defense UPDATE

The Iowa Defense Counsel Association Newsletter January, 1999 Vol. XII, No. 1

# THIRD-PARTY AUDITS

By John T. McCoy, Waterloo, Iowa

As noted by IDCA President, Mark Tripp, in his article in the October 1998 *Defense Update*, the use of third-party audits to control legal expense has been the subject of recent, sometimes heated, discussion among insurers, defense counsel and outside auditors. In an attempt to monitor and address issues arising from third-party audits in Iowa, the Client Relations Committee is soliciting input from IDCA members and any other interested parties.

The following background is not intended to provide an exhaustive evaluation of the tripartite (insured-insurer defense counsel) relationship in Iowa, but merely to offer a background for discussion and analysis of third-party audits. A "third-party audit" is being broadly defined as any review of an attorney's fee statement by someone other than an employee of the insurer.

**INSURER-INSURED RELATIONSHIP**

As you know, the insurer-insured relationship in Iowa arises from, and is defined by, the insurance contract. Beyond the express terms of the insurance contract, the Iowa Supreme Court has recognized reciprocal, common-law duties of good faith and fair dealing between the insurer and insured which have been described as "neither party will do anything to injure the rights of the other in receiving the benefits of the agreement." *See Kooyman v. Farm Bureau Mut. Ins. Co.*, 315 N.W.2d 30, 33 (Iowa 1982). In a third-party liability situation, the Supreme Court has recognized a heightened-duty standard for the insurer because the insurer is a claims professional who, normally by the terms of the insurance contract, controls the litigation. *Id.* Further, in special situations (ex. potential excess judgments), the insurer may owe the insured fiduciary duties which are not well defined, but which suggest that the insurer act primarily, but not necessarily exclusively, for the benefit of the insured. *See Wierck v. Grinnell Mut. Reins. Co.*, 456 N.W.2d 191, 194-95 (1990). *See also, North Iowa State Bank v. Allied Mut. Ins. Co.*, 471 N.W.2d 824, 829 (Iowa 1991) (dicta); *Pirkl v. Northwestern Mut. Ins. Ass'n*, 348 N.W.2d 633, 635 (Iowa 1984) (dicta); Restatement (Second) of Agency, § 13, Comment (a).

Therefore, based on the insurer's pecuniary interest (and sometimes exclusive pecuniary interest) in claim resolution and based on the insurer's contractual duty to defend and indemnify (within the policy limits) the insured, insurers have a substantial financial and professional interest in determining how cases are defended and resolved.

As a means to performing their professional obligations, and in an attempt to control and reduce litigation expense, certain liability insurers have implemented case control guidelines with varying degrees of success.

Third-party audits have been introduced as a means to control legal costs. It may be argued that these audits protect insurers from defense counsel who abuse fee arrangements. *See, e.g., Center Foundation v. Chicago Ins. Co.*, 278 Cal. Rptr. 13, 17-18 (Cal. App. 2 Dist. 1991) (billing of a total of 19,379.4 hours, including one attorney who charged for more than 24 hours in a single day and for 78 hours over a 4-day period).

Although reputable insurers and defense counsel agree that such billing abuses are wrong and should be eliminated, concerns have arisen whether third-party auditing of attorney billing statements is really an effective means of cost containment or may create more problems than it resolves.

**DEFENSE COUNSEL-INSURED RELATIONSHIP**

The defense attorney-insured relationship in Iowa is recognized as an attorney-client relationship. *See Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920, 923 (Iowa 1958). This relationship requires the defense counsel to perform all legal and ethical duties owed to the insured as if the insured had personally retained the attorney. *See, e.g., Iowa Code of Professional Responsibility for Lawyers*, Canon 4 (A Lawyer Should Retain the Confidences and Secrets of a Client) and Canon 5 (A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client). Despite the duty of confidentiality to the insured, the Iowa Supreme Court has recognized that defense counsel may communicate with the insurer

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# MESSAGE FROM THE PRESIDENT

Mark L. Tripp

## LONG RANGE PLAN

It is time for our organization to do some future planning and we can't undertake that job without the help of our membership. As promised at last year's Annual Meeting, the Iowa Defense Counsel is in the process of drafting its first Long Range Plan. Our Long Range Planning Committee is being chaired by Mike Weston. The following are members of the Committee: Mark Tripp, Robert Engberg, Marion Beatty, Robert Houghton, Doug Howard, Danette Kennedy, Gregory Lederer, David Phipps, Phil Willson and Jeff Wright.

We need to know what the membership wants and needs from the organization. We want to know what services and programs you would like to see provided. In an effort to gather the information we need to start the planning process, all IDCA members will be receiving a questionnaire in the near future. Please take the time to complete and return the questionnaire. The feedback we receive from you will serve as the foundation for our future planning efforts.

## ATTORNEY FEE AUDITS

I have received some feedback regarding my comments in the last issue of the Update relative to the attorney fee audits. The Iowa Defense Counsel is aware that many of its members are already dealing with issues related to the use of third party auditors. John McCoy and Sam Waters are co-chairing the Client Relation Committee. Our Client Relation Committee has been and continues to monitor the current developments in this area. In addition, the Iowa Defense Counsel is sending one of its officers to an Attorney Fee Conference to be held at the end of February. The conference is devoted in large part to addressing problems and issues relative to the use of billing guidelines and outside auditors. The faculty for the conference consists of attorneys in private practice and executives from some of the major insurance companies in the country. Over half of the conference is devoted to issues relating to billing guidelines and use of outside auditors.

Our intention is to gather as much information as possible regarding this important issue so as to provide some guidance to our members in dealing with these issues.

# EXCEPTIONS TO THE COLLATERAL SOURCE RULE OF EVIDENCE IN PERSONAL INJURY CASES

By John C. Gray, Sioux City, Iowa

## 1. INTRODUCTION

In the past twenty years, the Iowa Legislature has enacted two exceptions to the common law collateral source rule. Although the Iowa Supreme Court later limited the application of one of these exceptions with respect to evidence of workers' compensation benefits, the limitation is not as draconian as is commonly believed.

The common law collateral source rule applies both as a rule of damages and as a rule of evidence. As a common law rule of damages, the collateral source rule provides that damages awarded to a successful tort plaintiff are not to be reduced by benefits the plaintiff has or will receive from a third party unconnected with the tortfeasor. As a common law rule of evidence, the collateral source bars evidence of such "collateral benefits." *Schonberger v. Roberts*, 456 N.W.2d 201, 203 (Iowa 1990).

There are two significant statutory exceptions to the collateral source rule as applied to personal injury tort cases: Iowa Code § 149.136 and Iowa Code § 668.14.

Iowa Code § 149.136 is an exception to the collateral source rule as it applies to damages in medical malpractice actions. That section provides:

> "In an action for damages for personal injury against a physician or surgeon . . . *the damages awarded shall not include actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury, including but not limited to the cost of reasonable and necessary medical care* . . . and the loss of services and loss of earned income to the extent those losses are replaced or indemnified . . . from any source except the assets of the claimant of the members of the claimant's immediate family."

The purpose of that provision is "[t]o reduce the size of malpractice verdicts by barring recovery for the portion of the loss paid for by collateral benefits." *Toomey v. Surgical Services, P.C.*, 558 N.W.2d 166, 168 (Iowa 1997).

Iowa Code § 149.136 is an exception to the common law collateral source rule of damages. Theoretically, there is no need for the defendant to introduce evidence of collateral benefits in medical malpractice actions since plaintiff should not be allowed to introduce evidence of damages for which plaintiff has already been or will be compensated. Such evidence is irrelevant. Iowa Rule of Evidence 402. There are, however, cases where a judge will accept plaintiff's argument that past and future medical expenses are relevant to prove the extent of injury and admit them. Defense counsel is usually able to then persuade the court to admit evidence of collateral payment. When used as an exception to the common law collateral source of evidence, § 149.136, which allows evidence of payment pursuant to a state or federal program is broader than § 668.14, which excludes such evidence.

## II. IOWA CODE § 668.14

In 1987, the legislature enacted § 668.14, an exception to the collateral source rule of evidence. Iowa Code § 668.14 provides:

1. In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economical losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or the future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family.
2. If evidence and argument regarding previous payments or future rights of payment is permitted pursuant to subsection (1), the court shall also permit evidence and argument as to the cost to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.
3. If evidence or argument is permitted pursuant to subsection (1) or (2), the court shall, unless otherwise agreed to by all parties, instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating the effect of such evidence or argument on the verdict.
4. This section does not apply to actions covered by § 147.136.

Section 668.14, if applied properly, should prevent a plaintiff from "double dipping," *i.e.*, from recovering once from a collateral source and recovering again for the same injuries from the tortfeasor when the second recovery is not subject to any rights of indemnification or subrogation. The statute also provides protection against a double reduction, *i.e.*, a jury first reducing his award by the collateral benefits, and then repayment of those collateral benefits from the reduced recovery.

The appellate courts have determined that the purpose of the legislature in enacting § 668.14 was to prevent the

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# SETTLING COMPULSORY COUNTERCLAIMS: HOW TO AVOID COMPROMISING YOUR CLIENTS' RIGHTS BY SETTLING CLAIMS AGAINST THEM

By Merrill C. Swartz, Marshalltown, Iowa

Imagine you are an automobile insurance claims adjuster. A car accident involving Able, driver of car A, and Baker, driver of car B and one of your insureds. Able was seriously injured in the accident while Baker had mild complaints of pain after the accident. You believe that Able and Baker shared some fault in this accident, but that there is a good chance that Baker would receive a majority of the fault at any trial.

Able's attorney has filed a petition against Baker for strategic reasons but tells you that you do not need to hire defense counsel because she hopes to get this matter resolved without any further trouble. You receive a favorable settlement demand from Able's attorney. You decide to pay the demand in order to prevent what could be an enormous verdict against Baker, probably exceeding Baker's policy limits. Able executes a standard release and files a dismissal with prejudice in the action against your insured. You feel certain that Baker will be very pleased when you tell him that the claim against him has been timely settled. Unfortunately, you are dead wrong. When Baker tells his attorney that he has hired to bring an action against Able of your actions, he accuses you of fouling up any chance Baker had of recovering money from Able. He cites an Iowa Supreme Court case from 1959 and even threatens to bring an action against your company!

### 1. *MENSING v. STURGEON* AND *BROWN v. HUGHES*

Baker's attorney is not being ungrateful. He has analyzed the two holdings of *Mensing v. Sturgeon*, 250 Iowa 918, 97 N.W.2d 145 (Iowa 1959). In *Mensing*, the Sturgeons were in a motor vehicle accident with Mensing. The Sturgeons brought an action against Mensing claiming damages. Original notice was served on Mensing on May 23, 1954. Mensing made no appearance or answer in the case. On June 22, 1954, the Sturgeons executed a release of all claims to Mensing in exchange for $1,000. The Sturgeons also filed a dismissal with prejudice in the cause of action.

Some time later, Mensing commenced a suit against the Sturgeons for damages resulting from the accident. The Sturgeons claimed that the suit by Mensing was barred as a compulsory counterclaim under Rule 29 of the Iowa Rules of Civil Procedure. The Sturgeons also claimed that the settlement operated as a bar by agreement of any claim by Mensing.

The Mensing court agreed with the Sturgeons. It ruled that a dismissal with prejudice by a plaintiff is a final adjudication on the merits. Because of that conclusion, the court stated that:

> it must follow that Rule 29, the compulsory counterclaim rule, governs the instant case and supports the holding of the trial court. No counterclaim was filed by Mensing in the suit brought by the Sturgeons, although he had the opportunity to do so. Instead he elected to make a settlement with them and procure a dismissal with prejudice. His possible counterclaim, arising out of the same facts relied upon by the Sturgeons, was then barred by Rule 29. It was then matured; it was not the subject of a pending action; it was held by him against the opposing parties; and it did not require the presence of indispensable parties of whom jurisdiction could not be acquired.

*Id.* at 149.

In its second holding, the Mensing court also accepted the Sturgeon's alterative basis for affirming the dismissal of Mensing's action. The court held that the settlement and release of Sturgeon's claim was a bar by agreement of any claim by Mensing. The court held that because valid claims of Mensing and Sturgeon could not both exist, the act of payment by Mensing to Sturgeon in itself showed the intent of the parties that all causes of action between them were concluded.

The Iowa Supreme Court confronted a similar case in *Brown v. Hughes*, 99 N.W.2d 305 (Iowa 1960). The court utilized the bar by agreement rationale articulated in *Mensing* to dismiss Brown's case where Brown had settled an earlier claim made by the Hughes prior to Hughes bringing suit. The court there stated that if Brown had intended to settle with Hughes for a comparatively small amount so that he could then sue for a much larger sum, fair dealing required that he should have made it known. *See Waechter v. Aluminum Co. of Amer.*, 454 N.W.2d 565 (Iowa 1990) (holding that a settlement of an employment dispute barred a later suit by the employee where a reasonable person in the employer's position would not have expected the employee to accept the benefits of the settlement agreement and then sue the company).

### 2. ARE *MENSING* AND *BROWN* STILL GOOD LAW?

Iowa's substantive tort law has changed a great deal since 1959 when the *Mensing* case was decided. The adoption of comparative fault principles pursuant to Iowa Code Chapter 668 is one of the most obvious changes. Contributory negligence was in effect in 1959. Under contributory negligence, if both the driver of car A and the driver of car B involved in an accident were negligent,

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# ONE LAWYER LOOKS AT HIS PROFESSION

By David Hammer, Dubuque, Iowa

*Your lawyer in practice spends a considerable part of his life doing distasteful things for disagreeable people who must be satisfied, against an impossible time limit, and with hourly interruptions from other disagreeable people . . . and for his blood, sweat and tears, he receives in the end a few unkind words to the effect that he might have done better, and a protest at the size of his fee.*[1]

In the first half of the Nineteenth Century, Alexis de Tocqueville could declare of our profession that "the lawyers constitute the only enlightened class which the people do not mistrust . . . ."[2] But, today ours is a beleaguered profession.

With the current low view of the attorney, it may seem surprising that so many people wish to invade the lawyers' already seriously-diminished space. For example, we have the accountants, who are probably the greatest offenders with respect to invading the lawyer's turf, but who are also the most successful. (Accountants long ago convinced their clients that $150 to $200 per hour is not an unreasonable wage for their services, while lawyers have generally been unsuccessful in convincing their clients that even $100 an hour is an acceptable charge.) Almost all issues of taxation have been at risk to the lawyer, and except for those few specialists, and those generalists who do income tax returns for farmers, there is little left for the lawyer in the taxation area. This is not meant to be a criticism of accountants, for its is a growing profession, and lawyers should be quite competent to maintain their own turf, however, for reasons unknown to this writer, there has been little effort as a profession to resist the accretions of the accountants.

Another area of concern which the defense lawyer must now face involves the restrictions being placed on lawyers representing insurance companies with respect to the practice of their profession. For example, with some insurance companies, discovery cannot be commenced without advance permission, legal research cannot be begun without advance permission, and then only by associates, or partners willing to accept associate's charges. Then there is that despicable bane of all lawyers who represent insurance companies – a new business which critiques legal bills, and is paid on the basis of what reductions it generates in the fees.

There probably is no subject more likely to inflame a group of defense lawyers than this subject, but the tragedy is that it might fairly be regarded as a self-inflicted wound. The lawyer who is eager to "pad" his bill has been a recognized entity, both within and without the profession, for many years, and the overuse of depositions and the insanity of endless discovery of minutiae verges upon madness.

The cutting edge of computers and the use of the "fax" machine has been permitted to damage the legal profession with a magnitude of paper discovery and incessant demands (often requiring immediate response) which beggars the imagination, and with many lawyers providing three or four pages of "instructions" in each set of interrogatories or requests to produce. With a stringent meticulosity, we have permitted a paper beast to control our profession and our professional lives. (I can remember many years ago being laughed at by some of my partners when I suggested that one day every legal secretary would have a typewriter with a memory. At that time usually there was only one such machine in an office, and the legal secretary who received it was bitter at becoming a machinist, at least that was the complaint that I heard. Both she and the typewriter have long since been retired.)

I do not suggest that we return to the days of the scrivener when copy fees were significant, but there is a distressing willingness of the Bar to inundate one's adversaries with paper. As it is always easier to ask questions than to answer them, the result is much time spent on answering fruitless and futile questions. I early came to believe that there were probably only five or six inquiries in any case which were worth pursuing, and also early came to the knowledge that laying bare the personal life of your client's adversary is a doubled-edged weapon. (If your client wants his or her personal life disclosed, then perhaps he or she should go into politics, where such inquiries are increasingly prevalent.)

Nor has the judiciary been exempt from imposing cruel rules upon our profession. Some years ago when I was on the Supreme Court Advisory Rules Committee, there were also several member judges. That committee unanimously recommended to the Iowa Supreme Court that since we purported to have a unified court system, local rules should be abolished, and the same rules should apply, by logical necessity, to every court in the state. The chairman of the committee, unknown to the other committee members, procured an opinion from one or more law school professors who opposed the committee's recommendation. The Supreme Court eventually bought

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to permit the insurer to perform its duties under the insurance contract, at least as long as such disclosure is not unfairly prejudicial to the insured. *See Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920, 923-24 (Iowa 1958).

Section 215 of the Restatement (Third) of the Law Governing Lawyers, states as follows:

§ 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:

(1) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(2) the client consents to the direction under the limitations and conditions provided in § 202.

In the context of case-control guidelines, defense counsel may be faced with countervailing pressures to comply with business guidelines or to properly represent the insured. As demonstrated by cases addressing malpractice and bad faith, an insurer's substantial and legitimate interests in litigation expense do not diminish the duty for defense counsel to ethically, independently and zealously represent the insured. In fact, most Iowa insurers not only respect that obligation, but also consider such conduct necessary to properly defend their insureds.

Despite liberal discovery rules in Iowa, the Iowa Supreme Court has been hesitant to disclose information obtained by a liability insurer in defense of an insured. *See, e.g., Ashmead v. Harris,* 336 N.W.2d 197 (Iowa 1983). However, the use of third-party(outside) auditing, as opposed to an insurer's internal review of billing statements, raises certain ethical issues:

1. Does an attorney breach his or her duty of confidentiality to the client/insured or does an insurer breach its duty to act in good faith to the insured by allowing a billing statement, which may contain confidential or privileged information, to be submitted to an outside party not directly involved in representation of the insured? (This concern is increased with the trend for case guidelines to require more detailed billing statements.)
2. Does production of the attorney's billing statement to an outside auditor constitute a waiver of the attorney-client privilege or work product immunity regarding the disclosed information?

An author recently identified ABA'S Model Rule 1.6 as the controlling principle in most states' ethics rules regarding a client's confidences. See R. Mallen, "Guidelines or Land Mines? Preserving the Tripartite Relationship," Supplement to *For the Defense,* at 7-8 (August 1998). ABA Model Rule 1.6, in relevant part, states as follows:

(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....

If this standard of "informed consent" regarding outside auditing is eventually adopted in Iowa, query whether an attorney must provide the following information to the insured before the insured's consent is "informed.":

1. The nature and extent of any disclosure of the information (who will receive the information and whether such information is protected from secondary disclosure and how).
2. The potential adverse effects to the insured if the information is not kept confidential.

There are potential practical problems with implementation of this standard. First, even if insurers would include a boilerplate provision in the insurance contract to waive the insured's objection to outside auditing, such provision may not satisfy an attorney's ethical duty to independently evaluate the effect of such disclosure on the insured and duty to advise the client/insured accordingly. Second, it may be argued that an attorney is in a conflict-of-interest situation in advising an insured to disclose information contained in a billing statement due to the personal incentive to get paid. Third, it may be argued that there is not much incentive for the insured to give consent. As one author suggested:

> ... After a truly informed explanation, few insureds are likely to consent to that risk to save the insured the time and expense of reviewing the lawyer's bills.

R. Mallen, "Guidelines or Land Mines? Preserving the Tripartite Relationship," Supplement to *For the Defense* at 9 (August 1998). Fourth, who assumes the cost of this analysis and consultation?

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### INSURER-DEFENSE COUNSEL RELATIONSHIP

The insurer-attorney relationship is not well-defined in Iowa. *See Petersen v. Farmers Cas. Co.,* 226 N.W.2d 226, 227-31 (Iowa 1975); *Henke v. Iowa Home Mut. Cas. Co.,* 87 N.W.2d 920, 923 (Iowa 1958). The insurer-attorney relationship has been described as an attorney-client relationship, an employer-employee relationship, an employer-independent contractor relationship or a hybrid relationship of the above relationships.

However the insurer-defense counsel relationship is eventually defined in Iowa, the (express or implied) agreement between the insurer and defense counsel would appear to require duties quite similar to, but necessarily identical with, the attorney-client relationship. That is, the common-law contractual obligations of good faith (neither party doing anything to injure the rights of the other in receiving the benefits of the agreement) and of fair dealing (honesty in fact) would appear to apply to the insurer-attorney agreement, as well as the insurer-insured contract. Further, since the insurer, a claims professional, is retaining another claims professional, the defense attorney, there is arguably a reciprocal heightened-duty standard to use the knowledge, skill and ability ordinarily possessed and exercised by claims professionals in similar circumstances.

Therefore, the reciprocal concepts of good faith, fair dealing and heightened-duty standards would appear to afford protection to both insurers and defense attorneys in fulfilling their obligations to each other and to the insureds. If either the defense counsel or the insurer acts improperly toward the other or toward the insured, a very practical and efficient means to resolve the problem is to terminate the relationship. That is, if defense counsel is employing improper billing practices, a rather obvious resolution of the problem is to fire the attorney. If the insurer's case guidelines impede defense counsel from exercising independent professional judgment on behalf of the insured, the attomey may be ethically required to terminate the relationship.

In addressing case guidelines, insurers and defense counsel argue for the protection of their own interests. Insurers do not want defense counsel to "build battleships to cross creeks." Defense counsel do not want insurers to be "penny-wise and pound-foolish."

In Iowa, insurers and defense counsel have historically been able to listen to, and respect, the other's concerns and to avoid disruption of an effective tripartite relationship. As Mark Tripp noted in his October article, Iowa property and liability insurers have had lower combined ratios for losses and expenses as a percent of premiums compared to the rest of the industry since 1984 (referencing a recent article in the *Des Moines Register*). Both insurers and defense counsel have recognized that the survival of an effective relationship depends on each other and are willing to reasonably balance their own professional and business interests with the interests of the other parties within the tripartite relationship.

Outside auditing, however, introduces a new party who may not be concerned with maintaining a good tripartite relationship. An outside auditor is not bound by an insurer's duties of good faith and fair dealing with the insured. An outside auditor is not bound by the ethical obligations of an attorney to the insured. The financial existence of outside auditors depends on their ability to cut costs. Auditors do not have any real interest in maintaining a good insurer-attorney relationship, which relationship may be more effective in containing costs and defending the insured than any case guideline.

Experienced claim managers recognize the importance of good defense counsel and a good relationship with defense counsel, but claims representatives are being exposed to increasing business pressures. With the consolidation and downsizing of insurers, claim representatives are facing increasing case loads and reduced staff. Outside auditors advertise that they are available to review the billing statements to evaluate the effectiveness of legal counsel and to save expense. To outsource bill reviews reduces a claim representative's responsibilities, but concerns may arise if the auditor is not properly qualified to evaluate the litigation procedure, if the auditor is not sufficiently familiar with the facts of the case to make accurate evaluations, if the auditor is more concerned with short-term financial gain than maintaining any long-term relationship or if the auditor works for multiple insurance companies.

There is no question that there is a need to continually review case procedures and billing practices in order that both insurers and defense counsel are treated fairly within the tripartite relationship. If either party is treated unfairly, the relationship will deteriorate into an adversarial relationship much like we are witnessing on both coasts and in large urban areas. Bottom line, the members of the IDCA need to decide whether insurers and defense counsel will work together to

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address cost concerns or whether each group will exclusively attempt to protect its own interests.

By seeking input from IDCA members, it is hoped that outside-auditing issues may be addressed and proactively resolved before disrupting effective and valued relationships. If you, your office or company would have any input regarding the issue of outside auditing, please provide such input to the co-chairpersons of the Client Relations Committee:

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Fax: 515-278-3382

Mr. John T. McCoy
Yagla, McCoy & Riley, P.L.C.
327 East Fourth Str.
P.O. Box 960
Waterloo, Iowa 50704-0960
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Thank you for your assistance in this effort. ❐

## EXCEPTIONS TO THE COLLATERAL RULE . . . *Continued from page 3*

plaintiff from recovering duplicate damages to the extent that collateral benefits and tort recovery overlap. *Schonberger v. Roberts,* (456 N.W.2d, 202 Iowa 1990). Section 668.14 further protects the defendant from jury sympathy for the plaintiff. Juries will, it is believed, in a case where liability is sincerely disputed, sometimes find for the plaintiff in order to ensure that the plaintiff will not be left to pay any outstanding medical bills. Thus, allowing defendant to show that plaintiff's medical bills have been paid may prevent an incorrect verdict. Also, in other cases, undue sympathy for a "poor" plaintiff can be allayed by demonstrating to the jury that all of plaintiff's medical bills have been paid.

There are limitations to the use of Iowa Code § 668.14. First, the statute applies only to actions brought pursuant to the Comparative Fault Act. Thus, this section is not applicable to a claim based upon an intentional tort. *Carson v. Webb,* 486 N.W.2d 278 (Iowa 1992). Nor can defendant introduce evidence of collateral benefits in suits by employees against employers pursuant to Iowa Rule of Civil Procedure 97. *Baumler v. Hemesath,* 534 N.W.2d 650 (Iowa 1995). Also, as § 668.14 allows evidence of collateral payments for only "necessary medical care, rehabilitation services, custodial care, it does not extend to 'disability payments.'" *Collins v. King,* 545 N.W.2d 310, 312 (Iowa 1996). Similarly, evidence of payment of workers' compensation benefits which are for other than "necessary medical care, rehabilitation services, and custodial care" is not admissible under § 668.14. The Iowa Supreme Court, however, has not only excluded evidence of payment of disability benefits by workers' compensation carriers, but has also, in some cases, prohibited introduction of payment by a workers' compensation carrier of necessary medical care, rehabilitation services and custodial care.

The interplay of the collateral source rule, the employer's right to indemnity to under Iowa Workers' Compensation Law, and Iowa Code § 668.14 has caused diffficulty for the courts and commentators.

Under Iowa Workers' Compensation Law, an employer or an employer's insurer has a statutory right to be indemnified and to have a lien on any recovery or judgment entered in an action against a third-party tortfeasor. Iowa Code § 85.22(1) (1977); *Daniels v. HiWay Truck Equipment, Inc.*, 505 N.W.2d 485, 487 (Iowa 1993). Section 85.22 provides in part:

> When an employee receives an injury or incurs an occupational disease or an occupational hearing loss for which compensation is payable under this chapter, Chapter 85A or Chapter 85B, in which injury or occupational disease or occupational hearing loss is caused under circumstances creating a legal liability against some person, other than the employee's employer or any employee of such employer as provided in § 85.20 to pay damages, the employee, or the employee's dependent, or the trustee of such dependent, may take proceedings against the employer for compensation, an employee, or, in the case of death, the employee's legal representative may also maintain an action against such third party for damages . . .
>
> 1. If compensation is paid the employee, the dependent or the trustee of such dependent

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> under this chapter, the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payments so made, with legal interest, except for such attorney fees as may be allowed, by the district court, to the injured employee's attorney or the attorney of the employee's personal representative, and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable . . .

In *Schonberger v. Roberts,* a mail carrier was injured in an automobile accident during the course of his employment. He then sued the driver of the other car. During the course of the trial, the defendant's counsel sought to introduce evidence under § 668.14 regarding the payment of medical bills and other workers' compensation benefits to plaintiff. The trial court held the evidence inadmissible and the Supreme Court affirmed. Although the clear language of the statute, as pointed out by the minority opinion of Justice McGiverin, would seem to prevent such a result, the majority in *Schonberger* was concerned that to allow evidence of collateral benefits, would, in effect, result in a double reduction. The majority remanded the case to the district court for a determination whether the employer or its insurance carrier was entitled to the proceeds of any third-party recovery in accordance with Iowa Code § 85.22. If the plaintiff could establish that the indemnification requirements of § 85.22 are satisfied, and that the proceeds were pledged to reimburse the employer or its carrier, no evidence of collateral benefits is permitted. *Bride v. Heckart,* 556 N.W.2d 449, 455 (Iowa 1996); *Schonberger,* 456 N.W.2d at 203; *Loftsgard v. Dorrian,* 476 N.W.2d 730, 733 (Iowa App. 1991).

Justice McGiverin, in dissent, argued that § 668.14 was designed to prevent a double reduction and that evidence of previous payment of necessary medical expenses by the workers' compensation carrier should be admitted:

> Then, pusuant to subsection 3[of § 668.14] a jury should be instructed that if it finds liability it must find whether any of the plaintiff's claimed damages were or will be paid by collateral sources and, if so, how much. The jury should also be instructed to find whether any of those collateral services are subrogated to the plaintiff's recovery from the tort defendant. Next, the jury should be instructed that if it finds that such rights or subrogation do exist, the plaintiff's recovery from the defendant may not be reduced by the amount of those collateral benefits.

*Schonberger,* 456 N.W.2d at 205. The court of appeals in *Loftsgard v. Dorrian,* 476 N.W.2d at 734 found Justice McGiverin's minority opinion to be instructive and that it "may well set the tune that should be struck followed in cases where subrogation and indemnity rights are not statutorily prescribed." *Id.*

Although some commentators believe that *Schonberger* held that no evidence of payment made by the workers' compensation carrier is admissible, *see,* T. Riley, *Trial Handbook for Iowa Lawyers,* § 17.16 at 158 (1997), evidence of necessary medical care, rehabilitation services and custodial care paid by plaintiff's employer or its carrier pursuant to Chapter 85 should be admissible if there is no indemnity right under § 85.22 and thus no danger of double reduction.

Such evidence should be admissible when the employer or workers' compensation carrier has no right to any of the plaintiff's recovery because the carrier or the employer has waived or relinquished its indemnification and lien rights. *See, Pirelli-Armstrong Tire Corp. v. Midwest-Werner & Pfleiderer, Inc.,* 540 N.W.2d 647 (Iowa 1995). Additionally, such evidence should be admissible when the carrier has no statutory right to recover against the third party. For example, the workers' compensation carrier has no right to be indemnified from loss of consortium claims. *Estate of Sylvester v. Cincinnati Ins. Co.,* 559 N.W.2d 285 (Iowa 1997); the lien is not enforceable against an employee's medical malpractice claim, *Toomey,* 558 N.W.2d at 168 (Iowa 1997), and the workers' compensation lien does not attach to legal malpractice proceeds stemming from a personal injury suit against a third party. *Sladek v. KMart Corp.,* 493 N.W.2d 838, 841 (Iowa 1992). A workers' compensation carrier has no lien against any recovery made by an injured employee for underinsured motorist benefits. *March v. Pekin Ins. Co.,* 465 N.W.2d 852, 854 (Iowa 1991). Although not specifically determined in that case, the Iowa Supreme Court also indicated that a § 85.22 lien would also not extend to uninsured motorist benefits. If defendant insurance company admits it is liable to plaintiff, and plaintiff is able to prove causation and damages, the underinsured motorist claim is treated as a tort claim. *Johnson v. State Farm Auto Ins. Co.,* 504 N.W.2d 135, 138 (Iowa App.1993).

Defendant should be able to argue that plaintiff's medical bills have been paid if plaintiff voluntarily

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## EXCEPTIONS TO THE COLLATERAL RULE...

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introduces into evidence the amount of medical expenses incurred and the amount paid by the third party. *Loftsgard,* 476 N.W.2d at 735. However, to avoid a retrial, it is probably best to request that the court follow the procedures set forth in § 668.14(3) and as suggested by Justice McGiverin in his dissenting opinion in *Schonberger.*

Even in those cases in which the workers' compensation carrier has a valid lien pursuant to Iowa Code § 85.22, there is an argument that if the carrier and employee enter into and obtain an approved compromise special case settlement pursuant to Iowa Code § 85.35, that such settlement bars any statutory rights of indemnification.

Money paid prior to a § 85.35 settlement is subject to indemnification under § 85.22. Money paid under an Iowa Code § 85.35 settlement, however, is not "compensation . . . paid the employee . . . under this chapter" within the meaning of § 85.22(1). *Rich v. Dyna Technology, Inc.,* 204 N.W.2d 867 (Iowa 1973). Thus, money paid to claimant to effect a compromise special case settlement is not subject to indemnification. Any money paid pursuant to § 85.35 which is designated for necessary medical care, rehabilitation services or custodial care would be admissible in a claim against a third-party defendant. Since these § 85.35 payments will not have to be paid back to the carrier, there is no danger of a double reduction. There would be, however, a danger of "double dipping" if plaintiff were to receive both an award for future medical expenses from the workers' compensation carrier and from a jury.

A further procedural difficulty is engendered by the *Schonberger* decision. By remanding the case for proof that plaintiff's recovery is subject to subrogation, the court implies that if the employer or workers' compensation carrier has met the requirements of § 85.22, then any evidence of collateral benefits is excluded. The court, however, does not instruct as to who has the burden of proving compliance with Iowa Code § 85.22. Should plaintiff have to show compliance by the workers' compensation carrier with § 85.22 before excluding evidence under § 668.14, or should defendant have the burden to show that the workers' compensation carrier does not have a claim for indemnity under § 85.22? Or, should we follow established law which requires an employer or insurance carrier to prove facts required by the first sentence of § 85.22 in order to establish any right to subrogation or indemnification under Iowa Code § 85.22. *See, Disbrow v. Deering Implement Co.,* 233 Iowa 380, 9 N.W.2d 378 (1943).

### III. CONCLUSION

The Iowa Legislature enacted Iowa Code § 668.14, not only to prevent "double dipping," but also to prevent incorrect verdicts based upon jury sympathy. As set forth by the minority decision of Justice McGiverin in the *Schonberger* decision, the statutory framework of Iowa Code § 668.14 accomplishes these goals without exposing a claimant plaintiff to a double reduction. *Schonberger* did not impose a blanket prohibition on introduction of any collateral benefits paid by the workers' compensation carrier. There are clearly several exceptions to the limitation of *Schonberger* on admissibility of payments of collateral benefits allowed by § 668.14. Although such exceptions exist, it would seem to be much better, however, if the Legislature or the Supreme Court would overrule the majority opinion in *Schonberger*, and adopt the minority opinion propounded by Justice McGiverin. ❐

### WELCOME NEW MEMBERS

**Jeffrey L. Goodman**
West Des Moines, IA

**Dannette L. Kennedy**
Des Moines, IA

**Kevin J. Caster**
Cedar Rapids, IA

# SETTLING COMPULSORY COUNTERCLAIMS . . . *Continued from page 4*

neither could recover from the other. Today, one specific situation, **each** may be able to recover from the other. When both drivers are determined by a fact-finder to be 50 percent at fault for the accident, each may recover 50 percent of their damages from the other. *See* Iowa Code §668.3(1) (1997).

Have these changes to substantive law affected the law applicable to settlements of one side of a compulsory counterclaim? Iowa appellate courts have not decided this exact question. It seems likely that at least some of the principles of *Mensing* and *Brown* survive. The following sections will examine the vitality of both the "bar by agreement" holding and the compulsory counterclaim holding of *Mensing*.

**A. Bar By Agreement**

A strong argument can be made that a claim by injured party B against injured party A should not be extinguished merely because there was a settlement of the claim owned by A against B when B did not actually bring suit against A. Because of the change in the substantive tort law, a general release by A of B arguably does not bar B's claim because B possibly could have recovered damages at the same time A recovered damages. The rationale of *Mensing* - that valid claims of both parties cannot both exist - does not hold true today.

A court would likely leave to the jury the question of whether a general release of B was intended to bar B's claim against A. *See Robinson v. Norwest Bank. Cedar Falls, N.A.*, 434 N.W.2d 128 (Iowa App. 1988) (holding that where cross judgments in favor of a bank and in favor of its customers could coexist, it was a question of fact whether a prior release given by bank to the customers was intended to release the claim of customers against the bank). The effect of a settlement between parties is a matter of intention. *Casey v. Koos,* 323 N.W.2d 193, 198 (Iowa 1982). Even though the original rationale for the "bar by agreement" theory of *Mensing* and *Brown* may no longer exist for most tort settlements, the "bar by agreement" theory of Mensing may have been divorced from its original rationale so that an express reservation of rights is required to preserve a claim held by a party being released. *See Casey v. Koos,* 323 N.W.2d 193 (Iowa 1982) (holding that in the absence of an express reservation of rights, a settlement between parties disposes of all claims between them arising out of the event to which it related).

It makes sense to let the fact-finder determine whether a general release granted by one injured party to another was intended to settle all claims arising out of an incident. A jury is ideally equipped to make such determinations where the circumstances are not clear-cut.

**B. Compulsory Counterclaim**

The compulsory counterclaim basis for the decision in *Mensing* is likely still viable. Iowa Rule of Civil Procedure 29[1] has as its objective the avoidance of a multiplicity of suits. *Walters v. Iowa-Des Moines Nat. Bank,* 295 N.W.2d 430, 432 (Iowa 1982). It is designed to take care of all related issues in a single case. *Id.* When a dismissal with prejudice is entered in a tort claim, compulsory counterclaims held by the defendant in the original suit should be barred. A dismissal with prejudice pursuant to settlement is an adjudication on the merits of the claim. *Mensing,* 97 N.W.2d at 149; Iowa Rule of Civil Procedure 217.

Rule 29 is not limited in scope to tort claims. No reason is apparent why a change in the substantive tort law would or should change the effect of this procedural rule. When the defendant in a suit has a compulsory counterclaim against the plaintiff and settles with the plaintiff without asserting the counterclaim, the counterclaim should be barred as a matter of law.

*Mensing* was an extreme application of Rule 29. The claim that would have been a compulsory counterclaim was barred even though there was no pleading filed by the defendant prior to the dismissal of the original suit. Federal courts interpreting the almost identical Rule 13 have sometimes required that a pleading actually be filed before the compulsory counterclaim rule applied. Compare *Carteret Sav. & Loan Ass'n v. Jackson,* 812 F.2d 3 6 (lst Cir. 1987) (holding that a default judgment operated to bar a compulsory counterclaim even though defendant filed no answer) with *United States v. Thompson,* 262 F.Supp. 340 (S.D. Tex. 1966) (stating that a compulsory counterclaim need only be asserted if responsive pleadings are filed).

**3. THE EFFECT OF THE PRESENCE OF INSURANCE**

The potential for problems exists when an insured's defense is being handled by an insurance company. The insurance claims adjuster or defense attorney confronted with the chance to make a favorable settlement on behalf of an insured may have little knowledge of any injuries suffered by the insured in an accident. The adjuster or attorney should gain that knowledge in any case where the issue of a compulsory counterclaim may arise. Making a settlement without reserving the rights of an insured to bring an action could bar the insured from bringing suit at a later time.

There is the possibility that where the defense of an insured is controlled by an insurance carrier, the hold-

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## SETTLING COMPULSORY COUNTERCLAIMS . . . *Continued from page 12*

ings of *Mensing* may not be applied. In *Reynolds v. Hartford Acc. & Indem. Co.*, 278 F.Supp. 331 (D.C.N.Y. 1967), the court ruled that an insured's defense attorneys were not obligated to bring a compulsory counterclaim because the insured would not be barred from bringing what would otherwise be a compulsory counterclaim in a separate action. The *Reynolds* court took a flexible approach to Federal Rule of Civil Procedure 13(a), the federal compulsory counterclaim rule. It determined that it would be unfair to obligate the insurance company to pay for a prosecution of a claim and unfair to the insured to bar a legitimate claim simply because the insurance company refuses to bring the claim. This approach has been followed by various other courts. *See Becker v. Doubek*, 292 N.W.2d 72 (S.D. 1980) (court recognized exception to compulsory counterclaim rule when insurance company controls the action).

Iowa court's have not expressly addressed this issue. It is unknown whether insurance was involved in the *Mensing* or *Brown* cases. The control of a defense by an insurance company should be relevant evidence when determining whether the settling parties intended to settle all claims resulting from an incident. However, there is no reason to believe that the presence of insurance should make the determination of the settling parties' intentions a matter of law. Similarly, the application of Rule 29 should be unaffected by the presence or absence of insurance. Even though an insurance company may have practical control over the defense of its insured, both the insurance company and an attorney hired by it have a duty to look out for the insured' s best interests. This should include making sure its insureds are informed and have an opportunity to file compulsory counterclaims. To hold otherwise would deprive plaintiffs of the benefit of Rule 29 and subject them to multiple litigations merely because a defendant has insurance, a fact they have no control over.

### 4. HOW TO AVOID PROBLEMS

As is often the case for attorneys, a lack of information can be fatal. When a claim is made against a client, it is critical to determine whether the client has a potential claim against the claimant arising out of the same facts. If and when a suit is filed against your client, a compulsory counterclaim must be asserted against a plaintiff in a responsive pleading under Iowa Rule of Civil Procedure 29 or it is waived. And under the holdings of *Mensing*, no claim should be settled upon behalf of an insured without a determination of whether a client has a potential claim, regardless of whether suit has yet been filed against an insured.

When an attorney or other claim handler knows that a potential compulsory counterclaim exists, he or she must take steps to avoid compromising the client's right to bring such an claim at the appropriate time. If suit has not yet been filed against your client, you should have language in the release signed by the claimant that will be sufficient to reserve the right of your client to bring suit later on this accident.

It is possible that the claimant will not agree to that language. If so, the prudent course would be simply to refuse to settle the claim after full consultation with the insured. There is an unacceptable risk that a court would hold the intention of the parties to settle all claims to be a fact issue. This allows uncertainty to creep into a settlement, a place where certainty is rightly valued. If suit has been filed against your client, a defense attorney needs to determine through consultation with the insured and his or her personal attorney, if applicable, whether a compulsory counterclaim can or should be filed. If both the original claim and the counterclaim owned by your client simply cannot be settled at the same time, *In Re McClintock's Estate,* 118 N.W.2d 540 (Iowa 1962), answers the question of how to preserve your client's right to bring the counterclaim. In *In Re McClintock's Estate,* Brinker filed a claim for damages against McClintock's estate. The estate counterclaimed. Prior to trial, Brinker's claim was settled. A release was granted by Brinker to the estate which expressly reserved the rights of the estate to pursue its legal remedies against the releasing party. In addition, a dismissal with prejudice was entered that contained a similar reservation of rights to allow the estate to pursue its counterclaim. The Iowa Supreme Court Iowa Supreme Court distinguished the *Mensing* and *Brown* cases because the settlement documents therein did not contain a reservation of rights. The case was reversed to allow the estate to proceed on its counterclaim.

### CONCLUSION

In order to make a safe settlement of a claim when your client may hold a compulsory counterclaim, you need to have the following items: (1) full information about your client's circumstances and

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## SETTLING COMPULSORY COUNTERCLAIMS . . . *Continued from page 12*

intentions; (2) a release with appropriate language reserving your client's right to bring a claim against the releasing party; (3) a dismissal with prejudice, if necessary, with an appropriate reservation of rights of your client to bring a claim against the dismissing party. If you file an answer on behalf of your client, you or your client's personal attorney must assert any applicable compulsory counterclaim. If you ignore the consequences of getting a general release and a dismissal with prejudice, you may be placed in the unpleasant position of Mensing's attorney in attempting to explain why Mensing could not recover from Sturgeon due to the consequences of the attorney's actions. ❐

[1] Rule 29 states: "A pleading must contain a counterclaim for every claim then matured, and not the subject of a pending action, held by the pleader against any opposing party and arising out of the transaction or occurrence that is the basis of such opposing party's claim, unless its adjudication would require the presence of indispensable parties of whom jurisdiction cannot be acquired. A final judgment on the merits shall bar such a counterclaim, although not pleaded."

## ONE LAWYER LOOKS AT HIS PROFESSION . . . *Continued from page 5*

into what I viewed as a professional intrusion. As we are all aware, we continue to operate with a myriad of special local rules in each district in our state, some of which remain traps for the unwary.

Now if there is a group of people with less practical - as opposed to theoretical - knowledge of the operation of the law than law professors, I don't know where one would look to find such a group. Teaching law is one of the few professions in which no great experience in the practice of the law is required, and indeed, is apparently discouraged, yet since most lawyers regard themselves as natural-born instructors, I suspect that a respectable law school faculty could be obtained from adjunct professors who are practicing attorneys (an as yet largely untapped resource), and at no cost.

The lawyer who practices in more than one Federal court quickly learns that there are also a myriad of rules which govern the practice in that arena. One would think, that just as a unified court system in the State of Iowa would have or need no local rules, so also would there be no need for different local rules at the Federal level. That is not true, and the differences in the local rules in Federal court create judicial enclaves which can harry even the most indefatigable advocate; and if you think that local rules are becoming a thing of the past, you are wrong, for they continue to proliferate until it will quite literally take an act of Congress to address the matter, and then we will be obliged to consider whether that is a legislative infringement on the judicial process.

There also seems to be an untearful forgetfulness of lawyers once they become judges as to the care and treatment of the lawyer population. Some years ago I was having lunch with a cousin of mine who is a federal judge in California, and she mentioned that she had recently tried a certain case. My old lawyer hackles immediately were raised, as I pointed out to her that judges don't try cases, although I have heard many judges through the years use that verb to erroneously distinguish their role in a trial. Judges should hear cases and not try them. Is it not for the lawyer to try cases? It has been my observation over many years that generally the lawyers who make the best judges are former trial lawyers who, having tried their share of cases, are prepared as judges to permit the lawyers try the cases, and intervene only when there is a requested ruling or when the requirements of justice require the court to intervene.

We all know that the lawyer who ventures into a criticism of judicial policies or practices does so at his or her peril. Yet logically, as officers of the court, should lawyers not be permitted to make those criticisms as legitimate exercises in seeking an improvement in the system? Certainly the duty to show respect for the judiciary carries as a necessary corollary the obligation not to remain silent concerning matters which would improve the judicial system or the judiciary. But, sadly, has not any constructive criticism come to be regarded as an insult to the judiciary? We are obligated to show due respect for the judiciary, just as the judiciary is obligated to show due respect for lawyers as officers of the Court. However, respect is subject to a most significant qualification, the modifier "due."

The bloodletting of the legal pro-

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# ONE LAWYER LOOKS AT HIS PROFESSION . . . *Continued from page 13*

fession is also due in no small part to the professional rapaciousness of altogether too many lawyers, who confuse the sword of the advocate with the dagger of the assassin. Lawyers should be able to dispute issues with one another without personal battles resulting. There are usually more than enough legal issues without resorting to abuse or vendettas. Arts of the true advocate do not include character assassination.

The bifurcation of the bar into plaintiff's and defense bars is a tragedy, wisely avoided in England, and the consequences to the profession have been enormous and unfortunate. I believe it may be too late for any effective remedy to undo the consequences, and that there may always be a deep and mistrustful division. However, if we remember that we are all officers of the court, the cheap shot may be stayed, and the nub of the dispute resolved. Personally, I have never cared for the hawking of pain and suffering like snake oil; nor have I found comfort in the view that no plaintiff legitimately seeks compensation. The consequences of these strongly-held beliefs that pain is a commodity to be sold, and that everyone exaggerates their injuries, has not helped our profession. As we are a profession which deals with disputes, should we, as advocates, seek not to widen them, but to bridge them?

Unfortunately, much of the blame for the current state of our profession rests with the profession itself. Many older lawyers, if they speak candidly, will acknowledge that the changes of the last few decades have sullied the profession. And too many, had they to make the same decision today that they made many years ago, would not, regretfully, have made the same one.

We are a profession charged from the beginning with the pursuit of truth. Whatever happened along the way?

What has gone wrong with our profession? Perhaps the most basic problem is that we have become technicians of law and have too little appreciation of the connective tissue which binds the law to life, to literature, to history, and to that which makes our profession a quest. Aristotle taught that law is intelligence without passion. He was accurate, but yet wrong. O. W. Holmes, Jr., certainly our greatest American jurist, recognized this when he spoke about the law 85 years ago: "A man may live greatly in the law as well as elsewhere; there as well as elsewhere his thought may find its unity in an infinite prospective; there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable."[3]

Altogether too many who have just read these words of Holmes will smile at something alien and will puzzle, if at all, at his term "an infinite prospective." That very smile and that very puzzlement evidences precisely what is missing from our share vocation, and you will know from your reaction whether you are part of the problem, or part of the solution.

We, as lawyers, must never forget that which we were once reminded by another famous American jurist, Benjamin Cardozo: ". . . the quest is greater than what is sought, the effort finer than the prize ...."[4] We must declare with Justice Holmes: "Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart."[5] ❐

David Hammer is a Past President of the Iowa Defense Counsel.

[1] William L. Prosser, *Journal of Legal Education*, page 260

[2] *Democracy in America*, Chapter 16.

[3] *Profession of the Law, Speeches*, 23 (1913).

[4] Law and Literature, 164(1931).

[5] *Path of the Law*, 10 Harvard Law Review 457 (1897).

**"For What It's Worth"**

A local fledgling lawyer who was sitting in his new office waiting for his first client.

When he heard the outer door open, he quickly tried to sound very busy.

As the man entered the office, the young lawyer is on the telephone saying, quote:

"Bill, I'm flying to New York on the Mitchell Brother's thing; it looks like it's going to be a biggie. Also we'll need to bring Carl in from Houston on the Cimarron case. By the way, Al Cunningham and Pete Finch want to come in with me as partners. Bill, you'll have to excuse me, somebody just walked in..."

He hung up and returned to the man who had just entered, the young lawyer said,

"Now, can I help you?"

The man said, "I'm here to hook up the phone."

# IDCA LEGISLATIVE AGENDA FOR 1999

By Michael J. Weston, Cedar Rapids, Iowa

The Iowa Defense Counsel Association Board of Directors formulated its 1999 Legislative Agenda at its December meeting. Robert Kreamer, IDCA lobbyist, reported to the Board on the prospects for the passage of "tort reform" in the upcoming session. With the election of the first Democratic governor in 30 years, it is not expected that there will be sweeping tort reform in 1999. However, the IDCA will continue to advance legislative proposals designed to give all litigants fair access to the legal system. The 1999 IDCA legislative agenda is:

1. Maintain the legislative accomplishments of 1997;
2. Oppose any efforts that require mandatory mediations in civil cases;
3. Eliminate the 5% cap on the reduction of a Plaintiff's damages for failure to use a seatbelt/safety harness as provided in Iowa Code Chapter 321.445(4)(b); and
4. Repeal Iowa Code Chapter 228.9 so that psychological records and test data would be discoverable as our other medical records as provided in the Iowa Rules of Civil Procedure and Iowa Code Section 622.10.

Any members with questions or comments about these proposals or the positions of the IDCA on proposed legislation are encouraged to contact IDCA Legislative Chair, Mike Weston at Moyer & Bergman in Cedar Rapids, or Committee Co-Chair, Mike Thrall, at Nyemaster, Goode, Voigts, West, Hansell & O'Brien in Des Moines. □

# ADVANCE NOTICE

## 1999

### IDCA ANNUAL MEETING and SEMINAR

## SEPTEMBER 22, 23 & 24

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

**Registration Materials will be mailed the first week in August.**

# IS LAW HAZARDOUS TO YOUR HEALTH?

By Rebecca M. Nerison, Washington State Bar Association

Emily made partner last year. She enjoys a spectacular city view from her office windows - when she takes the time to look out. She has everything she has always wanted, yet feels enervated and guilty about not enjoying her success.

Edgar graduated from law school four years ago. He took a temporary job at a hardware store while looking for legal work, but his last employment interview was two years ago. He still works at the hardware store. Edgar feels hopeless and worthless.

Studies show that lawyers are more likely to be depressed than other professionals. I regularly see depression in the lawyers I counsel through the Washington State Bar Association's Lawyers' Assistance Program. Depression is often associated with feelings of loss, isolation, powerlessness and hopelessness. What is it about the law that causes this state of depression? What makes the law so hazardous to the health?

**Three environmental factors**

Law is a largely adversarial enterprise in which the winner takes all. Barbara Harper, director of our Lawyers' Assistance Program, believes it is often this adversarial attitude that contributes to depression. When lawyers relate continuously to the world in an us-versus-them/win-or-lose mode, interpersonal problems are inevitable.

In his 1994 book, The Soul of the Law7tn, psychotherapist and lawyer Benjamin Sells notes that his lawyer-clients frequently experience problems in maintaining close relationships. They are so into the habit of arguing that it's hard to break out of it when they're w with family, friends and colleagues. The interpersonal distance created by this fundamental disconnectedness often engenders feelings of isolation and misunderstanding. Sells calls litigation's fixation on winning "psychologically corrosive."

Another attribute of the law is what Sells calls the "tyranny" of the rational, objective mind. Lawyers must leave their feelings, beliefs and preferences out of their work. if a lawyer's world view differs greatly from the cause being advocated, an internal split can occur. This degree of objectivity and detachment may Lead to feelings of isolation from the true self and others.

A third d attribute of the law is its hierarchical nature. Law schools are rife with competition to earn the best grades and win the top jobs. Those who land in firms must then bill the most hours, make partner, lure the most (and richest) clients and win the biggest judgments. In recent years, the pressure to produce and compete successfully for clients has intensified as business loyalties shift and the number of lawyers grows. Failure to meet ever-rising standards equates with professional mediocrity and a loss of prestige and power.

**Personal factors**

Disillusionment with the practice of law is a common precursor to depression. It occurs when expectations don't match perceptions of reality. Despite modern cynicism, many lawyers have entered the law to help others, that is, "save the world." Some become lawyers for the financial rewards; others expect intellectual stimulation; and still others just like the idea of calling themselves lawyers—all goals easily thwarted in today's changing legal climate.

Many older lawyers complain that practicing law just isn't fun anymore. Younger lawyers looking for jobs or those who are underemployed struggle under the burdensome debt of student loans. Increasing competition results in more specialization, so many lawyers find themselves churning out work that is no longer challenging. All of these factors result in a loss of personal v vision.

Another occupational hazard for lawyers is the failure to honor body and soul. The pressure to bill thousands of hours can persuade the lawyer that there's no time for anything but work. Taking on others' problems and dealing with deadlines requires listening to everyone, but often neglecting one's self. Busy lawyers tend to neglect activities that nature has designed to nourish parts of the body other than the mind: nutrition, exercise, rest, recreation and the maintenance of relationships. Alcohol and other drugs (including caffeine) may become a quick fix for the symptoms of an impoverished spirit.

Likewise, reliance on money can entrap successful lawyers. They may realize they dislike their work but can't quit because of their inflated lifestyle. A person boxed in by financial obligations often feels powerless to change. Those who want a life apart from work struggle with the decision to leave the law. Some lawyers leave altogether; others change practice areas or settings to better suit their values.

**Law school**

Studies suggest that law students are four times more likely to get depressed than the general population. Sells points out that law school isolates students from the rest of the world by training them to view human pr problems problems objectively, intellectually and impersonally. Students feel reassured when their legal skills give them tools to solve others' problems,

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## IS LAW HAZARDOUS TO YOUR HEALTH . . . *Continued from page 16*

but those same skills prove useless in confronting their own feelings. Graduate students in other fields, such as medicine, are known to experience similar levels of depression during their training. But while these levels in other professions return to the national average, the level of lawyers' depression remains constant throughout their careers because the insidious internal processes that started in law school are perpetuated throughout the practice of law.

Humiliation and defensiveness is one of these processes. Barbara Harper believes that defending against humiliation becomes away of life for lawyers reminiscent of adolescent self-consciousness and the need to look good. She tells of watching a group of nicely dressed young lawyers who were drinking at a fashionable restaurant and loudly bragging to one another about their legal exploits. She could sense the feelings of powerlessness and fear underlying the arrogant behavior. This contributes to depression.

And w hat about the rate at which law schools are pumping out new graduates? In the state of Washington alone, 1,047 new lawyers were licensed in 1997, adding pressure to an already competitive job market. Many of these new lawyers are unable to find employment, so they go solo—something most law schools have not prepared them for. Sometimes they take non-lawyer positions that preclude them from future legal employment.

What are law schools thinking? Are they aware that the current supply exceeds the demand? Are they communicating this fact to eager applicants? Are they informing students of the emotional price they are likely to pay as they learn and practice law? In all fairness, many graduate schools, including psychology programs, are guilty of oversupplying a dwindling market, probably for similar economically driven reasons. Certainly, law schools bear some responsibility for the current and future psychological climate of the profession.

While it's true that there are many things lawyers can do to clean up their lifestyles, Sells sees their task as more fundamental. He encourages them to live lives that are "ordinary" in the sense that they remain in touch with the needs of the soul: savoring everyday sights, sounds, smells; reconnecting with passions deeply felt; being "erotically attached to the world."

Emily and Edgar already know how to work hard. Now they need to reintegrate. The big players—law firms, government agencies, law schools—must transform their environments into places where whole human beings can thrive. After all, law needn't be hazardous to the health. □

*The author is a psychotherapist with the Washington State Bar Association's Lawyers assistance Department. She has a Ph.D in counseling psychology and is a licensed psychologist. The Washington program is 10 years old, employs mental health professionals to counsel lawyers experiencing such problems as depression, substance abuse, and career concerns. Nerison is one of three psychotherapists on staff.*

# VIABLE Y2K SOLUTION FOR YEAR 2000

In response to growing concerns over year 2,000 computer problems, some have suggested that all computers be removed from the company by December 31,1999. Instead, everyone will be provided with an Etch-A-sketch. There are many sound reasons for doing this:

- No Y2K problems
- No technical glitches keeping work from being, done
- No more wasted time reading and writing emails
- No worry about inappropriate Internet usage.
- No need for network or software applications or support
- Others will not pester you to play with your computer

**Frequently Asked Questions (FAQ) for Etch-A-Sketch Technical Support:**

Q: My Etch-A-Sketch has all of these funny little lines all over the screen.
A: Pick it up and shake it.
Q: How do I turn my Etch-A-Sketch off?
A: Pick it up and shake it.
Q: What's the shortcut for Undo?
A: Pick it up and shake it.
Q: How do I create a New Document window?
A: Pick it up and shake it.
Q: How do I set the background and foreground to the same color?
A: Pick it up and shake it.
Q: What is the proper procedure for rebooting my Etch-A-Sketch?
A: Pick it up and shake it.
Q: How do I delete a document on my Etch-A-Sketch?
A: Pick it up and shake it.
Q: How do I save my document on my Etch-A-Sketch?
A: Don't shake it.

# Defending Liberty's Dream

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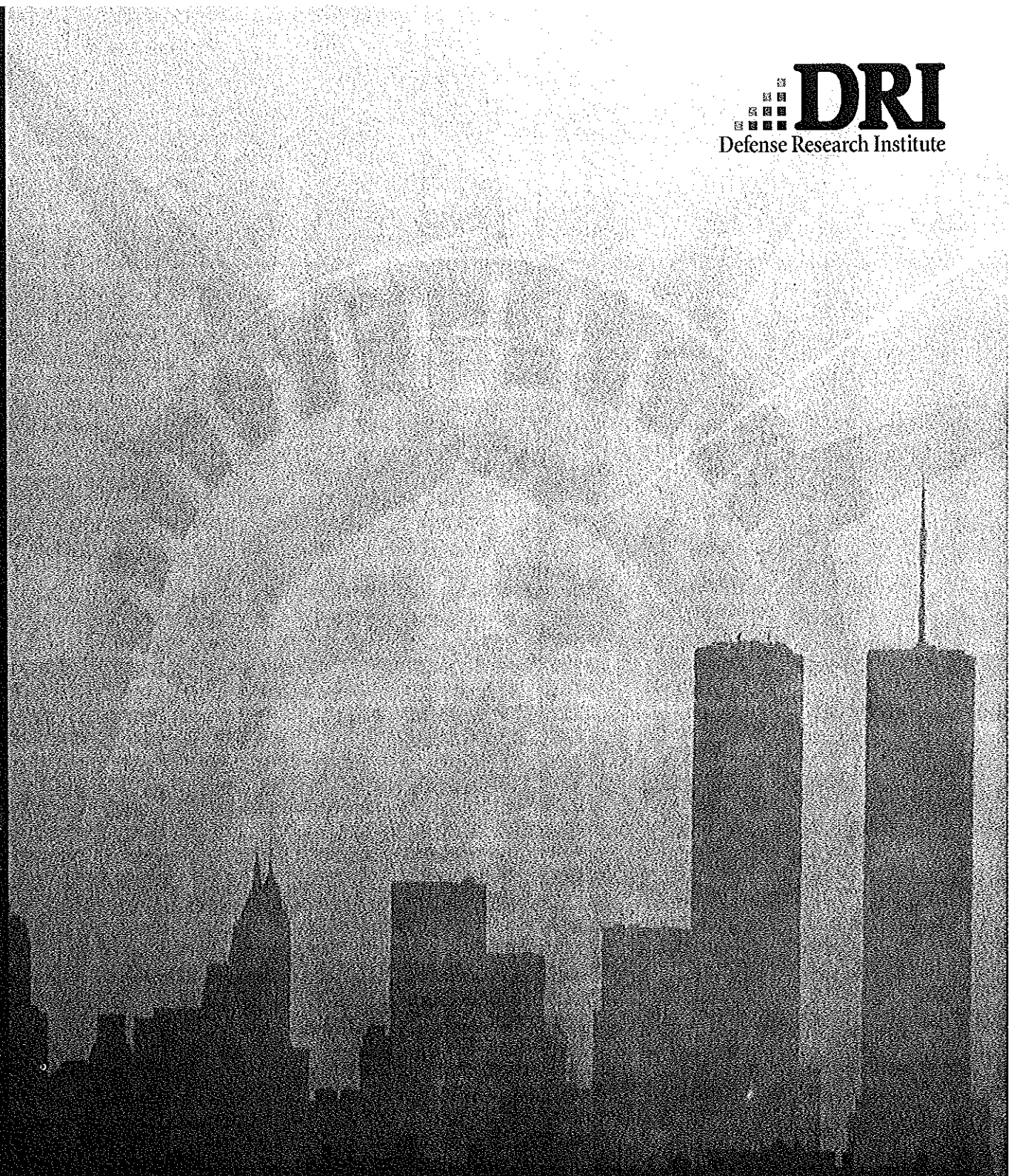
Defense Research Institute



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# Y2K HELP FOR LAW FIRMS

We've been hearing so much about the Year 2000 problem that we've almost turned a deaf ear to it. Is this like the doomsdayers who periodically predict the end of the world or should lawyers really sit up and take notice about a troubling problem that will soon be upon us? Time is running out - less than a year to go!

The following is a concise article written by David Vandagriff, a lawyer who formerly practiced in Missouri and who is currently employed with LEXIS-NEXIS. David provides "straight talk" on the Year 2000 problem and gives suggestions to pinpoint software problems before they occur on January 1, 2000.

## Try It! Simple Test Shows How Computers React Come Year 2000

By David Vandagriff, Esq.

***Want the straight talk on Year 2000? OK.***

Yes, you should worry about the perils the techno-pundits predict. Come Jan. 1, 2000, computers in banks, brokerage houses and even your modest law office will begin making costly errors. No, that future is not inevitable, especially if you manage a small law practice. That's right. This time being smaller and relying on more off-the-shelf computer solutions pays off. Because you have limited computer power, your firm can pinpoint Year 2000 software problems before Jan. 1, 2000. The procedure is simple - do it over a weekend and determine what software upgrades you need. By the way, don't count on your busines interruption insurance to cover any Y2K-induced problems. Insurance companies are rewriting policy exclusions, so unless you have a policy that renews in 2000, testing and upgrading is the better option.

**HERE'S HOW:**

***1. IDENTIFY POTENTIAL PROBLEM AREAS***

There are two classes of software where Y2K problems are likely to occur:

**A. Operating Systems - Think Windows, DOS or Mac.**

If you use Mac OS8 or Windows '95 or a more current version, your operating system is already Y2K compliant, that is, unlikely to cause you problems. However, older operating systems, e.g. DOS, Windows 3.1, etc., are not fully compliant. Use "1993" as your guideline. Was the software developed in 1993 or before? Count on upgrading. Developed after 1993? Check the publisher's web site for compliance details.

**B. Applications Software - Think time/billing systems, accounting/checkbook programs**

Watch out for that old time/billing program. It was expensive, wasn't it? And you've "tweaked" it dozens of times to fit your firm, haven't you? You're like many small practices -- you've avoided replacing it -- and now the publisher no longer updates it. That's why it's a good idea to test now. You've got time to shop for new essentials. And don't forget word-processing, spreadsheet and LEXIS-NEXIS research software. Again, if it was developed before 1993, count on upgrading. (Once you upgrade your spreadsheet software, also upgrade any spreadsheet templates you use.) Y2K-compliant LEXIS-NEXIS research software is already available -- and upgrades are FREE. See end of article for details.

***2. BACK UP EVERYTHING***

That is, make a tape or disk copy of every billing file, word-processed document, client folder and electronic calendar page. If it exists on your computer, copy it. It's worth some evening time for you or your office staff. You may need replacement data after the test is complete. Assemble your original system and application software disks in case you need to reload.

***3. MAKE IT 2000 TODAY***

Book a friday evening. After close of business, and after you back-up all files, re-set your firm computers. That's right. Re-set the initial date/time to Dec. 31, 1999 at 11:30 p.m. Then sit back and let the computer clock roll over to 2000. Run your average end-of-month billing. What happens? Then produce your regular reports such as payables and receivables. Run your spreadsheet and spreadsheet templates. Sign on to the LEXIS-NEXIS services. Check word-processing documents. What errors occur? Reload programs and data. Now you know where you stand. Upgrade as necessary. Want added reassurance? Year 2000 arrives on Saturday. Invite your colleagues to a system-checking party at the office before the bowl games.

**To Order FREE Y2K-compliant LEXIS-NEXIS research software upgrades:**

GO TO: lexis-nexis.com

Select the Year 2000 page; follow downloading instructions. Call: 1-888-Y2K-9265. LEXIS-NEXIS Customer Service will ship software within 2 - 4 weeks.

**Get A Free Copy of *Law Office Computing***

This author's favorite resource for information about hardware and software has long been *Law Office Computing* magazine. It looks like I'm in good company because, based on a survey conducted by the ABA Legal Technology Resource Center, 70.1% listed *Law Office Computing* as number one on the top ten list. A free trial copy of *Law Office Computing* can be obtained by visiting the magazine's web site at www.lawofficecomputing.com.

*David Vandagriff, director of technology alliances for LEXIS-NEXIS, is a former solo practitioner and technology columnist for the American Bar Association Journal. He is also the author of a number of software products for attorneys.*

# FROM THE EDITORS

The next few years will bc extremely interesting with Tom Vilsack as Governor. Governor Vilsack is closely allied with the Iowa Trial Lawyers Association. It has been reported that in prior years that organization has donated as much as $50,000 to defeat Terry Branstad (it is not known by this writer how much they may have contributed to the campaign of Mr. Vilsack). Members of the Iowa Defense Counsel Board, and those working on the Legislative Committee, arc well aware of Mr. Vilsack's opposition to some of our past proposals in the area of tort reform. His role on the Judiciary Committee presented an obstacle to many aspects of our legislative agenda. After the 1997 legislative session, a number of the leaders of ITLA decried the legislative changes of that year. Some of their editorials characterized the passage of certain measures as akin to the Saturday Night Massacre. All insurance companies were characterized as greedy and all plaintiffs as innocent victims.

There are those who legitimately question whether this mentality will control the Governor's legislative agendas. In the January issue of *The Iowa Lawyer*, Mr. Vilsack was asked a number of questions concerning his position on bar association reforms. Mr. Vilsack indicated that he was opposed to caps on recoveries. This should pose no great concern to the IDCA, as we have never supported caps. He also stated that he hoped the legislature would spend their time on issues such as education, health care and drug use rather than on tort reform.

It is probably unlikely that the Iowa Defense Counsel will see any major legislative changes in 1999. Our legislative agenda is a relatively modest one (see article by Mike Westin in this issue). What will be interesting is whether the plaintiff's bar will seek to aggressively push for changes which it deems favorable to its side of the case. If Governor Vilsack is true to his word, such changes are not a priority with him. In any event, the IDC Congratulates fellow lawyer Tom Vilsack and wishes him the best of luck. We look forward to working with him.



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