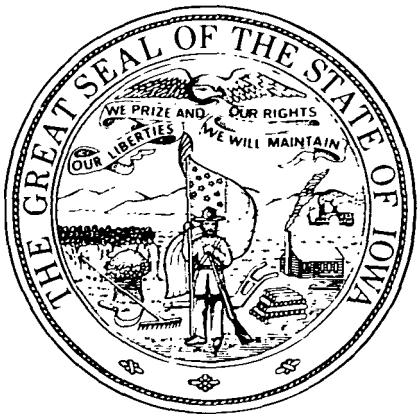

IOWA ADMINISTRATIVE BULLETIN

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PREFACE

The Iowa Administrative Bulletin is published in pamphlet form biweekly pursuant to Chapter 17A, The Code, and supersedes Part I of the Iowa Administrative Code Supplement.

The Bulletin contains Notices of Intended Action on rules, Filed and Filed Emergency rules by state agencies [continue to refer to General Information for drafting style and form], all proclamations and executive orders of the Governor which are general and permanent in nature, and other "materials deemed fitting and proper by the Administrative Rules Review Committee."

The Bulletin may also contain economic impact statements to proposed rules and filed emergency rules, objections filed by Administrative Rules Review Committee, Governor or the Attorney General, any delay by the Committee of the effective date of filed rules, and agenda for monthly committee meetings.

PLEASE NOTE: *Italics* indicate new material added to existing rules; ~~strike through letters~~ indicate deleted material.

The ARC number which appears before each agency heading is assigned by the Administrative Rules Co-ordinator for identification purposes and should always be used when referring to this item in correspondence and other communications.

The Iowa Administrative Code Supplement is also published every other week in loose-leaf form, pursuant to section 17A.6, The Code. It contains replacement pages for the Iowa Administrative Code. These replacement pages incorporate amendments to existing rules, new rules or emergency or temporary rules which have been filed with the administrative rules co-ordinator and published in the Bulletin.

WAYNE A. FAUPEL, Code Editor
PHYLLIS BARRY, Deputy Code Editor
LAVERNE SWANSON, Administrative Code Assistant

PRINTING SCHEDULE FOR IAB

ISSUE NUMBER	SUBMISSION DEADLINE	ISSUE DATE
17	**Friday, January 29, 1982**	**February 17, 1982**
18	**Friday, February 12, 1982**	**March 3, 1982**
19	**Friday, February 26, 1982**	**March 17, 1982**

SUBSCRIPTION INFORMATION

Iowa Administrative Bulletin

The Iowa Administrative Bulletin is sold as a separate publication and may be purchased by subscription or single copy. All subscriptions will expire on June 30 of each year. Subscriptions must be paid in advance and are prorated quarterly as follows:

First quarter	July 1, 1981, to June 30, 1982	$85.00 plus $2.55 tax
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Third quarter	January 1, 1982, to June 30, 1982	$42.50 plus $1.28 tax
Fourth quarter	April 1, 1982, to June 30, 1982	$21.00 plus $0.63 tax

Single copies may be purchased for $2.50 plus $0.08 tax. Back issues may be purchased if the issues are available.

Iowa Administrative Code

The Iowa Administrative Code and Supplements are sold in complete sets and subscription basis only. All subscriptions for the Supplement (replacement pages) must be for the complete year and will expire on June 30 of each year.

Prices for the Iowa Administrative Code and its Supplements are as follows:

Iowa Administrative Code - $563.00 plus $16.89 tax
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PUBLIC HEARINGS

AGENCY	HEARING LOCATION	DATE AND TIME OF HEARING
CONSERVATION COMMISSION[290]		
State forest camping, ch 41 IAB 2/3/82 **ARC 2668**	Conference Room Fourth Floor Wallace State Office Bldg. Des Moines, Iowa	February 23, 1982 10:00 a.m.
Metal detectors in state parks, ch 43 IAB 2/3/82 **ARC 2669**	Conference Room Fourth Floor Wallace State Office Bldg. Des Moines, Iowa	February 24, 1982 10:00 a.m.
HEALTH, DEPARTMENT OF[470]		
Health care facilities, chs 57, 58, 59, 63 and 64 (See IAB 12/23/81 **ARC 2578**) IAB 1/20/82 **ARC 2666**	Senior Center 424 Coolbaugh St. Red Oak, Iowa	February 19, 1982 1:00 p.m.
IAB 2/3/82 **ARC 2674**	Recreation Center 716 North Grant Road Carroll, Iowa	February 24, 1982 10:00 a.m.
Funds for public health, visiting nurse and homemaker-health aide services to low-income elderly. IAB 2/3/82 **ARC 2675**	Third Floor Conference Room Lucas State Office Bldg. Des Moines, Iowa	February 23, 1982 1:00 p.m.
TRANSPORTATION, DEPARTMENT OF[820]		
Financial assistance, [09,B] ch 1 IAB 1/6/82 **ARC 2623**	Department of Transportation Complex 800 Lincoln Way Ames, Iowa	February 16, 1982

ARC 2668

CONSERVATION COMMISSION[290]

NOTICE OF INTENDED ACTION

Twenty-five interested persons, a governmental subdivision, an agency or an association of 25 or more persons may demand an oral presentation hereon as provided in §17A.4(1)"b", The Code.

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under §17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Section 107.24, The Code, the state Conservation Commission hereby gives Notice of Intended Action to add a new chapter, Chapter 41, "State Forest Camping", to the Iowa Administrative Code.

This proposed rule establishes regulated camping areas and operations in state forests.

Any interested person may make written suggestions or comments on this proposed rule prior to February 23, 1982. Such written materials should be directed to the Director, State Conservation Commission, Wallace State Office Building, Des Moines, Iowa 50319. Persons who wish to convey their views orally may present those views in the Wallace Building, fourth floor conference room on February 23, 1982, at 10:00 a.m.

At the hearing, persons will be asked to give their names and addresses for the record, and to confine their remarks to the subject of the rule.

This rule is intended to implement sections 111.35, 111.44, and 111.47 to 111.51, The Code.

The following chapter is proposed.

CHAPTER 41
STATE FOREST CAMPING

290—41.1(111) Applicability. This rule governs camping activity in the following areas:

1. Yellow River State Forest, Allamakee County.
2. Stephens State Forest, Clarke, Lucas, Appanoose, Davis, and Monroe Counties.
3. Shimek State Forest, Van Buren and Lee Counties.

290—41.2(111) Camping areas established and marked.

41.2(1) Areas to be utilized for camping shall be established within each of these state forests.

41.2(2) Signs designating the established camping areas shall be posted along the access roads into these areas and around the perimeter of the area designated for camping use.

41.2(3) Areas approved for backpack camping (no vehicular access) shall be marked with appropriate signs and shall contain fire rings.

290—41.3(111) Camping restricted.

41.3(1) No person shall camp in these state forests except within the designated camping areas or at established backpack camping sites.

41.3(2) Camping within the designated camping area shall be on sites posted by numbered signs marking the location to be used by the camping unit or within the marked boundary of camping areas where sites are not posted.

290—41.4(111) Firearm use prohibited. The use by the public of firearms, fireworks, explosives, and weapons of all kinds is prohibited within the established camping area as delineated by signs marking the area.

290—41.5(111) Camping fees.

41.5(1) The fees for camping in these state forest established campgrounds shall be the same as in all other nonmodern areas managed by the commission where fees are charged. A basic camping unit is defined as the portable shelter used by one to six persons.

41.5(2) Chaperoned, organized youth group fees are the same as in all group camp areas managed by the commission.

41.5(3) The reduced fees for aged, blind, and handicapped established by 290—45.2(111) are applicable to camping in state forest areas.

41.5(4) Persons using backpack camping sites shall register at the forest area check station or other designated site. No fee will be charged for the use of the designated backpack campsites.

290—41.6(111) Hours. Access into and out of the established camping areas shall be permitted from 4:00 a.m. to 10:30 p.m. During the hours of 10:31 p.m. to 3:59 a.m. only registered campers are permitted in the campgrounds.

ARC 2669

CONSERVATION COMMISSION[290]

NOTICE OF INTENDED ACTION

Twenty-five interested persons, a governmental subdivision, an agency or an association of 25 or more persons may demand an oral presentation hereon as provided in §17A.4(1)"b", The Code.

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under §17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Section 107.24, The Code, the state Conservation Commission hereby gives Notice of Intended Action to add a new chapter, Chapter 43, "Metal Detectors in State Parks", to the Iowa Administrative Code.

This proposed rule establishes a procedure for the issuance of metal detector permits to persons wishing to use these devices in state parks. It also sets out the limitations and restrictions for the operation of metal detectors in these areas.

Any interested person may make written suggestions or comments on this proposed rule prior to February 24, 1982. Such written materials should be directed to the Director, State Conservation Commission, Wallace State Office Building, Des Moines, Iowa 50319. Persons who wish to convey their views orally may present those views in the Wallace State Office Building, fourth floor conference room on February 24, 1982, at 10:00 a.m.

At the hearing, persons will be asked to give their names and addresses for the record, and to confine their remarks to the subject of the rule.

This rule is intended to implement section 111.35, The Code.

The following chapter is proposed.

CHAPTER 43
METAL DETECTORS IN STATE PARKS

290—43.1(111) Definitions.

43.1(1) "Metal detector" means a portable electronic device used only for detecting metal above or below the surface of the ground which is carried by an individual.

43.1(2) "Beach" or "beach area" means that portion of state parks or recreation areas designated for swimming activity which is covered by sand only above the water level.

290—43.2(111) Permit required. No person shall operate a metal detector in any state park or recreation area without first obtaining a permit from the central office of the conservation commission. No fee will be charged for the permit.

290—43.3(111) Period of use. Metal detector use is prohibited in state parks and recreation areas except during the period from September 8 to May 21.

290—43.4(111) Area of use. The use of metal detectors is restricted to the beach area and the water area contiguous to the beach. When an artificial lake is drained completely for any reason, metal detector use will be permitted in the entire lake area proper below the vegetation line on the lake shore.

290—43.5(111) Restoration of disturbed areas. When digging is done to search for an object located through the use of a metal detector, the operator of the detector shall restore the disturbed area as nearly as possible to its original condition.

ARC 2677

DENTAL EXAMINERS[320]

NOTICE OF INTENDED ACTION

Twenty-five interested persons, a governmental subdivision, an agency or an association of 25 or more persons may demand an oral presentation hereon as provided in §17A.4(1)"b", The Code.

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under §17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Sections 147.80 and 153.33(5), The Code, the Board of Dental Examiners gives Notice of Intended Action to amend Chapters 15 and 51 of the IAC.

Chapter 15 is amended to more properly generate the actual moneys needed to operate the board. Subrule 51.7(1) is amended to permit the chairman or vice-chairman to appoint a hearing officer.

Any person, governmental agency, or association may submit written comments concerning the proposed amendments to Connie Price, Secretary, Board of Dental Examiners, Lucas State Office Building, Des Moines, Iowa not later than February 24, 1982.

The proposed rules are intended to implement sections 147.80, 153.22 and 153.33(5), The Code.

ITEM 1. Rule 320—15.1(153) is amended to read as follows:

320—15.1(153) License fees. *All fees are nonrefundable.*

15.1(1) The fee for a license to practice dentistry shall be ~~fifty~~ *seventy-five* dollars.

15.1(2) The fee for a license to practice dental hygiene shall be ~~twenty-five~~ *thirty-five* dollars.

15.1(3) The fee for a resident dentist license shall be ~~ten~~ *thirty* dollars.

15.1(4) The fee for a faculty permit shall be ~~fifteen~~ *forty-five* dollars.

15.1(5) The fee for a reciprocal license to practice dentistry issued on the basis of credentials shall be two hundred fifty dollars.

~~This rule is intended to implement sections 147.80(1), 147.80(9) and 153.22 of the Code and Acts of the Sixty-seventh General Assembly, Chapter 78.~~

ITEM 2. Rule 320—15.2(153) is amended to read as follows:

320—15.2(153) Renewal fees. *All fees are nonrefundable.*

15.2(1) The fee for renewal of a license to practice dentistry shall be ~~fifteen~~ *forty-five* dollars for an active practitioner and ~~five~~ *twenty* dollars for an inactive practitioner.

15.2(2) The fee for renewal of a license to practice dental hygiene shall be ~~five~~ *twenty* dollars.

15.2(3) The fee for renewal of a resident dentist license shall be ~~ten~~ *thirty* dollars.

15.2(4) The fee for renewal of a faculty permit shall be ~~fifteen~~ *forty-five* dollars.

~~This rule is intended to implement sections 147.80(1), 147.80(9) and 153.22 of the Code and Acts of the Sixty-seventh General Assembly, Chapter 78.~~

ITEM 3. Subrule 51.7(1) is amended to read as follows:

51.7(1) Every hearing in a contested case shall be presided over by the chairman of the board, or in his absence by the vice-chairman. *The chairman or vice-chairman may also appoint a qualified hearing officer to preside over the hearing, rule on admission of evidence, and assist the board in the preparation of the written decision.* Not less than three members of the board shall be necessary to constitute a quorum for the purpose of conducting ~~such~~ *the* hearing.

ARC 2674

HEALTH DEPARTMENT[470]

AMENDED NOTICE OF INTENDED ACTION

The Notice of Intended Action published in the December 23, 1981, IAB as ARC 2578 under the authority of Section 135C.14, The Code, relating to the rights of residents in health care facilities is amended by adding notice of rescheduled oral presentation. The oral presentation previously scheduled for January 13, 1982, in Carroll has been rescheduled due to inclement weather for February 24, 1982, at the Recreation Center, 716 North Grant Road, at 10:00 a.m.

Oral presentations may be made by appearing at this hearing. Written testimony will also be accepted at that time.

ARC 2675

HEALTH DEPARTMENT [470]

NOTICE OF INTENDED ACTION

Twenty-five interested persons, a governmental subdivision, an agency or an association of 25 or more persons may demand an oral presentation hereon as provided in §17A.4(1)"b", The Code.

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under §17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Section 135.11(15), The Code, the Iowa State Department of Health hereby gives Notice of Intended Action to amend Chapter 79 "Funds for Extending Public Health Nursing Services, Visiting Nurse Services and Homemaker-Home Health Aide Services to Low-Income Elderly Persons", Iowa Administrative Code.

The Acts of the Sixty-Ninth General Assembly, First Session, 1981, Chapter 5, section 4, subsection 7, paragraph "d"(1),(2) sets out appropriations in the form of grants for Homemaker-Home Health and Public Nursing Services.

The Acts of the Sixty-Ninth General Assembly, First Session, 1981, Chapter 9, section 26, subsection 5, sets out new appropriations for local boards of health, home health care grants.

The present rules are obsolete in respect to the numerical and fiscal year appropriations for the above cited services and need to be amended to reflect these changes.

A public hearing on these changes will be held on February 23, 1982, third floor conference room, Lucas State Office Building at 1:00 p.m. Any person wishing to make written comments can do so by addressing the same to Mark W. Wheeler, Hearings Officer, 3rd Floor Lucas State Office Building, Des Moines, Iowa 50319. Comments must be received by 4:30 p.m. February 23, 1982.

These rules are intended to implement Acts of Sixty-Ninth General Assembly, First Session, 1981, Chapters 5 and 9.

ITEM 1. Strike the existing title of **Chapter 79** and replace with the following:

FUNDS FOR EXTENDING PUBLIC HEALTH NURSING SERVICES, VISITING NURSE SERVICES, AND HOMEMAKER-HOME HEALTH AIDE SERVICES TO ADDITIONAL LOW-INCOME OR ELDERLY PERSONS.

ITEM 2. Strike rule 79.1(68 GA, Ch 9) and insert the following:

470—79.1(69 GA, ch 5) Amount to be allocated. The initial allocations are to be determined as follows, according to the Acts of the Sixty-Ninth General Assembly, First Session, Chapter 5, section 4, subsection 7, paragraph "d" (1),(2) and Chapter 9, section 26, subsection 5.

	Fiscal Year 1982
Total appropriation	$3,432,226
($1,771,119 for Nursing; $1,661,107 for HMHHA)	
For administration (1% of original $3,202,226)	32,022
For local use	3,400,204
¼ for equal division between counties	850,051
Share for each county (÷ 99)	8,586
¾ for proportionate division	2,550,153
Share per person 60 and over and family between 75% and 125% of poverty guidelines (÷ 537,075)	4.75

	Fiscal Year 1983	
	Nursing	HMHHA
Total appropriation	$1,987,568	$1,824,392
For administration (1%)	19,876	18,244
For local use	1,967,692	1,806,148
¼ for equal division between counties	491,923	451,537
Share for each county (÷ 99)	4,969	4,561
¾ for proportionate division	1,475,769	1,354,611
Share per person 60 and over or family between 75% and 125% of poverty guidelines	To be determined when 1980 census data becomes available	

ITEM 3. Amend rule 79.3 as follows:

470-79.3~~(68GA, ch9)~~ *(69GA, ch5)* Eligibility for services and sliding fee scales.

Further amend by striking 79.3(4) and inserting in lieu thereof:

79.3(4) For the purposes of 69 GA, Chapter 5, agencies should continue to use the admission policies and sliding fee scales they now have if they meet the above criteria. The funds available from 69 GA, Chapter 5 can be used to pay salaries and expenses for added local board of health staff so that the volume of services provided to the elderly can be expanded, to provide a subgrant to another nursing or homemaker-home health aide agency for staff expansion, or to purchase service on a case-by-case basis from another agency. If staff is added in this way, they need not be restricted to services to persons age sixty or over, but the volume of services provided by the total agency staff to persons sixty and over must increase in relation to the amount of staff added with these funds. A copy of the sliding fee scale shall be submitted to the Iowa

state department of health for each agency which expects to receive 69 GA, Chapter 5 funds either directly or through subcontract. Medicare, medicaid and health insurance carriers should be billed in all appropriate cases. All fee income from all sources shall be used to help support the nursing or homemaker-home health aide service program.

ITEM 4. Strike subrule 79.3(5) and insert in lieu thereof the following:

79.3(5) The population calculations for FY 1982 shall be based on the official figures from the 1970 census. The population calculations for FY 1983 shall be based on the official figures from the 1980 census if available (if 1980 census figures are not available by March 15, 1982 the 1970 census information will be used). For the purpose of dividing ¾ of the allocation for each county in proportion to the number of low-income and elderly persons in that county, the calculations shall be based on the census figures for the number of persons age sixty and over and the number of families between 75% and 125% of poverty guidelines.

ITEM 5. Strike subrule 79.3(6) and insert the following:

79.3(6) When there is both a city board of health and a county board of health, the allocation shall be divided between the two by dividing the total allocation to the county in proportion to the number of persons age sixty and over and families between 75% and 125% of poverty guidelines living in each board's jurisdiction.

ITEM 6. Strike subrule 79.4(1) and insert the following:

79.4(1) The funds shall be used to expand home health nursing and homemaker-home health aide services to low-income and elderly persons.

ARC 2671

HEALTH DEPARTMENT[470]

MEDICAL EXAMINERS, BOARD OF

NOTICE OF INTENDED ACTION

Twenty-five interested persons, a governmental subdivision, an agency or an association of 25 or more persons may demand an oral presentation hereon as provided in §17A.4(1)"*b*", The Code.

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under §17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Sections 147.29 and 147.36, The Code, the Iowa Board of Medical Examiners hereby gives Notice of Intended Action to amend Chapter 135, "Medical Examiners", Iowa Administrative Code.

The Acts of the Sixty-ninth General Assembly, 1981 Regular Session, Chapter 5, provided, in part, that examinations should be on a basis of one fee for one examination.

The present rules are in conflict with those statutory changes.

The present rules also require applications to sit the federation licensing examination (FLEX) to be filed sixty days prior to the examination. The board is required to have all applications on file with the federation sixty days prior to the examination.

These proposed rules would allow the board a sufficient amount of time to comply with the federation bylaws and would correct the present rules to comply with the above statutory change.

Any interested person may make written comments or suggestions on these proposed rules prior to February 23, 1982. Such written material should be directed to the Executive Director, Iowa Board of Medical Examiners, Capitol Complex, Executive Hills West, Des Moines, Iowa 50319. Persons who want to convey their views orally should contact the Executive Director, Iowa Board of Medical Examiners at 515/281-5171 prior to February 23, 1982.

These rules are intended to implement chapters 147, 148 and 150A, The Code, as amended by Acts of the Sixty-ninth General Assembly, 1981 Regular Session, Chapter 5.

The following amendments are proposed.

ITEM 1. Subrule 135.102(1) is amended to read as follows:

135.102(1) The application accompanied by a fee of one hundred fifty dollars must be on file at least ~~sixty~~ *seventy-five* days prior to the date of the examination.

ITEM 2. Subrule 135.102(3) is amended to read as follows:

135.102(3) The board has adopted and is administering the federation licensing examination (FLEX). FLEX examinations are ordinarily held in June and December of each year. Applications for the June examination must be on file by ~~April 1~~ *March 15* and applications for the December examination must be filed by ~~October 1~~ *September 15.*

ITEM 3. Subrule 135.102(4) is amended to read as follows:

135.102(4) The FLEX examination is a three-day examination and the candidate must successfully pass the entire examination with a flex-weighted average of seventy-five percent or better, in one sitting. ~~Any candidate who fails in his/her examination shall be entitled to take a second examination without further fee or application at any time within fourteen months after the first examination. The candidate shall be required to repeat the entire examination in his/her second examination.~~ *Any candidate who fails the examination shall be required to repeat the entire examination.*

These rules are intended to implement sections 147.81, 148.3 and 150A.3, The Code, as amended by, the Acts of the Sixty-ninth General Assembly, 1981 Regular Session, Chapter 5.

ARC 2676

NURSING HOME ADMINISTRATORS BOARD OF EXAMINERS[600]

NOTICE OF INTENDED ACTION

Twenty-five interested persons, a governmental subdivision, an agency or an association of 25 or more persons may demand an oral presentation hereon as provided in §17A.4(1)"b", The Code.

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under §17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Section 135E.15, The Code, the Iowa State Board of Examiners for Nursing Home Administrators gives Notice of Intended Action to amend Chapter 2 of the IAC. The proposed amendment would increase the fees for a license as a nursing home administrator.

Consideration will be given to written comments submitted not later than February 24, 1982 to Peter J. Fox, Hearing Officer, State Department of Health, Lucas State Office Building, Des Moines, Iowa 50319.

The proposed rule is intended to implement section 135E.15, The Code.

ITEM 1. Rule 600—2.5(147) is amended to read as follows:

600—2.5(147) License fees. *All fees are nonrefundable.*

2.5(1) The fee for a license issued by examination is ~~fifty~~ *seventy-five* dollars.

2.5(2) The fee for a license issued by reciprocity is ~~fifty~~ *seventy-five* dollars.

2.5(3) The fee for a provisional letter for the facility is thirty dollars.

2.5(4) The fee for evaluating credentials when a license has lapsed is thirty dollars.

2.5(5) The fee for biennial renewal of all licenses is sixty dollars payable on or before December 31 of each odd numbered biennium beginning December 31, 1981.

ARC 2682

REVENUE, DEPARTMENT OF[730]

NOTICE OF INTENDED ACTION

Twenty-five interested persons, a governmental subdivision, an agency or an association of 25 or more persons may demand an oral presentation hereon as provided in §17A.4(1)"b", The Code.

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under §17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Sections 421.14 and 17A.12(1), The Code, the Iowa Department of Revenue hereby gives Notice of Intended Action to amend Chapter 7, "Practice and Procedure Before the Department of Revenue", Iowa Administrative Code.

Chapter 17A, The Code, provides for the review of final agency actions. The denial of a timely filed refund claim, or a portion thereof, would constitute a final agency action. The tax statutes administered by the agency specifically provide for the filing of a protest to assessment notices within specified time periods. The income and excise taxes fail to provide a specific time period for protesting the denial of a timely filed refund claim or a portion thereof by the agency. The department does not feel that it is the intent of the general assembly to forbid the filing of a protest if a timely filed refund claim or a portion thereof is not honored by the agency. Historically, the department has accepted protests associated with refund claims but the time period for filing the protest has not been clear. This rule change is initiated to provide a reasonable statute of limitation for filing a protest to an agency action involving refund claims by establishing that the period is the same period provided by statute for filing a protest within a respective tax area. However, the rule also provides that the filing of a refund claim cannot extend the period of time for filing a protest to a notice of assessment.

Any interested person may make written suggestions or comments on this proposed amendment on or before March 5, 1982. Such written comments should be directed to the Deputy Director, Iowa Department of Revenue, Hoover State Office Building, Des Moines, Iowa 50319.

Persons who want to orally convey their views should contact the Deputy Director at (515) 281-3346 or at Department of Revenue offices on the fourth floor of the Hoover State Office Building.

Requests for a public hearing must be received by February 26, 1982.

These rules are intended to implement chapter 17A, The Code.

The following amendment is proposed.

Rule 730—7.8(17A), first paragraph, is amended as follows:

730—7.8(17A), Protests. Any person wishing to contest an assessment, refund claim, or any other department action, except licensing, which may culminate in a contested case proceeding shall file a protest with the hearing officer within the time prescribed by the applicable statute or rule for filing notice of application to the director for a hearing. *The period for appealing agency action relating to refund claims is the same statutory period for contesting an assessment. The time period for filing a protest to an assessment cannot be extended by filing a refund claim.* Failure to timely file a written protest will be construed as waiver of opposition to the matter involved unless the director on his or her own motion pursuant to statutory authority exercises his or her power of abatement. Upon failure of a person to submit a proper protest, the department may, in its discretion either require ~~such~~ *the* person to follow the provisions of this rule pointing out the defects and details needed to comply with the rule before accepting for filing or dismiss the protest for failure to comply with this rule.

ARC 2673

SOCIAL SERVICES DEPARTMENT [770]

AMENDED NOTICE OF INTENDED ACTION

Pursuant to the authority of Section 249A.4, The Code, the Department of Social Services proposed amending rules appearing in the IAC relating to medical assistance (chapters 75, 77 and 78). The amendments were proposed in the December 9, 1981 IAB as ARC 2561. Clarifications need to be made to certain references in that Notice of Intended Action.

In items 1 and 2, the rescission of subrules 75.1(2) and 75.1(7) should refer to a Notice of Intended Action published in the October 28, 1981 IAB as ARC 2455.

In item 6, the rescission of rules 770—77.22(249A) and 770— 78.24(249A) relating to psychologists should refer to Notice of Intended Action published in the October 14, 1981 IAB as ARC 2397 and ARC 2398.

In both these instances the previously proposed rules would be adopted before the proposed rules in ARC 2561 would be adopted.

In addition, item 7 proposes rescinding rules 770—77.13(249A), hearing aid dealers, 770—77.14(249A), audiologists, and 770—78.14(249A), hearing aids. Rather than completely eliminating this service, the department would propose that it be available to eligible individuals under age twenty-one as part of the early and periodic screening, diagnosis, and treatment program.

Consideration will be given to further written data, views, or arguments to these amendments received by the Bureau of Policy, Research, and Analysis, Department of Social Services, Hoover State Office Building, Des Moines, Iowa 50319 on or before February 24, 1982.

These rules are intended to implement sections 249A.3 and 249A.4, The Code.

NOTICE - USURY

In accordance with the provisions of Acts of the Sixty-eighth General Assembly, First Session 1979, Senate File 158, the Superintendent of Banking has determined that the maximum lawful rate of interest provided for in section 535.2, The Code, as amended, shall be:

March 1, 1980 - March 31, 1980	12.75%
April 1, 1980 - April 30, 1980	14.50%
May 1, 1980 - May 31, 1980	14.75%
June 1, 1980 - June 30, 1980	13.50%
July 1, 1980 - July 31, 1980	12.25%
August 1, 1980 - August 31, 1980	11.75%
September 1, 1980 - September 30, 1980	12.25%
October 1, 1980 - October 31, 1980	13.00%
November 1, 1980 - November 30, 1980	13.50%
December 1, 1980 - December 31, 1980	13.75%
January 1, 1981 - January 31, 1981	14.75%
February 1, 1981 - February 28, 1981	14.75%
March 1, 1981 - March 31, 1981	14.50%
April 1, 1981 - April 30, 1981	15.25%
May 1, 1981 - May 31, 1981	15.00%
June 1, 1981 - June 30, 1981	15.75%
July 1, 1981 - July 31, 1981	16.00%
August 1, 1981 - August 31, 1981	15.50%
September 1, 1981 - September 30, 1981	16.25%
October 1, 1981 - October 31, 1981	17.00%
November 1, 1981 - November 30, 1981	17.25%
December 1, 1981 - December 31, 1981	17.25%
January 1, 1982 - January 31, 1982	15.50%
February 1, 1982 - February 28, 1982	15.75%

ARC 2678

AGRICULTURE DEPARTMENT[30]

Pursuant to the authority of Sections 177A.6 and 159.5(11), The Code, the Iowa Department of Agriculture adopts amendments to Chapter 26, "Entomologist", Iowa Administrative Code.

Notice of Intended Action was published in the IAB, December 9, 1981 as ARC 2555. A public hearing was held on January 6, 1982. As a consequence of oral and written suggestions from concerned persons, the proposed rules have been modified. Changes from such notice are as follows: 26.1(177A), 26.4(177A), 26.12(3) and 26.15(177A). All changes were made for the purpose of typographical corrections, clarification and italicizing.

These rules will become effective on March 10, 1982.

Rescind chapter 26 in its entirety and insert the following new chapter 26 in lieu thereof:

CHAPTER 26
CROP PESTS

30—26.1(177A) Nursery stock. Hardy, cultivated or wild woody plants, such as trees, evergreens, shrubs and vines, and small fruits, such as strawberries and raspberries. Nursery stock dug from the wild and offered for sale or movement should be so labeled.

30—26.2(177A) Hardy. Capable of surviving the normal winter temperatures of Iowa.

30—26.3(177A) Person. Any individual or combination of individuals, corporation, society, association, partnership, institution or public agency.

30—26.4(177A) Nurseryman. A person who grows or propagates nursery stock for sale or distribution.

30—26.5(177A) Nursery. Any grounds or premises, on or in which nursery stock is propagated or grown for sale or distribution, including any grounds or premises on or in which nursery stock is being fumigated, treated, stored or packed for sale or movement.

30—26.6(177A) Nursery dealer. Any person who does not grow nursery stock, but who obtains, takes title to and possession of nursery stock, and moves it or offers it for movement to the ownership of other persons.

30—26.7(177A) Out-of-state nurserymen and nursery dealers. Any person desiring to ship nursery stock into Iowa shall:

26.7(1) File with the state entomologist's office an official certificate of inspection showing that the nursery from which the plants originated has been inspected and certified by the plant regulatory officials of that state. This information may be communicated to the state entomologist's office by the filing of an official list of certified nurseries by the plant regulatory official of the state of origin,.

26.7(2) Provide a valid copy of the certificate of inspection of the state of origin which will accompany each shipment of nursery stock into Iowa.

26.7(3) No fee shall be charged out-of-state nurserymen or dealers who ship nursery stock directly from their out-of-state location to Iowa purchasers, unless the state in which the shipping nursery is located charges a fee to Iowa nurserymen and dealers. In this case, a fee equivalent to that charged Iowa nurserymen or dealers shipping into that state shall be charged.

30—26.8(177A) Nursery inspection. Each nursery within the state of Iowa shall be inspected at least annually to ascertain if it is infested with insect pests or infected with plant diseases. If insect pests or diseases are found, control or cleanup measures shall be required. Certificates will be issued only for stock found apparently free from insect pests and diseases. Cleanup measures will be required if excessive weeds in the nursery make an adequate inspection impossible.

30—26.9(177A) Nursery dealer certificate. Nursery dealers shall secure a nursery dealer's certificate from the state entomologist before they carry on their business within the state. Each separate sales location shall operate under its own certificate. Nurseries that sell stock from more than one location shall obtain a nursery dealer certificate for those additional locations.

30—26.10(177A) Proper facilities. Individuals, firms or corporations who offer nursery stock for sale at nursery grounds, stores, roadside stands, public market places, or any other place, shall have and maintain proper facilities for keeping all nursery stock in a viable condition; shall keep the stock in a viable condition pending sale; and shall display at the sales location the proper kind of certificate showing that they have the right to offer nursery stock for sale. Proper facilities should include a storage and display area for the nursery stock which prevents excessive drying of plant tissues and a ready access to a water supply.

30—26.11(177A) Storage and display. All nursery stock offered for sale or distribution shall be stored and displayed as follows:

26.11(1) Balled and burlapped stock shall be kept moist at all times and shall be kept in sawdust, shingle tow, peat, sphagnum moss or other moisture-holding material not toxic to plants, of sufficient depth to cover the top of the ball of earth.

26.11(2) Container stock shall be watered sufficiently to maintain the viability and vigor of the stock. Potting soil shall be maintained at a depth so as to cover all roots of the plants.

26.11(3) Bare-root stock shall be kept under conditions of temperature and moisture to retard etiolated or otherwise abnormal growth and maintain viability. Moisture must be supplied to the root system by high humidity conditions in storage or by covering the roots with soil, sawdust, peat, wood shavings or other moisture-holding materials not toxic to plants. The material is to be kept moist at all times. Roots of heeled-in stock must be covered with well packed soil at least one inch above the crown of the plant.

26.11(4) Stock with roots packaged in moisture-retaining plastic, peat, wood shavings or other material not toxic to plants must be stored and displayed under conditions that will retard etiolated or otherwise abnormal growth and will ensure an adequate supply of moisture to the roots at all times.

26.11(5) Nursery stock offered for sale or movement at locations with hard surfaced areas, such as concrete or asphalt parking lots, must not be in constant, direct contact with the hard surfaced area; but must be so displayed that the roots of the stock are protected from excessive heat, drying, or other adverse conditions associated with contact from hard surfaced areas.

30—26.12(177A) Nursery stock viability qualifications. All nursery stock offered for sale or distribution, not meeting the following minimum indices of viability, shall be removed from public view and not offered for sale.

26.12(1) Woody stemmed deciduous stock shall have moist, green, cambium tissue in the stems and branches and shall have viable buds or normal, green, unwilted growth. Etiolated growth from individual buds shall be no more than four inches. In the case of rose bushes, each stem must show moist, green, undamaged cambium in at least the first six inches above the graft. Any single stem on a rose bush not meeting this specification shall disqualify the entire plant; however, a bush may be pruned to remove dead or damaged canes and the plant can then be sold at the proper grade according to Standards of the American Association of Nurserymen.

26.12(2) Balled and burlapped stock in addition to 26.12(1) regarding aerial parts, shall have unbroken earth balls of a size specified by the American Association of Nurserymen's American Standard for Nursery Stock.

26.12(3) Colored waxes or other materials used to coat the aerial parts of plants that change the appearance of the plant surface so as to prevent adequate inspection are prohibited.

30—26.13(177A) Certificates. Certificates issued to nurserymen or nursery dealers, are nontransferable and are for the exclusive use of the one to whom they are issued.

30—26.14(177A) Miscellaneous and service inspections. Any person wanting to move plants or plant products to any destination outside of Iowa may apply to the state entomologist for inspection of the plants or plant products and certification as to the presence or absence of plant pests and diseases likely to prevent the acceptance of those plants or plant products at the destination. The application must be made as far in advance as possible. Upon receipt of the application, the state entomologist will arrange for the inspection to be made as early as conveniently practical. The plants or plant products to be inspected shall be assembled and held in such a manner as to enable a proper and adequate inspection to be made. If destination requirements regarding plant pests and diseases are met, certification can be made in accordance with section 177A.9, The Code. Fees for the inspection will be set to cover in full any expenses incurred by the state entomologist or his authorized inspectors who made the inspection.

Any plants or plant parts capable of propagation, not classified as nursery stock, which originate outside the state, may be subject to inspection to determine whether those plants or plant parts are infested or infected with insect pests or diseases. If inspections reveal the presence of insect pests or diseases, the plants or plant parts will be treated or destroyed. If no infestations are discovered, a certification report may be issued by the inspector to the person offering the plants or plant parts for sale or movement. Inspection of these plants or plant parts shall be subject to the same rules and fees as nursery stock.

30—26.15(177A) Insect pests and diseases. To comply with section 177A.5, The Code, there is listed below the insect pests and diseases which the state entomologist finds should be prevented from being introduced into or disseminated within Iowa, in order to safeguard the plants and plant products likely to become infested or infected with such insect pests and diseases.

Insect pests:
Blue alfalfa aphid (Acyrthosiphon kondoi)
Gypsy moth (Lymantria dispar)
Khapra beetle (Trogoderma granarium)

Diseases:
Oat cyst nematode (Bidera avenae)
Golden nematode (Globodera rostochiensis)
Corn cyst nematode (Heterodera zeae)
Columbia root-knot nematode (Meloidogyne chitwoodii)
Soybean rust (Phakopsora pachyrhizi)
Head smut of corn (Sphacelotheca reiliana)

These rules are intended to implement Chapter 177A, The Code, and Acts of the Sixty-ninth General Assembly, 1981 Session, Chapter 70.

[Filed 1/15/82, effective 3/10/82]
[Published 2/3/82]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement, 2/3/82.

ARC 2670

ATHLETICS COMMISSIONER[110]

Pursuant to the authority of Sections 99C.5 and 17A.4(1), The Code, the Athletics Commissioner hereby amends rule 110—3.2(99C) IAC. This amendment would permit the use of an additional bout for the final two contestants and the use of shorter rounds in elimination tournament national championships.

Notice of Intended Action was published in the November 25, 1981, IAB. The notice included information on the manner in which the public could submit comments and set a public hearing for December 17, 1981. No public comments were received. The Notice of Intended Action was published as ARC 2518. The amendment is identical to the proposed rule included in the November 25, 1981, Notice of Intended Action.

The athletics commissioner adopted this amendment on January 7, 1982.

This amendment is intended to implement section 99C.5, The Code, and will become effective on March 10, 1982.

Rule 110—3.2(99C) is amended to read as follows:

110—3.2(99C) Bouts, rounds and rest periods. Each bout shall consist of no more than three rounds. Each round shall be two minutes in length. A rest period of ~~one and one half minutes~~ *ninety seconds* shall be provided between rounds. No contestant shall be permitted to compete in more than three bouts in any twenty-hour period.

In national elimination tournaments, when the ability and conditioning of the contestants is assured, the athletics commissioner may authorize two contestants to participate in a fourth bout which determines the championship, provided all bouts are comprised of three ninety-second rounds. Under no circumstances will any participant be

permitted to compete more minutes in any one twenty-hour period than is authorized under the rule allowing three bouts consisting of three two-minute rounds as set forth in this rule.

[Filed 1/8/82, effective 3/10/ 82]
[Published 2/3/82]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement, 2/3/82.

ARC 2672

HEALTH DEPARTMENT[470]

MEDICAL EXAMINERS, BOARD OF

Pursuant to the authority of Sections 148C.2 and 148C.7, The Code, the Iowa Board of Medical Examiners adopts amendments to Chapter 136, "Physician's Assistants", Iowa Administrative Code.

This rule allows the board some flexibility in special circumstances involving a change of supervising physicians when the physician's assistant remains the same and has served in a community for a reasonable period prior to such change.

An amendment to delete the address of the National Commission on Certification of Physician's Assistants is also included.

Notice of Intended Action was published in IAB, October 28, 1981 as ARC 2468.

Minor grammatical changes from such notice are as follows:

136.5(4)"a" There is a demonstrated need. ~~for such utilization.~~

This rule will become effective on March 10, 1982.

Subrule 136.5(4) is amended to read as follows:

136.5(4) Special permission may be granted by the board to utilize a physician's assistant in a place remote from the physician's primary place for meeting patients if:

a. There is a demonstrated need. ~~for such utilization.~~

b. Adequate provision for immediate communication between the physician and the physician's assistant exists.

c. A mechanism has been developed to provide for the establishment of a direct patient-physician relationship between the supervising physician and patients who may be seen initially by the physician's assistant.

d. The responsible physician spends at least two one-half days per week in the remote office.

e. Adequate supervision and review of the work of the physician's assistant is provided.

f. The physician's assistant has been certified by the National Commission on Certification of Physician's Assistants~~, 3384 Peachtree Road, N.E., Suite 560, Atlanta, Georgia 30326~~.

~~g. The physician's assistant has performed medical~~ services under the direct supervision of the supervising physician for a period of not less than three months prior to utilization in a remote clinic or *as approved by the board in special instances.*

This rule is intended to implement section 148C.7, The Code.

[Filed 1/13/82, effective 3/10/82]
[Published 2/3/82]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement, 2/3/82.

ARC 2679

HEALTH DEPARTMENT[470]

Pursuant to the authority of Section 135.72, The Code, the State Department of Health proposes to adopt IAC 202.2(9), to be added to the "Definitions" section of the Certificate of Need rules IAC 470—202.2(135). This rule provides a definition of the term "appropriate geographic service area" with respect to particular health care institutions. The Statewide Health Co-ordinating Council approved adoption of this rule on September 2, 1981. The State Board of Health approved adoption on September 9, 1981. The Health Facilities Council approved adoption on November 2, 1981.

Notice of Intended Action was published in the Iowa Administrative Bulletin, Vol. 4, No. 12, December 9, 1981, as ARC 2574. Public hearing was held on January 14, 1982. No public comments were received.

This rule remains unchanged from the Notice of Intended Action.

This rule becomes effective on March 10, 1982.

This rule is intended to implement section 135.61(1)"c", The Code.

Rule 202.2(135) is amended by adding the following new subrule.

202.2(9) "Appropriate geographic service area" as the term applies to defining affected persons in section 135.61(1)"c", The Code, shall be defined as follows:

a. For applications regarding hospitals, hospitals located in the same county and in Iowa counties contiguous to the county wherein the applicant hospital's proposed project will be located.

b. For applications regarding intermediate care facilities, other intermediate care facilities located within the county the applicant will be serving.

c. For applications regarding residential care facilities, other residential care facilities located within the county the applicant will be serving.

d. For applications regarding long term care facilities serving mentally retarded, developmentally disabled clients, other providers of long term care to the mentally retarded, developmentally disabled located within the same district. These districts are designated by the ~~office for planning and programming for state government~~ planning purposes.

e. For applications sponsored by other than the above-mentioned hospitals or health facilities, notice shall be sent to those providers within the same county who offer similar service or might logically be viewed as potential providers of such service.

f. For applications regarding the university of Iowa hospitals and clinics, the entire state of Iowa shall be the appropriate geographic service area.

Publication of acceptance of an application from the university of Iowa hospitals and clinics in the paid notice section of the Des Moines Register shall constitute sufficient notification for purposes of section 135.66(2), The Code.

[Filed 1/15/82, effective 3/10/82]
[Published 2/3/82]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement, 2/3/82.

ARC 2680

HEALTH DEPARTMENT[470]

Pursuant to the authority of Section 135.72, The Code, the State Department of Health repeals IAC 202.12(2), concerning appeals to the commissioner of the department's determination of reviewability or nonreviewability of a proposed project under the Certificate of Need Law. The Statewide Health Co-ordinating Council approved the repeal of this rule on September 2, 1981. The State Board of Health approved repeal of this rule on September 9, 1981. The Health Facilities Council approved repeal of this rule on September 10, 1981.

Notice of Intended Action was published in the Iowa Administrative Bulletin, Vol. 4, No. 12, December 9, 1981 as ARC 2575. Public hearing was held on January 14, 1982. No public comments were received.

This repeal remains unchanged from the Notice of Intended Action.

This repeal becomes effective on March 10, 1982.

No provisions of Iowa's Certificate of Need Law require that reviewability determinations of the Department be subject to departmental appeal.

Subrule **202.12(2)** is rescinded and reserved for future use.

[Filed 1/15/82, effective 3/10/82]
[Published 2/3/82]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement, 2/3/82.

ARC 2681

HEALTH DEPARTMENT[470]

Pursuant to the authority of Section 135.72, The Code, the State Department of Health repeals IAC 202.14(3) with respect to notification of affected parties of receipt of extension requests and adopts the below rule in lieu thereof. The Statewide Health Co-ordinating Council approved this repeal and adoption on September 2, 1981. The State Board of Health approved this repeal and adoption on September 9, 1981. The Health Facilities Council approved this repeal and adoption on September 10, 1981.

Notice of Intended Action was published in the Iowa Administrative Bulletin, Vol. 4, No. 12, December 9, 1981 as ARC 2576. Public hearing was held on this rule on January 14, 1982. No public comments were received.

This repeal and adoption remains unchanged from the Notice of Intended Action.

This repeal and adoption shall become effective on March 10, 1982.

This action is intended to implement section 135.71, The Code.

Subrule 202.14(3) is rescinded and the following adopted in lieu thereof:

202.14(3) The department shall use the news media to notify the public and affected parties of the council meeting agenda, including extension requests. The news media shall be notified at least ten days before the council meeting.

Any affected person shall have the right to submit to the department in writing, or orally at the council meeting at which the extension request is considered, information which may be relevant to the question of granting an extension.

[Filed 1/15/82, effective 3/10/82]
[Published 2/3/82]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement, 2/3/82.

ARC 2683

TRANSPORTATION, DEPARTMENT OF[820]

07 MOTOR VEHICLE DIVISION

Pursuant to the authority of Section 327.3, The Code, the Iowa Department of Transportation hereby adopts amendment to 820—[07,F], Chapter 3, entitled "Truck Operators and Contract Carriers," Iowa Administrative Code.

Notice of Intended Action was published December 9, 1981, in the Iowa Administrative Bulletin as ARC 2570.

TRANSPORTATION, DEPARTMENT OF[820] *(cont'd)*

To facilitate the trucking industry's urgent need to cope with rapidly escalating fuel costs during the summer of 1979, the Transportation Regulation Board (Board) issued its "Supplemental Order Concerning Owner-Operator Fuel Cost Increases" of June 22, 1979, and "Supplemental Order Concerning Fuel Cost Increases" of June 29, 1979. These orders authorized carriers to depart from the statutory requirements for effecting rate increases outlined in sections 327D.78 to 327D.86, The Code, and from the governing tariff circulars then in effect. The orders permitted carriers to recoup increased fuel expenses by filing for an increase in rates upon one day's notice only, and without justification for the increase to the Board. However, the maximum allowable percentage surcharge was determined and published weekly by the Interstate Commerce Commission (ICC); for a greater increase, carriers were required to follow regular statutory procedures. In addition, carriers were required to reimburse their respective owner/operators. However, so long as carriers followed those procedures outlined in the Supplemental Orders issued in June, 1979, the Board was prohibited from exercising its power of suspension under Section 327D.84, The Code.

It has become apparent that conditions have changed substantially since the time of the orders implementing the fuel surcharge, and that there is a growing dissatisfaction with the fuel surcharge system on both the national and state-wide levels. On October 8, 1981, the ICC announced that it was replacing its then-current revenue-based fuel surcharge with a mileage-based system. The Transportation Regulation Authority which replaced the Board as of January 1, 1982, pursuant to the Acts of the Sixty-ninth General Assembly, 1981 Regular Session, Chapter 22, proposes to change the Iowa fuel surcharge system by implementing the following subrule.

There are no changes made from the published notice.

This rule will become effective March 15, 1982, and is intended to implement Chapter 327, The Code.

Rule [07,F]3.8(327) is amended by adding a new subrule as follows:

3.8(14) Fuel surcharge. The fuel surcharge program implemented by Docket No. R-S-79-13, "Supplemental Order Concerning Owner-Operator Fuel Cost Increases" issued June 22, 1979, and "Supplemental Order Concerning Fuel Cost Increases" issued June 29, 1979, shall be discontinued as of March 15, 1982, in accordance with the following provisions:

a. The provisions of the above-named supplemental orders under Docket No. R-S-79-13 shall be repealed as of March 15, 1982.

b. All of the regulated Iowa intrastate freight and passenger motor carriers may file within sixty days of the effective date of the adopted rule an amended tariff schedule incorporating all or any part of the fuel surcharge on file as of July 17, 1981. The maximum allowable tariff increase for an individual carrier subject to this provision shall be determined by the fuel surcharge for the respective carrier on file with the transportation regulation board as of July 17, 1981.

c. All future rate increases will be subject to the statutory requirements set forth in chapter 327D, The Code.

[Filed 1/18/82, effective 3/15/82]
[Published 2/3/82]

EDITOR'S NOTE: For replacement pages for IAC, see IAC ~~Supplement, 2/3/82.~~

ARC 2684

TRANSPORTATION, DEPARTMENT OF[820]

07 MOTOR VEHICLE DIVISION

Pursuant to the authority of Section 325.3, The Code, the Iowa Department of Transportation hereby adopts amendment to 820—[07,F], Chapter 4, entitled "Motor Carriers and Charter Carriers," Iowa Administrative Code.

Notice of Intended Action was published December 9, 1981, in the Iowa Administrative Bulletin as ARC 2571.

To facilitate the trucking industry's urgent need to cope with rapidly escalating fuel costs during the summer of 1979, the Transportation Regulation Board (Board) issued its "Supplemental Order Concerning Owner-Operator Fuel Cost Increases" of June 22, 1979, and "Supplemental Order Concerning Fuel Cost Increases" of June 29, 1979. These orders authorized carriers to depart from the statutory requirements for effecting rate increases outlined in sections 327D.78 to 327D.86, The Code, and from the governing tariff circulars then in effect. The orders permitted carriers to recoup increased fuel expenses by filing for an increase in rates upon one day's notice only, and without justification for the increase to the Board. However, the maximum allowable percentage surcharge was determined and published weekly by the Interstate Commerce Commission (ICC); for a greater increase, carriers were required to follow regular statutory procedures. In addition, carriers were required to reimburse their respective owner/operators. However, so long as carriers followed those procedures outlined in the Supplemental Orders issued in June, 1979, the Board was prohibited from exercising its power of suspension under section 327D.84, The Code.

It has become apparent that conditions have changed substantially since the time of the orders implementing the fuel surcharge, and that there is a growing dissatisfaction with the fuel surcharge system on both the national and state-wide levels. On October 8, 1981, the ICC announced that it was replacing its then-current revenue-based fuel surcharge with a mileage-based system. The Transportation Regulation Authority which replaced the Board as of January 1, 1982, pursuant to the Acts of the Sixty-ninth General Assembly, 1981 Regular Session, Chapter 22, proposes to change the Iowa fuel surcharge system by implementing the following subrule.

There are no changes made from the published notice.

This rule will become effective March 15, 1982, and is intended to implement chapter 325, The Code.

Rule [07,F]4.14(325) is amended by adding a new subrule as follows:

4.14(14) Fuel surcharge. The fuel surcharge program implemented by Docket No. R-S-79-13, "Supplemental Order Concerning Owner-Operator Fuel Cost Increases" issued June 22, 1979, and "Supplemental Order Concerning Fuel Cost Increases" issued June 29, 1979, shall be discontinued as of March 15, 1982, in accordance with the following provisions:

a. The provisions of the above-named supplemental orders under Docket No. R-S-79-13 shall be repealed as of March 15, 1982.

b. All of the regulated Iowa intrastate freight and passenger motor carriers may file within sixty days of the ~~effective date of the adopted rule an amended tariff~~

schedule incorporating all or any part of the fuel surcharge on file as of July 17, 1981. The maximum allowable tariff increase for an individual carrier subject to this provision shall be determined by the fuel surcharge for the respective carrier on file with the transportation regulation board as of July 17, 1981.

c. All future rate increases will be subject to the statutory requirements set forth in chapter 327D, The Code.

[Filed 1/18/82, effective 3/15/82]
[Published 2/3/82]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement, 2/3/82.

ARC 2685

TRANSPORTATION, DEPARTMENT OF[820]

07 MOTOR VEHICLE DIVISION

Pursuant to the authority of Section 327A.17, The Code, the Iowa Department of Transportation hereby adopts amendment to 820—[07,F], Chapter 13, entitled "Liquid Transport Carriers," Iowa Administrative Code.

Notice of Intended Action was published December 9, 1981, in the Iowa Administrative Bulletin as ARC 2572.

To facilitate the trucking industry's urgent need to cope with rapidly escalating fuel costs during the summer of 1979, the Transportation Regulation Board (Board) issued its "Supplemental Order Concerning Owner-Operator Fuel Cost Increases" of June 22, 1979, and "Supplemental Order Concerning Fuel Cost Increases" of June 29, 1979. These orders authorized carriers to depart from the statutory requirements for effecting rate increases outlined in sections 327D.78 to 327D.86, The Code, and from the governing tariff circulars then in effect. The orders permitted carriers to recoup increased fuel expenses by filing for an increase in rates upon one day's notice only, and without justification for the increase to the Board. However, the maximum allowable percentage surcharge was determined and published weekly by the Interstate Commerce Commission (ICC); for a greater increase, carriers were required to follow regular statutory procedures. In addition, carriers were required to reimburse their respective owner/operators. However, so long as carriers followed those procedures outlined in the supplemental orders issued in June, 1979, the Board was prohibited from exercising its power of suspension under section 327D.84, The Code.

It has become apparent that conditions have changed substantially since the time of the orders implementing the fuel surcharge, and that there is a growing dissatisfaction with the fuel surcharge system on both the national and state-wide levels. On October 8, 1981, the ICC announced that it was replacing its then-current revenue-based fuel surcharge with a mileage-based system. The Transportation Regulation Authority which replaced the Board as of January 1, 1982, pursuant to the Acts of the Sixty-ninth General Assembly, 1981 Regular Session, Chapter 22, proposes to change the Iowa fuel surcharge system by implementing the following subrule.

There are no changes made from the published notice.

This rule will become effective March 15, 1982, and is intended to implement chapter 327A, The Code.

Rule [07,F] 13.11(327A) is amended by adding a new subrule as follows:

13.11(12) Fuel surcharge. The fuel surcharge program implemented by Docket No. R-S-79-13, "Supplemental Order Concerning Owner-Operator Fuel Cost Increases" issued June 22, 1979, and "Supplemental Order Concerning Fuel Cost Increases" issued June 29, 1979, shall be discontinued as of March 15, 1982, in accordance with the following provisions:

a. The provisions of the above-named supplemental orders under Docket No. R-S-79-13 shall be repealed as of March 15, 1982.

b. All of the regulated Iowa intrastate freight and passenger motor carriers may file within sixty days of the effective date of the adopted rule an amended tariff schedule incorporating all or any part of the fuel surcharge on file as of July 17, 1981. The maximum allowable tariff increase for an individual carrier subject to this provision shall be determined by the fuel surcharge for the respective carrier on file with the transportation regulation board as of July 17, 1981.

c. All future rate increases will be subject to the statutory requirements set forth in chapter 327D, The Code.

This rule is intended to implement chapter 327A, The Code.

[Filed 1/18/82, effective 3/15/82]
[Published 2/3/82]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement, 2/3/82.

SUMMARY OF OPINIONS FROM THE OFFICE OF

ATTORNEY GENERAL THOMAS J. MILLER

December, 1981

COUNTIES AND COUNTY OFFICERS

Board of Supervisors. Section 340A.6, The Code 1981; § 906(2), chapter 117, Laws of the 69th General Assembly, 1981 Session. The Board of Supervisors cannot return the recommended compensation schedule to the county compensation board for reconsideration. The Board of Supervisors may not disapprove the recommended compensation schedule and allow the current compensation schedule to be carried over through the next fiscal year. If the Board of Supervisors wishes to reduce the amount of the recommended compensation schedule, the equal percentage factor applies to the new annualized schedule. (Fortney to Stromer, Speaker, House of Representatives and Steven S. Hoth, Des Moines County Attorney, 12/24/81) #81-12-9

Chief Deputy Sheriff: Termination. Acts 1981, Senate File 130, §§ 320(4), 651(7), 902(2), §§ 341A.7, 341A.12, The Code 1981. A chief deputy sheriff may be terminated pursuant to §§ 651(7) and 902(2) of 1981 Acts, Senate File 130. Such termination is not made pursuant to § 320(4) of said Act. Constitutional due process does not require notice and an opportunity for a hearing in conjunction with the termination of a chief deputy sheriff unless the termination is based on allegations of dishonesty, immoral, or illegal conduct that call into question the terminated employee's honesty, reputation, or good name. (Fortney to Mullins, State Representative, 12/30/81) #81-12-10(L)

Real Property; Subdivision Platting. §§ 409.9, 409.12, The Code 1981. Chapter 409 of the Code requires that an abstract of title accompanying a subdivision plat be filed with the county recorder, however, the abstract need not be entered of record. (Ovrom to Glaser, Delaware County Attorney, 12/30/81) #81-12-11(L)

HIGHWAYS

Construction. Section 309.22, The Code 1981. For purposes of this section a work project would be classified as "construction" if the work constitutes a significant improvement to the existing facility. The project would be classified as "maintenance" if the work consists of preserving or upkeeping the highway. (J. Miller to Welsh, State Representative, 12/16/81) #81-12-3(L)

MOTOR VEHICLES

Operating While Intoxicated. Section 321.281 and 1981 Session, 69th G.A., S.F. 514, § 6. There are no license revocation provisions for convictions under the per se law as is written in amended § 321.281. Since the per se law is separate and distinct from the OMVUI law, there also are no license revocation provisions for a conviction under the per se law for §§ 321.283, 321.560 and 321B.7. In addition, no financial responsibility has to be filed under § 321A.17 for deferred judgment revocations under amended § 321.281. (Miller to Kassel, DOT and Miller, DPS, 12/24/81) #81-12-5

MUNICIPALITIES

Bonding. Sections 24.26-34, 76.1-2, 384.2, 4, 5, 16, 24, 26 and 32 and 403.19. Estimated debt levies may not be certified for those bonds not yet authorized prior to April 1, but may be made for bonds that are issued. Municipalities may caluclate estimated debt levies for bonds authorized but not yet issued or sold but no debt service fund may be created until the bonds are in fact issued. All of these calculations are subject to review by taxpayer protest and/or by the Auditor. (Hagen to Rush, State Senator, 12/24/81) #81-21-8(L)

Police and Fire Pensions. Section 411.6(12)(a) and (c), The Code 1981. Computation of the annual readjustment of pensions is provided for in Ch. 411. In the event the rank or position held by a retired or deceased police or fire official at the time of retirement or death is subsequently abolished, the board of trustees for the police and fire retirement systems are authorized to compute the adjustment of the member's pension. Two possible elements to consider in the adjustment of pensions, in such cases, are suggested. Finally, step increases based upon a reclassification of the salary scale are not to be used in the recomputation of pensions. (Walding to O'Kane, State Representative, 12/11/81) #81-12-1(L)

PUBLIC FUNDS

Deposits. Iowa Const. Art. VIII, § 3; Chs. 453, 454, §§ 4.7, 4.11, 456.10, 453.1, 453.5, 524.103, 534.11(10); Title I of the Housing and Community Development Act of 1974, Public Law 93-383. The Iowa Code requires that public funds must first be proffered to approved banks except where the public funds are to be deposited not more than 14 days. Once the funds are deposited, public funds not needed for current operating expenses may be invested pursuant to Section 452.10, The Code 1981, so long as said investment is not in contravention of Article VIII, § 3, the Iowa Constitution. In certain limited instances, federal legislation providing federal funds may preempt this proffer requirement. (Hagen to Priebe, State Senator, 12/31/81) #81-12-12(L)

SCHOOLS

School Finance; Stamped Warrants and Anticipatory Warrants. §§ 74.1, 452.10, 453.10, The Code 1981. Warrants may be stamped or anticipatory warrants issued while funds are invested if the investments were made in good faith and without negligence. These warrants should generally not be considered arbitrage bonds for purposes of federal taxation. (Norby to Baringer, Treasurer, 12/24/81) #81-12-4

STATE OFFICERS AND DEPARTMENTS

Department of Social Services. § 217.3, The Code 1981, 69th G.A., 1981 Session, Senate File 566. Discusses the procedures for reorganizing the Department of Social Services. (Fortney to Reagen, Commissioner, Department of Social Services, 12/24/81) #81-12-7(L)

Medical Care for Indigents. §§ 255.8, 255.16, 255.28 and 255.29, The Code 1981. The formula for determining a county's quota of indigent patients that may be admitted and treated at University Hospitals at state expense under § 255.16 is dependent upon the annual appropriation to the hospital for its implementation. A ceiling of 110 per cent of a county's quota exists on the state's financial liability under § 255.16. Section 255.16 does not impose a limit on the number of indigent patients that may be admitted and treated at University Hospitals. Where the number of indigent patients admitted to University Hospitals exceeds 110 per cent of a county's quota determined pursuant to § 255.16, the costs for the care and treatment of such patients shift to the county. (Mann to Welsh, State Representative, 12/24/81) #81-12-6(L)

STATUTES

Effective Date. Ch. 3, §§ 3.1, 3.7 The specification of an alternative effective date in the title of an Act is insufficient to contravene the effective date statutorily provided in § 3.7. (Pottorff to Pope, State Representative, 12/11/81) #81-12-2(L)

STATUTES CONSTRUED

Code, 1981	Opinion
3.1	81-12-2(L)
3.7	81-12-2(L)
4.7	81-12-12(L)
4.11	81-12-12(L)
24.26-34	81-12-8(L)
76.1-2	81-12-8(L)
255.8	81-12-6(L)
255.16	81-12-6(L)
255.28	81-12-6(L)
255.29	81-12-6(L)
309.22	81-12-3(L)
320.4	81-12-10(L)
341A.7	81-12-10(L)
384.2	81-12-8(L)
403.19	81-12-8(L)
409.9	81-12-11(L)
409.12	81-12-11(L)
411.612(a)(c)	81-12-1(L)
452.10	81-12-4
452.10	81-12-12(L)
453.1	81-12-12(L)
453.5	81-12-12(L)
524.103	81-12-12(L)
534.11(10)	81-12-12(L)
902.2	81-12-10(L)

69th Gen. Assembly	Opinion
Ch. 906(2)	81-12-9

Senate Files	Opinion
130	81-12-10(L)
514	81-12-5
566	81-12-7(L)

Const. of Iowa	Opinion
Art. VIII, § 3	81-12-12(L)

Title I, Housing & Community Dev. Act, 1974	
Pub. Law 93-383	81-12-12(L)

SUMMARY OF DECISIONS - THE SUPREME COURT OF IOWA
FILED - January 20, 1982

NOTE: Copies of these opinions may be obtained from the Supreme Court Clerk, State Capitol Building, Des Moines, IA 50319, for a fee of 40 cents per page.

No. 64621. McNABB v. OSMUNDSON.
Certiorari to Johnson District Court, Robert Osmundson, Judge. Writ sustained. Considered en banc. Opinion by Reynoldson, C.J. Concurrence in part and dissent in part by Uhlenhopp, J. (23 pages $9.20)

As this case finally reaches us after a series of district court actions, petitions for certiorari, stays, a remand, and a retained jurisdiction by this court, it appears that plaintiff, after a brief pro se appearance, was sentenced to 232 days in the county jail, two days for each of 116 unpaid installments of child support. Trial court found that plaintiff was indigent, but refused to appoint counsel. OPINION HOLDS: I. Under the fourteenth amendment to the United States Constitution plaintiff, an indigent, was entitled to counsel in the first hearing that resulted in his incarceration, and will be entitled to counsel in any subsequent hearing if it will result in the loss of his physical liberty. II. Since plaintiff was denied appointed counsel unconstitutionally, his sentence must be vacated. III. A sentence of incarceration, based upon a willful contempt in not paying past installments of child support provided in a valid decree, shown by clear and convincing evidence, may stand despite a jail-door offer of payment or even the present inability of the contemner, through indigency, to make payment. IV. Notwithstanding the absence of statutory or contractual authority for appointment of appellate counsel, plaintiff was entitled to appointment of counsel in this certiorari action vindicating his basic constitutional right to not be sentenced to jail without counsel. CONCURRENCE IN PART AND DISSENT IN PART ASSERTS: I would hold that the burden of representing indigent contemners remains on the bar unless and until the legislature provides otherwise.

No. 65513. CITIZENS SAVINGS BANK v. SAC CITY STATE BANK.
Appeal from Sac District Court, Edward J. Flattery, Judge. Affirmed in part, reversed in part, and remanded with directions. Considered by Reynoldson, C.J., and LeGrand, Uhlenhopp, McCormick, and Schultz, JJ. Opinion by Reynoldson, C.J. (23 pages $9.20)

Plaintiff appeals and defendant cross-appeals from declaratory judgment decree adjudicating priorities between two secured parties. The debtor, an automobile dealership, was changed from a proprietorship to a corporation in 1972; the dispute is over priority in assets transferred to the corporation and those acquired after the incorporation. OPINION HOLDS: I. This action was tried in equity below, and thus should be reviewed de novo in this court. II. We hold Citizens' contention that defendant did not establish the amount owed it is without merit. III. The effect of the pre-1975 security interests will be determined by the UCC provisions in effect at the time of the transactions. IV. No conduct of defendant could be interpreted as an authorization to transfer collateral which would negate defendant's security interest; there was no prior course of dealing to support a finding that defendant authorized a bulk conveyance of business assets; therefore, defendant's security interest continued in the transferred collateral, and in any "identifiable proceeds" from the disposition of that collateral. V. Because defendant's financing statement was inadequate to perfect a security interest in the corporation's after-acquired personalty, plaintiff's security interest prevails as to this property or its proceeds. VI. Because defendant's security interest was not perfected as to the corporation and does not extend to corporation property not acquired from the sole proprietorship, its security interest did not cover its losses on the full recourse chattel paper it purchased from the corporation. VII. The four prerequisites for invoking issue preclusion were not met in this case; the elements of equitable estoppel were not established here by the necessary quantum of clear, convincing and satisfactory proof. VIII. We affirm trial court's decree denying defendant's counterclaim; we reverse its judgment insofar as it decrees that defendant has a first lien on the proceeds from the sale of the assets of the corporation; but because we are in equity and in order to effectuate justice, we remand for further proceedings to provide defendant an opportunity to prove the amount of the section 554.9306(2) "identifiable proceeds," if any, generated by the sale or liquidation of the inventory and accounts receivable covered by its security agreement.

No. 65803. IN RE MARRIAGE OF DAY.

Appeal from Polk District Court, Rodney J. Ryan, Judge. On review from Iowa Court of Appeals. Decision of court of appeals affirmed; remanded with directions. Considered by Reynoldson, C.J., and Uhlenhopp, Harris, McGiverin, and Schultz, JJ. Opinion by Reynoldson, C.J. (14 pages $5.60)

Petitioner mother appeals trial court modification of child custody decree. OPINION HOLDS: We agree with the court of appeals that the controlling fact in trial court's determination to transfer custody of the children to their father was petitioner mother's secretive removal of the two younger children from Iowa; we do not condone petitioner's subterfuge in the move from Iowa, although we are convinced by the record that her fears of respondent father's reaction and the resulting emotional stress on the children were justified; given the circumstances of this case, removal of the children is insufficient to justify a change of custody; nor do we find any other ground or grounds in this record that would justify a change; respondent father shall have summer and holiday visitation with the two younger children in his home, with the parties splitting the transportation costs.

No. 65225. RASMUSSEN BUICK-GMC, INC. v. ROACH.

Appeal from Pottawattamie District Court, Leo Connolly, Judge. Affirmed on both appeals. Considered by LeGrand, P.J., and Harris, McCormick, Allbee, and Larson, JJ. Opinion by LeGrand, J. (10 pages $4.00)

Plaintiff appeals from judgment on defendant's counterclaim for malicious prosecution; defendant cross-appeals from court's refusal to submit additional counterclaim issues to the jury. Defendant had been unsuccessfully prosecuted for odometer tampering on information supplied by plaintiff. OPINION HOLDS: I. There was abundant evidence permitting the jury to find that both plaintiff's salesman and its sales manager knew the odometer was not functional at the time this transaction was completed; the jury was also justified in finding plaintiff's report to the FBI claiming defendant had furnished a false odometer statement was knowingly false; plaintiff put in motion the procedure which caused defendant to face criminal charges; the jury could find the information furnished was knowingly false because defendant had informed the corporation's agents of the facts and because of information readily available from the corporation's records; plaintiff cannot escape liability because the false information resulted in a charge other than the one it thought should be brought. II. The trial court correctly granted a motion for directed verdict as to defendant's claim for emotional distress, as it was specifically submitted as one of the elements of damage in the division asking redress for malicious prosecution. III. Defendant asserted a right to recover under 15 U.S.C. section 1989 because plaintiff accepted an incomplete odometer statement, which is prohibited by section 1988(c); defendant is not entitled to the benefits of this statute because it is intended to protect purchasers, not sellers, of used motor vehicles.

Nos. 65936/65212. STATE v. KOOP and STATE v. BLANCHARD.
Appeal from Polk District Court, Joel D. Novak and Van Wifvat, Judges. Affirmed. Considered by LeGrand, P.J., and Uhlenhopp, Harris, Allbee, and Larson, JJ. Opinion by LeGrand, J. (10 pages $4.00)

Defendant Koop appeals from sentences imposed following his conviction of first degree robbery in violation of sections 711.1 and 711.2, The Code 1979, and carrying an offensive weapon in violation of section 724.4, The Code 1979. Defendant Blanchard appeals from sentences imposed following his conviction of first degree robbery in violation of sections 711.1 and 711.2, The Code 1979, and unauthorized possession of an offensive weapon in violation of sections 724.1 and 724.3, The Code 1979. A landlord suspected a burglary in one of his apartments and summoned the police. The officers were in the apartment with the landlord when defendants returned. The officers seized weapons, a brown paper sack containing money, ski masks and other evidence from a recent restaurant robbery defendants brought in with them. OPINION HOLDS: Under both sections 562A.19 and 562A.29, The Code 1979, a landlord has a right to enter the occupied premises under certain conditions; here, the landlord had reasonable grounds for suspecting there had been a burglary and so was justified in entering the apartment under section 562A.19(2); the officers' warrantless entry to help him determine if there had been a burglary was thus proper; the evidence was legally seized, either because it was in plain view after defendants burst into the apartment and virtually deposited it at the officers' feet or because it was properly taken incident to a legal arrest; the trial court did not err in denying defendants' motions to suppress the evidence seized.

No. 66194. GATES v. BACKES.
Appeal from Black Hawk District Court, Karl Kenline, Judge. Affirmed. Considered by LeGrand, P.J., and Uhlenhopp, Harris, Allbee, and Larson, JJ. Per Curiam. (2 pages $.80)

Defendant appeals from verdict for plaintiff for injuries sustained in an automobile accident. OPINION HOLDS: The issue of the proximate cause of plaintiff's injuries was a fact question for the trier of fact to resolve; the judgment in plaintiff's favor has sufficient evidentiary support to be binding upon us.

No. 65946. ENOCHS v. CITY OF DES MOINES.
Appeal from Polk District Court, Ray Hanrahan, Judge. Affirmed and remanded. Considered by Reynoldson, C.J., and McCormick, McGiverin, Larson, and Schultz, JJ. Opinion by Reynoldson, C.J. (10 pages $4.00)

Defendant school district makes an interlocutory appeal from trial court's overruling of its motion for summary judgment based on a claim of insufficient notice under section 613A.5, The Code. Plaintiff Dezery, a six-year-old child, was struck by a car while walking home from school; her representatives gave notice of claim to defendant city of Des Moines within thirty days, but did not give notice to the school district until about nine months after the accident. OPINION HOLDS: I. If the record before trial court when it ruled on the school district's motion for summary judgment did not generate a factual issue relating to Dezery's notice of claim to the district, we must reverse; section 613A.5 does not require multiple municipal tortfeasors to be notified simultaneously; the act of this minor's representatives in notifying one municipal defendant of her claims before a second municipal defendant was notified does not preclude her from alleging and attempting to prove incapacitation to meet the section 613A.5 notice requirements. II. Reviewing the whole record in the light most favorable to Dezery, we hold the district has not demonstrated there is no issue of material fact.

No. 65860. STATE v. BELIEU.
Appeal from Polk District Court, Ray A. Fenton, Judge. Affirmed. Considered by Reynoldson, C.J., and McCormick, McGiverin, Larson, and Schultz, JJ. Opinion by Reynoldson, C.J. (5 pages $2.00)

On appeal defendant maintains that he was erroneously convicted on two counts of robbery in the first degree because no new trial information was filed after he withdrew his guilty plea and because he was denied a speedy trial. OPINION HOLDS: I. Trial court's post-guilty plea order was one sustaining defendant's motion to withdraw guilty plea, rather than one sustaining a motion in arrest of judgment; therefore, the State was not required to file a new trial information. II. When defendant pleaded guilty prior to retrial, he waived his right to a speedy trial; therefore defendant was not denied a speedy trial even though he was not tried within ninety days of our issuing procedendo after his first appeal.

No. 66601. IN RE MARRIAGE OF BRENNAN.
Appeal from Scott District Court, Margaret S. Briles, Judge. Modified, affirmed and remanded. Considered by Reynoldson, C.J., and LeGrand, Harris, McGiverin, and Schultz, JJ. Per Curiam. (3 pages $1.20)

Petitioner wife appeals from the economic and visitation provisions of the dissolution of marriage decree. OPINION HOLDS: Under these facts we affirm the property division but remand to the trial court for further specification of visitation rights; we deny the application for attorney fees on appeal and tax the costs on appeal equally to each party.

No. 66318. IN RE MARRIAGE OF VIERLING.
Appeal from Madison District Court, James E. Hughes, Judge. Affirmed. Considered by Reynoldson, C.J., and LeGrand, Harris, McGiverin, and Schultz, JJ. Per Curiam. (2 pages $.80)

Respondent husband appeals from the property division of the decree dissolving the parties' marriage. OPINION HOLDS: The property division was made in conformance with the guidelines set out in section 598.21, The Code 1981; on our de novo review, we adopt it as our own.

No. 65122. SCHROPP v. SOLZMAN.
Appeal from Pottawattamie District Court, Leo Connolly, Judge. Affirmed. Considered by Reynoldson, C.J., and Uhlenhopp, Harris, McGiverin, and Schultz, JJ. Opinion by Harris, J. (7 pages $2.80)

Defendants appeal from judgment awarding plaintiffs tort damages resulting from water and mud flowage from adjoining land. OPINION HOLDS: The trial court's findings of fact were supported by substantial evidence and its evidentiary rulings were well within its discretion; defendants were under a duty to plaintiffs under these facts to take reasonable measures to maintain and repair artificial embankments and dikes.

No. 66326. STATE v. STROUD.
Appeal from Appanoose District Court, Max H. Ruschmeyer, Judge. Reversed and remanded. Considered by Reynoldson, C.J., and Uhlenhopp, Harris, McGiverin, and Schultz, JJ. Opinion by Harris, J. (4 pages $1.60)

The State appeals from order granting new trial in prosecution for operating a motor vehicle under the influence of an alcoholic beverage in violation of section 321.281, The Code. OPINION HOLDS: I. Defendant was not entitled to the Miranda warnings before invocation of the implied consent procedure. II. Nothing in section 804.20, The Code, required the arresting officer or anyone to advise defendant of his right to counsel before invocation of the implied consent procedure.

No. 65774. FIRST JUDICIAL DISTRICT DEPARTMENT OF CORRECTIONAL SERVICES vs. IOWA CIVIL RIGHTS COMMISSION.

Appeal from Black Hawk District Court, Thomas H. Nelson, Judge. Affirmed. Considered by Reynoldson, C.J., and Uhlenhopp, Harris, McGiverin, and Schultz, JJ. Opinion by Uhlenhopp, J. (23 pages $9.20)

Civil Rights Commission appeals from district court judgment reversing Commission's determination that employer was liable for discriminatory act of predecessor employer. The employee, Mary Berdell, is a blind, black woman who was employed by the Black Hawk Department of Court Services as a part-time pretrial release interviewer and counselor. OPINION HOLDS: I. Under Linn Co-op Oil Co. v. Quigley, 305 N.W.2d 729 (Iowa 1981), the present case is a proceeding "in process on July 1, 1975," and therefore the judicial review provisions of the IAPA are inapplicable and the review of the district court and of this court is de novo. II. Because our review is de novo, the Commission is not prejudiced by the district court's refusal to change the venue. III. The employer's actions in restricting employee's access to the county jail and requiring her to perform only counseling duties did not constitute a constructive discharge from employment. IV. The evidence does not establish the necessary continuity between the now defunct Black Hawk Department of Court Services and the First Judicial District Department of Correctional Services; we therefore hold that the doctrine of successor liability is inapplicable in the present case.

No. 66162. MUCHMORE EQUIPMENT, INC. v. GROVER.

Appeal from Buchanan District Court, Karl Kenline, Judge. Modified, affirmed, and remanded with directions. Considered by Reynoldson, C.J., and Uhlenhopp, Harris, McGiverin, and Schultz, JJ. Opinion by Uhlenhopp, J. (18 pages $7.20)

Defendant appeals from judgment for plaintiff in this action for breach of a contract to construct a grain bin on defendant's farm. OPINION HOLDS: I. Although the contract denominates the delinquency penalty of 1% per month as a "service charge", it amounts to interest and as such it violates Iowa's floating usury rate, section 535.2, The Code; plaintiff can recover only the principal of the contract remaining unpaid; the transaction does not come under the Consumer Credit Code, Chapter 537, The Code. II. Section 535.2, The Code, expressly provides that in usury cases the plaintiff obtains judgment for the unpaid principal "without costs" and that "in no case . . . shall the plaintiff have judgment for more than the principal. . ."; we hold that by virtue of the usury statute, plaintiff cannot recover attorney fees. III. This case is a typical contract dispute; were we to permit punitive damages here, such damages would be recoverable in contract actions as a matter of course, contrary to the general rule; we hold plaintiff is not entitled to exemplary damages. IV. The trial court's findings on defendant's counterclaim for his sons' wages and for damages from lodged and downed corn were supported by substantial evidence and must stand.

No. 65167. DAVENPORT MACHINE & FOUNDRY CO. v. ADOLPH COORS, CO.
Appeal from Scott District Court, L.D. Carstensen, Judge. Reversed. Considered by Reynoldson, C.J., and Uhlenhopp, Harris, McGiverin, and Schultz, JJ. Opinion by Uhlenhopp, J. (12 pages $4.80)

Plaintiff appeals from order sustaining defendant's special appearance. Plaintiff sold defendant machinery parts to be used at its brewery in Colorado; defendant sells beer throughout Iowa. OPINION HOLDS: I. A foreign corporation has a "presence" in a state when it "does business" there, making it amenable to the laws and courts of that state; this was the law before the enactment of the single act statutes, and it is still the law; if a corporation's activities in the forum are so 'continuous and systematic' that the corporation may in fact be said already to be 'present' there, it may also be served in causes of action unrelated to its forum activities; Coors has sufficient contacts with this state to give Iowa courts jurisdiction of the present cause of action. II. Contract clauses purporting to deprive Iowa courts of jurisdiction they would otherwise have are not legally binding in Iowa; however, under a motion to dismiss an Iowa action without prejudice on the ground of forum nonconveniens, such a clause, if otherwise fair, will be given consideration along with the other factors presented in determining whether the Iowa court should decline to entertain the suit.

No. 66393. IN RE MARRIAGE OF OLIPHANT.
Appeal from Linn District Court, Larry J. Conmey, Judge. Modified, affirmed, and remanded. Considered by Uhlenhopp, P.J., and McCormick, Allbee, Larson and Schultz, JJ. Per Curiam. (2 pages $.80)

Petitioner wife appeals from economic provisions of the dissolution decree. OPINION HOLDS: The decree should be affirmed except that the amount of monthly alimony allowed appellant should be increased to $300.00 per month as long as both parties live, and the amount of attorney fees for services in the district court which were allowed to appellant should be increased to $700 with an additional $500.00 allowance to apply on her attorney fees in this court.

No. 66577. SIMS v. OTIS ELEVATOR CO.
Appeal from Linn District Court, Thomas M. Horan, Judge. Affirmed. Considered by Uhlenhopp, P.J., and McCormick, Allbee, Larson, and Schultz, JJ. Per Curiam. (2 pages $.80)

Defendant appeals from judgment for plaintiff in this personal injury action arising out of an elevator accident. OPINION HOLDS: The trial court properly submitted to the jury the charge that appellant was negligent in failing to place an "out of use" sign on an elevator while repairs and maintenance were being performed and also the charge of res ipsa loquitur.

NO. 66589. STATE V. WILSON.
Appeal from Black Hawk District Court, Peter Van Metre, Roger Peterson, and Dennis D. Damsgaard, Judges. Affirmed. Considered by LeGrand, P.J., and McCormick, Allbee, McGiverin and Larson, JJ. Opinion by McCormick, J. (7 pages $2.80)

This is an appeal by defendant from a guilty-plea conviction and sentence for first degree robbery in violation of section 711.2, The Code. OPINION HOLDS: I. Trial court was correct in holding that the applicability of section 906.5, The Code, is a parole board determination rather that a judicial determination; because a judicial determination is not required, it is unnecessary for the State to plead and prove a prior conviction upon which it relies for bringing into play the limitation on parole in section 906.5. II. The record does not show that the parole board has ruled on the applicability of section 906.5 to defendant; therefore, defendant has not been adversely affected by the statute and lacks standing to challenge its constitutionality. We find no violation of due process in the fact that the legislature has assigned the decision on applicability of section 906.5 the the parole board instead of the sentencing court.

NO. 65848. GLASS V. MINNESOTA PROTECTIVE LIFE INSURANCE CO.
Appeal from Dallas District Court, Robert O. Frederick, Judge. Reversed and remanded. Considered by Reynoldson, C.J., and LeGrand, McCormick, McGiverin and Larson, JJ. Opinion by McCormick, J. (10 pages $4.00)

Plaintiff appeals from dismissal of his contract action for insurance policy renewal commissions. OPINION HOLDS: I. The trial court erred in granting the defendant a summary judgment on the ground of the statute of frauds; the statute of frauds does not bar evidence of a contract which has been fully performed by one of the parties; if the plaintiff's evidence is believed he has fully performed his part of the contract, and therefore there is a genuine issue of material fact on the applicability of this exception to the statute of frauds. II. The trial court erred in granting the defendant a summary judgment on the additional ground the suit was barred by a five-year statute of limitations; if the plaintiff's evidence is believed, the defendant stated its intention to breach the contract in 1973 but did not actually breach it until 1978; since the plaintiff chose to disregard the alleged 1973 anticipatory breach and chose not to sue until the alleged 1978 actual breach, the statute of limitations did not begin to run until the date of the alleged actual breach. III. Part of the plaintiff's petition alleged that the defendant had breached a contract by deducting a service fee from sums due the plaintiff; this part of the petition stated a cause of action and raised a genuine issue of material fact; the trial court erred by holding otherwise and by granting summary judgment as to this part of the petition. IV. Part of the plaintiff's petition alleged that he was entitled to renewal commissions on a theory of unjust enrichment, in addition to the contract theory pleaded elsewhere; this part of the petition stated a cause of action, and the trial court erred in sustaining the defendant's motion to dismiss this part of the petition.

NO. 65960. SUCKOW V. BOONE STATE BANK & TRUST CO.
Appeal from Boone District Court, Paul E. Hellwege, Judge. Affirmed in part; reversed in part, and remanded. Considered by Reynoldson, C.J., and Uhlenhopp, Harris, McGiverin and Schultz, JJ. Opinion by McGiverin, J. Dissent by Harris, J.
(12 pages $4.80)

Plaintiffs appeal trial court's dismissal of their petition as a sanction for failing to attend at their own depositions after being served with proper notice thereof, pursuant to Iowa R. Civ. P. 134(d). OPINION HOLDS: I. Plaintiffs' rule 179(b) motion, which was directed at findings of fact and conclusions of law in the trial court dismissing the action, was proper and it served to extend the time for appeal pursuant to Iowa R. App. P. 5 by plaintiffs as to all defendants; plaintiffs' appeal was, therefore, timely and we have jurisdiction over it. II. There was no reason to question the trial court's finding that plaintiffs' absence from their depositions was willful; however, the dismissal of this action for willfully being absent from a single deposition is, in this case, too severe a sanction where no trial court order was disobeyed; it was an abuse of discretion to dismiss plaintiffs' petition under this record; therefore, the order dismissing the petition is reversed and the case remanded for further proceedings consistent with this opinion, including consideration of other appropriate discovery sanctions. DISSENT ASSERTS: The dismissal ordered here was not an abuse of discretion; I would affirm the trial court.

NO. 66786. IN RE MARRIAGE OF HUBBARD.
Appeal from Poweshiek District Court, Richard J. Vogel, Judge. Modified and affirmed. Considered by LeGrand, P.J., and McCormick, Allbee, McGiverin and Larson, JJ. Opinion by McGiverin, J. (17 pages $6.80)

Respondent mother appeals child custody modification. OPINION HOLDS: I. In this case the children had no "home state," so the Iowa court was not divested of subject matter jurisdiction under section 598A.3(1)(a), The Code; the record is replete with evidence of both significant connections between the children, and one, if not both the parents, and the State of Iowa, and there exists substantial evidence concerning the present and future care, protection, training and personal relationships of the children in Iowa; therefore, trial court properly ascertained that it had jurisdiction under section 598A.3(a)(b); had this proceeding been brought in California, we believe a court of that state would have declined to exercise jurisdiction; therefore, it is apparent Iowa would have had jurisdiction under section 598A.3(a)(b). II. Our de novo review of the record convinces us that there has been a substantial change in circumstances since the time of the dissolution decree such that it is in the best interests of the children to be placed in the custody of petitioner father. III. We modify trial court's ruling and allow respondent mother visitation in California for one month each year during the children's summer vacation with transportation to be provided or paid for by petitioner father.

NO. 66518. STATE V. HENNON.
Appeal from Warren District Court, M. C. Herrick, Judge. Affirmed. Considered by LeGrand, P.J., and McCormick, Allbee, McGiverin and Larson, JJ. Opinion by McCormick, J. (7 pages $2.80)

Defendant appeals from his conviction and sentence for possession of a controlled substance with intent to deliver in violation of section 204.401(1)(b), The Code, asserting the trial court erred in overruling his motion to suppress 144 pounds of marijuana seized from his barn pursuant to a search warrant. OPINION HOLDS: I. The failure of the affidavit to specify the date of the informant's observations is not fatal to the warrant; the officer's use of the present tense in his statement that he was told on "this date that the large quantity of marijuana . . . is in the barn," reasonably signifies that the informant's observations were fresh on the date of the application, which was the date the officer received the information. II. We hold that the informant's reliability was shown; the officer applying for the search warrant showed that the informant previously gave accurate information and stated that the informant had not given false information in the past.

NO. 66147. STATE V. CONNER.
Appeal from Polk District Court, Luther T. Glanton, Jr., Judge. Affirmed. Considered by Reynoldson, C.J., and Uhlenhopp, Harris, McGiverin, and Schultz, JJ. Opinion by Schultz, J. (10 pages $4.00)

Defendant appeals from his conviction of escape from custody in violation of section 719.4(1), The Code 1979, and robbery in the second degree in violation of sections 711.1 and 711.3, The Code 1979. OPINION HOLDS: I. We find no abuse of discretion by the trial court in admitting into evidence the trial information, warrant of commitment, and other exhibits showing that defendant was in jail on a charge of first degree robbery at the time of the incident which resulted in the present escape and second degree robbery prosecution; since the jury was not required to believe testimony to the same effect by a deputy clerk of court and an assistant chief jailer, the exhibits were highly probative, and the trial court removed any danger of prejudice by giving the jury a cautionary instruction explaining the limited purpose for which the testimony and the exhibits could be considered. II. We need not determine whether the trial court erred in overruling defendant's objection that part of the deputy sheriff's testimony was not contained in the minutes because even if the admission of the testimony constituted error, it was harmless; defendant was not surprised or prejudiced by the testimony because the same information was elicited from the witness in a discovery deposition taken ten days before trial. III. The legislature has a rational basis for imposing the same punishment for escape by persons charged with a felony and persons convicted of a felony; defendant was not denied equal protection under section 719.4(1), The Code. IV. The evidence was sufficient to support the jury's guilty verdict on the escape charge.

NO. 65232. STATE V. LEE.
Appeal from Polk District Court, Harry Perkins, Judge. Affirmed. Considered by Reynoldson, C.J., and McCormick, McGiverin, Larson, and Schultz, JJ. Opinion by Schultz, J. Special concurrence by McCormick, J. (6 pages $2.40)

Defendant appeals from her conviction by jury verdict of pandering in violation of section 725.3, The Code. OPINION HOLDS: I. The pandering statute is not unconstitutionally vague or overbroad. II. The evidence was sufficient to support the jury's verdict and insufficient to establish entrapment as a matter of law. SPECIAL CONCURRENCE ASSERTS: In view of the dictionary meaning of the word "arranges," section 725.3 plainly proscribes the conduct with which this defendant was charged.

NO. 66268. IN RE MARRIAGE OF BIEDERMANN.
Appeal from Dubuque District Court, T. H. Nelson, Judge. Affirmed. Considered by Reynoldson, C.J., and LeGrand, Harris, McGiverin and Schultz, JJ. Per Curiam. (2 pages $.80)

Respondent husband appeals from economic provisions of the parties' marriage dissolution decree. OPINION HOLDS: Upon examination of the record we find that both the allocation of property and the award of alimony were equitable.

NO. 66782. IN RE MARRIAGE OF GIBBONS.
Appeal from Mahaska District Court, Richard J. Vogel, Judge. Modified and Affirmed. Considered by Reynoldson, C.J., and LeGrand, Harris, McGiverin and Schultz, JJ. Per Curiam. (3 pages $1.20)

Petitioner husband appeals from economic provisions of the dissolution decree. OPINION HOLDS: Under these facts we affirm the property division but reduce the alimony award from $100 per week to $200 per month and award respondent wife $500 toward her attorney fees on appeal.

NO. 66717. STATE V. ELDER.
Appeal from Clay District Court, Murray S. Underwood, Judge. Affirmed. Considered by Reynoldson, C.J., LeGrand, Harris, McGiverin and Schultz, JJ. Per Curiam. (2 pages $.80)

Defendant appeals his guilty-plea conviction of conspiracy to commit a non-forcible felony in violation of sections 706.1 and 706.3, The Code. OPINION HOLDS: Defendant is precluded from challenging on appeal the adequacy of the guilty plea proceedings due to his failure to file a motion in arrest of judgment; regardless, trial court sufficiently explained and ascertained that defendant understood the intent element of the conspiracy charge.

NO. 65455. BERENGER V. FRINK.
Appeal from Clay District Court, Tom Hamilton, Judge. Affirmed and remanded. Considered en banc. Opinion by McGiverin, J. (12 pages $4.80)

Defendants appeal and plaintiff cross-appeals from an interlocutory ruling denying defendants' motion for partial summary judgment. Plaintiff administrator sued defendants for malpractice when decedent died after checking himself out of defendant hospital. OPINION HOLDS: I. The trial court incorrectly found that a motion for summary judgment was an inappropriate procedural device to seek application of the rule that punitive damages cannot be recovered in an action brought after the death of the injured party; however, the ruling was correct for a reason other than that relied on by the trial court. II. Given the purposes of punitive damages, we find it is not logical to allow punitive damage claims to survive only where decedent brought an action for them prior to his death; thus, we hold that claims for punitive damages survive the death of the injured party; our previous rule is inequitable in its operation and is therefore overruled.

NO. 65124. STATE V. WILLIAMS.

Appeal from Polk District Court, Harry Perkins, Judge. Affirmed. Considered by Reynoldson, C.J., and McCormick, McGiverin, Larson, and Schultz, JJ. Opinion by Schultz, J. Special concurrence by McCormick, J. (26 pages $10.40)

Defendant appeals from his conviction of pimping in violation of section 725.2, The Code, and pandering in violation of section 725.3, The Code. OPINION HOLDS: I. The legislature in using the terms "persuades" or "arranges" did not intend to require an act of actual prostitution as an element of the offense of pandering; the evidence is sufficient to support the jury's verdict that defendant was guilty of pandering; the offense of pandering is committed when a person furnishes a room or other place with the intent that it be used or belief that it will be used for the purpose of prostitution whether or not the person for whom the place is furnished had the intent to use it for the purpose of prostitution; this evidence is sufficient to convince a rational jury beyond a reasonable doubt that defendant knowingly furnished a room to be used for the purpose of prostitution. II. We find no abuse of discretion on the part of the trial court in allowing evidence of defendant's prior felony conviction for purposes of impeachment. III. The evidence does not establish as a matter of law that the activities of the law enforcement agents were sufficiently provocative to induce a normally law-abiding person to commit the crimes of pimping or pandering; the evidence is sufficient to support the jury's finding of no entrapment. IV. The trial court did not abuse its discretion in holding inadmissible evidence of the state's amendment of the information and a subsequent unsuccessful attempt to futher amend the information. V. None of the alleged acts or prosecutorial misconduct was so prejudicial individually or collectively as to deprive defendant of a fair trial although some of the acts were clearly inappropriate. VI. The trial court did not err in instructing the jury with regard to the information as amended; the term "solicited person" in Iowa R. Crim P. 20(3) is applicable only when the accused is charged with the offense of solicitation under section 705.1, The Code, and the confidential informant who testified against defendant was not a "solicited person" within the meaning of rule 20(3) as an accomplice whose testimony had to be corroborated; the court's instructions correctly failed to state that the charges against defendant required proof that the victim actually became a prostitute; the trial court did not err in submitting an instruction concerning evidence of other criminal conduct. VII. The trial court did not abuse its discretion by imposing the maximum sentence allowed by law and its statement of reasons for doing so was sufficient to comply with requirements of Iowa R. Crim P. 22(3)(d). SPECIAL CONCURRENCE ASSERTS: The legislature's alternative use of the word "arranges" in section 725.3 authorizes a conviction of pandering without proof of an act of prostitution but the word "persuades" does not alone do so.

NO. 63766. WESTWAY TRADING CORP. V. RIVER TERMINAL CORP.
Appeal from Muscatine District Court, Max R. Werling, Judge. Affirmed in part and reversed in part on the appeal; affirmed on the cross-appeal. Considered by LeGrand, P.J., and McCormick, Allbee, McGiverin and Larson, JJ. Opinion by McCormick, J. (14 pages $5.60)

Defendants appeal from judgment for plaintiff on a claim of interference with lease rights; plaintiff cross-appeals from amount of damages. OPINION HOLDS: I. Because we find the present cause of action is distinct from the causes of action in the 1969 litigation, we hold that the trial court did not err in refusing to sustain defendants' res judicata defense. II. The parol evidence rule is not violated when extrinsic evidence is received to assist the trial court in determining the meaning of contractual language; the extrinsic evidence was not introduced to prove the truth of the assertions; the trial court did not err in overruling defendants' hearsay objections; defendants' attempt to invoke the best evidence rule is merely an attempt to advance their parole evidence argument under a different banner; the finding that plaintiff's right to use the steamline was assured in the lease is supported by substantial evidence and is therefore conclusive. III. The court, upon substantial evidence of conspiracy, found that the letter alleged to constitute the tort was not an act of River Terminal alone; a letter of this kind can constitute the tort of interference with contractual relations; defendants also assert no conspiracy was shown because one person acted for both defendants and could not conspire with himself; nothing prevents principals from conspiring with each other through a common agent. IV. Defendants did not plead the statute of limitations, nor did they offer an acceptable excuse for their failure to do so; trial court was not obliged to find defendants proved their waiver defense. V. We do not find a reasonable basis in the record from which the amount of damages could be determined; we therefore reverse the award of compensatory damages. VI. There was substantial evidence that plaintiff suffered actual damages but insufficient evidence to support determination of their amount; the predicate for an exemplary damage award has thus been satisfied; substantial evidence of legal malice was adduced in support of the punitive damages award in this case. VII. Plaintiff's auxiliary request for injunctive relief joined with its law petition was sufficient basis for the court to enter the order for equitable relief which it did; defendants' claim of illegality is moot; we reverse the award of actual damages and otherwise affirm on defendants' appeal. VII. Plaintiff's auxiliary request for injunctive relief joined with its law petition was sufficient basis for the court to enter the order for equitable relief which it did; defendants' claim of illegality is moot; we reverse the award of actual damages and otherwise affirm on defendants' appeal. VIII. The sole issue raised in the cross-appeal is whether the trial court erred in finding that defendants' tort was not the proximate cause of plaintiff's lost profits in the winter of 1972-73; the evidence is not strong enough to make this an exceptional case requiring us to say the court was compelled as a matter of law to reach the conclusion urged by plaintiff; we affirm on the cross-appeal.

NO. 65301. STATE V. FARBER.

Appeal from Black Hawk District Court, Forest E. Eastman and George L. Stigler, District Associate Judges. Affirmed. Considered en banc. Opinion by McCormick, J. Concurrence in part and dissent in part by Allbee, J. Dissent by Uhlenhopp, J. (21 pages $8.40)

Defendant appeals from her conviction of possession of a controlled substance in violation of section 204.401(3), The Code 1979. OPINION HOLDS: I. Section 622.7, The Code, which bars testimony by one spouse against the other at trial, does not apply to applications for search warrants; the warrant was validly issued. II. Section 808.6, The Code, authorizes officers executing a search warrant to break into the premises when reasonably necessary after notice and non-admittance; it does not require officers in any circumstances to attempt to locate or bring an absent owner to the premises as an alternative to peaceful or forcible entry; the warrant was lawfully executed. CONCURRENCE IN PART, DISSENT IN PART ASSERTS: While I concur in division I relating to the issuance of the search warrant, I dissent from division II; I would reverse defendant's conviction on the ground that the search warrant was unlawfully executed; I would hold it was not reasonably necessary for the officers to break into the defendant's apartment; they knew defendant was at work not far away, and the success of the search would not have been endangered by bringing her to the scene before executing the warrant. DISSENT ASSERTS: In my opinion, the situation here is one in which some police officers with a warrant go directly to an apartment and enter and search it, and other police officers go to the place the inhabitant is, get her, and take her to the apartment, arriving when the entry and search was complete; I think this would constitute an evasion of section 808.6 and be unlawful, I would reverse.

NO. 66035. WHITMER V. INTERNATIONAL PAPER CO.

Appeal from Clinton District Court, C. H. Pelton, Judge. Affirmed. Considered en banc. Opinion by Larson, J. (5 pages $2.00)

Plaintiff appeals district court's judgment dismissing as untimely filed her review-reopening claim for additional workers' compensation benefits. OPINION HOLDS: Under the plain language of section 83.34, The Code 1971, (now section 85.26, The Code), the "discovery rule" does not apply to workers' compensation review-reopening proceedings; therefore, such proceedings must be commenced within three years of the last payment of compensation made under the original award, regardless of when additional injury or disability is discovered or discoverable.

No. 66252. MASON v. STATE.

Appeal from Scott District Court, L.D. Carstensen, Judge. Affirmed. Considered by Uhlenhopp, P.J., and McCormick, Allbee, Larson, and Schultz, JJ. Per Curiam. (3 pages $1.20)

Petitioner appeals from denial of postconviction relief. OPINION HOLDS: I. Petitioner failed to meet his burden of proving ineffective assistance counsel regarding petitioner's allegation that trial counsel had assured him that he would be granted "shock probation" if he pleaded guilty. II. Petitioner failed to sufficiently raise in the postconviction relief proceeding his claim that trial court failed to inform him during his guilty plea hearing that a person convicted of third degree sexual abuse is ineligible for probation by reason of section 907.3, Supplement to the Code 1977; therefore, petitioner is precluded from raising that issue on his appeal.

No. 66221. STATE v. HOLLINGSWORTH.

Appeal from Polk District Court, Dale S. Missildine, Judge. Affirmed. Considered by Uhlenhopp, P.J., and McCormick, Allbee, Larson, and Schultz, JJ. Per Curiam. (2 pages $ .80)

Defendant appeals from his conviction of second degree robbery in violation of sections 711.1 and 711.3, The Code. OPINION HOLDS: The trial court did not err in not submitting to the jury as lesser included offenses assault, assault with intent to inflict serious injury, and assault while participating in a felony, because the evidence estalbished as a matter of law that a robbery had been committed.

No. 66839. STATE v. HATFIELD.

Appeal from Dubuque District Court, Alan J. Pearson, District Associate Judge. Affirmed. Considered by Uhlenhopp, P.J., and McCormick, Allbee, Larson, and Schultz, JJ. Per Curiam. (2 pages $ .80)

Defendant appeals from conviction pursuant to his guilty plea to a charge of OMVUI, § 321.281, The Code 1979. OPINION HOLDS: Our review of the transcript of the guilty plea proceeding shows the elements of the offense were fully explained to the defendant, who acknowledged that he understood them; the trial court did not abuse its discretion by refusing to permit withdrawal of the plea.

No. 66226. STATE v. JEFFRIES.

Appeal from Polk District Court, Norman D. Elliott, Judge. Affirmed. Considered by Uhlenhopp, P.J., and McCormick, Allbee, Larson, and Schultz, JJ. Per Curiam. (2 pages $ .80)

The defendant appeals his conviction of escape from custody, a violation of § 719.4(1), The Code. OPINION HOLDS: I. Any error in the trial court's ruling which required the defendant to appear at trial in prison clothing was harmless beyond a reasonable doubt because the defendant appeared in open court in prison clothing at the commencement of the trial, before his request was made, and was presumably seen by the jurors at the time and because, by the very nature of the charge, escape, the jury would know he was a prison inmate.

No. 65873. STATE v. CASTILLO.

Appeal from Muscatine District Court, R. K. Stohr, Judge. Affirmed. Considered by Reynoldson, C.J., and McCormick, McGiverin, Larson, and Schultz, JJ. Opinion by Larson, J. (12 pages $4.80)

Defendant appeals from convictions of assault in violation of section 708.2(2), The Code, and second degree robbery in violation of section 711.3, The Code. OPINION HOLDS: I. The trial court did not err in allowing the State to introduce inculpatory portions of the discovery deposition of Mark Hagens, one of defendant's companions in the incident in question, after defendant introduced exculpatory portions of the deposition; the State's use of the deposition was provided for in Iowa R. Crim. P. 12(1), incorporating Iowa R. Civ. P. 145(a); moreover, it did not violate defendant's federal and state constitutional rights to confront adverse witnesses; although Hagens was not called as a witness at trial, defendant had a meaningful opportunity to examine him when taking the deposition; Iowa R. Crim. P. 5(3) deals with witnesses expected to be called and their expected testimony; it does not require the State to call every witness whose name is endorsed on the county attorney's information or listed in the minutes of testimony. II. The record does not establish ineffective assistance of counsel under the test set out in Sims v. State, 295 N.W.2d 420 (Iowa 1980).

No. 66730. IN RE MARRIAGE OF BURGER.

Appeal from Linn District Court, Clinton E. Shaeffer, Judge. Modified and remanded. Considered by Uhlenhopp, P.J., and McCormick, Allbee, McGiverin, and Larson, JJ. Per Curiam. (2 pages $ .80)

Respondent wife appeals from decree dissolving the parties' marriage, asserting that the amount of alimony awarded is inadequate. OPINION HOLDS: We hereby remand this case and direct that the decree of dissolution be modified to require petitioner to pay support to respondent in the sum of $200 per month until she remarries or either party dies; the application of respondent's counsel for attorney fees on appeal is denied.

No. 65420. KOOYMAN v. FARM BUREAU MUTUAL INSURANCE CO.

Appeal from Polk District Court, Harry Perkins, Judge. Reversed and Remanded. Considered by LeGrand, P.J., and Harris, McCormick, McGiverin, and Larson, JJ. Opinion by Larson, J. (15 pages $6.00)

Plaintiff in suit against liability insurer appeals from rulings of district court sustaining objections to proferred testimony and directing verdict in favor of defendant insurer. Plaintiffs are assignees of a claim by defendant's insured for improper handling of insured's defense in a prior suit by plaintiffs. OPINION HOLDS: I. The general rule is that an insured only if "bad faith" is established; when the cumulative evidence is viewed in the light most favorable to the plaintiffs, a jury could find Farm Bureau had approached the preparation and trial with indifference, especially in view of the great amount of its insured's money at stake, and had not pursued settlement negotiations with the same intensity, interest, and good faith it would have if there had been no policy limits; it was error to direct a verdict for Farm Bureau. II. Bad faith is the standard by which Farm Bureau's liability must be measured; it is not a proper subject of expert testimony, and the district court properly refused it; an expert opinion that there was not a "sufficient investigation" is in effect an opinion that the attorney's actions did not meet the requisite standard of care and is therefore inadmissible.

No. 64030. STATE v. OLSEN.

Appeal from Jasper District Court, Thomas S. Bown, Judge. Reversed and remanded. Considered by LeGrand, P.J., and Harris, McCormick, Allbee, and Larson, JJ. Opinion by Larson, J. (15 pages $6.00)

Defendant appeal from his conviction for possession of a controlled substance with intent to deliver, § 204.401(1), Code Supp. 1977. OPINION HOLDS: I. The State concedes error on the defendant's contention that a prosecution witness testified beyond the minutes and agrees the case must be retried. II. The two searches of defendant's person, as to which he has raised no specific objection, were proper as incidents to his arrest for possession of marijuana; the searches of the car's passenger compartment, including the glove compartment, were proper under New York v. Belton, ___ U.S. ___, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); the officers had probable cause to search the trunk based on their belief that defendant was involved in a Des Moines armed robbery. III. The expert opinions tendered here, whether a profit may have been realized under the facts, and whether the acts were consistent with operating for profit, were properly admitted as comparisons to the typical modus operandi and not as opinions on guilt or innocence; expert testimony about packaging and distributing marijuana is helpful to a jury and is outside the realm of common knowledge and experience; it is admissible. IV. Trial court refused to submit to the jury the issue of the constitutional protection accorded defendant's use of marijuana as part of the practice of his religion; according to defendant's testimony, he was a "priest" in the Ethiopian Zioncoptic Church; the church's only sacrament is marijuana, combined with tobacco and smoked continually; "the deterrence of drug abuse and traffic is a legitimate governmental interest"; courts considering the issue appear to have uniformly refused to sustain a free exercise claim with regard to marijuana use; compelling state interest sufficient to override defendant's free exercise clause argument is demonstrated in this case.

No. 66336. IN RE C.K.

Appeal from Linn District Court, Brent G. Harstad, District Associate Judge. Affirmed. Considered by LeGrand, P.J., and Harris, Allbee, McGiverin, and Larson, JJ. Opinion by Larson, J. (12 pages $4.80)

The natural parents appeal from an order terminating their parental rights under chapter 600A, The Code. The natural parents had earlier signed a release of custody and had consented to adoption of the child, but in the juvenile court they argued that their release of custody was invalid or alternatively should be revoked. OPINION HOLDS: I. The natural parents' release of custody pursuant to section 600A.4 was valid; the release form which the natural parents signed adequately informed them of their rights concerning revocation of the release of custody. II. The natural parents did not effectively revoke their release of custody within the 96-hour period provided by section 600A.4(4) for revocation as a matter of right. III. The natural parents did not show that "good cause" existed for revocation of their release of custody, as they were required to do in order to revoke after the 96-hour period for revocation as a matter of right. IV. The best interests of the child dictate that the parental rights of the natural parents be terminated and that the child remain in the home of the adoptive parents.

No. 66751. STATE v. SCHOELERMAN.

Appeal from Cedar District Court, James R. Havercamp, Judge. Reversed; judgment vacated; charge dismissed. Considered by LeGrand, P.J., and McCormick, Allbee, McGiverin, and Larson, JJ. Opinion by Allbee, J.
(13 pages $5.20)

Defendant appeals from judgment entered on his plea of guilty to false use of a financial instrument, a violation of section 715.6, The Code 1979. OPINION HOLDS: I. The act for which the defendant was charged, writing a check on a bank where he knew he had no account but signing his own name to the check, constitutes the crime of theft pursuant to section 714.1(6) but not the crime of false use of a financial instrument (FUFI) pursuant to section 715.6; there was no actual basis for the defendant's plea of guilty to the charge of FUFI. II. The defendant may raise this issue, even though he entered a plea of guilty and then failed to challenge that plea by filing a motion in arrest of judgment, because the defendant's trial attorney rendered ineffective assistance by failing to consider and raise the possibility that the defendant was guilty only of the simple misdemeanor of fifth-degree theft rather than the much more serious crime of FUFI.

No. 63269. AMANA SOCIETY v. COLONY, INC.

Appeal from Iowa District Court, Ansel J. Chapman, Judge. Reversed on appeal; affirmed on cross-appeal. Considered en banc. Opinion by Larson, J. Dissent by Reynoldson, C.J. (38 pages $15.20)

Defendants appeal from trial court's granting of injunctions in land-use case; plaintiff cross-appeals from its holding that section 614.24, The Code 1975, is constitutional. Plaintiff is a business corporation owning virtually all the farmland and business property within the Amana Colonies, and was the original grantor in deeds to defendants' property. Defendants are business people in Amana who have attempted to operate businesses without permission from plaintiff or in violation of their business permits. OPINION HOLDS: I. The plaintiff here is a "claimant" for purposes of the "stale use" statute, section 614.24; the deed restrictions as to future sale, rental and business use of the property are "negative" easements and therefore subject to the statute as "use restrictions"; this action for an injunction to enforce the use restrictions is one to "establish [an] interest" in the real estate as contemplated by section 614.24; the 21-year limitation period on claims runs from the recording of the deed, not from the time the potential claimant learns of a challenge to the restrictions; section 614.24 does not violate substantive and procedural due process, does not impair the obligation of contract, and is not impermissibly vague; we uphold its constitutionality. II. Any doubts about whether the use restrictions apply must be resolved in favor of the free use of the property; there is no clear and unambiguous language by which these defendants agreed to allow the Society to impose the use restrictions with which they are now confronted; the trial court erred in concluding plaintiff had established an express contract; there is no "clear and unambiguous" language from which we may conclude that these defendants impliedly agreed to give the Society the broad power of land use it claims. III. A general scheme of land use, with the necessary specificity, was not established; rather than promoting stability and fairness in land use, upon which the general-scheme theory is premised, the Society's version of the theory would create instability and would foster unfairness. IV. The record fails to establish the essential elements of promissory estoppel. V. We take judicial notice of the extraordinary historic, cultural and architectural value of the colonies; however, the argument that application of section 614.24 is inappropriate in the case of the

AMANA SOCIETY v. COLONY, INC. continued

Amana Colonies should have been addressed to the legislature, not to this court; the Amana Colonies are not without other effective means of land-use control; chapter 303, The Code, which was drafted by the Society's attorneys, contains provisions for establishment of historical preservation districts which would apply to the colonies; we cannot permit the power of a court of equity to be used in such a way as to place its imprimatur upon the board's policies, even though the possibilities of abuse might seem remote; the Society's equity and public policy arguments are therefore rejected; the trial court erred in granting the injunction; the case is reversed on appeal; on the cross-appeal by the Society, we conclude section 614.24 is not unconstitutional and affirm the district court on that issue. DISSENT ASSERTS: I believe that section 614.24, The Code, is unconstitutional as applied under the facts of this case; there are other valid grounds that fully support trial court's ruling; our analysis ought to start with the premise that the Amana Colonies are sui generis, and that the controversies between the Amana Society and its stockholders may require an innovative resolution; the board of the Society, through the device of business and building permits, has maintained the original environment and character of the Colonies; I find it unbelievable that these defendants, long-time residents of the area, stockholders, and successful business persons, did not know of the use restrictions on the premises or the obligations they assumed when they signed the Common Stock Registry; trial court necessarily made the same finding in holding Amana Society could enforce the provisions of a collateral, express contract between the Society and these defendant stockholders; the evidence fully supported trial court's finding that a general scheme of land use control always has existed in the Amana Colonies; where a general scheme of land use control can be proved, as here, it can be enforced against persons owning property within the affected area who have knowledge of it, whether or not the deeds or conveyances to their land actually contain the restrictions or the substance of the general scheme; these defendants knew of the general scheme and have enjoyed its benefits in the past; I would hold they cannot reject it now, and would affirm the trial court.

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