defense UPDATE

The Iowa Defense Counsel Association Newsletter Summer 2006 Vol. XV, No. 3

SPECIAL VERDICT FORMS IN EMPLOYMENT DISCRIMINATION CLAIMS

By: Frank Harty, Nyemaster Law Firm, Des Moines, IA

Introduction

Of late, a number of judges and members of the trial bar have bemoaned the imminent extinction of the American civil jury trial. Arbitration, mediation and other forms of alternative dispute resolution (ADR), together with runaway verdicts and burgeoning legal expenses, have reportedly played a role in drastically reducing the number of civil trials in Iowa's state and federal courts. Once leading advocates of court-sponsored settlement conferences, the federal judges of the Northern and Southern Districts now openly lament a caseload that consists almost entirely of criminal trials.

Last year in Iowa, very few cases were tried to conclusion before a jury in the federal courts. In all of Iowa's state courts, only 267 civil jury trials occurred. *Iowa Lawyer*, Vol. 66, No. 4, p. 12 (April 2006). Employment cases make up a majority of the civil docket in many of America's federal courts. This is true in both the Northern and Southern Districts of Iowa.

With the enactment of the Civil Rights Act of 1991, Congress effected a sea change in employment litigation. Cases that were once tried to the court are now the province of juries. In its decision in *McElroy v. State of Iowa*, 703 N.W.2d 385 (Iowa 2005), the Iowa Supreme Court followed suit. Iowa Civil Rights Act discrimination claims are now also tried to a jury.

Though employment trials are still somewhat common, the numbers appear to be dwindling. It is difficult to pinpoint a reason, but litigation costs, fee-shifting provisions and the perceived risk of "runaway juries" are common culprits often cited by experts. This may be a reason for the increased use of ADR in the employment setting. While some say that the increased use of ADR is good, others vehemently disagree. The federal courts in Iowa have nearly abandoned entirely the once robust court-sponsored mediation program. In recent addresses, Iowa's federal judges have made it clear they believe that a civil jury trial plays a vital role. In a recent ruling, Magistrate Judge Shields stated:

> [The Court's] comments are prompted by the recognition, and regret, that too few cases proceed to trial; far too much effort, and hope, seems to be directed toward the preparation of dispositive motions. . . . Too often, rulings on motions for summary judgment result more in immediate settlements of cases than they do in establishing the proper framework for a trial.
>
> . . .
>
> There is nothing wrong with cases going to trial. Trials tell the court and the lawyers what the community feels about legal conflicts.

See Gross v. Farm Bureau, No. 4:04-cv-60209 (S.D. Iowa Dec. 15, 2005).

continued on page 5

Inside This Issue

MESSAGE FROM THE PRESIDENT

Michael W. Thrall

REFLECTIONS

The fifth anniversary of 9/11 brought back a flood of emotions and memories. I still remember standing in the doorway of a partner's office watching the screen of a small black and white television as the first of the two towers crumbled under its own weight. My emotions flashed, both simultaneously and randomly, between disbelief, horror, anger, sadness, sympathy and resolve as I watched the events unfold that day. Emotions, I am sure, that were shared by all Americans in countless homes, offices, and factories across the Nation.

Reflecting after five years, I am struck once again by the resolve and strength of the American people and the need for the institutions that make this country great. If anything, 9/11 has fortified my resolve to work towards the preservation of these institutions. I have touched on several of these items in past letters, but they bear repeating.

It is essential that we preserve the independence of our judiciary. Questionnaires and surveys of judges by special interest groups simply have no place in the state or in this country. With upcoming judicial retention elections in the state, it is imperative that we all jealously guard Iowa's system of selecting judges and vociferously protect the independence of our judiciary. Please be active in resisting any efforts that would encroach on the independence of the Iowa judiciary.

We must assure that our courts are adequately funded and have the other resources necessary to dispense justice. Talk with legislative candidates in your districts and voice your concerns. Let the candidates know that you consider the adequate funding of the courts to be a priority of the Iowa legislature.

Voice your support of the Iowa jury. Do not foster criticism of this fundamental unique American institution by sitting silently by while it is criticized.

We have much to be proud of in Iowa. However, we must be diligent in protecting these fundamental institutions.

It has truly been an honor to serve as your President this past year. I am leaving the Association in excellent hands with President-Elect Mark Brownlee and an outstanding Board of Directors.

Thank you,

Michael W. Thrall

SOME "UNIQUE" DEFENSES APPLICABLE TO PUNITIVE DAMAGE CLAIMS IN IOWA

By: Kevin M. Reynolds and Nicholas O. Cooper, Whitfield & Eddy, PLC, Des Moines, IA

INTRODUCTION

Defense practitioners should be aware of certain defenses that are unique to punitive damage claims in Iowa. This article will briefly discuss some of these defenses, some of which may not be very well known or understood.

DEFENSE NO. 1: THE 'NOVEL THEORY' DEFENSE.

If a cause of action or theory of recovery has not before been adopted under Iowa law, then the defendant to such a claim should not be held liable for punitive damages. This makes sense; how can a defendant conform their conduct to the law, when the courts of Iowa have not even known what the law was? Moreover, why should the defendant be punished when they could not have known beforehand the conduct was actionable? Under Iowa's standard for punitive damages, how could a defendant's conduct be "willful and wanton" if the standard of conduct is unknown and unknowable? If plaintiff's theory of tort is completely unprecedented, new and novel, and has never before been adopted under Iowa law, any claim for punitive damages based on that claim should be dismissed. Iowa law is clear that an award of punitive damages is not proper or appropriate in a circumstance involving a new or novel theory of law. *See, e.g., Lara v. Thomas*, 512 N.W.2d 777 (Iowa 1994) (punitive damages should not be awarded when a new cause of action for retaliatory discharge is recognized); *Smith v. Smithway Motor Xpress, Inc*., 464 N.W.2d 682, at 687 (Iowa 1990) (same).

A trial court recently ruled in a defendant's favor and dismissed a claim for punitive damages based on this argument. *Kristina Ragsdale v. Walgreen Co*., Polk County Law No. CL 96316, ruling dated June 16, 2006 (Hon. Judge Glenn Pille) (unpublished). In *Ragsdale*, the plaintiff attempted to place tort liability on an employer based on an as-yet defined and unadopted theory of tort law in an employment context, to-wit, that an employer had a "duty" to provide an accurate employment reference for a former employee. The rule stated in *Lara* and *Smith* against punitive damages in such a situation applied with equal force in *Ragsdale* and Judge Pille dismissed the punitive damage claim.

The novel theory defense is not unique to Iowa. *See e.g., Hansen v. Harrah's*, 675 P.2d 394, 397 (Nev. 1984) (holding that it would be "unfair to punish employers for conduct which they could not have known beforehand was actionable in this jurisdiction."); *Clanton v. Cain-Sloan Co*., 677 S.W.2d 441, 445 (Tenn. 1984) (finding that "in future cases a successful plaintiff in a suit for retaliatory discharge will be permitted to recover punitive damages, however, since this is a case of first impression . . . punitive damages should not be recoverable); *Kelsay v. Motorola, Inc*., 384 N.E.2d 353, 360-62 (Ill. 1978) (holding that punitive damages may not be awarded where the cause of action was novel and "there was no statutory or judicial pronouncement which would have caused the defendant to believe it actionable."); and *Brown v. Transcon Lines*, 588 P.2d 1087, 1095 (Ore. 1978) (same). However, every jurisdiction utilizing this defense emphasizes the importance of the claim being completely novel and generally allow the potential for punitive damages to be awarded in all subsequent decisions. *See Id*.

DEFENSE NO. 2: ADVICE OF COUNSEL.

If a party conducts itself in good faith upon reliance of advice of counsel, then that party should be legally insulated against a claim for punitive damages. *See C. Mac Chambers Co. v. Iowa Tae Kwon Do Academy, Inc*., 412 N.W.2d 593 (Iowa 1987). A party relying on this defense generally must show an attorney-client relationship existed and counsel actually gave advice under authority. 22 Am. Jur. 2d *Damages §* 566 (2006). In *C. Mac Chambers*, the court noted:

> Nevertheless we do not think defendants' conduct here, though ample to form the basis for compensatory damages, was sufficiently wrongful to support a punitive damage award. There was no direct evidence of malice. Moreover, defendants' conduct was not so improper as to raise any

continued on page 9

CASE NOTE: (Parish v. ICON Health & Fitness, Inc., __ N.W.2d __ (Iowa 2006), filed July 21, 2006.)

Defective design under Restatement 3rd Products Liability Sections 1 and 2 requires proof of a reasonable alternative design. "Manifestly Unreasonable" exception to the reasonable alternative design requirement will be applied sparingly.

By: Tom Joensen, Des Moines, Iowa

I. Overview

Iowa adopted sections 1 and 2 of the *Restatement (Third) of Torts: Products Liability* in *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (Iowa 2002). In its recent decision, *Parish v. Icon Health & Fitness, Inc.*, ____ N.W.2d ____ (2006), the Supreme Court furthered its instruction on product liability by reviewing the application of the "manifestly unreasonable" exception to the reasonable alternative design requirement for defective design. As an issue of first impression, the Supreme Court found that the "manifestly unreasonable" exception should be sparingly applied.

The litigation arose after the plaintiff's brother, Delbert Parish, and another, Shelley Tatro, purchased a "Jumpking" trampoline for their backyard. After falling off the trampoline, the two bought a net enclosure that provided fall protection but offered only one entry point onto the trampoline. Later on, the plaintiff, James King, landed on his head while using the trampoline and was rendered a quadriplegic. Mr. King brought suit against the designer and manufacturer of the trampoline and enclosure.

Defendant Jumpking, Inc. moved for summary judgment on plaintiff's theories of defective design and negligence in failing to warn of the danger in using the trampoline. The District Court granted Defendant Jumpking's motion. On appeal, plaintiff maintained that there was a genuine issue of material fact on the design-defect claim and on the adequacy of Jumpking's warnings.

II. Manifestly Unreasonable Exception

Plaintiff asserted that the product met the manufacturer's design specifications, however, the specifications themselves created an unreasonable risk. Normally, under *Restatement* section 2(b), a plaintiff must show a reasonable alternative design existed and that the alternative design would reduce the foreseeable harm posed by the product. In this case, the plaintiff did not offer an alternative design; rather, he argued that a trampoline is inherently dangerous and that a reasonable alternative design was not achievable. The plaintiff argued that there is no safe way to use a trampoline in a backyard and the "manifestly unreasonable" exception to the alternative design requirement should apply.

In a straightforward manner, the Iowa Supreme Court rejected plaintiff's contentions. Citing to the *Restatement's* comments and other commentary on the subject of the "manifestly unreasonable" exception, the Court expressed its opinion that the exception is rarely applicable. Indeed, the Court noted, the exceptions to the requirement of a reasonable alternative design were originally "grudgingly accepted by the Reporters." Keith C. Miller, *Myth Surrenders to Reality: Design Defect Litigation in Iowa*, 51 Drake L. Rev. 549, 564 (2003). Furthermore, the Court supported the notion that "there may be times, …, probably non-existent, when a product might come to court, to you, that was so bad, so very outloud bad, so very antisocial, that it would tug against the very grain of the way you were raised[,]" and thus meet the exception. James A Henderson, Jr. *The Habush Amendment: Section 2(b) comment e*, 8 Fall Kan. J.L. & Pub. Pol'y 86, 86 (1998). Moreover, the Iowa Supreme Court noted, "a clear majority of courts that have faced the issue [of egregiously dangerous products being defective for that reason alone] have refused so to hold." *Restatement § 2*, American Case Law and Commentary on Issues Related to Design-Based Liability, at 87.

The Court then turned its attention to whether a trampoline's design is "manifestly unreasonable," and spent little space in dismissing that proposition. Trampolines are used by 14 million people and only 2.1% of trampolines were associated with injuries in 2002, and only one-half of one percent of jumpers were actually injured. Trampoline injuries ranked 12th in terms of product injuries; trailing such innocuous sports as basketball, bicycle riding, football, soccer, and skating. Plus, the Court found, trampolines demonstrate fundamental utility in cardiovascular workouts and other medical treatments. As such, the Iowa Supreme Court held that there was no

continued on page 14

SPECIAL VERDICT FORMS IN EMPLOYMENT DISCRIMINATION CLAIMS . . . *continued from page 1*

The Employment Jury Trial

Thus, with this backdrop, we address the task of saving the employment jury trial. One simple solution seems obvious. Iowa state and federal judges should adopt the use of special jury interrogatories and verdicts in employment cases. With the use of special interrogatories and verdicts, the courts can: (a) simplify complex cases for jurors; (b) reduce the costs of an appeal; and (c) minimize the role of improper juror prejudice in employment trials.

In many civil actions, a jury is forced to deal with matters that are entirely foreign. Most jurors, for example, have never dealt with a factual scenario like an industrial accident allegedly due to a product defect. Most have never entered into a substantial contract, other than perhaps a home purchase. While some jurors may have experience with automobile collisions or similar mishaps, most have never faced serious bodily injury or incapacity.

The employment case is different. Virtually every juror has experience in the workforce. Most jurors have experienced perceived injustice in the workplace and a substantial percentage of jurors believe they have witnessed or endured sex harassment, age discrimination or a similar perceived injustice. In a jury panel questionnaire used in a recent case tried by the author, nearly 25% of jury panel members claimed to have been victims of or knew victims of sex harassment. It, therefore, stands to reason that the risk of the injection of juror prejudice or passion is far greater in employment cases.

The increased cost of litigation is hard to quantify using empirical data. Nevertheless, anecdotal evidence indicates that litigation costs may be directly responsible for an increase in the settlement of employment claims. Once an employment claim makes it past summary judgment, an employer or insurance carrier knows that "the price to play" goes up substantially. Even prevailing at trial can be extremely expensive. Appeal costs and the potential cost of a retrial are even more costly.

With the development of the *Faragher* and *Ellerth* affirmative defenses, "determining cause" and "mixed motive" analyses involved in many employment cases, the cases involve fairly arcane and complex concepts. In such complex cases, courts are forced to reconcile the Fifth Amendment's due process guarantees with the constitutional right to a jury trial in actions at law. The Constitution dictates that the courts ensure fair dealing. *See In re Boise Cascade Sec. Litigation*, 420 F.Supp. 99, 104 (W.D. Wash. 1976). A competent and impartial jury is a linchpin to a fair civil jury trial. If a juror is unable to comprehend or assess evidence adequately, then a jury is unable to render a rationale decision and the parties are essentially denied the due process of law. *See Arnold: A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U.Pa.L.Rev. 829 (1980); *Jorde*, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 Calif.L.Rev. 1 (1981). Thus, due process requirements mandate that jurors understand and address all issues and decide facts in an informed manner.

Special Verdicts and Interrogatories

While not a panacea, the proper use of special verdict forms and written interrogatories under Rule 49 of the Federal Rules of Civil Procedure and Rule 1.931 of the Iowa Rules of Civil Procedure can help a jury in the difficult task of returning an informed decision. *See Skidmore v. Baltimore & Ohio R.R. Co.*, 167 F.2d 54 (2nd Cir.), cert. denied, 335 U.S. 816 (1948). *See also Wilson v. Humestead Value Mfg. Co.*, 217 F.2d 792, 800 (3rd Cir. 1954), cert. denied, 349 U.S. 916 (1955). Rule 49 provides as follows:

> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court

continued on page 6

SPECIAL VERDICT FORMS IN EMPLOYMENT DISCRIMINATION CLAIMS . . . *continued from page 5*

shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Rule 1.931 of the Iowa Rules likewise contemplates the use of "special verdicts, or answers to interrogatories." In *Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, No. 04-1893 (Iowa May 12, 2006), Justice Cady recently very adeptly outlined the difference between general verdicts, special verdicts and special interrogatories. A general verdict is one in which the jury simply finds in favor of one party or the other. A special verdict is one in which a series of questions is used to elicit answers to specific issues, while special interrogatories generally involve the use of responses to special questions that support a general verdict.

In *John Deere Health Care*, Justice Cady explained the differences among these various trial devices by likening them to a puzzle. The Court stated that in "the case of special verdicts, the jury merely gives the court the pieces, and the court assembles the puzzle and enters judgment. In the case of a general verdict with special interrogatories, the jury assembles the puzzle to complete the picture. If all the pieces do not fit together correctly, the court can see what went wrong and attempt to fix the puzzle instead of starting over again with a new jury." *See Cowan v. Flannery*, 461 N.W.2d 155, 158 (Iowa 1990).

Advantages of Special Verdicts

There are clearly a number of advantages to using written interrogatories instead of a primitive general verdict. *See SCM Corp. v. Xerox Corp.*, 463 F.Supp. 983 (D. Conn. 1978), aff'd and remanded, 645 F.2d 1195 (2nd Cir. 1981). *See also Ware v. Reed*, 709 F.2d 345, 355 (5th Cir. 1983). When a jury renders a general verdict, it has to make factual findings, comprehend an extremely long and detailed explanation of the law and reach a general verdict by applying the law to findings of fact. See *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 60 (C.A.2 1948).

On the other hand, the use of a special verdict compels a jury to focus on its role as a fact-finder. *See* D. Crump, W. Doraneo, C. Chase and P. Perschbacher, *Cases and Materials on Civil Procedure*, 723 (1987). This likewise enables the judge to apply the law to the jury's findings. This allows the judge to give shorter and clearer legal instructions to the jury. *See Lawrence v. Gulf Oil Corp.*, 327 F.2d 427, 429 (3rd Cir. 1967). The use of written interrogatories similarly compels the jury to pay special attention to specific points. *See* Driver, *The Special Verdict – Theory and Practice*,

continued on page 7

SPECIAL VERDICT FORMS IN EMPLOYMENT DISCRIMINATION CLAIMS . . . *continued from page 6*

26 Wash.L.Rev. 21, 24 (1951). This likewise simplifies the jury's task in a complicated case. At the very minimum, it requires jurors to organize their thoughts and address the matter logically.

Special verdicts and interrogatories also minimize the risk of compromise or sympathy verdicts. The use of special verdicts minimizes the risk of sympathy or prejudice because it is not readily apparent which party will benefit from a specific response. *See* J. Frank, *Court on Trials*, 127-140 (1950). *See also Ratigan v. New York Central R.R.*, 291 F.2d 548, 555 (2nd Cir.), cert. denied, 368 U.S. 891 (1961).

Perhaps most important, special interrogatories provide a means by which the jury's application of the law to the facts can be evaluated. Error can be "localized." By breaking up a jury's factual findings into smaller portions or categories, it is far easier for the trial judge on motion, and an appellate judge on appeal, to review and, where appropriate, modify the judgment without having to order a new trial.

Iowa courts have three options to address conflicts in answers to special interrogatories in a general verdict or special verdicts. If the interrogatory answers are internally consistent but inconsistent with the general verdict, the court may send the jury back for additional deliberations, enter judgment according to the special interrogatory answers or grant a new trial. *See Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, No. 04-1893 (Iowa May 12, 2006). Where, however, the interrogatory answers are internally inconsistent and, likewise, inconsistent with the general verdict, the court can only send the jury back for additional deliberations or order a new trial. In *John Deere Health Care*, the Court reversed the trial court after it had dealt with inconsistent interrogatory answers by "reconciling them" in attempting to divine what the jury had intended. The Court concluded this was reversible error and ordered a new trial.

Examples of Success

Two recent cases – one state and one federal – exemplify the way in which the use of special interrogatories or special verdicts streamline and economize the litigation process. In *Wilbur v. Correctional Services Corp.*, 393 F.3d 1192 (11th Cir. 2004), the plaintiff, Diane Wilbur, asserted claims of hostile work environment, quid pro quo sexual harassment and retaliation until Title VII and corresponding state law. After trial, the jury answered special interrogatories and rendered a general verdict for the plaintiff. The trial court concluded that the general verdict was irreconcilable with the answers to nine special interrogatories and entered judgment as a matter of law in favor of the employer. On appeal, the Eleventh Circuit held that the trial court judge appropriately exercised his discretion under Rule 49(b) and affirmed the judgment for the defendant.

The *Wilbur* case involved a fairly typical factional scenario, resulting in sexual harassment and retaliation claims. The plaintiff alleged that she was subjected to retaliation after rejecting the advances of a superior. *Id.* at 1195-96. The defendant alleged that the plaintiff was terminated for legitimate, non-discriminatory reasons. After trial, the court submitted to the jury a 10-question special interrogatory verdict form. Questions 1-5 addressed the hostile work environment claim and the employer's affirmative defense. *Id.* at 1197-98. Questions 6 and 7 addressed the quid pro quo harassment claim. Questions 8 and 9 addressed the plaintiff's claim of retaliation. In Question 10, the jury was asked to determine whether the plaintiff was entitled to emotional distress damages. The court's interrogatories and the jury's responses were as follows:

Did you find from a preponderance of the evidence:

1. That the Plaintiff was subjected to a hostile or abusive work environment because of her sex or gender?

   Answer Yes or No <u>No</u>

2. That such hostile or abusive work environment was created or permitted by a supervisor with immediate or successively higher authority over the Plaintiff?

   Answer Yes or No <u>No</u>

continued on page 8

SPECIAL VERDICT FORMS IN EMPLOYMENT DISCRIMINATION CLAIMS . . . *continued from page 7*

3. That the Plaintiff suffered damages as a proximate or legal result of such hostile or abusive work environment?

   Answer Yes or No <u>No</u>

4. That the Defendant exercised reasonable care to prevent and correct promptly any sexually harassing behavior in the work place?

   Answer Yes or No <u>Yes</u>

5. That the Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Defendant to avoid or correct the harm?

   Answer Yes or No <u>Yes</u>

6. That the Plaintiff was subjected by her supervisor or supervisors to a quid pro quo sexual demand or threat (as those terms are explained in the Court's instructions)?

   Answer Yes or No <u>Yes</u>

7. That the Plaintiff's employment was terminated because of her rejection of the quid pro quo sexual demand or threat?

   Answer Yes or No <u>No</u>

8. That the Plaintiff in good faith asserted claims or complaints of sex or gender discrimination?

   Answer Yes or No <u>No</u>

9. That the Plaintiff was then discharged from her employment because of her assertion of such claims or complaints?

   Answer Yes or No <u>No</u>

10. That the Plaintiff should be awarded damages to compensate for emotional pain and mental anguish?

    Answer Yes or No <u>Yes</u>

    If your answer is Yes, in what amount? <u>$25,000</u>

Id. at 1198.

The trial court concluded, and the Court of Appeals agreed, that the jury's responses showed that they flatly rejected the plaintiff's hostile work environment claim and that the jury accepted the defendant's affirmative defense. Based on this analysis, judgment for the defendant was granted and affirmed. The plaintiff claimed that the court erred in interpreting the jury's verdict. The plaintiff asked for a judgment in her favor for $49,000 or, in the alternative, a new trial. The Eleventh Circuit concluded that the jury's answers to the special interrogatories could not be reconciled with its damage award. The Court of Appeals explained that the trial court had three options when presented with the inconsistent jury responses. The court could: (1) enter judgment in accordance with the interrogatory answers, notwithstanding the general verdict; (2) return the jury for further consideration of its answers; or (3) order a new trial. The Court of Appeals suggested that the best alternative might have been to return the jury for further deliberations with a supplemental instruction indicating that negative responses to Questions 7 and 9 would foreclose an affirmative response to Question 10. The Court of Appeals held, however, that the trial court did not abuse its discretion in choosing instead to grant judgment as a matter of law. Id. at 1199-1203.

The *Wilbur* case points out the beauty of the use of special interrogatories in the context of sexual harassment claims involving affirmative defenses under *Faragher* and *Ellerth*. Had special interrogatories not been used, an irreconcilable verdict may have been entered or a new trial ordered. The decision illustrates the advantage of special interrogatories in reducing the cost and uncertainty associated with employment jury trials.

A recent decision by the Iowa Supreme Court further highlights the advantage of special jury interrogatories. In *Boyle v. Alum-Line, Inc*., 710 N.W.2d 741 (Iowa S.Ct. 2006), the plaintiff alleged that she was sexually harassed. The employer used a two-pronged defense, claiming first that the plaintiff failed to complain of harassment and second that it took prompt and effective remedial steps to end the harassment. The trial court submitted the matter to the jury on special interrogatories pursuant to Rule 1.931 of the Iowa Rules of Civil Procedure. The jury answered a series of questions with respect to factual is-

continued on page 9

SPECIAL VERDICT FORMS IN EMPLOYMENT DISCRIMINATION CLAIMS . . . *continued from page 8*

sues. After a defense verdict, the case was appealed.

On appeal, the Iowa Supreme Court, in an opinion by Justice Streit, examined the facts of the case and the jury's responses to the questionnaires and overturned the trial court's ruling. Rather than ordering a new trial, the Court used the responses to the questionnaires to conclude that a verdict should be entered for the plaintiff. The matter was remanded for damage calculation only.

Practice Pointers

If a court is reluctant to use special verdicts or special interrogatories, a trial brief citing authority encouraging the use of them should be helpful. While the form of verdict is generally a matter of trial court discretion, an argument can be made that the use of a general verdict in certain complex cases may constitute a denial of due process. *See Arnold, supra*.

Although cases will vary, in most instances a defendant in a complicated employment claim would be better off using special verdicts, as opposed to special interrogatories and a general verdict. The special verdict will, hopefully, force the jury to concentrate on its role as fact finder and may all but eliminate passion in the deliberative process.

When using special verdicts or special interrogatories, counsel should refrain from allowing the court to take a sealed verdict. As the court has stated, when parties agree to a sealed verdict, they "lose their right to have a verdict returned in open court where inquiry can be made into its findings." *See Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc*., No. 04-1893 (Iowa May 12, 2006) (citing Iowa Rule of Civil Procedure 1.931). It is, therefore, "not possible to use additional deliberations as a remedy for an inconsistency in a verdict when a sealed verdict is used in a case." *Id*.

Conclusion

If Iowa state and federal courts are truly interested in saving the jury trial in general, and the employment jury trial in particular, the use of special verdicts and special interrogatories will help achieve this goal. If, as Magistrate Shields opined in *Gross v. Farm Bureau*, one of the benefits of jury trials is that they "tell the Court and the lawyers what the community feels about legal conflicts . . .," then special verdicts are especially important because they enable "the public, the parties and the Court to see what the jury has really done." *Skidmore v. Baltimore & Orr*, 167 F.2d 54, 65 (2nd Cir.) cert. denied, 355 U.S. 816 (1948).

IDCA SCHEDULE OF EVENTS

December 1, 2006

IDCA Board Meeting
11:00 a.m. – 1:00 p. m.
The Suites of 800 Locust
Des Moines, IA

February 9, 2007

IDCA Board Meeting
11:00 a.m. – 1:00 p. m.
The Suites of 800 Locust
Des Moines, IA

April 13, 2007

2007 IDCA Spring Seminar
Des Moines Golf & Country Club
West Des Moines, IA
Topic: Products Liability

April 13, 2007

IDCA Board Meeting
11:00 a.m. – 1:00 p. m.
Des Moines Golf & Country Club
West Des Moines, IA

SOME "UNIQUE" DEFENSES APPLICABLE TO PUNITIVE DAMAGE CLAIMS IN IOWA . . . *continued from page 3*

> inference of malice. Rather, *defendants were acting on the advice of counsel* in a straightforward attempt to stay in business. Counsel undoubtedly believed our cases made this possible. We think not, but our disagreement does not render the situation appropriate for punitive damages.

Id. at 599 (emphasis added). The court went on to affirm a dismissal of the punitive damage claim in a case where it was contended that defendant had attempted to "hide assets" to avoid paying an amount due on an open account. *Id*.

Advice of counsel is a defense in other jurisdictions as well. *See, e.g., Stanton by Brooks v. Astra Pharmaceutical Products, Inc*., 718 F.2d 553, 14 Fed. R. Evid. Serv. 257 (3d Cir. 1983); *Perkins v. Stephens*, 131 Mont. 138, 308 P.2d 620 (1957); and *U.S. Through Farmers Home Admin. V. Redland*, 695 P.2d 1031 (Wyo. 1985).

The "advice of counsel" defense dovetails well with the Iowa punitive damage statute, Chapter 668A.1, and the standard of conduct set forth in the statute. A party who takes the affirmative steps to seek legal advice, and then acts in good faith upon that advice, could hardly be described as engaging in "willful and wanton disregard for the rights or safety of another." *See* § 668.1(1)(a) Iowa Code (2005).

Practice pointer: Asserting an advice of counsel defense requires separate trial counsel because the "advising" attorney will be a witness. Moreover, with the advice placed at issue, the related communications and the file of the advising attorney become discoverable. Trial counsel should consider the contents of the file and what the advising attorney would say under cross-examination before pleading the defense.

DEFENSE NO. 3: CHAPTER 668A 'PREEMPTS' THE FIELD OF PUNITIVE DAMAGES.

Chapter 668A was adopted by the Iowa Legislature in 1986 and was clearly an attempt by Iowa's legislative branch to engage in some "tort reform" in by making punitive damages more difficult to prove and obtain in this state. The original statute was later amended in 1987 when the initial mere preponderance of evidence standard of proof was changed to a "preponderance of clear, convincing, and satisfactory evidence." Iowa Code § 668A.1(1)(a) (2005). Prior to this time, Iowa followed a "common law" of punitive damages. This common law has had a variety of iterations and descriptions of "punitive damage conduct:" ill will, spite, hatred, contempt, gross negligence, recklessness and so forth. *See, e.g., McClure v. Walgreen Co*., 613 N.W.2d 225 (Iowa 2002) (punitive damages are appropriate only when actual or legal malice is shown; "actual malice" is characterized by such factors as personal spite, hatred, or ill will, while "legal malice" is shown by wrongful conduct committed or continued with a willful *or* reckless disregard for another's rights).

The adoption of Chapter 668A did not change the general prerequisite that the plaintiff must incur actual damages prior to an award of punitive damages. *Speed v. Beurle*, 251 N.W.2d 217 (Iowa 1977). However, the plaintiff must only show actual damages, the award of actual damages is not required. *Suss v. Schammel*, 375 N.W.2d 522 (Iowa 1985). The exception to this general rule is a shareholder derivative action. *Holden v. Construction Mach. Co*., 202 N.W.2d 348 (Iowa 1972).

Subsequent to the adoption of Chapter 668A, a convincing argument can be made that this statute "preempts" the field of punitive damages, and that no other standard should be applied when addressing a party's entitlement to exemplary damages, regardless of the underlying theory of liability. Although the statute itself does not use the word "preemption," its use of the word "shall" makes it clear that the prior common law is preempted by this statute. In section 1 of the statute, it states that the court "shall" instruct the jury on the applicable standard of conduct, and the jury "shall" make certain findings. *See* Iowa Code § 668A.1(1)(a) and (b). In section 2, any award under this scheme "shall not be made" unless the standards identified in section 1 are met. Further, the court "shall fix the amount" under the statute, and any damages "shall be ordered paid" in accordance with subsection 2(a), and a certain share "shall be paid to the claimant." *See* Iowa Code § 668A.1(2)(a). The mandatory lan-

continued on page 11

SOME "UNIQUE" DEFENSES APPLICABLE TO PUNITIVE DAMAGE CLAIMS IN IOWA . . . *continued from page 10*

guage of the statute, which applies whenever any claim for punitive damages is made, is clear. The practical effect of such an interpretation would be that punitive damages would no longer be recoverable for: ill will, hatred, spite, contempt, and mere acts of recklessness or gross negligence, for example. The problem with continuing to apply the prior, common law of punitive damages, even after the adoption of § 668A.1, is that it is contrary to the dictates of the statute, and in doing so, it "waters down" the heavy burden that the legislature intended to apply to such claims.

To conclude, any time that a plaintiff seeks punitive damages based on "ill will, spite, hatred, contempt, gross negligence" and the like, the defense should argue that such does not state a claim upon which any relief can be granted, and is subject to a motion to dismiss or motion for summary judgment. Only if the elements of § 668A.1 are met and the plaintiff shows actual damages, should a claim for punitive or exemplary damages be allowed to proceed.

DEFENSE NO. 4: A CORPORATION OR PRINCIPAL IS NOT NECESSARILY LIABLE IN PUNITIVE DAMAGES FOR THE CONDUCT OF ITS EMPLOYEE OR AGENT.

Under Iowa law, corporations are only responsible for punitive damage claims based only upon the actions of: (1) high-level employees who are (2) acting within the scope of their authority. *See, e.g.*, Iowa Uniform Civil Jury Instruction No. 210.3 (Punitive Damages Against a Principal or Employer) (July 1998). In this situation, a plaintiff must prove one of the following:

a. That the principal or employer or managerial agent authorized the act and the way in which it was done; or

b. The employee was unfit and the employer was reckless in employing or retaining him or her; or

c. The employee was employed in a managerial capacity and was acting in the scope of employment; or

d. The employer ratified or approved the act.

See Bethards v. Shivvers, Inc., 355 N.W.2d 39 (Iowa 1984); *Briner v. Hyslop*, 337 N.W.2d 858 (Iowa 1983); and *Restatement (Second) of Torts*, Section 909 (1979). There may very well be situations where a plaintiff has a claim for punitive damages against an individual person, but does *not* have a claim against the employer of that person based on vicarious liability under *respondeat superior*. In some cases, the claim against the person may be uninsured and the party with the liability insurance, the employer, may be insulated from punitive damage liability under this defense. *Compare Seraji v. Perket*, 452 N.W.2d 399 (Iowa 1990) (punitive damages may be imposed against an employer who has acted with legal malice, even if the act of the employee which gave rise to the tort claim was merely negligent) with *Rowen v. Le Mars Mut. Ins. Co.*, 282 N.W.2d 639 (Iowa 1979) (holding an assessment of punitive damages against the company would not serve the purpose of punitive damages).

This issue often comes up in the following way, as it did in the *Ragsdale* case, discussed supra. Oftentimes a plaintiff will file suit against the corporation, and not name the employee personally in the suit. If the claim also includes a punitive damage allegation, depending upon the facts of the case, the corporate defendant may be able to show that the actions taken were not within the employee's scope of authority and as a result, the corporation is not liable for punitive damages. As a matter of litigation strategy, it may be best to "lay in the weeds" on this defense, at least until the applicable statute of limitations on plaintiff's claim personally against the employee has run.

DEFENSE NO. 5: PUNITIVE DAMAGES CANNOT BE AWARDED AGAINST A DEAD PERSON.

Just as it is true that you cannot "defame" a dead person, a correlative rule is that punitive damages cannot be awarded against one who is deceased. *Rowen v. Le Mars Mut. Ins. Co.*, 282

continued on page 12

SOME "UNIQUE" DEFENSES APPLICABLE TO PUNITIVE DAMAGE CLAIMS IN IOWA . . . *continued from page 11*

N.W.2d 639, *appeal after remand*, 347 N.W.2d 630, *appeal after remand*, 357 N.W.2d 579 (Iowa 1979); *Wolder v. Rahm*, 249 N.W.2d 630 (Iowa 1977) (right to punitive damages does not survive wrongdoer's death); *Amos v. Prom*, 115 F. Supp. 127 (S. D. Iowa 1953) (punitive damages cannot be recovered against a personal representative of a decedent); *Sheik v. Hobson*, 64 Iowa 146, 19 N.W.875 (1884) (although death action survives the decedent, a claim for punitive damages does not lie against the personal representative). However, other jurisdictions do not subscribe to this defense and a claim for punitive damages may be pursued against the estate of the tortfeasor. *See e.g,. Haralson v. Fisher Surveying, Inc*., 31 P.3d 114 (Ariz. 2001); *Estate of Farrell ex rel. Bennett v. Gordon*, 770 A.2d 517 (Del. 2001); *G.J.D. v. Johnson*, 713 A.2d 1127 (Pa. 1998).

Query: Since the public-policy basis for the invocation of this rule is there is no one left to "punish," if a corporation goes out of business or ceases to exist after an accident, does this insulate it from a claim of exemplary damages? In a somewhat analogous situation, in Iowa the Court has held that fault may not be assessed against a bankrupt or insolvent defendant under the Iowa Comparative Fault Act. *See Spaur v. Owens Corning Fiberglas Corp*., 510 N.W.2d 854 (Iowa 1994); *Pepper v. Star Equip. Ltd*., 484 N.W.2d 156, 158 (Iowa 1992). By way of analogy, if fault cannot be assessed against a defendant corporation, what principled basis would exist for permitting an assessment of punitive damages against such an entity? Some cases have held that punitive damages are not proper against a successor corporation, since the original entity is no longer in existence and is not being punished. *See, e.g., Bowen v. W. R. Grace & Co*., 781 F. Supp. 682 (D. Mont. 1991) (*applying Montana law*) (while a successor corporation may expressly assume the liabilities of its predecessor as part of an acquisition, the liability of the successor applies only to compensatory damages and not to punitive damages). At present, this precise issue has not been answered under Iowa law.

Query: Can an employer be liable in punitive damages for mere recklessness in hiring or retaining an unfit employee, if Chapter 668A requires intentional wrongdoing? Arguably not, if the conduct at issue does not fit the statutory mandate of "willful and wanton disregard for the rights or safety of another."

DEFENSE NO. 6: THE IOWA PUNITIVE DAMAGE STATUTE REQUIRES INTENTIONAL CONDUCT BEFORE PUNITIVE DAMAGES MAY BE AWARDED.

Pursuant to § 668A.1(1)(a), before exemplary damages can be awarded a plaintiff must prove by a preponderance of clear, satisfactory and convincing evidence that defendant's conduct amounted to "*willful and wanton* disregard for the rights or safety of another." (Emphasis added). Under the law, "willful" means "intentional." Further, the term "willful" is used in the conjunctive with "wanton," and not in the disjunctive. *Id*.

The Iowa Legislature passed this statute in 1986. It was intended to be a part of a "tort reform" package, but this fact has been lost on many litigants and courts alike. *See* Commission to study liability and liability insurance concerns; 86 Acts, ch. 1211, §44. This tort reform effort was further buttressed by an amendment to the statute in 1987, which added a heightened burden of proof of "clear, convincing and satisfactory preponderance of the evidence." *See* 87 Acts, ch 157, §11, SF 482; Iowa Code § 668A.1(a). When viewed in this context, it is clear that the Legislature intended to make punitive damages *more difficult* to obtain, not easier, as compared to the prior "common law" of punitive damages.

Many reported appellate decisions in Iowa overlook or ignore the plain language of this statute requiring proof of an *intentional* act. One way in which this high standard has been circumvented is by interpreting the term "willful" in the statute to mean simply a mere "intent to act." This is what the court did in *McClure*, discussed *supra*. However, when viewed in the context of a claim which must involve conduct of an egregious nature, such a strained interpretation renders the term "willful" to be a nullity.

Defense counsel should urge the trial court, and preserve record on appeal, that in every case involving a claim for punitive damages, that *intentional* conduct, as required by the statute, must be shown.

continued on page 13

SOME "UNIQUE" DEFENSES APPLICABLE TO PUNITIVE DAMAGE CLAIMS IN IOWA . . . *continued from page 12*

DEFENSE NO. 7: ANY PUNITIVE DAMAGE AWARD THAT EXCEEDS A ONE-TO-ONE RATIO, OR A SINGLE-DIGIT RATIO IN AN UNUSUAL CASE, IS *PER SE* SUBJECT TO CONSTITUTIONAL CHALLENGE.

This guideline flows from the 2003 United States Supreme Court decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). The *Campbell* decision supports limiting punitive damages to a "one-to-one" ratio of compensatory damages to punitive damages in most cases where substantial compensatory damages are awarded. 123 S.Ct. at 1524 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.") However, some defendants overlook this helpful "one-to-one" ratio limitation argument, quoting instead the Campbell Court's oft-cited admonition that, "[I]n practice, few awards exceeding a single-digit ratio [*e.g.*, 9-1] between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id*.

In December, 2004, the Iowa Bar Association Board of Governors approved a *post-Campbell* update to Iowa Uniform Civil Jury Instruction 210.1. *See generally Thomas D. Waterman, State Farm v. Campbell Mandates Revisions to the Iowa Uniform Civil Jury Instruction on Punitive Damages*, Defense Update, Fall, 2004.

Practitioners should note on May 30, 2006, the U.S. Supreme Court granted certiorari in *Philip Morris v. Williams*, 126 S.Ct. 2329; 164 L.Ed.2d 838 (2006). A decision is expected next year for which the U.S. Supreme Court is expected to clarify *Campbell* and what ratios are permissible under the Constitution in wrongful death cases.

DEFENSE NO. 8: CONDUCT BY LARGE, INSTITUTIONAL CLIENTS THAT OCCURS OUTSIDE THE STATE OF IOWA CANNOT BE CONSIDERED UNDER *BMW v. GORE*.

In *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 134 L.Ed.2d 809, 824-25 (1996), the Court held that any economic penalty must be supported by the State's interest in protecting consumers and its own economy, and may not take into account out-of-state activity. In *McClure*, cited *supra*, the defendant on appeal tried to argue that the trial had committed reversible error when it instructed the jury on the defendant's worldwide finances with respect to the punitive damage claim. However, the Iowa Court dismissed this argument by simply noting that *Gore's* holding was not that broad. 613 N.W.2d 225, at 233 (Iowa 2000).

Under *Gore*, the federal Constitution does not permit a jury in one jurisdiction to consider extraterritorial conduct of a corporate defendant when fashioning a punitive damage award. In *Gore*, the Court found that it was unconstitutional for a jury in Alabama to award punitive damages based, at least in part, on evidence of BMW's conduct in other states. 134 L.Ed.2d at 824-25. The reasoning for this is simple: first, such conduct has nothing to do with defendant's conduct in the forum state in the case at bar. Second, potential plaintiffs in those other jurisdictions theoretically can sue the defendant in those other jurisdictions based on the conduct in those other jurisdictions.

As a practice pointer, in any case where a claim for punitive damages is made, defense counsel should be sensitized to carefully consider any out-of-state conduct by the defendant that may be presented in the case by plaintiff. *Gore* clearly holds that to the extent that conduct is legal in other states, it may not form the basis of a punitive damages award in the forum state. But *Gore's* holding may be broader than that, in the sense that the forum state does not have the jurisdiction to punish such out-of-state conduct , and from the view that courts in those other states might very well punish the defendant, leading to a situation of "double punishment." Defendant can be punished once for the same conduct, but not twice. Another potential side benefit to *Gore* may apply in a situation, for example a product liability case, where plaintiff attempts to put on evidence of other claims, accidents and lawsuits. To the extent those other incidents have occurred outside of the forum state, an argument can be made that those instances cannot be considered on the punitive damage claim. In an appropri-

continued on page 15

PRODUCTS LIABILITY . . . continued from page 4

issue of material fact sufficient to except trampolines from the alternative-design requirement of section 2(b).

III. Warnings

As for plaintiff's argument that the trampoline did not incorporate adequate warnings, the Iowa Supreme Court observed that the trampoline provided numerous and adequate warnings of the product's foreseeable risks. Under the *Restatement*, a product may found to be defective if inadequate instructions or warnings fail to reduce or avoid the risk of harm of foreseeable risks and the omission of instructions or warnings render a product unreasonably dangerous. *Restatement § 2(c)*.

Jumpking's trampoline and net enclosure had numerous warnings on the trampoline's case, as well as on the pad of the trampoline itself. There were warnings on the eight legs of the trampoline, which were required to face out. Warning placards contained pictorial and language warnings and provided safety instructions on the use of the trampoline. It was undisputed that the warnings exceeded the warnings required by the American Society for Testing and Material, similar warnings were found on the net enclosure.

In addition, the Court positioned itself along side the Restatement that recognizes that users themselves must pay attention to their own safety. In particular, the Court quoted *Restatement § 2* cmt. a, which places the onus on users to bear appropriate responsibility in using a product, so that those more careful users of a product are not funding damages to the less careful users by paying higher prices. After this discussion, the Iowa Supreme Court held that the reasonable fact finder could not conclude the warnings were inadequate and affirmed the district court's summary judgment ruling in favor of the defendant Jumpking.

IV. Conclusion

The Iowa Supreme Court has established that use of exceptions to the alternative design requirement of design defect claims will rarely obtain approval. Unless the product offers no social utility whatsoever, it is unlikely that a "manifestly unreasonable" exception could ever apply to a product liability claim.

Typically, a plaintiff will introduce evidence of a reasonable alternative design. If the plaintiff does not present reasonable alternative design evidence, the Iowa Supreme Court has followed the *Restatement* commentary for sections 1 and 2 to create a demanding burden to surpass to utilize the manifestly unreasonable exception. Plaintiffs must offer evidence of a reasonable alternative design or likely suffer summary judgment.

Manufacturers, in turn, can be assured that proper warnings can be effectively designed and used to reduce liability on warning product defect claims. The Court provided the road map for manufacturers to protect themselves from inadequate warning claims. Numerous warnings found in both pictorial and written word formats that show inappropriate as well as appropriate use of the product will protect a manufacturer from a warning claim. A manufacturer should also investigate the American Society for Testing and Material guidelines and surpass those rules while placing warnings on its products.

SOME "UNIQUE" DEFENSES APPLICABLE TO PUNITIVE DAMAGE CLAIMS IN IOWA . . . *continued from page 13*

FROM THE EDITORS *. . . continued from page 16*

ate case, this "other accident" evidence might be kept out altogether, unless plaintiff consents to a dismissal of the claim for punitive damages.

CONCLUSION

When confronted with a claim for exemplary or punitive damages, defense counsel should be mindful of specific defenses that may apply to such claims under Iowa law. In the right kind of case with the proper facts, you may be successful in dismissing such claims by filing a dispositive motion prior to trial. Keeping a punitive damage claim away from the jury is probably the most effective way of defending against such claims.

IDCA WELCOMES NEW MEMBERS

Frank S. Capuani,

Law Office of

Capuani & Peterson,

Des Moines, IA

Computers are a fixture in our business and personal lives. The rules governing discovery will now formally acknowledge the role they play and the changes they have wrought. Instead of a smoking-gun document turning up in discovery, it could be a piece of "electronically stored information," which a party thought had been deleted only to find out later that the other side's computer expert was able to retrieve it from the hard drive it had to produce in discovery. Information and data stored on a computer should always be treated with the same caution and respect as that contained in hard copy documents. The rules now clearly make all information equally accessible regardless of form.

The next issue of Defense Update will include an article by President Mike Thrall further discussing the new e-discovery rules.

Visit our Web Site at www.iowadefensecounsel.org

FROM THE EDITORS . . .

By: Kermit Anderson, Des Moines, IA

As technology continues to affect life as we have known it, get ready for new federal rules concerning the discovery of electronically stored information. Effective December 1, 2006, amendments to federal rules of civil procedure 16, 26, 33, 34, 37, and 45 addressing the subject take effect. Similar amendments to the Iowa rules can't be far behind.

Rule 34, which in its current form governs the production of "documents" and "things," now places "electronically stored information" on equal footing. The new Rule broadly defines such information to include virtually anything that can be stored on a computer – writings, images, sound recordings, photographs, etc. – and allows the requesting party to designate the form it wants the information produced. Rule 26(a) is similarly amended to require initial disclosure of any electronically stored information, along with documents and things, that a party may use to support its claims or defenses.

The production of such information is not without limitations. Amended Rule 26(b) will now provide that electronically stored information need not be produced if it is not reasonably accessible because of undue burden or cost. And what about discoverable material that once existed but has since been deleted or destroyed? A discovery response that requested information is no longer available will surely be greeted with skepticism, but new Rule 37(f) states that a party may not be sanctioned for failing to provide information "lost as a result of the routine, good-faith operation of an electronic information system."

continued on page 15

Iowa Defense Counsel Association
431 East Locust Street, Suite, 300
Des Moines, IA 50309
Phone: (515) 244-2847
Fax: (515) 243-2049
E-mail: staff@iowadefensecounsel.org
Website: www.iowadefensecounsel.org

Presorted
Standard
US Postage Paid
Des Moines IA
Permit No. 3885