defense UPDATE

The Iowa Defense Counsel Association Newsletter July, 1994 Vol. VII, No. 3

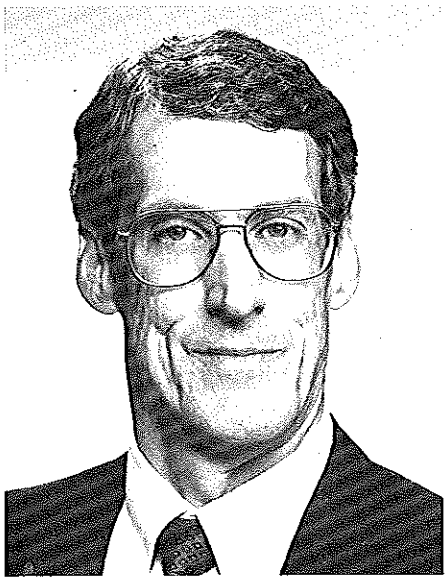
# JUROR STRESS IN IOWA FICTION OR REALITY?

By James E. Kelley, District Court Judge, Seventh Judicial District of Iowa

The public stage of the legal system is the courtroom. The actors include lawyers, judges, witnesses, bailiffs, parties and jurors. All have a function, some more than one. The intended result of the system's activity is a decision: the conclusion of a controversy.

Our jury trial method for deciding disputes presents "evidence" to a group of non-expert lay persons, gives them some guiding legal rules, and tells them to make a decision about the facts shown in the trial on the basis of the given legal rules. Lawyers present a story to the jury in order to persuade them that a particular view of the case is its reality. In effect, a trial is an exercise in creating a reality in the courtroom as a basis for a decision.

Reality, however, is not always neat, pretty or comfortable to observe, either in everyday life or in the courtroom. Psychiatry and psychology teach that persons exposed to traumatic experiences can have adaptive reactions others may not experience. The most well known example is what was called "shell shock" in prior wartime, now referred to generally as post traumatic stress disorder. There is some evidence that jurors in very difficult cases may exhibit symptoms of stress similar to those seen in persons clinically diagnosed as suffering from post traumatic stress disorder. Recent attention from journalists and therapists highlight a growing public perception of the stress of jury service



**Judge James E. Kelley**

in difficult cases. Judges also observe the stress jurors manifest during trials. Some judges regularly talk to jurors after verdict in particularly difficult trials in order to lessen distress and "close" the jury process. However, even these judges often question whether such contacts are appropriate or even helpful.

Recent media accounts of juror stress indicate the fascination of the public with a perceived risk of jury service. For instance, an article in the January, 1994 issue of *Redbook* magazine trumpets "The Hidden Perils of Jury Duty." Judges and lawyers should be aware of the possibilities of juror stress, and the impact the perception of stress has on juror willingness to serve.

In 1992 I developed a study of juror stress as the basis for my Masters Thesis in the Masters of Judicial Studies program at the National Judicial College, University of Nevada, Reno. I sent a questionnaire to jurors who deliberated to verdict in forty-four recent murder trials in Iowa. The study was designed to test two hypotheses:

1. Jurors who decide criminal murder trials are likely to experience stress symptoms related to the case.

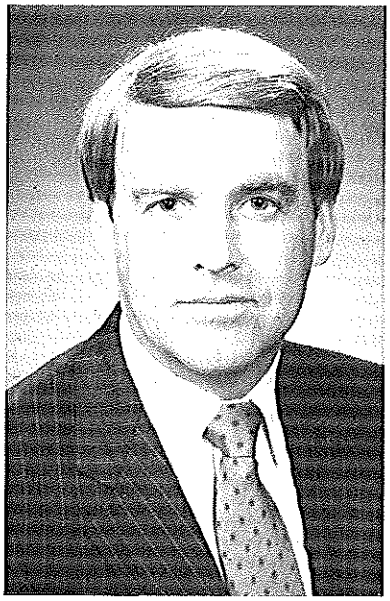
2. Jurors in murder cases who have informal post-verdict conversations with the trial judge are less likely to experience severe stress symptoms than jurors not provided that opportunity.

The study, soon to be published in the Drake Law Review, recommends standards and techniques for both informal judicial debriefing and formal professional debriefing of jurors in difficult cases.

Judges are required to follow ethical restrictions on their contact with jurors after trial. Canon 3 of the ABA Model Code of Judicial Conduct, adopted as Canon 3 A (6) of the Iowa Code of Judicial Conduct, prohibits a judge from making any public comment that might reasonably be expected to affect the outcome or fairness of any pending case in any court. The canon also prevents a judge from making any non-public comment that might interfere with a fair trial or hearing in any pending or expected case. This ethical rule

*Continued on page 6*

# MESSAGE FROM THE PRESIDENT



**Richard J. Sapp**

Much has been written and discussed recently about the changing relationship between insurance companies and retained defense counsel. The tension between insurance companies' desire to contain litigation costs, and defense counsels' desire to defend the insured in the manner he or she deems necessary and most effective, is somewhat natural. Much of the debate stems from disagreement over what truly constitutes cost control and effective case management. There are legitimate concerns raised on both sides of this discussion.

On the whole, I believe that the relationship between the Iowa defense bar and insurer clients is generally good. I suspect that defense counsel in Iowa are experiencing fallout from bad insurance company experiences in other parts of the country, although none of us are probably without blame in dealing with "client relations" problems with respect to insurers.

The issues are broader than just cost containment. Achieving cooperative and effective case resolution strategies between the insurer and defense counsel, and addressing ethical issues which arise when defense counsel defends under cost control policies, are also important.

To begin a constructive dialogue to help the Iowa defense bar and our insurance company members and constituent clients satisfactorily resolve these issues, our Association this year established a Client Relations Committee. It is comprised approximately equally of in-house counsel from insurance companies and private defense bar practitioners. The members of this committee are: Marion L. Beatty, Paul Aamadt, Alanson K. Elgar, James A. Gerk, Sharon Soorholtz Greer, Doug Howard, Steven P. Larsen, Robert J. Laubenthal, John T. McCoy, Wendy N. Munyon, David Narigon, and J. Michael Weston.

The committee has been active and already is working on a draft of some specific cooperative guidelines which hopefully will be supported by both insurance companies and our private practitioner members. The committee is also looking at issues of case management, ethical issues involving the insurer-defense counsel relationship, and alternative fee arrangements. I wish to personally thank the members of the committee for their hard work to date, and we look forward to more of their work product as the year progresses.

Hopefully the effort of our Client Relations Committee will allow our Association to assume an important leadership role seeing that the relationship between insurers and defense counsel in Iowa will remain a cooperative and effective one, not one of antagonism and conflict. This in turn should lead to a cooperative and effective defense of cases in a cost-efficient manner.

There is no good data showing what effect a "settle rather than pay defense costs" claims philosophy has on the continuing upward spiral of tort litigation. One recent study does show that defense costs comprise approximately 18 percent of the total cost to insurance companies in handling tort claims. In addition to adjustment expenses of 24 percent, the remaining 58 percent is comprised of awards to plaintiffs and plaintiffs' attorneys fees. With payments to plaintiffs representing a cost three times greater than defense costs, the cooperative resolution of issues between insurers and retained defense counsel will hopefully allow us to turn attention to this latter figure, and thus tackle the most substantial cost component of the current tort system.

**Richard J. Sapp**
President

# IN THE PIPELINE

By Kermit B. Anderson, Des Moines, Iowa

### PUNITIVES - AGAIN

The United States Supreme Court has agreed to review yet another case presenting an issue of punitive damages and the due process clause. Certiorari was granted in the case of *Honda Motor Company Ltd. v. Oberg*, No. 93-644, January 14, 1994. (Decision below *Oberg v. Honda Motor Company*, 851 P.2d 1084 (Or. 1993)). The Court apparently continues to feel that its previous decisions in this area need clarification.

*Oberg* involved a product liability action brought after an all-terrain vehicle manufactured by Honda overturned backward injuring the Plaintiff. The jury returned awards of $919,390.39 in compensatory damages, reduced by 20% fault allocated to the Plaintiff, and $5,000,000 in punitive damages. On appeal to the Oregon Supreme Court, Honda argued that the punitive verdict was excessive and the product of standardless discretion by the jury.

Honda relied upon *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S.1 (1991) for the proposition that an award of punitive damages must be subject to comprehensive post-verdict trial and appellate court review in order to satisfy due process. Because Oregon law limited the review of punitive awards to a consideration of the sufficiency of the evidence in support of the award, Honda contended that the procedural safeguards required by *Haslip* were absent in the Oregon scheme.

The Oregon Supreme Court analyzed the *Haslip* decision and concluded that the broad constitutional interests to be protected were simply to ensure the fact finder had "adequate guidance" and that the amount of the award was "reasonable". 851 P.2d at 1094. The Court noted that Oregon law required juries to consider specifically enumerated statutory criteria including the likelihood of harm, the duration and profitability of the conduct, the defendant's awareness or concealment of the conduct, the defendant's financial position, and the imposition of other sanctions. These objective standards coupled with the evidentiary requirement of proof by clear and convincing evidence prompted the Court to conclude that sufficiently definite and meaningful constraints were imposed on the fact finder ensuring that the resulting award is not disproportionate to a defendant's conduct and to a need to punish and deter. *Id.* at 1096.

The more troubling issue as it related to *Haslip* was Oregon's near total absence of post-verdict review procedures. The Oregon Court interpreted *Haslip* as not mandating in all cases a form of post-verdict or appellate review that includes the possibility of remittitur. Rather, the Court found Oregon's procedure constitutional "as a whole and in its net effect" which was seen as *Haslip's* bottom line requirement. *Id.* Since the jury was instructed properly about the substantive criteria to be applied and since there was evidence to support its determination, the Court held the punitive award did not violate the due process clause. *Id.* at 1099. The dissenting justice read *Haslip* to require post-verdict review procedures of a character and quality not present in the Oregon scheme. *Id.* at 1110. The Supreme Court's decision should help to resolve the uncertainty on this point.

Imposing due process standards upon punitive awards has proved to be a more complicated exercise than the Supreme Court must have expected. This is the third time in four years that the Court has agreed to address the issue. *Burke v. Deere and Company*, 780 F.Supp. 1225 (S.D. Ia. 1991) remains the only reported case in Iowa discussing punitive damages in connection with the requirements of *Haslip*. The *Burke* case, however, was reversed on appeal. *See* 6 F.3d 497 (8th Cir. 1993). The panel majority found it unnecessary to reach the issue of whether the due process requirements of *Haslip* had been met, but did express concern "that the trust fund component of the Iowa statute may implicate questions of standing and justicibility as well as constitutional issues of due process and excessive fines." *See* 6 F.3d at 512 n.26. The constitutionality of the Iowa scheme thus remains an open question, and will continue to be so while the demands of due process are still being articulated by the nation's highest court.

### EMOTIONAL DISTRESS - LEGAL MALPRACTICE

On the Iowa Supreme Court's docket is an interesting case entitled *Lawrence v. Grinde, et al.*, No. 93-1663. This is an appeal of a legal malpractice action arising from the Plaintiff's retention of the Defendant lawyers to handle his Chapter 7 bankruptcy proceeding. Plaintiff alleged in the trial court that although he advised the Defendants of a recent monetary transfer to his mother-in-law, the bankruptcy schedules as prepared by the Defendants failed to disclose the payment. The Plaintiff was later indicted, tried, and acquitted in federal court of bankruptcy fraud based upon the omission of this transfer. In his malpractice action, he claimed the Defendants were negligent for omitting the payment which negligence was the cause of his having to face

*Continued on page 13*

# NEW CASE SUMMARIES

*The TORT & INSURANCE COMMITTEE of the Iowa Defense Counsel has prepared the following summaries of five significant cases handed down by the Iowa Supreme Court on May 25, 1994.*

1. ***Engstand v. West Des Moines State Bank,* No. 132-91-1378 (Iowa 1994).** (Court upholds denial of shareholders' causes of action against bank for bank's liquidation of corporate assets.)

Facts: Plaintiffs were shareholders of two bankrupt corporations. As part of bankruptcy proceedings, Defendant bank began to dictate the disposition of collateral in which it had a security interest. The shareholders of the corporation alleged that the bank was negligent in its lending relationship with the shareholders, negligent in failing to allow the shareholders an active role in the liquidation, negligent in failing to dispose of the collateral in a commercially reasonable manner and that the bank breached a fiduciary duty to the shareholders.

Decision: The issues on appeal were whether the trial court erred in ruling as a matter of law that the bank did not owe a fiduciary duty to the plaintiff shareholders and whether the bank owed a "special duty" to the shareholder which would allow them to sue for alleged wrongs committed against the bankrupt corporations.

With regard to the first issue, the shareholders contended the bank owed them a fiduciary duty which arose from the nature of loans given to the bankrupt corporations. The Court, however, found that because the bank was acting on its own behalf and not on behalf of the plaintiffs or as an advisor to the plaintiffs in a confidential or trust relationship no fiduciary duty existed. Regarding the second issue, the shareholders claimed that because the bank had agreed the shareholders would be actively involved in the liquidation of their assets and they had personally guaranteed the corporation's indebtedness, a "special duty" had been created. The Court noted that all claims were being brought on behalf of shareholders and not corporations. The general rule is that shareholders have no claim for injuries to their corporations by third parties unless within the context of a derivative action. However, if a shareholder is able to show that the third-party owned a special duty to the shareholder or the shareholder suffered an injury separate and distinct from that suffered by other shareholders, the shareholder may have such an action. In this case, no separate and distinct injuries were found by any particular shareholder. Furthermore, the Court noted that the shareholder signed the guarantees in question before the liquidation of the corporation's assets. Thus, the suit was not on the guarantee agreements themselves. Accordingly, the damages to the shareholders would have occurred even if there has been no guarantee. Thus, the only wrong alleged was a wrong against the corporation. The judgment of the district court was affirmed and the shareholders' causes of action were appropriately denied.

2. ***West Des Moines State Bank v. Ralph's Distributing Co.*, No. 133-91-1948 (Iowa 1994).** (Court upholds foreclosure and disposition of property by creditor.)

Facts: Ralph's was a boat wholesaler which gave the bank a real estate mortgage as security for financing. The bank obtained a decree of foreclosure and Ralph's appealed.

Decision: The issues raised by Ralph's were as follows:

1. The bank was not entitled to foreclose because Ralph's was on a default.
2. The bank did not dispose of Ralph's collateral in a commercially reasonable manner under the Uniform Commercial Code, and
3. The bank acted with "unclean hands."

The Court found that Ralph's was in default. The terms of the loan agreement provided that Ralph's would be in default by defaulting on various notes. Because there was evidence that Ralph's had defaulted by missing a note payment to the bank, the Court found that the loan was in default for foreclosure purposes in accordance with the loan agreement. The Court also found that Ralph's argument that the bank did not dispose of its collateral in a commercially reasonable manner and acted with unclean hands was insufficient. The Court noted the Uniform Commercial Code does not specifically provide that a secured party which fails to abide by rules of the Code will lose its right to a deficiency judgment. In Iowa, the failure to abide by the rules creates an irrefutable presumption that (in certain cases) the value of the collateral seized will be presumed to be equal to the amount of the remaining debt. In this case, however, the district court had reduced the amount of the deficiency judgment against Ralph's by $137,000.00 which the district court said was the amount of the excessive costs in connection with the liquida-

*Continued on page 12*

# TEN WAYS TO SAVE MONEY ON LEGAL FEES

By Kevin M. Quinley, Fairfax, Virginia

**The following article was originally published in the March, 1994 issue of Claims magazine which is distributed nationally to insurance company executives and risk managers. The article is yet another voice in the ceaseless debate over controlling the cost of litigation.**

Hanging on my office wall is a copy of a classic legal print from the 1700's titled, "The Lawsuit." First appearing in a medieval wood carving above a fireplace in an old English manor house, it reflects the jibes aimed at all lawyers today. It depicts a dispute between two farmers over a prized cow. The judge looks on, but three other people are present at the dispute. How can you determine which one is the lawyer? Well, plaintiff has hold of the cow's head, tugging in one direction. The defendant pulls the cow in the opposite direction, straining at the bovine haunches. The lawyer? He's the one in the middle, squatting down on the stool, milking the cow.

"What's the difference," a risk manager recently asked me, "between a rooster and a lawyer?" "Beats me," I answered. The punch line: "A rooster clucks defiance. . ." More and more clients are clucking defiance, in response to sky-high legal fees.

The continuing hemorrhage in outside legal costs threatens to bleed budgets dry, and has spurred interest in in-house legal staffs, "beauty-contest" bidding wars and tight written guidelines on travel expenses. Whether risk managers are insured or self-insured, they have an interest in containing the upward spiral in legal costs. Rather than trying to fix blame, however, they can take some constructive steps to solve the problem. "Empowerment" is a trendy management hazard, hut risk managers can empower *themselves* and their companies to take steps to save money on legal fees.

Risk managers can form partnerships with their insurers and defense counsel without compromising the quality of defense. Here are 10 practical steps:

1. **Let *your* fingers do the walking.** Assemble and organize needed documents in-house. A law firm associate may bill $100 an hour or more for this non-legal work. In one recent bit of litigation which my company managed, outside firms were going to charge us hundreds of dollars an hour to "redact" medical records and prior patient complaint files. At first, I though a "redactor" was a carnivorous dinosaur in the movie "Jurassic Park." When we probed for an English-language translation for this process, we learned that "redacting" meant going through and blackening out the names of patients, so that plaintiff attorneys could not go trolling for more clients. While I sympathized with the intent of this project' it made little sense to pay some $100-an-hour lawyer to do some highfalutin magic-marker work. Moreover, I had no intention of paying for—pardon the expression—redundant redacting!

"You say tomato and I say tomahto,
You say redacto and I say eraso. . .
Tomato, tomahto
Redacto, eraso
Let's write the whole thing off!"

Moral: Press for a lay translation of legalese gobbledygook. Then, after getting an answer, consider whether you can do some of the pack-mule work in-house. Lawyers make very expensive pack-mules . . . and redactors!

> "One Philadelphia defense firm to whom I've paid thousands of dollars invited *me* to find a local copying facility in *its* city which did cut-rate copying!"

2. **Conduct cost-cutting copying.** Do any needed photocopying in-house. Law firms may charge as much class 50 cents per page, making their photocopier a profit center within the firm. With medical records and corporate documents, this can add thousands of dollars to your legal fee tab. Even if you have to farm the job out to Kwik-Copy or Kinko's, you're still saving money. Alternatively, set an upper limit—cents per copy—on how much you will reimburse for photocopy expenses. Some suggest that six to 10 cents per sheet is a reasonable figure. Caveat: expect howls of protest from counsel. One Philadelphia defense firm to whom I've paid thousands of dollars invited *me* to find a local copying facility in *its* city which did cut-rate copying! I politely declined and suggested that if that's how they felt, then perhaps we needed to shift our assignments to a different firm. At this

*Continued on page 15*

# JUROR STRESS IN IOWA: FICTION OR REALITY?

*Continued from page 1*

further addresses whether a judge may explain the procedures of the court for public information. The relevant portions of the Canon state:

> "A judge should abstain from public comment about a pending or impending court proceeding in any court .... This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."

When judges attempt to follow their ethical rules and promote public understanding of the legal system, they are often put in an awkward position. They cannot ethically comment on the cases they are most familiar with until all appeals are final.

The new Model Code of Judicial Conduct, adopted in 1992 by the American Bar Association, affects a judge's duty when talking to jurors after a verdict. Section B (10) of new Canon 3 now provides:

> "A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community."

There is no standard similar to Section B (10) in any preceding code of judicial ethics. However, a fairly equivalent suggestion is found in the ABA STANDARDS, TRIAL BY JURY § 5.6 ( 1968 ). The commentary supplementing Standard § 5.6 indicates a fear that any comment by the judge, favorable or not, might influence the jurors in other cases, especially where the jurors may be called to serve in another case during a long term of jury duty. In areas where a "one-day, or one trial" term of jury service is in effect, this fear seems unfounded. The commentary of the ABA Advisory Committee on the Criminal Trial accompanying this Standard decries the practice of some judges who have been heard, on occasion, to tell the jury that they "did the right thing," or that they acquitted a guilty recidivist. If these jurors are immediately assigned to another case, such comments from a judge could influence them in those cases.

However, avoiding commendation or criticism of the verdict does not mean that a judge should avoid all contact with jurors post-verdict. If judges understand the reasons for controlling post-verdict contact with jurors they will be able to determine whether and what type judicial contact is appropriate.

Restrictions on post-verdict contacts with jurors generally reflect the long-held common law rule against inquiry into jury deliberations. Wigmore suggests that the rule originated in an English opinion in 1785, and became a nearly unquestioned rule in the United States. *See* 8 WIGMORE, EVIDENCE § 2352, at 696-97 (McNaughton rev. ed. 1961). The rule has now been adopted in Rule 606(b) of both the Federal and Iowa Rules of Evidence. Rule 606(b) provides:

> "Upon an inquiry into the validity of a verdict ... a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict ... or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

The Comment of the Iowa Supreme Court Advisory Committee on Study of the Federal Rules of Evidence noted the following:

> "Rule 606(b), like Iowa common law, protects the sanctity of the jury room regarding matters that inured in the verdict, while allowing disclosure of extraneous misconduct."

The United States Supreme Court upheld Rule 606(b) against the argument the rule prevented a criminal defendant from proving a violation of his sixth amendment right to a competent jury. In *Tanner v. U.S.*, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed.2d 90 (1987), the Court held that prohibiting use of juror affidavits about juror intoxication during deliberations advances three policies crucial to the jury system. First, the prohibition promotes open and frank discussion during jury deliberations. Next, the rule maintains the community's trust in the jury system, and last it protects

*Continued on Page 7*

# JUROR STRESS IN IOWA: FICTION OR REALITY?

*Continued from page 6*

jurors from harassment if they return an unpopular verdict. These reasons all focus on protecting the deliberative process by cutting off some types of inquiry into the dynamics of actual jury deliberations in real cases. The urge to protect the process also remains strong in our state jurisprudence. *See, e.g., Doe v. Johnston,* 476 N.W. 2d 28, 34-35 (Iowa 1991).

When trial courts apply these policy reasons to the question whether the judge should meet and talk privately with the jury post-verdict, the analysis leads to some confusion. If trial judges focus on helping the jury understand their function and duties, while promoting public acceptance of the jury system, then the reasons supporting Rule 606(b) seem irrelevant to the trial judge's problem.

Lessening potential distress in jurors does not impinge on the policies supporting prohibitions of some types of post-verdict contact. In fact, one reason for debriefing jurors post-verdict is consonant with protecting jurors from harassment. Harassment produces stress. Stressed jurors are less likely to want to be on another jury. So a rule preventing harassment suggests another reason favoring post-verdict contact: reducing juror stress. The basic policy supporting both the rule preventing harassment and a preference for debriefing juries is to preserve the jury system and to promote wide acceptance of jury service.

A review of reports and studies suggesting that jurors in serious cases suffer stress supports a decision to help reduce juror stress. In the Redbook article mentioned previously, the author details the difficulties three women jurors experienced because of criminal jury service. Two were on juries dealing with charges of sexual abuse, one of children, the other of an adult. The third juror sat on the Jeffrey Dahmer trial. Even though that jury was professionally debriefed, the juror related she had trouble sleeping, and had flashbacks during the day.

The reactions of jurors who decide difficult issues in murder trials resemble certain clinical signs of post traumatic stress disorder. The diagnostic criteria for post traumatic stress disorder is found in AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.89 (3d ed. Revised 1987). Psychiatric literature and studies propose that persons experiencing a distressing event outside the normal range of human events will have similar responses during the process of working through the stressful event. Strains to a person's psychological system can produce a large number of responses, not all of which are maladaptive. However, repetition and chronic recurrence of a number of these responses over a long time can be signs of a clinical disorder.

Although some professional research indicates jurors in difficult criminal trials do suffer some stress symptoms, there are methods of reducing such adverse effects. Some experimental evidence suggests that positive effects accrue from talking about traumatic events to an accepting and trustworthy confidant. These effects can include both reductions in reported physical illness and improvement in immune system functioning. Benefits derived from discussing shared traumatic experiences lie at the heart of recommendations from psychiatrists that jurors exposed to disturbing evidence in high profile criminal cases be debriefed by mental health professionals after the trial. Feldmann & Bell, *Crisis Debriefing of a Jury After a Murder Trial,* 42 Hosp. & Community Psychiatry 79 (1991).

Judges throughout the country have apparently been helping jurors overcome the effects of stress in the jury box. *See. e.g.,* T. MURPHY, G. LOVELAND & T. MUNSTERMAN, MANUAL FOR MANAGING NOTORIOUS CASES 77-78 (National Center for State Courts, 1992). For instance, I have routinely debriefed jurors in criminal cases since 1984. The intensity of the reaction of jurors to the stress of jury service at first surprised me. My experience over the past ten years has proved to me that many jurors have reactions which can be lessened by post verdict debriefing. The reactions I have observed do not appear to be dependent upon either the size of the community or the amount of publicity about the case. Informal contacts with judges from around the United States indicate that some do regularly talk to jurors in private after a verdict is announced in criminal cases. These trial judges are concerned about what effects such informal debriefing has on jurors, and whether the practice is effective. They also feel ill-equipped to engage in this type of discussion. Although at least one videotape instructional program is available to courts, its existence is not well known in many jurisdictions. No known studies have explored the effects on juror stress levels of private, post-verdict conferences with the trial judge.

My Iowa jury study was designed to assess stress levels in a large number

*Continued on page 8*

# JUROR STRESS IN IOWA: FICTION OR REALITY?

*Continued from page 7*

of jurors involved in serious criminal cases. I sent a questionnaire to jurors who actually decided forty-four murder cases in Iowa. The names and addresses of jurors who deliberated to verdict in these cases between January 1, 1989 and January 30, 1991 in the State of Iowa were obtained from the public records. I am deeply indebted to the Clerks of Court in all ninety-nine Iowa counties for researching their records and providing the names and addresses of the jurors.

A three page questionnaire was sent to all 528 jurors. All names of jurors and personally identifying information was omitted from the questionnaires. The jurors were assured anonymity. Each questionnaire was coded for the county and case number only. Three-hundred fifty responses were received. No follow up letter was sent. The response rate of 65% without a follow up request was unusually high, and greater than reasonably expected. This rate may have been due to the nature of the inquiry, the source of the request (a judge) or a perceived (or unconscious) need of the responding jurors to communicate with someone about their experience. It can be interpreted as partial confirmation that jurors are concerned about the legal system and their part in it.

None of the juries in the Iowa study were sequestered. Two juries heard cases removed from the original county on change of venue. At least two cases were retrials after appellate court reversals; none were repeats of the same case.

Juries in Iowa have no responsibility for recommending sentences. Many jurors seemed aware that first degree murder is punished in Iowa by life imprisonment without parole. One psychiatrist's work suggests that sequestration and death penalty sentencing functions place special stress on jurors. However, these variables could not be controlled in the study. Their effect must be evaluated in future inquiries.

*Voir dire* and jury selection by lawyers adds further variables to the selection process. Some judges suggest that lawyers will generally remove prospective jurors more likely to have severe stress reactions to expected evidence, especially in a serious case. Also, jurors who indicate in *voir dire* that the stress of a gruesome or difficult case would affect their ability to be impartial will usually be excused for cause.

Analysis of the responses to the first question identified twelve juries as having been "debriefed" by the trial judge. For the purposes of the study, a "debriefing" was any private post-verdict conference with the judge where jurors' questions were answered, informal conversations held, and instruction given about whom the jurors could talk to after discharge. No information was received indicating that any judge talked with the jurors about typical psychological stress responses. Ninety-one jurors who had been "debriefed" returned questionnaires, and two hundred fifty-eight who had not. One response was not able to be assigned.

Since none of the juries were professionally debriefed by psychiatric or psychology clinicians, the study could not compare stress levels of jurors debriefed by such trained persons. Analysis of the data show that there was no statistically significant difference in the aggregate, mean stress levels reported by jurors debriefed by judges and those not debriefed. The small number of jurors experiencing a private post-verdict conference with the trial judge made a clear test of the second hypothesis difficult. Data sets comparing 91 responses to 258 responses are not likely to yield statistics with a confidence level of 95%. The inability to control the type or content of the judges' private conferences with jurors was another methodological limitation. The only reasonable conclusion to be drawn on the second question in the hypothesis is that juror stress response is neither increased nor decreased by judicial "debriefing" post-verdict. Confirmation of this hypothesis must await further studies where the post-verdict conferences can be better controlled. The National Center for State Courts has proposed a research project to study juror stress. One of its goals is to develop recommended procedures for prevention and treatment of juror stress. Hafemeister & Ventis, *Juror Stress: What Burden Have We Placed on Our Juries?,* 16 STATE CT. J. 35, 43 (1992).

Statistical tests run on the data indicate a difference in stress responses between women and men. Women reported statistically significant higher stress responses, on average, than men. The psychological literature offers an explanation. Women are more likely to admit stress symptoms than men. An alternate explanation could be that women react to stress in the jury trial setting in ways different from men.

The data from the study also show a

*Continued on page 9*

# JUROR STRESS IN IOWA: FICTION OR REALITY?

*Continued from page 8*

link between the severity of the stress response and the number of different types of people the juror reported discussing the case experience with. The more types of people the juror reported talking to about the case, the higher the reported stress level.This may mean that jurors experiencing high stress levels naturally attempt to reduce stress by "talking it out". The psychological literature encourages discussing traumatic events as an adaptive means of reducing stress symptoms.

From the study of Iowa jurors it appears that jurors in serious criminal cases suffer stress symptoms as a result of jury service. Debriefing by the trial judge post-verdict does not seem to measurably affect juror stress, either positively or negatively. The study may not be replicable in other states, since Iowa has no death penalty, and Iowa juries have no sentencing function. The penalty for first degree murder in Iowa is life in prison without parole. Some jurors in the study knew this before trial, while some asked about the sentence after the verdict. Another circumstance possibly linked to the low observed stress levels is that no juries in the study were sequestered. The author is not aware of any criminal juries in Iowa which have been sequestered in the last ten years. One psychiatrist writing on the subject has suggested that sequestration is a factor in heightening stress in jurors.

The difficulty of defining "debriefing" by a trial judge, and the small number of "debriefed" jurors in the study make this study more suggestive than definitive. One conclusion supported by the study is that jurors obtain stress relief from discussing their jury experience with family, friends and others after the case is over.

Some commentators suggest that professional debriefing should be regularly considered in cases drawing high media attention, where the jury is sequestered, or the trial is unusually long or difficult. It may be almost a necessity in a notorious case where the jury has a sentencing function. Whichever type of debriefing is selected,certain issues should always be considered by the judge.

A useful way to begin debriefing a jury after the verdict is given is for the judge to offer to answer jurors' questions. The first thing jurors usually want to know is whether the judge thinks they did the right thing. The primacy of this question is borne out by many responses from the Iowa jurors studied. One of the most interesting, but typical comments came from a juror in a large county.

> "I lived & breathed that trial for one and a half weeks. Then it was there with me for weeks afterwards. I park next to the County jail daily & all I could see was the defendant sitting in there. I felt that we could have possibly convicted an innocent man. But, one day, a couple of months after the trial, I had a friend of mine find out the defendant's past and the weight of the whole world was lifted from my shoulders. I felt like it was really over. The defendant had been in a courtroom before and if he hadn't killed anyone before, apparently, he had tried to. I hadn't convicted someone who was as pure as the driven snow. All of this is leading up to something that I think would have helped me after the trial was over and the verdict was read. If the judge had talked to us & possibly showed some sign of approval over the verdict that was decided or even told us that this wasn't the first time the defendant had been in trouble, I think that I might have had a much easier time dealing with it. If the trial I served on had been more cut & dried than it was, the verdict might have been easier to decide on and live with. But being as it wasn't a drug related murder or even a very sensational murder trial, it made it much closer to home, like something that is more likely to happen in your own neighborhood than in downtown (big city). I really wish the judge had said something."

The need to be reassured that they did their duty when exercising an often disagreeable task is understandable. In the three hundred fifty questionnaires received, seventeen jurors commented on the need to know whether they had made the right decision. One typical response in this vein was:

> "I feel it's important to allow the jurors to ask questions after the verdict is rendered. It's also important for the judge to tell the jurors they did a good job in reaching their verdict. It's a very difficult job for 12 people to decide the fate of another person- it weighed upon me for several weeks after the trial."

My usual response to this question, without violating judicial ethics, is to

*Continued on page 10*

# JUROR STRESS IN IOWA: FICTION OR REALITY?

*Continued from page 9*

tell the jurors that the trial judge's function is different from the jury's, and so judicial ethics prevent a judge from commending or criticizing a jury's verdict. One juror in the study suggested that a debriefing might not be such a good idea if it resulted in devaluing the jury's decision. The objection was stated:

> "I'm not sure [debriefing] is a good idea because as a juror you must come to a decision that you can live with - many jurors struggle with this & if a post-trial discussion with the judge were to change their mind (feelings) that person may have a difficult time dealing with the original decision. That original decision is something I must live with for the rest of my life - I want to feel good about it."

However, the judge should assure jurors that by coming to a unanimous verdict, whether guilty or not guilty, they fulfilled the function of a jury in our system of justice. If jurors have not reached a verdict, but are discharged because they are hopelessly deadlocked, they can be reassured that they have also fulfilled the function of a jury by requiring the State to prove its case by evidence convincing to twelve people beyond a reasonable doubt. In this situation, it is also appropriate to discuss with jurors the provisions of Rule of Evidence 606(b), and to indicate that the attorneys may want to know what aspects of the evidence were most bothersome. The judge may properly admonish the jurors to avoid indicating who the minority jurors were in order to avoid harassment and maintain confidentiality. Jurors appreciate knowing whom they may or should talk to after the trial.

As one debriefed juror put it,

> "He [the judge] mentioned that the lawyers & the press might want to talk to us — they could even call us at home. However, we did not have to talk to them."

Another juror said:

> "I would have benefitted from an instructional session on who to talk to and what to avoid disclosing about the deliberations. I felt a tremendous amount of responsibility - I didn't want any of my actions to be cause for mistrial - if that were ever possible."

A formal statement to the jury in open court may emphasize these points, both for the jury's benefit and for others in the courtroom.

Jurors may also ask about the defendant's prior criminal history. As one juror in the study wrote:

> "The judge's explanation of the criminal's background and appreciation for and support of our verdict helped allay some of my feelings of discomfort."

Another juror who was not debriefed commented that a debriefing session would be good, because

> "[s]pecial details (past crimes of suspect, etc.) which weren't allowed to be discussed in our presence could have then been disclosed at that time."

In states where the jury does not decide the sentence, it seems appropriate to advise them of the defendant's known prior criminal record, if any. Many jurors are visibly relieved when the defendant's prior record is disclosed after a guilty verdict. They may ask why the defendant's prior record was not mentioned during the trial. This question allows the judge to explain the law about impeachment, Iowa R. Evid. 609(a), and some of the rules of "basic fairness" surrounding criminal evidence and procedure. The jury's relief on hearing about the defendant's prior record provides an opening to discuss why the rule against disclosure may protect persons from being convicted for being a "bad person" rather than for the act the State claims they committed. *See*, Iowa R. Evid. 404.

Jurors need to discuss whether, how and to whom they can talk about the case now that it is over. During the trial they have been repeatedly told they are not to discuss the case among themselves or with anyone else. Now they can talk to anyone they wish about the case, or about their reactions to the case. However, it may be helpful to advise jurors that they retain the right to refuse to talk to anyone about the case if they do not want to. The Judge may advise the jury that if someone continues to bother them about the case after the juror tells them they do not want to discuss it, they should report the harassment to the court, as the system has means to protect their privacy. Advising jurors of this in open court after the verdict also sends the message to the defendant's and victim's friends and family that the court will protect jurors from harassment Such a message may also be appropriate to give in a civil case.

The responses of some jurors in the study indicate that at times juries debrief themselves. When asked what recommendations they have for discussions between judges and jurors after

*Continued on page 11*

# JUROR STRESS IN IOWA: FICTION OR REALITY?

*Continued from page 10*

verdicts are announced, one juror who had no judicial debriefing wrote;

> "I never felt like I had the need to talk to the judge afterwards, but after the verdict, about half of the jurors went to a bar/restaurant and talked for about an hour. I felt that was a good thing - we had the chance to share our thoughts & feelings about the intense experience we went through together. Talking about it helped me. I felt like it helped tie up loose ends."

Another juror who was debriefed had a similar experience.

> "I liked the private conference. Nearly everyone stayed to talk to the judge and also to the lawyers. I was a juror who was of the minority opinion (3-no, 9-yes) when we first began to deliberate. I had to go back through my notes item by item to make up my mind about the case. The conference allowed me time to debrief. The majority of the jurors did go to a place to eat and have a drink after the case was done. This gave us an opportunity to talk and share our feelings."

A judge debriefing a jury should at least mention some of the stress responses a juror might expect. The judge can properly mention typical stress responses: sleep disturbances, dreams about the case or evidence, strong feelings about the evidence, avoiding reminders of the case, and even unbidden thoughts about the evidence or facts of the case. Even if no questions are asked, it seems proper to advise the jurors that these responses are normal, but if they persist for a long period of time, the person should consult a counsellor. It is also appropriate to suggest that the jurors talk out their feelings about the case and the evidence with a spouse or other close trustworthy friend, since these discussions can help them work through the experience. Jurors seem to understand their needs. In response to the open-ended question about what a post-verdict discussion with the judge should include, one juror in the Iowa study suggested

> "probably something concerning how it is 'normal' to feel after participating in a jury that dealt with such a serious issue. I found myself wondering whether others in the same position felt the way I did."

Formalizing the use of such jury debriefing feedback mechanisms may also have other systemic benefits. Professor Patrick Kelley has suggested that the jury system makes tort law by affirming the community's expected behaviors through jury verdicts. P. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability,* 38 Clev. St. L. Rev. 315 (1990). The same analysis may apply to criminal jury verdicts, although attenuated through the lens of legislation. If this is true, then the feedback mechanism of jury debriefing can provide positive systemic benefits. Owen M. Fiss has suggested that a community must have a belief in certain shared public values and be willing to act on them. He then posits that the judiciary has a "responsibility for giving meaning and expression to those values." Fiss, *The Death of the Law?,* 72 Cornell L. Rev. 1, at 14 (1986). Although this analysis seems focused on appellate judges, the combination of Fiss' analysis with that of Kelley does suggest another reason for trial judges to routinely debrief juries: reinforcement of shared public values.

Some judges fear that if they debrief juries they will impair their proper function as judge. Citing the rules on misconduct of juries during deliberations, they suggest that during debriefing the jury may disclose some jury misconduct, either about improper experiments (*e.g., State v. Houston,* 209 N.W. 2d 42 (Iowa 1973)), discovery of inadmissible evidence (*e.g., State v. Holland.* 485 N.W. 2d 652, 655 (Iowa 1992)), or about outside influences. The rules of judicial ethics and the necessity for fidelity to the law of the jurisdiction neither require inquiry by the judge into areas of potential misconduct, nor prohibit judges from disclosing evidence of misconduct if it comes to their attention. However, since the trial judge will have to rule on any post-trial motions involving alleged juror misconduct, caution is imperative.

If, early in the discussion, the judge explains the rules preventing jurors from being brought into court as witnesses to what occurred in the jury room during deliberations, and the exception for evidence of outside influences, then it is very unlikely the issue of jury misconduct will ever arise. If misconduct comes to the judge's attention, he or she is under an ethical requirement to disclose it to the attorneys involved so they can take any necessary action.

These recommended rules for judges debriefing juries will be useful in most

*Continued on page 12*

## JUROR STRESS IN IOWA: FICTION OR REALITY?

*Continued from page 11*

criminal cases. In fact, they will be effective in various types of civil cases, such as death cases or medical malpractice trials. In the author's own experience since 1985, these suggested rules have worked well in post-verdict jury conferences in over 150 criminal and many civil jury trials.

Jurors in difficult criminal cases often experience stress as a result of their service. The findings of the Iowa juror study may also apply to high impact civil cases. The judicial system should be sensitive to this fact and should respond appropriately. Debriefing trial juries, post-verdict, either by informal conferences with the trial judge or by formal professional sessions are both appropriate responses. Properly handled, debriefing juries post-verdict can help ensure continued public support for the American jury trial system without compromising ethical or legal values. Our trial courts will thus continue to peacefully settle disputes about appropriate behavior by enforcing shared community values of fairness and the rule of law. ❑

## NEW CASE SUMMARIES

*Continued from page 4*

tion. According to the Supreme Court, when a debtor obtains an additional remedy the denial of a right to a deficiency judgment is not warranted. Thus, the reduction of the bank's judgment by the amount of the excessive liquidation costs was a proper remedy for Ralph's. The Court also noted that Ralph's had received notice and then advised of the disposition of the collateral at all stages of the proceedings. The Court further noted that deficiency judgments could not he taken in cases where notice had not been given.

**3. *205 Corporation d/b/a The Tavern Restaurant v. Brandow*, No. 135-92-2009 (Iowa 1994).** (Court modifies damage award in trade secret and inducement of breach of duty of loyalty case.)

Facts: 205 Corporation hired Brandow to manage The Tavern, a restaurant. Brandow was provided with recipes for The Tavern's pizza sauce, pizza crust, and grinder sandwiches. The recipes for the pizza sauce and grinders were, prior to Brandow's employment, known by only two persons. The recipe for the crust was known by several current and former employees of The Tavern. Brandow was later terminated and he provided the recipes to another restaurant, also named as a Defendant. 205 Corporation sued claiming misappropriation of trade secrets and the inducement of the breach of a duty of loyalty not to disclose confidential information. A jury awarded $145,000.00 on the trade secret claim and $195,000.00 on the inducement claim. The parties participating in the appeal were the respective restaurants.

Decision: The issues on appeal were:

1. The substantiality of the evidence supporting the jury's verdict that the recipes derived independent economic value and were the subject of reasonable efforts to maintain their secrecy;
2. The duplicity of recovery by the Plaintiff;
3. That Iowa Code Chapter 540 (Trade Secrets) provided the exclusive remedy in this case and that the lower verdict should be the sum of the award; and
4. That the permanent injunction granted by the trial court was vague and overly broad.

The Court found that there was substantial evidence to support the verdict regarding the trade secret claim because the value of the recipes was established by testimony regarding the value of the restaurant and its popularity; as well as the fact that the owners had taken measures which were "reasonable under the circumstances" to conceal the ingredients of the recipes. The Court then found that the separate claims were alternative theories of recovery for the same injury and remanded the judgment to allow only one recovery for the Plaintiffs. In addition, the Court found that Chapter 540 of the Iowa Code did not pre-empt common law recovery in cases involving trade secrets. The Court further found that language preventing the Defendants from using recipes which were substantially similar to the Plaintiff's was not overly broad or vague. It should also be noted that the Court held that the evidence of damages was not speculative or uncertain based on the Plaintiff owner's own testimony.

**4. *Allen Stahl v. Preston Mutual Insurance Association*, No. 140-93-534 (Iowa 1994).** (Court denied Plaintiff's bad faith claim for denial of insurance as it was not filed within the one-year limitation of action provision in a fire insurance policy.)

Facts: Preston Mutual Insurance

*Continued on page 14*

## IN THE PIPELINE

*Continued from page 3*

criminal prosecution. Trial to a jury resulted in awards of $52,000 for economic loss and $700,000 for emotional distress.

Both during trial and in post trial motions, the Defendants argued that emotional distress damages are not properly recoverable in a legal malpractice action. In ruling on the Defendants' post trial motions the Court reduced the emotional distress award to $5,000 although adhering to its view that such damages were allowable under the facts of the case. The Court also reduced the jury's award of economic loss to approximately $14,000 which was the amount of the Plaintiff's attorney fees in the criminal case and undisputedly the only evidence of economic loss in the record. Both sides appealed. The recoverability of damages for emotional distress in a legal malpractice case is a primary issue.

The general rule in Iowa and elsewhere is that absent physical injury no recovery may be had for emotional distress in actions grounded solely in negligence. *Mills v. Guthrie County Rural Electric,* 454 N.W.2d 946, 852 (Iowa 1990). Iowa recognizes an exception to this general rule, however, "where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm." *Oswald v. LeGrand,* 453 N.W.2d 634, 639 (Iowa 1990). Thus, claims for emotional distress without physical injury have been allowed in the negligent performance of contractual services that carry with them "deeply emotional responses in the event of breach," as, for example,in the transmission and delivery of death messages, *Mentzer v. Western Union,* 62 N.W.1 (Iowa 1895), and in services incident to a funeral and burial, *Meyer v. Nottger,* 241 N.W.2d 911, 920 (Iowa 1976). The *Oswald* Court added to this list cases involving medical negligence in connection with child birth: "The birth of a child involves a matter of life and death evoking such 'mental concern and solicitude' that the breach of a contract incident thereto 'will inevitably result in mental anguish, pain and suffering.'" (Citation omitted) 453 N.W.2d at 639.

Iowa Courts have discussed the emotional distress issue in a legal malpractice context on one occasion in a case entitled *Kunau v. Pillers, Pillers, and Pillers, P.C.,* 404 N.W.2d 573 (Iowa App. 1987). In *Kunau,* the Court of Appeals was urged to allow recovery for the emotional distress flowing from a lawyer's negligent handling of a client's case. The Court refused. "We do not believe that our courts have recognized or should recognize a cause of action of negligent infliction of emotional distress arising out of the attorney-client relationship." *Id.* at 578. Case authorities from other jurisdictions are generally in accord, at least where the "interest" invaded is primarily economic, that is to say, where the emotional distress is a consequence of a separate property or monetary loss. *See generally,* Mallen and Smith, *Legal Malpractice* (3rd Edition) Section 16.11, p.903-904. Emotional distress damages have been allowed in negligence actions against attorneys retained to defend criminal prosecutions. *See Lawson v. Nugent,* 702 F.Supp. 91 (D.N.J. 1988), *Snyder v. Baumecker,* 708 F.Supp. 1451 (D.N.J. 1989). These courts reasoned that the professional relationship in such cases is predicated upon a liberty, and not solely an economic, interest which makes emotional distress a more reasonably foreseeable consequence of an attorney's negligence.

In the case presently pending before the Iowa Supreme Court, the Defendant lawyers were retained to process Plaintiff's Chapter 7 bankruptcy. Such an engagement would not appear to patently implicate a liberty interest such as in the criminal defense cases, nor does it involve the kind of service that carries with it a "deeply emotional response" in the event of breach such as in the cases involving transmission of death messages, mishandling of corpses, or child birth. Furthermore, the Plaintiff's subsequent prosecution for criminal fraud with its requirements of knowledge and intent hardly seems to be a reasonably foreseeable consequence of the act of negligence found against the Defendant lawyers. The Court's decision and analysis of the issue is certain to be important for those who defend professional liability claims.❑

# NEW CASE SUMMARIES

*Continued from page 13*

Association had issued a home-guard insurance policy to Allen and Gloria Stahl. The policy was in effect on March 4, 1990 when their home in Clinton, Iowa was destroyed by fire. Because the Stahl's marriage was ending, they filed separate claims with Preston Mutual for the fire loss. Allen's claim was denied because Preston Mutual's investigation revealed he had intentionally misrepresented "material facts and circumstances relating the extent of the loss claimed under the insurance policy." Relying on a policy condition, Preston Mutual declared the policy void as to Allen.

More than one year later, Allen filed a two-count petition claiming a breach of the insurance contract and a bad faith denial of his insurance claim. The district court granted Preston Mutual's summary judgment motion by applying the insurance policy's one year statute of limitations for the filing of any lawsuit. Stahl had argued the one year limitation did not apply because his claim for bad faith was an independent tort and not an action for breach of the insurance contract.

Decision: The Iowa Supreme Court affirmed the district court's grant of summary judgment, ruling the bad faith claim was a "disguised attempt to resolve a dispute as to Preston Mutual's liability for his [Stahl's] loss" and was therefore an action "on this policy." In so ruling, the Supreme Court denied the claim because of the one-year limitation of action provision in the policy.

The Court found it significant that Stahl failed to allege any additional acts or wrongdoing by Preston Mutual which might otherwise have given rise to a collateral or independent claim.

**5. *Freeman v. Ernst & Young*, No. 128-93-489 (Iowa 1994).** (Negligent misrepresentation applies only to those defendants in the profession or business of supplying information or opinions and because a released party could not be sued for negligent misrepresentation, the district court improperly applied the comparative fault act to the released party.)

Facts: This appeal arose out of a negligent action brought by a purchaser of a video rental business against the employer of an accountant who advised the purchaser concerning the purchase. The district court had found both the accountant's employer and the seller of the video rental business, a released party, negligent. Fault was apportioned between them and judgment entered against the accountant's employer for its proportionate share of the damages.

In selling the video rental business to the purchaser, the seller made certain statements which subsequently turned out to be false. In exchange for taking the business back, the seller was released from any claim arising out of the purchase agreement.

After a bench trial, the district court found the accountant to be negligent in making representations to the purchaser concerning the business's worth and what the transaction would cash flow. The Court assigned 25% of the fault to the accountant's employer and also found the seller to be 75% at fault. The Court also found the purchaser to be 0% at fault. The Court, however, did not specify how or under what theory the seller was at fault.

Decision: On appeal, the purchaser argued that any claim against the seller would have been based on a theory of fraud and since fraud was not "fault" under Iowa Code Chapter 668, the seller could not be assigned a percentage of fault.

In response, the accountant's employer relied only on a theory of "negligent misrepresentation" to support the finding of fault on the part of the seller. The Supreme Court analyzed whether or not the purchaser would have a claim against the seller for "negligent misrepresentation" and concluded no such claim would have existed against the seller. The Court concluded there were no facts in the record that supported a finding the seller was in the business of supplying information; rather, any representations made while negotiating the sale were made at arms length in a commercial transaction. As such, under existing Iowa law, the seller was not a person "engaged in the business or profession of supplying guidance to others" and therefore the tort of negligent misrepresentation did not apply. Accordingly the Supreme Court concluded the District Court was in error in assigning "fault" to the seller.❑


*"I'm sorry - our insurance company won't allow us to treat lawyers."*

# TEN WAYS TO SAVE MONEY ON LEGAL FEES

*Continued from page 5*

point, brotherly love surfaced and the firm begrudgingly agreed to the lower photocopy rate. Also, you must monitor bills, because even after you set this type of guideline, lots of firms are simply going to ignore it and gamble that you will be too busy to check invoice minutiae such as this. So. . . check closely.

3. **Reply promptly.** Be timely in answering interrogatories and producing documents. Avoid the need for follow-up correspondence and phone calls, which is billable. We know you're busy, but avoid costly follow-ups. Set a good example for your defense counsel in terms of responsiveness. How can you be exacting with counsel on turn-around when they have to chase you for call-backs and decisions on authority, tactics, etc.? Here is another example of where being conscientious not only saves you money, but has a positive impact on the caliber of service you receive from outside counsel.

4. **Make a defense kit.** On anticipated or recurring claims, such as those involving a product, for example, assemble a model defense packet to send to your outside counsel. Send product liability literature, and maybe even an exemplar product to your defense attorney. This reduces learning time, which is also billable. If you have repetitive claims involving the same product or allegation, assemble a "kit" for defense counsel's use. Contents might include: medical literature about the product, names of defense experts, product literature, suggested interrogatories, indexes of key documents available, etc.

5. **Remember—it's a case, not a crusade.** A civil suit will not vindicate your product. Be pragmatic. As a business professional, make a business decision. Does it really make sense to spend $30,000 defending a case that could settle for $10,000? Don't let emotion get in the way of reason. Why spend two dollars to save one?

6. **ADR is A-OK.** Consider alternative dispute resolution. Courts take too long and the legal process siphons money. Fast-track avenues can bring cases to a head earlier: non-binding or binding arbitration, mediation, rent-a-judge conferences. Don't rely on your own attorney to pose (or kill) these ideas. When their livelihood depends on billings, they may not favor faster alternatives.

> "We know you're busy, but avoid costly follow-ups. Set a good example for your defense counsel in terms of responsiveness."

Therefore, overcome this resistance by making it clear to your outside counsel that you are serious about using ADR. Keep asking on each case, "Why Isn't this case a candidate for ADR?" Better still, make "use of ADR" one criteria for attorney selection and publicize this amongst your outside counsel. Consider even "rewarding" your outside counsel who utilize mediation or arbitration. To overcome resistance, you must continually "preach the gospel" to have any hope that defense counsel will get religion.

7. **Meet on your lawyer's turf.** Meet with lawyers on their own turf, not yours! Why pay a lawyer $100) an hour to travel, when she may be billing from portal to portal? Too busy to travel? Fine, but just be aware that you may be foregoing some cost savings by failing to go visit the lawyer. Ever wonder why defense lawyers are so eager to take trips? Let's put it this way, if *you* were getting paid $100 an hour to travel, wouldn't your perspective on this chore change?

8. **Consider an in-house paralegal.** For a high volume of litigation, hire an on-staff paralegal. A paralegal can save you money by performing tasks that would otherwise be billed by lawyers on a time-and-expense basis. (One of my clients, a manufacturer of bone plates and fixation screws, successfully used this technique. The paralegal went to night law school, and is now the company's in-house counsel.) Lots of what the outside attorney is billing you for is glorified scut work. Necessary for case defense, but tedium nonetheless. If you can buckle down and perform these tasks, you can save yourself a bundle. Another bonus: you vividly demonstrate to outside counsel how committed you are to defending yourself. This can have a salutary effect on the lawyer's motivation to be your advocate and fight hard on your behalf. You also free up the lawyer to deploy his or her

*Continued on page 16*

# UPDATE ON AMENDED LOCAL RULES
## NORTHERN AND SOUTHERN DISTRICTS

By Richard J. Sapp, Des Moines, Iowa

A final proposed draft of new local rules for the Northern and Southern Districts has been prepared and is scheduled to go into effect on July 1, 1994. The local rules contain several significant changes, and all counsel should make an effort to obtain a copy of the newly amended local rules and study them.

Perhaps of most significance are the "opt out" options exercised by both the Northern and Southern Districts in regard to newly-amended Federal Rules of Civil Procedure. The new local rules specifically opt out of the initial disclosure provisions otherwise required by F.R.C.P. 26(a)(1)(A), (B), (C) and (D). By local rule, the Northern and Southern Districts have determined that these amended rules "shall not apply" to civil cases in either district.

The local rules also exercise the opt out option as to newly-amended F.R.C.P. 26(a)(2) regarding disclosure of expert witnesses (which would otherwise require the expert witness to prepare a lengthy signed report).

Also, the requirements of newly-amended Rule 26(d) prohibiting the parties from engaging in discovery prior to the Rule 26(f) scheduling meeting will also not apply to civil cases in the Northern and Southern Districts. The new local rules encourage the parties, however, to hold their mandatory 26(f) meeting of the parties "as soon as practicable." The new local rules require the parties to meet and confer within 120 days after the filing of the complaint and submit a proposed Rule 16(b) scheduling order and Rule 26(f) discovery plan for approval by the Magistrate Judge.

There are several other significant changes in the newly-amended local rules pertaining to the forms of appearance, use of facsimile transmissions to the courts seeking expedited relief from the court on pleadings or motions, and with respect to applications for attorney fees.

Copies of the newly-amended local rules should be available soon from the clerks of court in the Northern and Southern Districts, and all members are urged to obtain a copy of the local rules and study the new changes which have been made.❑

## TEN WAYS TO SAVE MONEY ON LEGAL FEES

*Continued from page 15*

talents to areas where they are better allocated.

9. *Help out on experts.* Be ready to recommend experts or help search them out. This avoids your lawyer having to reinvent the wheel. Long before you get sued, especially on product liability cases, start culling names of experts in your field, individuals you can later approach about being expert consultants or witnesses. Defense counsel will be happy to scour around for experts, all the time their meters are running. Save time—save money. Have the names and c.v.'s of these recommended experts ready for that unpleasant day when the sheriff arrives at your front door to serve you with suit papers. This also sends a message to counsel that you are well-prepared and that she better be too!

10. Stay awake! Tell counsel to send you a copy of all legal bills and expenses charged to your case. Advise your insurer of any discrepancies or things which seem out of line. Did Mr. Attorney charge one-fourth of an hour for a three-minute phone call with you? Do the charges look out of line? Bring this to your insurer's (and lawyer's) attention. This sends a positive message to counsel as well, besides having a salutary effect on their cost-consciousness.

So maybe you have insurance to cover legal fees. Why should you care? First, fees may be paid by you directly if they are within your self-insured retention.

Second if the bills are above your SIR and paid by the insurer, they may erode your coverage dollars if you have a defense-within-limits policy.

Third, legal fees are one component of loss ratios, which underwriters weigh heavily when pricing your renewal premium.

Finally, these techniques can be deployed for virtually all lines of insurance and risk exposures, insured and uninsured.

These tips can have a positive bottomline impact on your legal fees and, indirectly, on your insurance budget as well. By forming a partnership with your insurer—and your outside defense counsel—you can ensure that your interests are served in the most cost-efficient manner. In this way, your claim file will avoid being the golden calf, beckoning to be milked! ❑

*Kevin M. Quinley, CPCU, ARM, AIC, AIM is v.p. of risk services, MEDMARC Insurance Co. and Hamilton Resources Corp., Fairfax, Va. He approves of redacting, but only between consenting adults.*

# IDCA STANDING COMMITTEES

**Any member interested in serving on one of the Association's Committees listed below should fill out and submit the following application prior to the annual meeting. Present committee members need not reaply, but will automatically be reappointed unless they affirmatively indicate otherwise.**

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.

2. **ANNUAL MEETING**
   Assists president-elect in organizing annual meeting events and CLE program.

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.

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.

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 additions to IDCA recommended jury instructions.

6. **LAW SCHOOL PROGRAMS/TRIAL ACADEMY**
   Liaison with law school trial advocacy programs and young lawyer training programs.

7. **LEGISLATIVE**
   Monitor legislative activities affecting judicial system; advise Board of Directors on legislative positions concerning issues affecting members and constituent client groups.

8. **MEMBERSHIP**
   Review and process membership applications and communications with new Association members.

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.

10. **PRODUCT LIABILITY**
    Monitor current development in the area of product liability; act as resource for Board of Directors and membership on product liability issues. Advise and assist in amicus curiae participation on product liability issues.

11. **RULES**
    Monitor activities of ISBA and supreme court rules committees and monitor changes in Rules of Civil Procedure, recommend positions of IDCA on proposed rule changes.

## COMMITTEE APPLICATION

Please provide the following information and identify the committees on which you would be interested in serving. A brief summary of our committees and their functions is shown on the preceding page:

Name: _____
Address: _____
Firm: _____
Address: _____
Telephone: _____

### COMMITTEE REQUESTED

(indicate1st, 2nd and 3rd choice)

____ Amicus Curiae
____ Annual Meeting
____ Client Relations
____ Commercial Litigation
____ Jury Instructions
____ Law School Programs/Trial Academy
____ Legislative
____ Membership
____ Product Liability
____ Rules
____ Tort and Insurance Law

Please provide a brief summary of your interest in this area, experience, or attach a brief resume:

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_____

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_____ _____

(Date) (Signature)

Photo copy this application, fill out and return to:

Gregory M. Lederer
Simmons, Perrine, Albright & Ellwood
115 3rd St. SE, Suite 1200
Cedar Rapids, Iowa 52401-1266

THANK YOU FOR YOUR INTEREST

## 1994 IDCA ANNUAL MEETING
## SEPTEMBER 21 - 23

# *CELEBRATING OUR 30TH YEAR!*

The 1994 Iowa Defene Council Association Annual Meeting will be held ***Wednesday, September 21 through Friday, September 23*** at the Embassy Suites Hotel in Des Moines. IDCA president-Elect, Greg Lederer, is putting together an excellent CLE program. To help celebrate our 30th Anniversary, our reception Wednesday evening will be at the beautiful Botanical Center, and the annual banquet Thursday evening will be held at the elegant Des Moines Club.

The Board of Directors hope that the same Wednesday through Friday format used last year will make it more convenient for members to attend all seminar sessions and other events. It is anticipated that the seminar program will qualify for 16 hours of CLE credit, including 2 hours of ethics and at least 6 hours of federal CLE.

***The following is a list of speakers and topics to be presented at the annual meeting:***

**JURY SELECTION**
David W. Dutton
Waterloo, IA

**EXPERT WITNESSES & *DAUBERT***
Mark S. Olson
Minneapolis, MN

**IOWA SUPREME COURT REPORT**
Honorable Marsha K. Ternus
Des Moines, IA

**FEDERAL COURT REPORT**
Honorable Mark W. Bennett
Des Moines, IA

**LEGISLATIVE UPDATE**
Robert M. Kreamer
Des Moines, IA

**TRIAL BY VISUAL AID**
David L. Riley
Waterloo, IA

**RULES UPDATE**
William H. Courter
Cedar Rapids, IA

**COMMERCIAL LAW ISSUES**
Stephen J. Holtman
Cedar Rapids, IA

**ANNUAL APPELLATE UPDATE**
Amy H. Snyder
Davenport, IA

Steven L. Serck
Des Moines, IA

Leonard T. Strand
Cedar Rapids, IA

**WORKERS' COMPENSATION UPDATE**
Joseph M. Bauer
Des Moines, IA

**ALI AND THE RESTATEMENT OF TORTS**
Robert L. Fanter
Des Moines, IA

Professor Michael Green
Iowa City, IA

**MEDICAL MALPRACTICE**
Carole A. Freeman
Davenport, IA

**CRASHWORTHINESS**
Richard A. Stephani
Cedar Rapids, IA

Kevin M. Reynolds
Des Moines, IA

Tom M. Zurek
Des Moines, IA

**UNINSURED/ UNDERINSURED**
Ann Fitzgibbons
West Des Moines, IA

**INSURER/INSURED/DEFENSE LAWYER ISSUES**
Client Relations Committee

**AGRICULTURAL LITIGATION**
Greg G. Barnsten
Council Bluffs, IA

***PIERCE V. NELSON* AND MEDICAL DEPOSITION FEES**
Diane Kutzko
Cedar Rapids, IA

Registration materials and the complete CLE program will be mailed to association members in the near future. Non-members may contact DeWayne Stroud at 515-225-5608 for registration materials

*MARK YOUR CALENDARS NOW FOR ANOTHER OUTSTANDING AND ENJOYABLE ANNUAL MEETING!*

# FROM THE EDITORS

The time has come to correct a misnomer which has plagued the field of insurance litigation for the last 20 years. We refer to the Doctrine of Reasonable Expectations. Contrary to its name, the doctrine really has very little to do with "reasonable expectations" as that phrase is defined by the ordinary insurance consumer. When told of the existence of a Doctrine of Reasonable Expectations, a layman believes that if he is reasonable and expects coverage, he should get it. Unfortunately, too many plaintiff attorneys also take this literal view. But can they really he blamed in light of the simplistic label attached to a principle which is in reality much more complex than its name would imply.

How many frivolous lawsuits brought pursuant to the Doctrine of Reasonable Expectations would have been brought under a "Doctrine of Bizarre or Oppressive Exclusions" or a "Doctrine of Eviscerating Conditions"' Yet the latter two classifications clearly delineate the factors involved in a more accurate manner. In recent years the Supreme Court and Court of Appeals have both attempted to clarify this matter and emphasize the objective nature of the doctrine. *See Clark-Peterson Co. v. Independent Insurance Associates,* 492 N.W.2d 675 (Iowa 1992). However, until the name of the doctrine is modified to more accurately reflect the true nature of the relevant factors, insureds and their attorneys will continue to burden the courts with groundless reasonable expectation lawsuits. Consequently, we hereby decree that the Doctrine of Reasonable Expectations shall hereinafter be known as the Doctrine of Eviscerating Conditions.❑



**James A. Pugh**
**5400 University Avenue**
**West Des Moines, Iowa 50266**