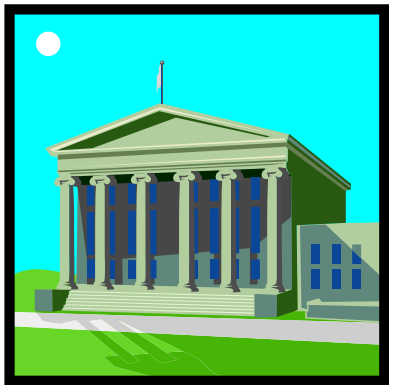
An Update on the New ECA Rule and Discovery Amendments



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ECA AND DISCOVERY AMENDMENTS

- These rules went into effect January 1, 2015.
- This brief presentation is intended to provide a quick update on experience under these rules.
- More importantly, I am here to receive feedback and answer questions.
- This is your turn to interrupt *me*.

RULE 1.281 - THE ECA RULE

- A reminder concerning resources:
- Look at the rule.
- Look at the official comments to the rule (published with the rule).
- Look at the Q&A on the IJB website.
- A very good resource is an article by Professor Laurie Dore – the official reporter for the ECA rule. *See* "If You Build It, Will They Come? Designing Iowa's New Expedited Civil Action Rule and Related Civil Justice Reforms," 63 Drake Law Review 401 (2015).

RULE 1.281 – CURRENT STATUS

Status of ECA Cases Filed 01-01-2015 through 02-18-2016			
Statewide			
CASE SUB TP DESCRIPTION	**# Disposed**	**Total # Filed**	**% Disposed**
CONTRACT - DEBT COLLECTION	39	72	54%
CONTRACT-FRAUD MISREPRESENTATI	1	6	17%
CONTRACT/COMMERICAL - OTHER	25	48	52%
EMPLOYMENT CLAIM	3	8	38%
Other	5	7	71%
OTHER ACTIONS	9	18	50%
PI - MOTOR VEHICLE	79	180	44%
PI - OTHER NEGLIGENCE/INTENT	4	13	31%
PI - PREMISES LIABILITY	14	37	38%
PI-MEDICAL/DENTAL MALPRACTICE	2	2	100%
PI-PRODUCT LIABILITY(NONTOXIC)	2	2	100%
PROFESSIONAL MALPRACTICE(NOPI)	1	2	50%
PROPERTY/FINANCE DAMAGE (NOPI)	11	26	42%
Total	**195**	**421**	**46%**
P.I. = Personal injury; NOPI = No personal injury			

RULE 1.281 – CURRENT STATUS

- From Leesa McNeil, 3rd District DCA:

- From the Third Judicial District perspective (Jan 1, 2015 thru Jan, 25, 2016):
- 38 cases filed in 10 of our 16 counties
- 17 cases disposed of -- most settled/dismissed -- one jury trial on a motor vehicle case-- verdict awarded=$15,004.00
- All cases set within one year -- several have been continued beyond the one year upon motion by a party(s)

- Several cases have been filed that have never been served. Many are dismissed before we get them set for a trial date.

RULE 1.281 - FEEDBACK

- From Judge Sean McPartland, 6th District Judge:
- I also have had good experience with expedited civil cases. I really like the ability to dispense with findings of fact and conclusions of law, and I have developed a one page form for judgment entries in expedited non--jury trials.
- There has been some confusion by lawyers regarding the interplay between Rule 1.281(4) (c) and (e). While subpoint c indicates the parties *must* file joint jury instructions and verdict forms, subpoint e says, "In such cases [where the court dispenses with findings of fact and conclusions of law], the parties must comply with the pretrial submission requirements of rule 1.281(4)(c)." Since judges often do not get assigned the cases until the day before trial, lawyers come to trial not knowing that we may elect to dispense with findings of fact and conclusions of law. The lawyers contend that they did not know that the requirement for a joint set of jury instructions was applicable. I guess the short version is that lawyers apparently believe the joint instruction requirement is only triggered in cases in which the court communicates that it will dispense with findings of fact and conclusions of law, based upon the language in subsection e. This comment may also be related to the comment made by Tim.

RULE 1.281 - FEEDBACK

- From Judge Eliza Ovrom, 5C District Judge

- Judge Romano tried an expedited civil action case in late 2015.
- The attorneys had no troubles keeping within the time frames. The only hiccup was that they had not realized they needed to prepare a joint set of jury instructions. This slowed things down a bit.

- Judge Romano likes the joint jury instruction process so much that she has used in in other civil jury trials, and it has worked well.

RULE 1.281 - FEEDBACK

- From Chief Judge Marlita Greve of the 7th District:
- In the 7th District, we have only had one ECA case go to trial. It involved a woman who allegedly got a bad tattoo. The case started; however, settled at the end of the first day.
- I am very proud of all the work done on this committee. I think this litigation path will be used more and more as time goes on and will become invaluable to litigants and lawyers alike.

RULE 1.281

- Here are some other possible issues that may arise:
  - Issues with getting health care providers to complete the statements.
  - Challenges to health care provider statements.

RULE 1.281- POSSIBLE CHANGES

- A few changes are under consideration. Nothing earth-shattering – e.g., some language that would make clear there is an early deadline for filing the ECA certification.
- However, the supreme court is trying to defer rules changes while the legislature is in session.

DISCOVERY AMENDMENTS

- "Discovery amendments" is a little bit of a misnomer. Most of the changes relate to discovery but there are some related amendments that affect trial scheduling procedures – e.g., changes to rule 1.906.
- The court also is supporting an effort to come up with pattern interrogatories, as envisioned by the amendments.
- In the long run, I think our court may be inclined to follow a similar approach to that we have taken with the rules of evidence – i.e., take the federal rules as a package and then modify them as needed for Iowa. This may work better than the flip side, which is what we are doing now.

DISCOVERY AMENDMENTS - RESOURCES

- The new forms and rules can be found on www.iowacourts.gov website. When you get to the home page, click on "Discovery Amendments" under Features (lower right hand area of the screen).
- If you have questions, be sure to read both the rule and the official comments that are embedded therein.
- The website also has a helpful Q&A.
- *Some* of the changes are modeled on federal rule changes so federal case precedent may be helpful in those instances.

THE RULE CHANGES SUMMARIZED AND OVERSIMPLIFIED

- **Initial disclosures (1.500(1)):**
  - Required unless the case is exempt by rule, the parties agree not to do them, or the court orders otherwise. They are generally similar but not identical to federal initial disclosures.
  - Key differences:
    - Parties generally must produce **actual documents** with the disclosures, not just a description and location.
    - Special disclosures are required for personal injury claims and claims for lost time or earning capacity.
    - Special disclosures are required for domestic relations cases.
    - There is an Iowa-specific list of cases exempt from the initial disclosure requirement.
- **Discovery conference (1.507):**
  - The parties have to confer at the outset of the case and then submit a scheduling order and discovery plan.

THE RULE CHANGES SUMMARIZED AND OVERSIMPLIFIED

- **Experts (1.500(2), 1.508):**
  - Signed expert reports (similar to the current federal practice) are required for retained experts. This replaces the existing Rule 1.508 answers to interrogatories.
  - No discovery is permitted on communications between attorneys and retained experts or on draft reports, unless the communications relate to expert compensation or identify facts, data, or assumptions that the expert relied upon in forming her or his opinions.
- **Discovery motions (1.501(3), (1.517(5)):**
- "…must include a certification that the movant has in good faith personally spoken with or attempted to speak with other affected parties in an effort to resolve the dispute without court action. The certification must identify the date and time of any conference or attempts to confer."
- Discovery motions are getting kicked back for failure to comply with this requirement.

THE RULE CHANGES SUMMARIZED AND OVERSIMPLIFIED

- **Depositions (1.708):**
  - "An objection must be stated concisely in a nonargumentative and nonsuggestive manner."
  - "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion [for protective order]."

THE RULE CHANGES SUMMARIZED AND OVERSIMPLIFIED

- **Interrogatories and document requests (1.503(7), 1.509, 1.512):**
  - Authority is given for the supreme court to issue pattern interrogatories.
  - When a party answers an interrogatory or responds to a document request subject to an objection, the party needs to make clear what information/documents are and are not being provided. The objection is preserved, but there is a duty to supplement whatever information/documents are given.
  - A party can rely on another party's interrogatory answers even if that party didn't promulgate the interrogatory.

THE RULE CHANGES SUMMARIZED AND OVERSIMPLIFIED

- **Duty to supplement (1.503(4)):**
  - The duty is clarified by eliminating the "knowing concealment" standard and adopting the federal standard: If you learn the response is materially incomplete or incorrect, you need to supplement unless the information has already been made known to the other side. You also need to supplement when specifically requested.
- **Scope of discovery (1.503(8)):**
  - The court on motion or on its own may limit the frequency or extent of discovery otherwise allowed by the rules if it finds the discovery is unreasonably cumulative or duplicative, the discovery can be obtained more easily elsewhere, or the burden of the discovery outweighs the likely benefit.
  - But we did *not* adopt the federal language on the presumptive scope of discovery (relevant to the claim vs. relevant to the subject-matter of the action).

FEEDBACK ON THE DISCOVERY AMENDMENTS

- From Judge Eliza Ovrom, 5C District Judge

- Most attorneys have adjusted to the new rules. I still occasionally get a motion to compel discovery where the attorney has not tried to speak to opposing counsel. In those cases I refuse to set a hearing on the motion until they state they have done so.

- I had one case involving a motion to compel where I refused to set hearing on a motion to compel because the moving party had not attempted to speak to opposing counsel. When she did make a call they worked things out and did not need a hearing. That is truly good news for a trial court judge!

- I think the parties must be adjusting to discovery conferences and initial disclosures, because I have had very few issues.

WHAT'S COMING ON RULES GENERALLY

- Permanent EDMS rules – very soon
- Tweaks to ECA rule and discovery amendments – probably this summer
- Rule 1.904(2) – old Rule 179(b) – see *Hedlund v. State*, 2016 WL 756682 (Feb. 26, 2016): "[T]his court is aware that Rule 1.904(2) has been subject to criticism. We have initiated an effort to explore its possible amendment."
- Pattern interrogatories

WHAT'S COMING ON RULES

- Rules of Evidence:
- Justice Appel is chairing a group that is updating our rules of evidence. The federal rules have evolved so there are an increasing number of language differences between the federal rules and the Iowa rules – even though the same rule numbers are used. We are generally not looking to make substantive changes to our rules of evidence, but some substantive changes are being considered.
- This project is pretty far along and a proposal probably will go out for public comment soon.
- BTW, we really encourage detailed, specific comments when rules are put out for public comment.