

_____

IN THE IOWA DISTRICT COURT
DUBUQUE COUNTY

PARTNERS MUTUAL INSURANCE COMPANY, Plaintiff, vs. HAROLD SHAFFER a/k/a HAROLD SCHAEFFER and SCOTT LONG, Defendants.	NO. 01311 EQCV 091497

'00 JAN 28 PM 4:15

FILED
DISTRICT COURT
DUBUQUE COUNTY

MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, Partners Mutual Insurance Company, and moves for entry of summary judgment in its favor declaring that it owes no duty to defend or to indemnify its insured, Harold Shaffer a/k/a Harold Schaeffer, against any claims of Scott Long arising out of an altercation between them on or about November 30, 1998. In support hereof, Plaintiff states:

1. It is undisputed that on or about November 30, 1998, Harold Shaffer intentionally struck Scott Long in the head causing Scott Long to fall to the floor. Scott Long was rendered unconscious.

2. Partners Mutual Insurance Company insured Harold Shaffer against liability under a Custom Homeowners Policy containing an intentional act exclusion. Partners Mutual Insurance Company brought this declaratory action for declaration that

it owed no duty to defend or to indemnify Harold Shaffer under the circumstances.

3. Scott Long is in default.

4. Upon the undisputed material facts, and viewing of the facts most favorably to Harold Shaffer, Partners Mutual Insurance Company is entitled to judgment as a matter of law. A Statement of Material Facts and a Memorandum of Authorities are provided in support hereof.

WHEREFORE Plaintiff, Partners Mutual Insurance Company, prays for entry of judgment in its favor declaring that it owes no duty to defend or to indemnify Harold Shaffer a/k/a Harold Schaeffer for any claims by Scott Long arising out of the altercation between them on or about November 30, 1998.

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IN THE IOWA DISTRICT COURT
DUBUQUE COUNTY

PARTNERS MUTUAL INSURANCE COMPANY, Plaintiff, vs. HAROLD SHAFFER a/k/a HAROLD SCHAEFFER and SCOTT LONG, Defendants.	NO. 01311 EQCV 091497

'00 JAN 28 PM 1 16

STATEMENT OF MATERIAL FACTS

1 Partners Mutual Insurance Company is an Insurance Company organized under the laws of the state of Wisconsin and is qualified to underwrite insurance in the State of Iowa. [Petition, paragraph 2, admitted by Harold Shaffer in his Answer, paragraph 2] Harold Shaffer a/k/a Harold Schaeffer ("Harold Shaffer") and Scott Long are residents of Dubuque County, Iowa. [Petition, paragraph 3, admitted by Harold Shaffer in his Answer, paragraph 3]

2. Partners Mutual Insurance Company issued in Wisconsin a Custom Homeowners Policy to Harold Shaffer, No. H116810, effective for the policy period of December 29, 1997 to December 29, 1998, at 12:01 a.m. Standard Time. A copy of said policy is attached to Plaintiff's Petition for Declaratory Judgment. Section II of said policy provides liability coverages -- Coverage E provides for personal liability

coverage and Coverage F provides for medical payments. Both Coverage E and Coverage F are subject to the following exclusion:

> "1. **Coverage E -- Personal Liability** and **Coverage F -- Medical Payments to Others** do not apply to 'bodily injury' or 'property damage':
>
> a. Which is expected or intended by the 'insured';..."

[Petition, paragraphs 4, 5 and 7, admitted by Harold Shaffer in his Answer, paragraphs 4, 5 and 7]

3. A transcription of a recorded statement given by Harold Shaffer to Randy Mesch is attached. In summary, Harold Shaffer's version of the events on or about November 30, 1998, is as follows: Harold Shaffer, then 45 years old, had been drinking at the Lucky 13 Bar, at 13th and Elm in the City of Dubuque, Iowa. Scott Long approached him earlier that evening and threatened to beat him up, but the manager of the bar, Dave Erickson, intervened and broke up the confrontation. Harold Shaffer moved away to play songs on the jukebox. Scott Long came up behind him and hit him on the back of the shoulder and told him to take his glasses off because he was going to take Harold outside and "beat the shit out of me." "I just turned around when he did that, I just turned around and punched him and then he went down on the floor. He hit pretty hard when he went on the floor, he, I had ah, just (bird whistling [background]) gettin, healing up from a knee injury and I didn't want to you know,

wrestle around, scared I was gonna hurt my knee so I just came around and popped him. I just hit him once and he went down on the floor." Harold Shaffer struck Scott Long with his right hand on Scott Long's left side of the face. Scott Long hit the floor "kind of ass first in a sittin position and then boom he went flying backwards." He did not get back up because he was unconscious. [Statement of Harold Shaffer]

4. Harold Shaffer is apparently prepared to testify that he did not intend to injure Scott Long. [Harold Shaffer's Answer, paragraph 6]

5. A transcription of a recorded statement given by Scott Long to Randy Mesch is attached. Scott Long's version of the events on or about November 30, 1998, is as follows: he went to the Lucky 13 Bar that night. When he entered, Harold Shaffer confronted him and he told Harold to get away from him. Harold Shaffer went over to the jukebox and took off his glasses and was doing something with his jacket. Scott Long reached in his pocket for money to pay the bartender for a drink she was delivering and Harold Shaffer struck in in the back of the head knocking him out. [Statement of Scott Long]

6. A transcription of a recorded statement given by a witness, Mike Maus, to Randy Mesch is attached. Mike Maus' version of the events on or about November 30, 1998, is as follows: Harold Shaffer and Scott Long had been in the bar for some time screaming and yelling back and forth at each other. Both were angry and had

been drinking. They faced off and Dave Erickson split them up. Harold Shaffer got up to play the jukebox when Scott Long started yelling at him. Harold Shaffer ignored him. Scott Long came over to him and Harold Shaffer noticed him coming up behind him. It looked like Scott Long was going down forward and would have hit his head on the table if Harold Shaffer had not hit him. However, Harold Shaffer spun around swinging the right hand, hitting Scott Long in the head. Scott Long fell into Harold Shaffer and then Scott Long fell backwards down on the floor. Scott Long did not hit Harold Shaffer first. [Statement of Mike Maus]

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4.

MOTION IN LIMINE

Law

I.R.Civ.P. 46

Twyford v. Weber, 220 N.W.2d 919 (Iowa 1974)

Sprynczynatyk v. G.M., C.A. 8 (N.D.) 1985, 771 F.2d 1112

State v. Peterson, 189 N.W.2d 891, 896 (Iowa 1971)

Text

TRIAL HANDBOOK, Third Edition, Iowa Academy of Trial Lawyers, § 532.06 et seq.

A. The motion is made. Not in every case, not to preclude all evidence, but to keep something important away from the jury. An adjunct use is to control an inexperienced opponent or Judge. Its value is diminished if presented to the Court on the morning of voir dire.

There are following two examples of these motions that exhibit varying philosophies of the scrivener. Nissen is a rifle approach -- one topic. Stineman is a shotgun attempt, closing with a request to the Court to exclude anything else that might be helpful to the plaintiff.

B. The motion is overruled. Nothing has happened -- no record has been made for appeal -- evidence is not limited. The evidence should be offered as if there had been no motion. Objections should be made when the evidence is offered. Perhaps the record can be preserved by simply saying you object and do so for the reasons set out in resistance to the motion.

C. The motion is sustained. This is where the action begins. No record has yet been made for appeal. The rejected evidence must be presented by offer of proof. The argument that was successful should be reurged as an objection. Next comes a quagmire -- the Court's order is violated. What to do -- object -- move to strike -- move for mistrial? A cautionary instruction to disregard the offending evidence may be all one is entitled to. State v. Peterson.

The brave can rely on the Court's ruling on a motion in limine as being so dispositive of the issue that no objection is necessary when the evidence is introduced to preserve the record on appeal. See TRIAL HANDBOOK, § 532.06[I]. Personally, I'd make quite a record away from the jury that I understood the Court's ruling to be absolute and final and any later objection to be not only a waste of time but unwise.

IN THE IOWA DISTRICT COURT
SCOTT COUNTY

ALBERTA E. NISSEN, Plaintiff, vs. JIM STURGIS d/b/a THE RUSTY NAIL, Defendant.	NO. LA 91477

MOTION IN LIMINE

COMES NOW Defendant and states:

1. Whether this Defendant may have insurance to pay all or part of any judgment rendered in favor of the Plaintiff is totally irrelevant and moreover inadmissible under Iowa Rule of Evidence 411.

2. Plaintiff was asked an interrogatory intended to determine specific amounts claimed in damages as is allowed under Gordon v. Noel, 356 N W 2d 559, 564 (Iowa 1984). The interrogatory No 6, and its answer, is attached and by this reference incorporated herein.

3 The Plaintiff must be limited in this case to claiming damages precisely consistent with what she has disclosed in answering the above interrogatory See White v. Citizens National Bank of Boone, 262 N W 2d 812, 816 (Iowa 1978); Barks

v. White, 365 N.W.2d 640, 643 (Iowa App. 1985); Harari v. Morse Rubber Products Co., 465 N.W.2d 546, 550 (Iowa 1990).

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Attorneys for THE RUSTY NAIL

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was served upon the persons listed below by personal service by United States mail postage prepaid to the address, or by fax to the fax number, of the person as disclosed in the pleadings on the ____ day of Sept., 1998

Robert S. Gallagher
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Suite 200
4500 Brady Street
Davenport, IA 52806

Michael J. Motto
1000 Firstar Center
201 West 2nd Street
Davenport, IA 52801

Q

INTERROGATORY NO. 6: Kindly state exactly the amounts and elements of money damages that you claim. We ask that you itemize the elements by setting out each and every element and then across from that set out the exact amount of money you seek for that element.

ANSWER:

The Plaintiff is requesting a reasonable amount to compensate her for her past pain and suffering and her future pain and suffering. With regard to the medical reimbursement, the plaintiff is requesting please see attached medical bills.

INTERROGATORY NO. 7: Kindly tell us the name and address of each health care provider you have seen for any reason whatsoever during the past fifteen years.

ANSWER:

Dr Michael De Blois
106 E Durant
Walcott, Iowa

Dr Shivokaumar
1351 West Central Park
Davenport, Iowa

Dr. Alan Skora
1108 11th Avenue
DeWitt Iowa

Dr. Lyons --- Dr. De Blois has his records

Dr. Ronald Meske -- died

Dr. Robert Godwin
2322 East Kimberly Road
Davenport Iowa

Dr DD Stierwalt -- Dr Alan Diercks
1502 Kimberly Road
Davenport Iowa

Dr. Kreiter

IN THE IOWA DISTRICT COURT
IN AND FOR MUSCATINE COUNTY

CANDACE L. STINEMAN, and GARY G. STINEMAN, Plaintiffs, vs. RICKEY D. SNYDER and THE CONTINENTAL INSURANCE COMPANY, Defendants.	)	No.: LACV010114

PLAINTIFFS' MOTION IN LIMINE

COME NOW Gary Stineman and Candace Stineman, by and through their attorneys, and prior to the trial of this case, ask the Court for an order in limine preventing the Defendant, his counsel, or any of his witnesses from making mention of any of the following matters to any potential or final jury member in this case, without further order of the Court:

1. Whether or not Rickey D. Snyder has any insurance coverage for any compensatory or punitive damage verdict entered in this case.

2. Whether or not the Plaintiffs have any underinsured motorist coverage or uninsured motorist coverage to pay a verdict entered against Rickey D. Snyder.

3. That any alleged pre-existing or subsequent condition, injury, or illness of the Plaintiff Gary Stineman contributed to his current permanent impairment and loss of

function unless and until the Defendant produces competent medical evidence to support a causal connection between such alleged condition or injury and the injuries or impairment being discussed in this case.

4. That the Plaintiffs were not wearing their seat belts at the time of this crash, and, specifically, that the Defendant not be allowed to make any mention of his so-called seat belt defense because he lacks no competent, credible, scientific evidence upon which to base the submission of the seat belt defense to the jury.

5. The Defendant must be restrained from making mention of any witnesses, anticipated testimony, exhibits, or evidence of any kinds which has not previously been fairly disclosed in the Defendant's responses to Plaintiffs' discovery.

6. In support of this motion, Plaintiff simultaneously submits a memorandum of law submitted herewith.

WHEREFORE, Plaintiff's ask the Court for an order in limine as discussed herein and covering such other matters as the Court may deem appropriate for the just, fair, and expeditious trial of this case.

Respectfully submitted,

CROWLEY & BUNGER

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MEDICAL MALPRACTICE DEFENSE: THE MOST COMMON MISTAKES, OBSERVATIONS AND SUGGESTIONS FROM FILING THROUGH VERDICT

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III. TRIAL ISSUES

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C. Organizing the Case

D. Order of Evidence/Witnesses/Proof

E. Use of Experts

F. The Medical Record and Exhibits as Tools of the Trade

G. Utilization of Visual Aids, Models, etc.

H. Defenses and Closing Arguments

MEDICAL MALPRACTICE DEFENSE: THE MOST COMMON MISTAKES, OBSERVATIONS AND SUGGESTIONS FROM FILING THROUGH VERDICT

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I. ASSESSING AND EVALUATING THE MALPRACTICE CASE

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F. The "Right" Expert

THE ABC's OF MEDIATION

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The ABCs of Mediation

by

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Introduction: This presentation is directed to the attorneys who are familiar with the mediation process. Little, if any, of the presentation will be directed toward explaining the mediation process and how it works. Instead, I will concentrate on addressing practical and fundamental problems and issues associated with mediation. This will include, but not be limited to, when to mediate, how to locate a mediator, considerations in selecting a mediator, how you prepare for mediation, effective strategies of mediation, and tips to an effective mediation from the perspective of a mediator, plaintiff's attorney, and defense attorney

A Advantages

- Save time.
- Save money.
- Reach immediate closure.
- Client controls his own destiny.
- Parties participate first-hand in the negotiation process. Client has ownership and, therefore, settlement has credibility. (Not a passive participant in making decisions.)
- Opportunity to preview the other side's best case, legal arguments, and legal theories.
- Adjust the expectations of the unreasonable party.

B Disadvantages

- Cost of mediation.

C When to Mediate

- When you are prepared
- When the other side is prepared.

Note: You will never be offered what your case is worth until the other side appreciates its value and what is at risk. To effectively mediate a case and settle it for fair value, it is important that the other party clearly understands the facts, issues, and law. They need to be able to evaluate their exposure.

D How to Locate a Mediator

- Mediation services.
- Mediation law firms.
- Trial attorneys who act as mediators on a part-time basis
- Private recommendations.

E Considerations in Selecting a Mediator

- Advocate v. Water Carrier
- Ex-Judge v Trial Attorney
- Area of law involved.
- Plaintiff's Attorney v Defense Attorney
- Experience of the mediator in the area of law involved
- Ability to effectively evaluate strengths, weaknesses, and issues of the case.
- Ability to effectively communicate
- Imagination (skilled negotiator)

Note: Ability of the mediator to implement various settlement techniques and strategies in order to settle the case.

- Comfort level.
- Confidence.
- Trust.
- Likeability.
- Tenacity – work ethic

F. Preparation for Mediation

- You must be prepared.
  - Must understand your case.
  - Must be able to accurately evaluate the case.
  - Must be able to effectively appreciate and communicate the strengths and weaknesses of your case.
  - Know where you are going and how you want to get there (game plan).
- Make sure you and your client are singing off the same song sheet.
  - Goals need to be the same.
  - Explain to your client how you intend to get there (game plan).
- Educate your clients concerning the mediation process.
  - Don't let your clients be surprised as to any facet of the process.
  - Make sure your clients are prepared for everything that will occur during the course of the mediation.
  - Don't let your clients be offended and lose their composure and good judgment during the mediation process because of something that is said or done by the other side.

G. Effective Strategies

- Hard ball.
- Conciliatory attitude.
- Multiple defendants and multiple counsel
  - Good cop/Bad cop.
- Be yourself.
- Be sincere.
- Be professional.

H. Mediation Tips

- Be patient
- Listen
- Be prepared to play the game if you have to (and you will have to)
- Be professional
- Don't become emotional
- Choose your words carefully when talking with the mediator so as to not give any false signals to the mediator or the other side.
- Be consistent in the settlement approach. (Difficult to change oars in midstream.) Generally, if you change your settlement approach or format, the chances of settling the case diminish On the other hand, there are occasions when approaches and strategies must be changed in order to salvage the mediation
- Consider reducing the terms of settlement in written form signed by all parties before they leave the mediation to memorialize the settlement.
    - Address the issue of confidentiality up front and make sure it is clearly communicated if it is a consideration in the overall settlement
    - Prepare and provide the mediator with a position paper and any other information which will be beneficial to him or her in understanding the fundamental facts and issues in the case. (Consider depositions, medical reports, and records)
    - Require both parties' decision makers to be present (insurance company adjuster just about a must)

/pjm/gp

Iowa Defense Counsel Association
Annual Meeting Index
1965 through 1999

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Iowa Defense Counsel Association

1965 through 1999 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 Mr. James Pugh
5400 University Avenue
West Des Moines, IA 50265
515/225-5608

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