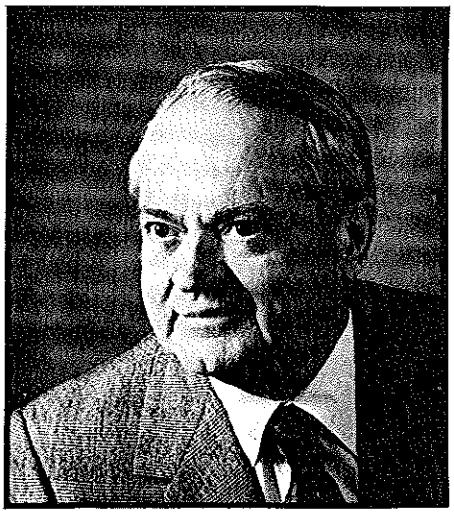
defense UPDATE

The Iowa Defense Counsel Association Newsletter January, 1990 Vol. III, No.1

HISTORY OF IOWA DEFENSE COUNSEL ASSOCIATION AND SILVER ANNIVERSARY HIGHLIGHTS

Edward F. Seitzinger, of Des Moines, Iowa, Founder and First President of IDCA, and Annual Meeting General Program Chairman, Recalls IDCA's Beginning



Edward F. Seitzinger

The Iowa Defense Counsel Association's Silver Anniversary Annual Meeting is now a part of our past, but a memorable session it was. I would like to first recap some events that made this meeting a little more special. To start things off, each registrant received a surprise gift - an executive office travel kit for their brief case, and the spouses in attendance received a canvas tote bag. Thursday evening we enjoyed dinner aboard the Pathfinder Dinner Train, and from all comments received, everyone had a great time. Most of you even did well on the Trains & Tracks Trivia, and we want to congratulate the ones receiving the prizes given in each railroad car! Those of you who didn't make the trip missed a very pleasant and unusual evening.

The overall programs for IDCA Annual Meetings have carried a reputation of being the finest in the country and our Program Chairperson this year, Craig D. Warner, certainly lived up to that reputation by providing us with an exceptional list of subjects and speakers. Besides our own illustrious Iowa speakers, we were privileged to have speakers from Columbia, South Carolina; Chicago, Illinois; Minneapolis, Minnesota; Kansas City, Missouri and Washington, D.C.

The Friday night Annual Banquet was devoted to honoring the Founders and Past Presidents of the Association and each received a beautiful marble desk pen set with the IDCA logo. We were especially pleased that Mike McCrary, a Founder and the first Treasurer of IDCA, came from Horseshoe Bay, Texas to be with us on this occasion. A great applause should go to President Patrick M. Roby for the excellent way in which he handled the Banquet program, I am sure everyone enjoyed his presentation.

Four special people were also honored that evening for their devotion and outstanding work, and they each received the same marble dest pen set in recognition of their contribution. I think it appropriate that I mention them here: Eugene Marlett, Betty Hyndman, Jerry J. Miller and Ginger Plummer. Gene Marlett is our Treasurer, the handler of our funds who keeps us solvent; the amount of work Gene does each year goes to a great extent unnoticed, but not unappreciated! Betty Hyndman has silently but diligently worked with Gene since he became Treasurer; Betty keeps the membership records straight, and sees that you are registered at the Annual Meeting and all have paid your dues! Jerry J. Miller has been our Hospitality Chairman of the Annual Meetings for a number of years. Jerry is one fellow who probably receives the least recognition and has one of the worst jobs at these meetings. The list of dedicated people would not be complete without including the name of Ginger Plummer. Ginger has worked with me on the Association's Annual Meetings since 1970 and has been a great contributor to the Thursday and Friday evening activities. I guess the only thing to really say to these four dedicated people is, *"Thank you . . . you've done good!"*

The Board of Directors, at the suggestion of President Patrick Roby, at the board meeting following the Annual Meeting of October, 1988, and in my absence, adopted a resolution to annually recognize the board member who made the greatest contribution to the Association during the year. The award was to be made in honor of Edward F. Seitzinger for his years of service and was to be known as the *Eddie Award.* The first *Eddie Award* was presented at the 1989 Silver Anniversary Annual Banquet to John B. Grier of Marshalltown, Iowa, for getting the IDCA quarterly newsletter, the *Defense Update,* off and running. Jack, congratulations!

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MESSAGE FROM THE PRESIDENT

Craig D. Warner

Those of you who attended the Friday night banquet at our Annual Meeting witnessed the Association celebrate its Silver Anniversary. We recognized the founders, the first twenty-five presidents and other distinguished members and friends whose contributions have made a significant impact in establishing this Association where it is today.

A Silver Anniversary is more than just the passing of another year. It is one of the significant milestones of one's existence and provides the occasion to look back upon the Association's infancy and formative years and the opportunity to envision the future.

As we embark on the next twenty-five years our direction is governed by the fact that we are a growing organization of nearly 400 trial attorneys and professionals who primarily represent the interests of persons against whom others have made claim for some form of legal redress. What bonds us as a professional organization is our individual interest in assuring that our adversary system of justice maintains a sense of balance and fairness. To this end, our activities for the coming year will be a continuation of education of judiciary and legislature with the defense perspective and providing litigation support services and education to our members.

Specifically, some of the current activities of the Association are that a committee of the officers and recent past presidents of the Association have been appointed to examine the desirability and feasibility of the Association's maintaining some form of an office. The Association has been very fortunate in being able to call upon it members to provide substantial contributions in furtherance of its goals. As a professional organization we will continue to do this. However, now that we are nearly 400 members strong and have been maintaining certain traditional activities, this committee is examining whether the Association can better function and provide more meaningful support for its members through the maintenance of an office.

If you attended the Annual Meeting you learned that one of the most ambitious projects your Association has going at the present is a Task Force which has been studying the new Iowa Uniform Jury Instructions. This Task Force has been at work for the past year and anticipates publishing a report of its study to the members in the near future if it has not already done so by the time this message is published. Those who attended the Annual Meeting know and appreciate the effort the Task Force has put into this project and its report will be a very usable and valuable part of your trial library.

Many fine papers are printed each year in the Annual Meeting Program. The Association will continue the practice of sending complimentary copies of the program to the Iowa federal and state judiciary. We can realize greater value in these papers by providing an index to them; and we are in the process of preparing an index to our annual programs and will have that distributed to the members this year and also see that the index is cumulative each year and included in the publication of the Annual Meeting Program.

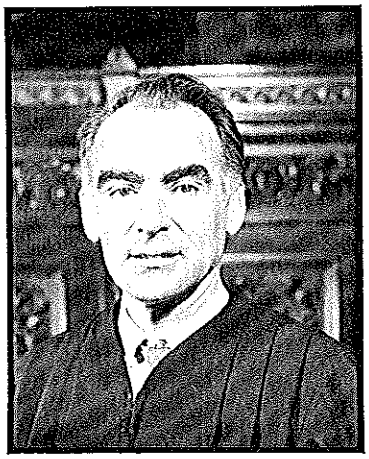
On the legislative side of our current activities, the Board of Directors has again retained Kevin Kelly as our Legislative Representative for the ensuing year and at present Kevin and our Legislative Committee consisting of Herb Selby, Chair, Lanny Elgar, Tom Hanson, Gene Marlett, David Hammer and Edward F. Seitzinger are busy making recommendations to report to the Board of Directors and officers who will then be formulating our legislative agenda for the coming year.

Now that the *Defense Update* is really off the ground and flying we will have better communication amongst membership, not only with substantive articles of professional interest, but reports on the activities of the Association. The strength of this Association lies in its membership and we take pride in that each of us is an accomplished professional with our own ideas of how to better the order. The mere fact that each of us cares enough to be a member of the Iowa Defense Counsel Association is of itself proof that individually we care about and support our common bond. Please let us have your suggestions for change and development. When you learn of a concern or have an idea as to something the Association should be aware of or involved in, please share your knowledge with each other and any of the officers and directors. As members we want and need your ideas to keep this Association vibrant and meaningful for the next twenty-five years.

Craig D. Warner,
President

FROM THE BENCH

Demise of the Date Certain for Trial: Four Case Studies — An Open Letter from U.S. District Judge Charles R. Wolle



Judge Charles R. Wolle
United States District Judge for the Southern District of Iowa

"For every problem there is some solution which is simple, neat and wrong."
— H. L. Mencken

Taking heed of the wit and wisdom of Mencken, I confess I have no simple remedy for the malady I here describe — docket overload that causes uncertainty of trial date in our state and federal courts. Clouds of asbestos-related civil actions and drug-related criminal cases have settled upon our long-congested Iowa courts, clogging many of our dockets and choking trial schedules. My purpose in presenting this open letter is three-fold: to warn of the affliction; to describe its acute symptoms; and to recommend an immediate heavy dose of patience and informed advanced planning (while we await the miracle cure).

I need not elaborate on the obvious. Court administrators, trial lawyers and judges all prefer that every case have a firm trial date fixed several months in advance. Only then can busy trial lawyers (the best soon become the busiest) plan their final trial preparations while keeping up on other cases. Firm dates give lawyers, their clients and their witnesses the scheduling certainty they crave, even allowing for an occasional weekend or vacation week with the family or friends.

Court administrators and judges also know that cases settle when clients and trial lawyers realize there is no tomorrow (which is to say no additional week or month to prepare witnesses and steel the nerves for the inevitable pressure of trial itself). When trial will indeed start "next Monday," deals are struck and cases end. Without timely pretrial settlement of most cases, gridlock would have stymied the entire judicial system years ago.

In the United States District Court for the Southern District of Iowa, our magistrates and clerk of court, working with counsel, arrange pretrial and trial schedules. Counsel ordinarily initiate the process by submitting to the clerk a joint report, due 120 days after filing of suit, estimating times for completing discovery, designating experts, framing the issues and filing dispositive motions. Counsel also must estimate the length of trial at that early date. This counsel-generated schedule, usually accepted and confirmed in a scheduling order, puts the case on a course that will not be modified except for good cause. When the deadlines have passed, the case is deemed ready for trial. The clerk then schedules a final pretrial conference, to be held before a magistrate about five months later, and schedules trial for a date about one month after the pretrial conference. Approximately ten cases will be scheduled for trial during the same three-week period.

The order scheduling the final pretrial and trial dates limits the time within which a party may request a continuance. We rely heavily on pretrial and trial dates assigned to each case. Because criminal cases occupy at least the first week of each month, civil cases must be stacked for trial during the remaining three weeks of the month. Exceptions are April and October, when all judicial officers in the district gather in Des Moines for two weeks to dispose of a large number of relatively short civil cases.

Simple mathematics precludes me from providing truly firm trial dates. At last count the number of civil cases on my own docket was 1,347, compared to 549 two years ago when I began my work as a federal district judge. Many of these new cases, asbestos-related personal injury actions, involve multiple parties and complex issues. The number of criminal cases now awaiting trial by Chief Judge Vietor and myself has also increased dramatically; and guideline sentencing in most of these cases consumes additional time.

I present four case studies to bring home the immediacy of scheduling problems in my court:

CASE I - Complex Jury Case, Trial Date Uncertain — Complaint filed in July of 1986, seeking major relief from several defendants who allegedly provided a City a waste treatment plant gone awry. Very capable trial counsel from within and outside Iowa have prepared diligently for a complex trial involving many professional witnesses. In February, 1989, they jointly requested and by special order received a firm trial date for a 5 or 6 week jury trial, to start on December 11, 1989.

Even that special trial date fixed months in advance is somewhat shaky. By constitutional and statutory mandate, criminal cases are entitled to speedy-trial priority. As of November 20, 1989, ten criminal cases were stacked for trial on December 4 before Chief Judge Vietor and me. Some criminal

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CASE NOTE SUMMARY

Mark L. Tripp, of Bradshaw, Fowler, Proctor and Fairgrave, Des Moines, Iowa, examines several recent cases dealing with underinsured motorist coverage concerning the enforceability of the Consent to Sue Clause

It is apparent that the coverage provisions of uninsured and underinsured motorist policies, no matter how unambiguous they may appear, may nevertheless be unenforceable, or enforceable only under limited circumstances. For example, the court in *Kapadia v. Preferred Risk Mutual Insurance Co.*, 418 N.W.2d 848 (Iowa 1988) significantly limited the use of the Consent to Settlement provisions contained in an underinsured motorist policy. In *Kapadia* the court held that the Consent to Settlement provision was a valid provision intended to protect the subrogation rights of the insurer. Nevertheless, the court held that, in the event the Consent to Settlement provision is breached, the insurer has the burden of proving prejudice as a result of the breach. With regard to the burden imposed upon the insurer, the court refers to the case of *Pikens, Barnes, Abernathy v. Heasley,* 328 N.W.2d 524 (Iowa 1983) which suggests that the insurance company will have to produce substantial evidence from which a jury could reasonably find that all or part of its subrogation rights would be collectible.

More recently, in *Estate of Rucker v. National General Insurance Co.*, 442 N.W.2d 113 (Iowa 1989), the court held that a policy provision requiring as a prerequisite to coverage exhaustion of an underlying tortfeasor's policy limits was void as against public policy.

The validity of the Consent to Sue clause contained in most uninsured motorist policies has not yet been addressed by the Iowa courts. Most uninsured policies provide language which states: *Any judgment for damages arising out of a suit brought without our written consent is not binding upon us.* Even though an insured may file suit directly against the insurer, it is not unusual to see an insured pursuing a claim against an uninsured motorist without including the insurance company in the suit. Insurers should exercise caution in reliance on the Consent to Sue clause since the validity of this clause has not yet been ruled upon in Iowa. If the clause is held invalid, the insured may be able to obtain a judgment against an uninsured motorist and attempt to make the judgment binding upon the insurer in connection with an uninsured motorist claim.

Many courts have held that the Consent to Sue clause is unenforceable. Some courts have reasoned that the clause is ambiguous while other have held that the clause is against public policy. *Clayton v. Alliance Mut. Cas. Co.*, 212 Kan. 640, 512 P.2d 507 (1973); *Nationwide Mut. Ins. Co. v. Webb,* 291 Md. 721, 436 A.2d 465 (1981). For similar cases *see generally* Annotation, Uninsured Motorist -Consent to Sue, 24 ALR 4th 1024 (1983). Other courts have held that the Consent to Sue clause is not ambiguous or against public policy, and therefore an enforceable provision in the policy. *Moorcraft v. First Ins. Co.*, 720 P.2d 178 (Hawaii 1986); *Johnson v. United Service Auto Asso.*, 462 P.2d 664 (Okla. 1969).

The only Iowa case to consider this policy provision is *Mizer v. State Automobile & Casualty Underwriters,* 195 N.W.2d 367 (Iowa 1972). In *Mizer,* the insured filed suit and obtained a $7,250 judgment against an uninsured motorist. The Plaintiff later filed a second suit against her uninsured motorist carrier and was awarded $8,500. The insurer, who refused consent to the suit against the uninsured motorist, attempted to offensively use the doctrine of issue preclusion, thereby limiting the Plaintiff to the $7,250 judgment obtained in the suit against the uninsured motorist. The court, however, relying on the Consent to Sue provision in the policy, held that the insurer was estopped from arguing issue preclusion since it had refused to consent to the suit against the uninsured motorist. While portions of the *Mizer* decision would lead one to conclude that the court felt Consent to Sue clause was binding upon both the insured and the insurer, the court specifically cautioned against such a conclusion. The *Mizer* court held in part: *It is not necessary that we reach the question of the validity of these provisions [referring to the Consent of Suit provision]. That issue will undoubtedly come before the court when the insured seeks to rely on the doctrine in an offensive manner against an insurance carrier and the carrier relies on the policy terms as a basis for contending both the liability and damage issue should be relitigated in the suit not presented by this record.*

Those courts holding the clause void often cite the potential for multiplicity of lawsuits if an insured is forced to litigate liability and damage issues against an uninsured motorist in one suit and forced to relitigate those same issues against an insurer in a second suit. This argument, however, makes little sense in those jurisdictions that allow direct actions against the uninsured motorist carrier. *See generally* Annotation - Insured's Right to Bring Direct Action Against Insurer for UM Motorist Benefits, 73 ALR 3d 632 (1976).

The most compelling argument in support of the Consent to Sue provision is that it protects against the likelihood of collusion between an insured and an uninsured motorist. Just as importantly, it protects the insurer against a situation where an uninsured

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ARTICLE OF INTEREST

Michael W. Ellwanger — Are Defense Oriented Reforms Having the Desired Effect?

A previous issue (Volume II, No. 1) contained a discussion of whether various defense oriented reforms have had their desired effect. Specifically, §668.11, requiring timely designation of expert witnesses, was analyzed. (Thanks to Jack Hilmas of Des Moines for sending some district court decisions in which summary judgment was granted for failure to timely designate an expert.) Some of the questions in that previous article were resolved by the recent Supreme Court decision of *Donovan v. State of Iowa* (opinion filed September 20, 1989). In that case, the plaintiff did not file his certification of experts until approximately 14 months after the suit was filed (§668.11 requires this to be done within 180 days unless the plaintiff obtains an extension for good cause). In *Donovan* the district court denied the plaintiff's good cause application for extension and sustained the defendant's motion for summary judgment. The plaintiff stated that he was inexperienced in malpractice cases and had attempted to locate experienced co-counsel. The district court held that this did not constitute "good cause." Further, distinguishing *Daboll v. Hoden,* 222 N.W.2d 727 (Iowa 1974), the Court went on to hold that summary judgment was appropriate because this was the type of case in which expert testimony was required. The Court refused to address the constitutionality of the section because it was not raised with the district court. Nor did the Court address the issue of whether the defendant (State of Iowa) was a "licensed professional," although by implication the Court must have held that it was.

In conclusion, although §668.11 does offer opportunities for defense counsel, it creates problems as well. Foremost of these is the time constraint imposed by the 90 day requirement for defendants to certify experts after plaintiff has done so, and the apparent inability of the defendant to obtain extensions of time under the statute. Perhaps the Iowa Defense Counsel should take measures to correct these deficiencies legislatively.

Rule 125(a) Statements — Another recent change in the law, supposedly to assist defense counsel, is Rule 125(a) (effective August 3, 1987). A portion of this new rule provides: *In the case of an expert retained in anticipation of litigation or for trial, answers to interrogatories asking for the qualifications of the person expected to testify as an expert, the mental impressions and opinions held by the expert, and the facts known to the expert shall be separately signed by the designated expert witness.* This provision introduces the concept of the "125(a) Statement." (The previous 122(d) stated that one could request "the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.")

There appear to have been two objectives for the 125(a) Statements. First, they reduce the cost of litigation by requiring a party to produce a signed statement with the opinions of the expert. In this sense it provides a "poor man's deposition." Second, it may prevent the frivolous listing of numerous experts who may or may not have an opinion or even be involved in the case.

The question is whether these objectives in any way assist defense counsel. Most defense counsel depose all of the plaintiff's expert so cost is not a factor. On the other hand, plaintiff's lawyers frequently elect not to depose all of the defense experts in order to keep costs down.

As for frivolous or inaccurate listing of expert witnesses, there may be some slight advantage to defense counsel, assuming that defense counsel is willing to go to the effort of filing requests for 125(a) Statements, followed by a motion to compel such statement (this must be done within 30 days of the answer). On the other hand, many firms do not demand that the plaintiff produce 125(a) Statements for fear that the plaintiff will turn around and ask the defendant to do the same thing. Being required to produce 125(a) Statements is undesirable for a number of reasons.

First, it is simply more work. It is difficult enough to line up expert witnesses without having to chase them down to sign statements.

Second, according to the rule, an expert witness will not be allowed to testify "beyond the fair scope of the expert's testimony" in discovery proceedings. However, if the expert's deposition has been taken, then he may testify "on matters with respect to which the expert has not been interrogated in the discovery proceedings," Rule 125(d). The situation has arisen where plaintiff's counsel has obtained 125(a) Statements, but has not taken the deposition of defense experts. Portions of the expert's testimony have been disallowed because they are not within the "fair scope" of the 125(a) Statement. It is very difficult for an attorney to anticipate all opinions which an expert will testify about at the time of the trial. A defense lawyer is in the position of reacting to plaintiff's evidence. This often requires that the defense expert will go into areas which were not previously anticipated. Unfortunately, the constraints of Rule 125 may prevent this from being done.

On the other hand, a defense lawyer who has taken the plaintiff's expert's deposition may be prevented from

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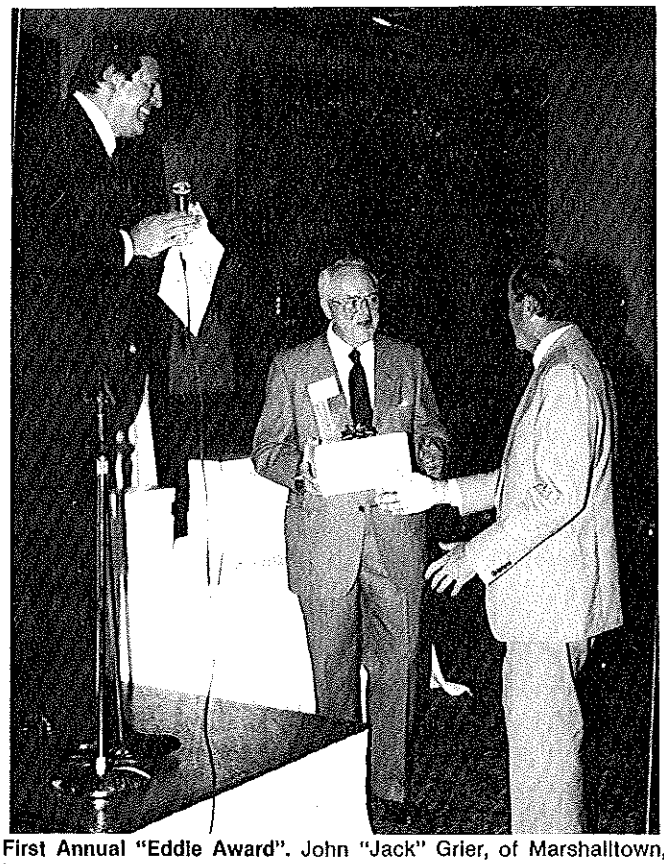
HISTORY - IDCA *Continued from Page 1*

Annual Meeting Highlights

Past Presidents, *front row left to right:* Stewart H. M. Lund 1976-1977; Harry Druker 1967-68; Edward F. Seitzinger 1964-65; D. J. Goode 1966-67; Dudley Weible 1970-71. *Center left to right:* Thomas D. Hanson 1987-88; David L. Phipps 1986-87; Harold R. Grigg 1983-84; Claire F. Carlson 1985-86; L. R. Voights 1981-82; Raymond R. Stefani 1984-85; Robert G. Allbee 1972-73. *Back row left to right:* Herbert S. Selby 1980-81; Don N. Kersten 1978-79; Marvin F. Heidman 1979-80; Philip J. Willson 1969-70; Patrick M. Roby 1988-89; Robert V. P. Waterman 1975-76; Ralph W. Gearhart 1974-75; Alason K. Elgar 1982-83; Kenneth L. Keith 1971-72. *Not Pictured:* Craig H. Mosier 1973-74; Edward J. Kelly (deceased) 1977-78; Philip H. Cless (deceased) 1968-69; Frank Davis (deceased) 1965-66; Albert D. Vasey (deceased) Honorary 1983.



First Annual "Eddie Award". John "Jack" Grier, of Marshalltown, Iowa, receives the first annual "Eddie Award" from Edward F. Seitzinger, in whose honor the award is presented, during the Silver Anniversary Annual Banquet; President Pat Roby looks on.

Train Crew. Acting train crew on the dinner train Thursday evening are *left to right:* Alan E. Fredregill; Eugene Marlett; Patrick M. Roby, Ginger Plummer; Edward F. Seitzinger; Craig D. Warner.

Special Recognition. Special recognition was given to the above people for their outstanding work and dedication to IDCA. *Left to right:* Betty Hyndman, Eugene Marlett, Jerry J. Miller, Ginger Plummer.

HISTORY - IDCA *Continued from Page 1*

How did all this get started? Well, in order to give you the background, I have to get a little personal for which you must forgive me. Back in 1964, I was sitting in my office one day when I received a call from Charlie Plager, who was a Washington, D.C. attorney and was a member of the International Association of Insurance Counsel (IAIC) and on the Board of the Defense Research Institute (DRI). They were meeting in Phoenix, Arizona when Mr. Plager called and asked if I would serve as a regional vice president for DRI. I asked him what the organization was all about and he gave me a thumbnail explanation. I asked him how long I had to decide about accepting the appointment and he said to take all the time I needed but he wanted to know in at least the next 30 seconds. Playing hard to get, I accepted.

At this same time, Edward J. Kelly was a member of the DRI Board and very active in IAIC. A week or so after the telephone call from Charlie Plager, Ed Kelly called and said we should have a meeting to consider organizing a defense counsel association in Iowa. At that time DRI had a program urging all states to organize local defense groups to offset some of the efforts that were being made by the plaintiff's original organization, the National Association of Claims Counsel (NACC), which is now known as the Association of Trial Lawyers of America (ATLA). It has always been gratifying to me that DRI, IDCA and other defendant organizations throughout the country have had as their primary purpose and interest, to maintain within the judicial system a judiciary that would give fair treatment to the parties involved in litigation and to work at avoiding excessive, unreasonable and emotional judgments that have come to be so costly to the public.

In addition to myself, Ed Kelly called D.J. Fairgrave, one of Des Moines' outstanding defense trial lawyers; "big" Mike McCrary, who at the time was running Carriers Insurance Company; William J. Hancock, who was the vice president of claims for Allied Insurance; Frank W. Davis, a local Des Moines defense lawyer whose work was primarily for the railroads; and Paul D. Wilson, who at the time was heading up the claims department of Farmers Mutual Insurance Companies.

Founders, *left to right:* Mike McCrary; Edward F. Seitzinger; D. J. Fairgrave; Paul D. Wilson. *Not shown:* William J. Hancock; Frank Davis (deceased); Edward J. Kelly (deceased).

The first meeting was held at the Elk's Club in downtown Des Moines. After several meetings, we finally agreed that a defense organization should be started. One major decision was, of course, how much the dues were going to be and how large a membership we thought we could have. Bill Hancock and I believed we could get at least 150 members and the dues ought to be $10.00. D.J. Fairgrave thought Bill and I had lost our minds thinking we could get 150 members. D.J. didn't realize that both of us were assigning cases to lawyers around the state. We soon had our 150 members. I drafted the Articles of Incorporation and we were off and running.

The first officers of IDCA were Edward F. Seitzinger, President; D.J. Fairgrave, Vice President; Frank W. Davis, Secretary; Mike McCrary, Treasurer; and Edward J. Kelly, William J. Hancock and Paul D. Wilson made up the rest of the Board of Directors. Ed Kelly did not want to be an officer in the Association at the time for the reason he felt he might have a conflict from the standpoint of DRI and IAIC. He later became one of our outstanding Presidents for the year 1977-1978. Ed Kelly was the real catalyst in getting this organization started and off the ground and IDCA shall be eternally grateful for his contribution.

We had our first Annual Meeting on October 1, 1965 at Johnny & Kay's Motor Lodge and Restaurant. This first meeting started with registration

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HISTORY - IDCA *Continued from Page 7*

from 10:00 a.m. to 12:00 noon. At noon the President, "yours truly", introduced William E. Knepper of Knepper, White, Richards, Miller & Roberts, Columbus, Ohio, President of DRI, who spoke on the subject "It Can Happen Here." At 2:00 p.m., Gordon R. Close of Lord, Bissell and Brook, Chicago, Illinois, spoke on "Products Liability." At 3:30 p.m., Walter W. Selvy of Whitfield, Musgrave, Selvy and Kelly, Des Moines, Iowa, spoke on "The Iowa Judicial Selection Law - How it Works." At 4:30 p.m., we had the first annual business meeting and election of the Board of Directors. That evening cocktails were at 6:30 p.m. and dinner at 7:30 p.m. Don Beving of Beving and Swanson, Des Moines, Iowa, gave a very humorous and entertaining talk on "How to Try a Lawsuit - Some Impractical Pointers."

On the morning of October 2, 1965, at 9:30 a.m., Harry Druker of Cartwright, Druker, Ryden and Fagg, Marshalltown, Iowa, spoke on "The Question of Damages Resulting from Recent Iowa Legislative Changes." At 10:30 a.m., Philip Willson of Smith, Peterson, Beckman and Willson, Council Bluffs, Iowa, spoke on "The Question of Contributory Negligence Resulting from Recent Iowa Legislative Changes." Following Phil's speech, there was an adjournment. I am sure you can see from the quality of speakers at our first Annual Meeting, that it went a great way to set the tone and quality for future IDCA programs.

At our first Annual Meeting Friday luncheon, we had rock cornish hen, and rock cornish hen has been our traditional Friday luncheon menu ever since, except for one year. I do not understand to this day why the President that year, Ralph Gearhart, thought a hamburger was superior to a rock cornish hen - it may be his lack of ability to carve the bird, or his insensitive palate - but anyway, there were so many complaints about the hamburger that rock cornish hen is now as much a part of the IDCA Annual Meeting as the entire program; I do hope they continue raising them for you for the next 25!

As I walked out of the first Annual Meeting with Herschel Langdon of Des Moines, he said to me, "Ed, if you continue to have this quality of a program, you'll never need to worry about having good attendance." Those of you who have a long experience with the Association and those of you who are relatively new, recognize what a great job every President-Elect has done in organizing the programs for the Annual Meetings. There isn't any question that this Association has one of the finest, most informative and outstanding programs of any legal seminar that is put on in the State of Iowa, or for that matter, anywhere else.

The original Board of Directors felt that getting a large membership was not an essential requirement. They believed that it was more important that a careful selection of members for membership be made so that those who became a member were philosophically dedicated to the defense of litigation, having a genuine concern for the interest of the public in general, have great legal talent and high moral standards. The membership of this Association can be justly proud of itself in that it contains the finest and best defense lawyers in the State of Iowa. It is my hope that future Boards of this Association continue to require the members to have this same philosophy of defense and continue to recruit the highest quality lawyers to become members. It is only through this continued effort that we shall find continued growth, effectiveness and great respectability for IDCA.

One of the highlights in IDCA's past 25 years was when we hosted the 11th National Conference of Local Defense Associations, April 6, 7 & 8, 1978. It took me about five years to convince the Association that a conference should be held in Des Moines, Iowa. They wanted to know what they could do in Des Moines, and I wanted to know what difference it made since they were coming here to work and not play. It was finally agreed that a conference would be held in Des Moines. The IDCA and DRI were the co-hosts for this conference. With the help of Bill Timmons, who has represented the Iowa Insurance Institute for a good many years, the Iowa Insurance Institute generously offered to host a black tie dinner for us. The Govenor of Iowa and other State officials, the Mayor of Des Moines, Iowa, the Insurance Commissioner, the Iowa Supreme Court Justices, U.S. District Court Judges, the Iowa Court of Appeals, many Iowa District Court Judges, executives of the member companies of the Iowa Insurance Institute and all members of the 11th National Conference of Local Defense Associations attending the conference were invited. This dinner was held at the Des Moines Club. I don't recall exactly how many hundreds of people were there, but the attendance was very large and people from around the country who attended the conference were greatly impressed with the affair. At this conference, we gave each of the ladies who attended a 14 carat gold ear of corn charm as a remembrance of the conference held here in Des Moines. This ear of corn was designed by Holmes Jewelry of Des Moines. Even to this day, people who attended this conference will tell us it was the greatest National Conference of Local Defense Association meetings they have ever attended.

Those of you who attended the celebration of our 20th Anniversary when Harold Grigg was President in 1984, will recall what a great time we had. Our local booking agent provided the entertainment with the assistance

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HISTORY - IDCA *Continued from Page 8*

of leading man Tom Hanson, and a beautiful young lady emerged from our anniversary cake, all of which was followed by a dance.

Historically, the IDCA has gone to a dinner theatre on Thursday evening of our Annual Meetings. Last year (1988) Ginger suggested that we put on a Luau Thursday evening, with video pictures taken in Hawaii - I thought this was crazy, but after due consideration I told Ginger we could try it, but she would have to write the script, which she did. I contacted Richard E. Stifel, of Honolulu, Hawaii, who is State Chairman for DRI, to take the video pictures in accordance with the script, and obtain a "judge." He enlisted Mark B. Desmarais of his office to be the judge. You who attended know what a great success the Luau was, with the appearance of Stewart "The Streaker" Lund, Alason "Lanny" Elgar a/k/a "Georgie Porgie", Thomas D. Hanson a/k/a "The Rubber Rafter", Herbert Selby a/k/a "Sand Dune Charlie", Patrick M. Roby, a/k/a "The Jolly Green Giant", Claire Carlson a/k/a "Minnie the Mermaid", Craig Warner, alias "Captain Hook" and Eugene Marlett, alias "Mac the Nut". I also arranged for an appearance by the playwright, Virginia (Ginger) E. Plummer a/k/a "The Scribbler", much to her surprise. In appreciation of their efforts and fine work in the production of the video entertainment, IDCA, by resolution, voted Virginia E. Plummer of Des Moines, Iowa, Richard E. Stifel of Honolulu, Hawaii, and Mark B. Demarais of Honolulu, Hawaii, Honorary Life Members.

To all the Founders, Past Presidents, Honorary Life Members and the four specially recognized contributors, but more importantly to all of the members of this Association, I hope that your next 25 years will show even greater accomplishments than the past 25 years.

Even though some of us will not be able to attend the Golden Anniversary (50th) in person, you can be sure we will be there in spirit. Keep up your committed dedication to the Iowa Defense Counsel Association and its basic philosophy.

FROM THE BENCH *Continued from Page 3*

cases are resolved by pleas of guilty and others take less than a week to try. Nevertheless, experience teaches that civil cases frequently must be delayed until we complete disposition of the criminal cases scheduled for trial in each month. Moreover, we must also give priority to habeas corpus petitions and many civil rights cases.

Regardless whether the start of CASE I must be delayed to allow completion of the December criminal cases, this several-week jury trial necessarily will be interrupted by the Christmas holidays and also in early January when another list of criminal cases will again receive priority. Counsel beware: even first-on-the-list civil cases scheduled to begin on the second Monday of a given month may not be reached until days or weeks later. Our best efforts to etch in stone definite trial dates are unavailing.

CASE II - Complex Jury Case, Asbestos Counsel with Conflict, Trial Date Uncertain — Complaint filed on February 17, 1987, seeking major relief from defendants who allegedly damaged plaintiff's business by providing an inadequate computer system. Counterclaim, cross-claims, and search for appropriate expert witnesses, together with extensive discovery, have caused understandable delay in trial readiness. Complex two-week trial expected. First-rate trial lawyers also involved in hundreds of asbestos cases now scheduled for trial in Iowa courts during every month of 1990. Parties jointly move for continuance of non-firm February 13 trial date, requesting a firm date that will not conflict with scheduled asbestos cases. Request for firm date denied.

As noted, our heavy criminal docket forces some slippage between the scheduled trial date and the start of trial in almost all civil actions. The spectre of potential asbestos-case trials in Iowa courts for many months to come exacerbates that problem. Approximately twenty Iowa trial firms, active in all Iowa courts, are heavily burdened with the lawsuits filed by asbestos victims. One option — perhaps too simple, neat and wrong — is to quarantine asbestos counsel within asbestos litigation, requiring that their firms provide other lawyers to prepare and try other cases they have been working on. Another option — now being used in several states, including Maryland and Washington — is for court-appointed Masters to perform most of the pretrial and fact-finding functions of judges in asbestos cases. Does a cost-benefit analysis justify these or other innovative proposals?

On December 8, 1989, about a dozen of our Iowa federal and state judges and magistrates, presently handling most of Iowa's asbestos litigation, will meet to discuss our options and talk about scheduling problems, important mutual concerns. I predict we find no

(continued next page)

FROM THE BENCH *Continued from Page 9*

inexpensive nor early cure for our asbestos-exacerbated overload headache.

CASE III - Ordinary Jury Case, Insured versus Insurer, Continuance Denied — Complaint filed in 1985 against insurer, alleging bad faith refusal to pay disability coverage. Plaintiff twice switched attorneys, causing preparation problems for present counsel. Scheduling order in August set non-firm November 13 trial date. Counsel in early October filed joint request for continuance of November 13 trial date. Request denied. [But parties agreed to have trial before a U.S. magistrate on a later firm date.]

No judge wants to force the parties in an action and their lawyers to try a case before it can reasonably be made ready. The court trusts counsel to estimate accurately when each case will be ready for trial and how long trial will last. When the estimates change and more time is needed, a prompt request for extended deadlines creates relatively few problems. But delay of a one-week trial to a later month will likely delay by one week all other cases destined for trial on the court's docket. Ordinarily, there is not time to replace the continued case with another case that may be ready for trial. To survive the overload affliction we must hold scheduled cases to their course, making maximum efficient use of our precious court trial time by denying late requests for continuance.

CASE III does illustrate another option available in federal court for many civil cases. Our full-time U.S. magistrates are able, with consent of the parties, to preside in jury and bench trials of civil actions, and appeal is to the Court of Appeals, not to the district court. I have the utmost respect for our present full-time magistrate, Honorable Ronald E. Longstaff, and for our part-time magistrate, Honorable Celeste F. Bremer, who soon will become full-time. Their schedules are more flexible than the federal judges' schedules, permitting them to give firm trial dates. This is an option we federal judges encourage the parties and counsel to consider, while never insisting that they give up their right to have a federal judge preside at trial.

CASE IV - Garden Variety Jury Case, Mass Trial Assignment, Continuance Denied — Complaint filed in 1986 seeking money damages for property damage and personal injury. Case scheduled for pretrial conference in March and Mass Trial Assignment in April. Counsel requests continuance to definite date in summer months because of conflicting trial in state court and inconvenience to plaintiff-farmer who does field work in April, May and June. Request denied.

Twenty years ago, even ten years ago, the unresisted request for continuance would routinely have been granted and a more convenient date agreed upon and approved. Mass Trial Assignments were not needed.

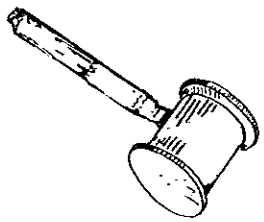
Times have changed. For reasons I hope are here made clear, available court time is an increasingly precious commodity that all litigants must share and courts must parcel out sparingly.

I encourage all Iowa trial lawyers to inform themselves and educate their clients about the inevitable delays and tight schedules they will face in bringing cases to trial now and in the forseeable future. Clients must not be led to expect more certainty and convenience in scheduling than we can deliver. At the inception of every civil lawsuit responsible trial counsel, working with their clients and with opposing counsel, should develop workable programs for promptly undertaking and completing discovery and other trial preparations. Accurate estimates of preparation and trial times must be presented to the court with the understanding the lawyers' estimates will become enforceable deadlines. Finally, the lawyer requesting a continuance should do so at once, explaining to the client the reasons for requesting a delay and the real likelihood the request will be denied.

The public demands that our courts expedite litigation and reduce its cost. Your clients want fast action; they resent unreasonable delay and do not care who is to blame. On January 18, 1988, in his first State of the Iowa Judiciary Address, Chief Justice Arthur A. McGiverin succinctly described the problem of the delay and the reason for time standards:

"Trial delays tend to clog the judicial system, increase the cost of litigation, and waste scarce judicial resources. We believe that the sooner a case is resolved, the less it will cost the parties. With the help of our Judicial Council, the supreme court has taken important steps to eliminate needless trial delays. Recently, the court implemented statewide procedures and time standards for case processing and movement.

We recognize that time standards promulgated for Iowa's state and federal courts complicate the lives of busy trial lawyers. But courts must serve the public, not just the trial bar. We must all work together to minimize case-processing bottlenecks, maximize informed scheduling, and assure the public that justice is neither unnecessarily delayed nor unfairly denied.



CASE NOTE SUMMARY *Continued from Page 4*

complaining about additional testimony from the plaintiff's expert, because he did not think to ask him motorist presents a nominal defense in the litigation. In response to these arguments, however, it has been noted that an insurer may adequately protect its interests simply by intervening in the action filed against the uninsured motorist. Annotation - Right of Insurer Issuing "Uninsured Motorist Coverage" to intervene in action by insured against uninsured motorist, 95 ALR 2d 1330 (1964).

Naturally, there is little an insurer can do to protect its interests in a case where it is not notified of pending litigation against the uninsured motorist. In fact, in *Heiser v. Jones,* 184 Neb. 602, 169 N.W.2d 606 (1969), the court held the Consent to Sue clause was invalid. Nevertheless, the court went on to hold that the insurer would not be bound by a judgment unless it was given full notice and an opportunity to intervene in the pending litigation.

Rather than relying solely on the enforceability of the Consent to Sue clause, it is advisable to at least recognize the risk of allowing an uninsured motorist case to proceed to judgment without any participation by the insurer. Many cases which have held such judgments enforceable against the insurer have commented upon the fact that the insurer was advised of the litigation and monitored the progress of the litigation. Until the Iowa courts have addressed the validity of the Consent to Sue provision, insurers would be wise to consider intervention in those cases where significant damage exposure exists and where there exists either a potential for default judgment or for the cases being nominally defended due to a lack of resources by the uninsured motorist.

ARTICLE OF INTEREST

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questions about these other areas at the time of the original deposition.

Some plaintiff's attorneys have indicated that they feel they have a tactical advantage by requesting 125(a) Statements from defense counsel and taking *no* depositions, and then insisting that the defense expert go no further than what is set forth in the 125(a) Statement.

A defense lawyer, to protect himself, should probably go the full route: file interrogatories, demand 125(a) Statements, and then take the deposition of the plaintiff's experts. Hopefully a court will hold the plaintiff's expert to the 125(a) Statement even though his deposition was subsequently taken.

Nevertheless, the above problems cause one to wonder whether 125(a) Statements create more problems for defense lawyers than they solve.

Michael W. Ellwanger is a partner in the Sioux City law firm of Kindig, Beebe, Rawlings, Nieland, Probasco and Killinger.

WOOD STOVE ANYONE?

While contemplating installing a woodstove, the following cost figures may be of interest to any of you considering the same possibility:

Stove, pipe, installation materials, etc.	$658.00
Smoke damage and reinstallation cost	425.00
Doctor's fee for burns (set sideburns on fire)	150.00
Chainsaw	280.10
Gas and maintenance for saw	44.60
4-Wheel Drive Pick-Up with stripes	8,379.04
Dealer options	4,129.30
Truck maintenance	438.00
Donations to highway patrol	38.00
Replacement of rear truck window (twice)	510.80
Replacement of leaf springs	300.00
Fine for cutting unmarked tree in state forest	200.00
Fourteen bottles of bourbon	126.00
Littering fine	50.00
Tow charge from creek	50.00
Doctor's fee for removal of splinter from eye	45.00
Safety glasses	49.50
Emergency room treatment (broken toe-dropped log)	75.00
Safety shoes	49.50
New paint for walls and ceiling	110.00
New living room carpet	800.00
Chimney brush and rods	45.00
Log splitter	450.00
Fifteen acre woodlot	9,000.00
Replacement coffee table (mistakenly chopped up while feeling no pain)	75.00
Divorce settlement	33,678.22
Total first year's cost	60,136.06
LESS savings in fuel (gas heat)	162.37
NET COST OF FIRST YEAR'S WOODBURNING	**$59,973.69**

Great works are performed not by strength but by perserverance.

Samuel Johnson

NOTE FROM THE EDITORS

In a recent missive, DRI advises the "plaintiffs' bar has launched a broad attack on the use of protective orders in civil litigation," apparently directed at products liability and commercial cases. Secrecy provisions in settlement agreements are also under attack. The argument is that such protective orders make it difficult for plaintiffs' lawyers to share information, give unfair advantage to defendants' lawyers who have access to company records, and deter plaintiffs from bringing lawsuits.

These arguments are very thin. The discovery rules are not intended to aid others outside the litigation. There is no unfair advantage. Defense lawyers have access to their clients' records as plaintiffs do to their clients'. The discovery rules permit each to discover unprivileged information from the other. The last complaint, that plaintiffs will be less likely to sue, is simply not true.

Happily, disputes about protective orders in Iowa are rarely litigated. The major case on the scope of Rule 123, which governs protective orders in Iowa, is *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384 (Iowa 1983). *Farnum* offers little incentive to make the use of protective orders a point of contention between plaintiff and defense counsel. A closely divided Supreme Court upheld the denial of a protective order, the request for which was viewed as overbroad and not specific enough to identify what information was confidential or constituted trade secrets. Though the court took a rather restrictive view of the criteria for a Rule 123 protective order, it noted the matter was one for the trial court's discretion, invited the defendant to try again, and encouraged litigants to work out such issues without resort to the court - a suggestion taken to heart by the Iowa Bar. The dissent favored a more liberal use of protective orders and noted that plaintiff's counsel stated he intended to disseminate the material to "the plaintiff's bar," a use of private papers which the dissent found improper. One wonders if *Farnum* would be decided the same today inasmuch as the four dissenters remain on the court whereas four of the five justices in the majority are gone.

Hopefully, none in Iowa will find the need to challenge the simple principle at the core of Rule 123 and related discovery rules: plaintiffs are entitled to discovery; defendants are entitled to protection from dissemination of trade secrets and confidential information to those not involved in the lawsuit. It is an accommodation of competing interests that have worked well in practice.

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