defense UPDATE

The Iowa Defense Counsel Association Newsletter April 2000 Vol. XIII, No. 2

IDCA STATEMENT REGARDING "INSURANCE GUIDELINES" ETHICS OPINION

Submitted by: IDCA Client Relations Committee

The IDCA has received a number of inquiries regarding the ethics opinion, entitled "Insurance Guidelines," which was issued by the Iowa Supreme Court Board of Professional Ethics and Conduct on September 8, 1999, Opinion No. 99-01. While each individual attorney must construe and apply this ethics opinion based on his or her professional judgment regarding the specific facts of a particular case, the following observations are made to hopefully assist Iowa defense counsel and liability insurers in complying with the provisions of this ethics opinion.

1. *Third-Party Defense:* Ethics Opinion No. 99-01 ("Insurance Guidelines") focuses on an attorney's defense of an insured relating to a third-party's claim (that is, when an insurance company has engaged a lawyer to represent its insured) and does not relate to first-party representation of an insurer (that is, when the insurer is pursuing or defending its own sole interests). In a first-party situation, the attorney and insurer are involved in an attorney-client relationship, subject to all the normal conditions and requirements of such relationship.

2. *Control of Work:* Ethics Opinion No. 99-01 ("Insurance Guidelines") addresses the issue whether it is proper for an Iowa lawyer to agree to, accept or comply with guidelines imposed by the insurer in defense of the insured. The ethics opinion notes that the Iowa Supreme Court has recognized the relationship between defense counsel and the insured as an attorney-client relationship. The opinion does not attempt to address, or define the reciprocal duties of the relationship between the insurer and defense counsel in third-party defense.

Relating to the issue as to who can direct and control legal services rendered by defense counsel to an insured and how those services are to be delivered, the ethics opinion clearly states that only the lawyer can direct and control legal services rendered to the client. The ethics opinion specifically states:

> Determining the legal services necessary to represent the client and who, within the lawyer's office renders them, are and must be solely within the province of the lawyer.
>
> The Iowa Supreme Court Board of Professional Ethics and Conduct concludes that:
>
> It would be improper for an Iowa lawyer to agree to, accept or follow Guidelines which seek to direct, control or regulate the lawyer's professional judgment or details of the lawyer's performance; dictate the strategy or tactics to be employed; or limit the professional discretion and control of the lawyer.

Even though control of the litigation must be subject to the independent professional judgment of defense counsel, the ethics opinion does not prohibit input from, or conveyance of information to, the insurer. In fact in order for the insurer to perform its duties to properly defend the insured and to reasonably attempt to resolve a claim within policy limits, the insurer must receive accurate and timely information from defense counsel. Defense counsel's communication to the insurer has traditionally been inferred from the insurance contract and by the insurer's retention of defense counsel to represent the insured. However, if the Iowa Supreme Court adopts the provisions of *Restatement (Third) Law Governing Lawyers*, Section 215, defense counsel may be required to communicate to the insured at the commencement of representation that it is defense counsel's intention to disclose case information to the insurer.

The ethics opinion proscribes billing guidelines which interfere with an attorney's independent professional judgment, but does not proscribe other billing guidelines which promote reasonable case management. The ethics opinion does not prevent the insurer from providing input regarding litigation strategy or

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MESSAGE FROM THE PRESIDENT

Robert D. Houghton

1. "Insurance Guidelines" Ethics Opinion

Last September, the Iowa Supreme Court Board of Professional Ethics and Conduct issued Opinion No. 99-01, entitled "Insurance Guidelines." That opinion was published in the previous *Defense Update* and was also contained in the written materials at our annual meeting.

The "Insurance Guidelines" opinion is a very important one for all members of this association - whether the member is a trial lawyer or an insurance company claims representative. It directly addresses the issue of who can control the legal services to be delivered to the insured in a particular case - the lawyer or the insurance company. The opinion also addresses the question of whether it is proper for a lawyer practicing in this state to agree to insurance guidelines which control the lawyer's judgment and performance. Finally, the opinion speaks to the ethical concerns which arise when the insurance carrier requires the lawyer to send his or her bill to a third-party auditor. For instance, is there a waiver of the attorney-client privilege when the bill is sent to a third-party auditor? Should the consent of the insured be sought before the bill is sent to the third-party auditor?

A number of states have wrestled with these same issues. DRI has on its website a listing of opinions from thirty-four states. An action is also currently pending in Montana in which the Montana Supreme Court is being asked to decide whether an attorney licensed to practice law in that state can; (a) abide by an insurer's billing and practice rules which impose conditions limiting the scope of representation, and (b) submit detailed descriptions of professional services to outside auditors without obtaining the informed consent of the insured. There has been no decision in this case, which was argued last September.

To say that this subject matter is a hot topic at meetings of DRI is an understatement. Some attendees report that the issues relating to control of work and third-party audits are creating real friction in the relationship between the insurer and the attorney in their state. Fortunately, this does not appear to be the case in Iowa.

The Iowa Defense Counsel has been looking at the issues discussed in the "Insurance Guidelines" opinion for some time. A couple of years ago, when Mark Tripp was President of the Iowa Defense Counsel Association, he asked the members of the Client Relations Committee to begin to study the questions raised by third-party audits. The Client Relations Committee is chaired by John McCoy and Sam Waters. The members of the committee are Marion Beatty, Lanny Elgar, Sharon Greer, Wendy Munyon, Brad Price, and Neal Scharmer. The excellent work of the committee was reflected in John McCoy's presentation at last fall's annual meeting on this subject. His written materials include draft rules from the ABA, Model Rules of Professional Conduct, briefs from the Montana litigation and copies of pertinent articles. I recommend that you obtain copies of his outline if you are faced with any of the issues raised by the ethics opinion. After Opinion No. 99-01 was issued, your board requested the Client Relations Committee to prepare the article which is published in this *Defense Update*. The article represents the consensus opinion of both the insurance company representatives and the practicing lawyers on that committee.

The fact that our organization has been looking at these issues for a number of years and that the Client Relations Committee was able to publish a consensus article of this sort speaks volumes about the relationship between insurance carriers and defense attorneys in this state. Congratulations to the members of the Client Relations Committee for their hard work.

2. Seminars and Programs

Thanks to Rick Santi and Kevin Reynolds for agreeing to put together the program for the Commercial and Products Litigation seminar. The seminar was held February 25, 2000, at the Des Moines Golf & Country Club. The speakers included Wade Hauser, Fred Beaver,

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DERIVATIVE SHAREHOLDER ACTIONS: A START

By Bruce L. Walker and Andrew B. Chappell, Iowa City, Iowa

Introduction

You have been in practice for a time. You think you are a trial lawyer that is ready for almost anything because of your vast experience. An office client calls you and tells you that he has been sued. No problem. Send me the original notice and petition and we will file an answer and defend. Then you learn it is a suit by minority shareholders against several corporate officers and directors, including your client. The petition alleges claims for breach of duty of care, breach of duty of loyalty, an injunction, and dissolution and liquidation of the corporation. You panic because you have never had a similar case before and you do not work on the office side of the practice. Unfortunately, you cannot really say no to this client. What do you do?

The initial questions regularly encountered in this type of suit are:

1. What is the law in this area generally?
2. What is the role of counsel for the Corporation?
3. What is your role?
4. Can the claim be defended for less than the demand for settlement?
5. If an agreement is reached to settle the case, can it be resolved without jeopardizing the company?
6. Is your client insured and, if not, is there an agreement that the company will indemnify and defend?
7. Can you defend the case under a joint defense agreement with co-defense counsel?
8. What are the preliminary steps in properly defending such a case?

What follows is a discussion of these questions intended to give you "a start" in defending a derivative shareholder action—and to help you ensure you do not have to tell your client "no."

General Concepts of Law

A shareholder derivative action is an equitable one in which, normally, the corporation is made a defendant, albeit a nominal one. *Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517, 523 (Iowa 1974). These actions are maintained by dissatisfied shareholders and must be verified at the time the petition is filed. I.C. § 490.740 (1999); I.R.Civ.P. 44 (1999). The petition must contain either an allegation that the shareholder has made a demand that the corporation do or not do something or that such a demand would be futile. *See* I.C. § 490.740; I.R.Civ.P. 44; *Berger v. General United Group, Inc.*, 268 N.W.2d 630, 635 (Iowa 1978). This requirement appears to be driven by a belief that courts should not normally interfere in the internal affairs of a corporation until all internal remedies have been exhausted. Even though demand is required, however, a general allegation that demand is futile is sufficient to overcome a motion to dismiss as long as there are sufficient other assertions of fact in the petition to support that allegation. *Berger*, 268 N.W.2d at 636.

Even if an individual shareholder brings a derivative claim or action, the corporation is the one that benefits from any award as a result of the action. The shareholder benefits from such award by an increase in the value of his or her investment. This rule is grounded on the principle that shareholders suffer only in proportion to the size of their investments. *Cunningham v. Kartridge Pak Co.*, 332 N.W.2d 881, 885 (Iowa 1983).

It is also possible for individual shareholders to have an individual cause of action if the alleged harm to the corporation damages the shareholder in his or her individual capacity, not as a shareholder. *Id.* at 883. To be able to maintain this claim, the shareholder must show he or she suffered an injury separate and distinct from other shareholders.

Generally, directors and officers of a corporation are fiduciaries of the corporation. *Holi-Rest*, 217 N.W.2d at 525. The director of a corporation owes the corporation complete loyalty, honesty and good faith. *Midwest Mgmt. Corp. v. Stephens*, 353 N.W.2d 76, 80 (Iowa 1984). This duty is owed the corporation and its shareholders whenever the actions of the director concern matters affecting the general well-being of the corporation. *Id.* Specifically, directors' fiduciary duties are two-fold, consisting of a duty of care and a duty of loyalty. *Cookies Food Products, Inc. v. Lakes Warehouse Distributing*, 430 N.W.2d 447, 451 (Iowa 1988). A majority shareholder has the same fiduciary duties to the corporation and other shareholders as does a director or officer. *Id.* Application of these duties of care and loyalty are discussed below.

Business Judgment Rule

The Business Judgment Rule is the standard of care that applies to a director's conduct unless the claims involve selfdealing. *Hanrahan v. Kruidenier*, 473 N.W.2d 184, 186 (Iowa 1991); *Miller v. Register & Tribune Syndicate, Inc.*, 336 N.W.2d 709, 712 (Iowa 1983). In Iowa, the Business Judgment rule is codified at section 490.830, which provides:

1. A director shall discharge that director's duties as a director, including the director's duties as a member of a committee in conformity with all of the following:
   a. In good faith.
   b. With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
   c. In a manner the director reasonably believes to be in the best interests of the corporation.
2. In discharging the director's duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by any of the following:
   a. One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.

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ALTERNATIVE DISPUTE RESOLUTION: Coming of Age in the Iowa Courts?

By Gale E Juhl, West Des Moines, Iowa

"Discourage litigation. Persuade your neighbor to compromise whenever you can. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough." Abraham Lincoln

While mediation as a means of conflict resolution has been around as long as there have been human beings, today we enjoy a process of rediscovery and maturation. Each generation discovers for itself what generations before had long known.

Mediation, as an alternative to litigation, is enjoying a period of resurgence. The past ten years has seen exponential growth in LLM programs in conflict management, conflict resolution firms and licensure of mediators. The value of mediation as a concept and practice has proven so important that it is being incorporated more and more into the fabric of the legal system. What was once considered a private affair has become a public directive.

Recently in the "Iowa Judicial Branch Strategic Planning Initiatives" Goal number 8 was established as: "Adopt alternative resolution strategies in domestic relations cases, as appropriate, to improve the quality of justice." In formulating this goal it was stated: "In recent years there has been a trend toward increasing use of court-ordered mediation (or other alternative dispute resolution) in various types of cases in state and federal courts. The Iowa Supreme Court's Commission on Planning for the 21st Century recommended adoption of alternative dispute resolution programs in Iowa's courts to improve the quality of justice and citizens' satisfaction with the legal process." On March 14, 2000 the Mediation Study Group established by the Iowa Supreme Court issued its *Final Report* (cited as *Report* hereafter). It has been reported that "[t]he state legislature is currently considering legislation consistent with the recommendations in the report."

The goal and report are focused primarily on mediation as an alternative in domestic relation cases but the content and sentiments expressed suggest a context of concepts beyond this single isolated substantive area of the law. The *Final Report* offers insight to all practitioners of alternative dispute resolution.

INCREASING SATISFACTION WITH THE LEGAL SYSTEM

"The notion that ordinary people want black robed judges, well dressed lawyers, fine courtrooms as settings to resolve their disputes is incorrect. People with problems, like people with pains want relief, and they want it as quickly and inexpensively as possible." Warren Burger

"Throughout the United States, institutions and individuals, in both public and private sectors, are increasingly using mediation as a method of resolving disputes. Unlike the adversarial legal process, mediation facilitates the resolution of conflict by improving communication between the parties and encouraging mutual understanding to the end that the parties make their own decisions." *Report* p. 2. "'Mediation' means a process in which an impartial person facilitates the resolution of a dispute by promoting voluntary agreement of the parties to the dispute. In a mediation, the decision-making authority rests with the parties." *Id.* (citing Iowa Code Chapter 679C). The Mediation Study Group formulated 12 goals that should be incorporated into any court-referred mediation program in Iowa. They identified as goals:

1. Give parties to mediation control of the decision-making process and the substance of any decisions made during mediation.
2. Provide parties full and fair access to all methods of dispute resolution, including mediation, settlement conference, or other ADR method of their selection.
3. Establish uniform standards for mediators and provide for systematic and scientifically valid evaluation of the programs.
4. Make all dispute resolution programs compatible with a fair and efficient legal system.
5. Provide a fair method for allocating the costs.
6. Make the mediation process responsive to the needs of the parties and the lawyers who represent the parties in family law cases.
7. Insure mediation will not delay the parties' access to the court.
8. Insure the parties are fully informed about the processes available in clear, simple language.
9. Urge parties to consult with legal counsel throughout the mediation sessions.
10. Provide rules of professional conduct which define the obligation of attorneys to inform clients about mediation and screen clients to determine whether the client is appropriate for mediation.
11. Insure attorneys will properly prepare clients to participate in any court ordered mediation.
12. Require mediated family law agreements to be approved by counsel and the court." *Id.* p. 3.

The Mediation Study Group proposed "A Statewide Mediation Model for Iowa" as it relates to family law cases. Essentially the Mediation Study Group proposes legislation by the General Assembly to be augmented by rulemaking by the Iowa Supreme Court. At its base the model places the Iowa Supreme Court in control of court-referred mediation, "by permitting the Supreme Court to establish a mediation system in each district and direct when in the litigation process the district court would order parties to participate in mediation." *Id.* p.8. Additionally, the district court's authority to order mediation

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RECENT CASES OF INTEREST

By: Kermit B. Anderson, Des Moines, Iowa

Miller v. Westfield Ins. Co.,
(Iowa, filed January 20, 2000)
Owned-but-not-insured exclusion upheld in UM context; *Lindahl v. Howe,* 345 N.W.2d 548 (Iowa 1984) overruled.

Plaintiff Craig Miller was injured by an uninsured motorist while riding a motorcycle insured with Midwest Mutual Insurance Company. Miller had expressly rejected UM coverage under the Midwest policy, but he also owned a pickup separately insured on a policy issued by Defendant Westfield which included such coverage. Miller and his family members brought this action to recover UM benefits under the Westfield policy.

Westfield's policy contained a common provision excluding uninsured coverage for injuries sustained while occupying a vehicle "which is not insured for this coverage under this policy." This provision by its terms plainly precluded Miller's recovery of UM benefits, but he argued that the exclusion was unenforceable under *Lindahl v. Howe,* 345 N.W.2d 548 (Iowa 1984). The district court distinguished *Lindahl* and ruled that the UM benefits were not payable. On appeal, the Supreme Court sitting *en banc* affirmed the lower court's decision, but also reexamined *Lindahl* in the process and concluded that it had been erroneously decided and should now be overruled.

Iowa Code § 516A.1 requires automobile and other motor vehicle insurers to provide uninsured motorist (UM) coverage in their policies, but the named insured may reject such coverage in writing if he so desires. Section 516A.2 permits exclusions to such coverage "which are designed to avoid duplication of insurance or other benefits." The *Lindahl* court construed this language to prohibit enforcement of an owned-but-not-insured exclusion to defeat uninsured benefits unless evidence showed that a duplication of such benefits actually occurred.

Justice Ternus, writing for the Court in *Miller*, said *Lindahl* effectively rewrote the statute by requiring actual duplication because the statutory language authorizes exclusions which are simply "designed to" avoid duplication irrespective of whether such duplication really occurs. Since the exclusion in the Westfield policy was clearly intended to avoid a duplication of benefits (even though there was no actual duplication due to Miller's express rejection of UM coverage) it was valid and enforceable.

Justice Cady wrote a vigorous dissenting opinion joined by Justices Snell and Larson in support of the earlier *Lindahl* decision. The dissenters felt in defining legislative intent consideration must be given to the fact that the legislature has failed to respond to *Lindahl* in the fifteen years since it was decided, unlike the legislature's prompt reaction to *Hernandez v. Farmers Ins. Co.,* 460 N.W.2d 842 (Iowa 1990) holding antistacking provisions unenforceable. Moreover, according to the dissenters, the *Lindahl* decision furthered the mandate of § 516A.1 to provide coverage for the protection of "persons insured," whereas that mandate is frustrated when the court authorizes exclusions under which the uninsured coverage follows the covered vehicle.

Balmer v. Hawkeye Steel,
(Iowa, filed January 20, 2000)
Constructive discharge standing alone not actionable.

Plaintiff Balmer brought action against her former employer claiming verbal and mental workplace harassment so intolerable that she was forced to quit. Conspicuously absent, however, was any allegation that the defendant had breached an employment contract or had violated any civil rights law or state public policy. Thus plaintiff presented only a bare claim of constructive discharge. The district court granted the defendant's motion for directed verdict at trial ruling that a constructive discharge claim by itself was not actionable without proof of underlying illegal activities of the employer. On appeal, the Supreme Court affirmed.

Justice Lavorato's opinion for the court contains an informative review of the law concerning employment-at-will and the development of the constructive discharge concept. The doctrine of constructive discharge was designed to prevent employers from forcing an employee to quit and later being able to cast the resignation as voluntary. By itself, however, a constructive discharge is nothing more than the transformation of an ostensible resignation into a firing and can only be actionable when an express discharge would be actionable in the same circumstances. This, of course, makes perfect sense and is the opinion of other courts to consider the issue. As Justice Lavorato emphasizes, "[w]hat is needed additionally is an accompanying claim that the discharge was the result of illegal conduct such as the violation of public policy or statutory law or breach of a unilateral contract of employment created through employer's handbook or policy manual."

EFCO v. Norman Highway Construction Inc.
(Iowa, filed January 20, 2000)
Choice of forum clause in form agreement upheld.

Plaintiff EFCO brought action against Norman Highway Construction Inc., a Texas corporation, to collect payments alleged to be owing on a written lease of concrete forming equipment. Less than two hours earlier, Norman had filed suit in Texas against EFCO claiming breach of contract, breach of warranty, and fraud. Norman moved to dismiss the Iowa action for lack of personal jurisdiction, or alternatively, to stay the Iowa proceedings in favor of the Texas action. The court denied the motion on the basis of a choice of forum clause in the parties' written agree-

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obtaining reasonable notice of the intent of defense counsel to assume substantial expenses, such as in the retention of expert witnesses. The insurer's representative and defense counsel are both claims professionals who should cooperate in providing a proper defense for the insured. Insurers have a contractual right to provide input regarding, and be advised of, litigation strategy. However, regardless of the insurer's input, defense counsel should exercise independent professional judgment regarding proper representation of the insured.

Reasonable billing guidelines may include periodic status reports, interim billing, reasonable billing format and increments and any other guidelines which would promote the conveyance of accurate and timely information to the insurer to assist the insurer in supervising and evaluating a particular case.

However, guidelines which attempt to micro-manage defense counsel (such as, who within the law firm staff performs a particular task, when such particular tasks are supposed to be performed, limiting information to the insured and dictating how and when specific legal tasks may be performed) appear to be in violation of the ethics opinion.

There will be practical problems in constuing whether billing guidelines inappropriately interfere with defense counsel's independent professional judgment because many guidelines are postured as "suggestions" or "recommendations" which are not stated as mandatory, but which may seek prior approval of the insurer before a particular expenditure. Whether such guidelines are appropriate attempts by the insurer to keep aware of case developments and to reasonably manage the expenses of litigation or are an inappropriate attempt to direct, control or regulate the lawyer's professional judgment will have to be resolved on a case-by-case basis. However, if the payment of defense counsel's fees are contingent upon compliance with these litigation "suggestions," it is anticipated that such "suggestions" will be construed as, and equated with, impermissible "requirements," attempting to control an attorney's independent professional judgment.

Normally, the insurer is given the right or opportunity by the insurance contract to retain defense counsel of its own choosing. If the insurer believes that defense counsel is providing ineffective representation of the insured or causing an unreasonably expensive defense, the insurer is not obligated to continue to utilize such law firm.

The primary import of the ethics opinion does not change either the rules of ethics for Iowa defense attorneys or the reciprocal duties within the tripartite relationship among insurers, insureds and defense counsel in Iowa, but merely requires insurers and defense counsel to address cost-containment issues without adversely affecting the defense or interests of the insured.

In order that billing guidelines do not adversely affect defense counsel's independent professional judgment on behalf of the insured, and in order to hopefully avoid an adversary relationship between defense counsel and insurers, it is recommended that defense-counsel members of the IDCA forward a copy of Ethics Opinion No. 99-01 ("Insurance Guidelines") to insurers that retain them. A proactive, cooperative effort between insurers and defense counsel to address cost-containment issues may avoid polarization of interests and infighting which can only be detrimental to the best interests of the insureds.

If a dispute arises between defense counsel and the insurer regarding a billing guideline or proposed course of action, defense counsel might consider the following:

A. Fully explain defense counsel's position regarding the proposed procedure and request that the insurer reconsider its position.

B. If such dispute remains unresolved and defense counsel believes that the particular work is necessary for the protection of the insured, the defense counsel should:

1. Perform the work and reserve the fee/expense issue for later determination;
2. Withdraw from representation of the insured; or
3. Consult with the insured and obtain informed consent of the insured not to proceed with the particular work (caveat: if the insured is not sophisticated or knowledgeable regarding litigation, the insured may not be able to provide "informed" consent without consultation with the insured's own personal attorney).

3. ***Outside Auditing:*** Ethics Opinion No. 99-01 ("Insurance Guidelines") does not prohibit outside auditing but does raise a number of ethical concerns.

The ethics opinion concludes that:

> ... It would be improper for an Iowa lawyer to agree to, accept or follow such proposed service-log requirements in any form that causes the attorney-client privilege to be placed in jeopardy, if the service-log is sent to a third party. An Insurer may require a lawyer to identify the services rendered in time spent, so long as it does not control the lawyer's professional judgment or undermine the attorney-client privilege.

Therefore, the type of auditing prohibited is auditing which may interfere with defense counsel's independent professional judgment or which causes "the attorney-client privilege to be placed in jeopardy."

Disciplinary Rule 4-101 of the Iowa Code of Professional Responsibility for Lawyers requires an attorney to preserve the confidences and secrets of a client except in specified situations. A "confidence" is defined as information protected by the attorney-client privilege under applicable law, and a client's "secret" refers to other information gained in the professional relationship which the client has requested to be held inviolate or the disclo-

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sure of which would be embarrassing or probably detrimental to the client. See Disciplinary Rule 4-101(A).

A detailed description of the "Ethical Issues Relating to Third-Party Audits of Defense Counsel," is included in part C of Volume II of the 1999 Annual Meeting book of the IDCA, pages C-1 through C-101. As a practical matter, defense counsel may want to focus on the following:

A. If a fee statement is to be audited, defense counsel may wish to eliminate any "confidences" or "secrets" of a client in the fee statement. Defense counsel is presented with two (2) practical problems. First, the insurer's billing guidelines may require a specific description of legal services for payment (thereby creating the "detailed, but innocuous" standard for fee statements). Second, sometimes it is difficult to determine what are "confidences" or "secrets." Some state ethics' opinions define personally-identifiable information as possible "secrets." *See* Cooley, *"Fee Audits: Coming Full Circle and Looking Down the Road, For The Defense,* Vol. 41, No. 6, at 18 (The Defense Research Institute, Inc., June 1999).

B. Defense Counsel should urge the insurer to protect against secondary disclosure of the audit information. The insurer, as opposed to defense counsel, would appear to be in a better position to protect against secondary disclosure, due to the insurer's contractual relationship with the outside auditing company.

C. If an attorney's fee statement does include a client's "confidences" or "secrets," and, if disclosure to an outside auditor is considered disclosure to a non-client, an attorney may be obligated to obtain informed consent from the insured/client before submission of the fee-bill to the auditor after full disclosure of relevant information. This obligation would presumably require defense counsel to submit a copy of the proposed fee statement to the insured, require defense counsel to explain the possible ramifications of disclosure of this information and require the client to consent to this disclosure. This procedure would create very substantial practical problems.

First, this procedure may expose an attorney to a conflict-of-interest situation whereby an attorney would advise an insured to disclose information contained in a billing statement for the attorney's personal benefit of being paid. Therefore, such consultation with an insured may require disclosure of this potential conflict-of-interest and advice to the insured regarding the opportunity for an independent opinion from another attorney.

Second, there is not much incentive for the insured to give consent when the only benefit is to assist the insurer in saving expense.

Third, the time and effort for an attorney to review a proposed statement with the insured/client would probably not be considered compensable by the insurer.

Therefore, if outside auditing is going to be conducted regarding an attorney's fee statement, all reasonable efforts should be made to remove any "confidences" or "secrets" to avoid the necessity of obtaining the insured's informed consent for disclosure. Ironically, the insurer's own billing guidelines may require information in the fee statement which may prohibit the use of outside auditing.

It should be noted that there is currently a dispute in different jurisdictions whether the submission of a defense-attorney's fee statement to an outside auditor waives the attorney-client privilege. *See* Anderson, *"The Attorney-Client Privilege and Outside Auditors: Oil and Water?", For The Defense*, Vol. 41, No. 6, at 22 (The Defense Research Institute, Inc., June 1999). There does not appear to be a knowing and voluntary waiver of the attorney-client privilege by an insurer utilizing an outside auditor to review billing statements. However, once again, it would be prudent for defense firms to be cautious regarding what information is contained in fee statements. Further, if audited information is requested by an adversary, defense counsel may wish to seek a protective order asserting the disclosure protections afforded by Iowa Rule of Civil Procedure 122(c).

Specifically, if defense counsel is advised that defense counsel's bills will be audited, defense counsel might wish to consider the following proposed procedure:

1. Forward a copy of the "Insurance Guidelines" ethics opinion to the insurer.
2. Question any requirement that the insured's secret or confidential information be included within the billing statement.
3. Request that the insurer provide assurance that the fee information will be protected from secondary disclosure by the auditor.
4. Advise the insurer that any auditing guidelines will be construed in compliance with the "Insurance Guidelines" ethics opinion. That is, any provisions in the auditing guidelines which conflict with the ethics opinion will be considered void, and any ambiguous provisions in the auditing guidelines will be construed to be in compliance with the "Insurance Guidelines" ethics opinion.

SUMMARY

Disciplinary Rule 2-106 requires an attorney to charge only a reasonable fee. The IDCA believes that insurers and defense counsel can cooperate to prevent fee abuses such as over-staffing, improper staffing, duplication of effort, lack of direction, unreasonable charges and inefficiency. However, when an insurer retains defense counsel to represent the insured, the insurer must recognize the defense counsel's ethical obligations to the insured, specifically to maintain independent professional judgment and to protect matters obtained within the attorney-client privilege. An outside auditor may not be bound by the same legal or ethical obligations of an insurer or defense counsel to the insured, and, therefore, insurers and defense counsel should be very cautious in the requirements for, and use of, outside auditing. ❑

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b. Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence.

c. A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

3. A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection 2 unwarranted.

4. A director is not liable for any action taken as a director, or any failure to take any action, if the director performed the duties of the director's office in compliance with this section, or if, and to the extent that, liability for any such action or failure to act has been limited by the articles of incorporation pursuant to § 490.832 [of the Iowa Code].

I.C. § 490.830. In addition, Iowa Code § 490.842 provides the same standard of conduct for corporate officers. If the directors or officers have acted in compliance with this standard, they are not liable for their actions. *See* I.C. §§ 490.830(4), .842(4).

The purpose of the Business Judgment Rule is to limit second guessing of business decisions made by those whom the corporation has chosen to make them. *Hanrahan*, N.W.2d at 186. The Business Judgment Rule is a test that is both objective and subjective. *Id.* The test can be adequately summed up as follows: When directors act in good faith in making a business decision, if the decision is reasonably prudent and they believe it is in the corporation's best interests, there is no liability. *See Id.*

Self-Dealing/Conflicts Of Interest

If the shareholders' derivative action involves claims of self-dealing on the part of the defendant, the business judgment rule does not apply. *Id.* If directors and officers are involved in self-dealing, the burden shifts to them to establish that the questioned-transaction was fair to the corporation. *Id.* The director accused of self-dealing must establish that the action was in good faith, honest and fair. *Cookies*, 430 N.W.2d at 453; *Holi-Rest*, 217 N.W.2d at 525. Thus, self-dealing transactions must appear to have been at arms length before a court will find them to be fair and reasonable to the corporation. *Cookies*, N.W.2d at 453. To be approved, the self-dealing transaction should have been taken after full disclosure and with the consent of all involved. *See Holden v. Construction Machinery Co.*, 202 N.W.2d 348, 356-357 (Iowa 1972). However, the failure to disclose and obtain consent will not per se create liability if the transaction is in good faith, honest and fair. *Id.* at 354.

Self-dealing transactions must also meet the requirements of Iowa Code § 490.831. Section 490.831 specifically deals with transactions in which a director has a direct or indirect interest. A director has an "indirect" interest in a transaction if, (a) another entity in which the director has a material financial interest or in which the director is a general partner is a party to the transaction, or (b) another entity of which the director is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation. I.C. § 490.831(2). A self-dealing or conflict-of-interest transaction is not voidable by the corporation solely because of the director's interests in the transaction if, (a) the material facts of the transaction and the director's interest were disclosed or known to the board of directors (or a committee thereof) and the board of directors (or committee) authorized, approved, or ratified the transaction, or (b) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved or ratified the transaction, or (c) the transaction was fair to the corporation. I.C. § 490.83(1). Such a transaction is authorized, approved, or ratified if it receives an affirmative vote by a majority of directors or shareholders who do not have a direct or indirect interest in the transaction. I.C. § 490.831(3), .831(4).

The Corporate Opportunity Doctrine

Another rule limiting the actions of directors and officers is the Corporate Opportunity Doctrine. This doctrine requires that, as a fiduciary, a director or officer may not secure for himself or herself a business opportunity that in fairness belongs to the corporation. *Connolly v. Bain*, 484 N.W.2d 207, 211 (Iowa App. 1992); *Cookies*, 430 N.W.2d at 452. A plaintiff's claim that a director or officer has wrongfully taken a corporate opportunity will be denied; (a) wherever the fundamental fact of good faith is determined in favor of the director or officer charged with usurping the corporate opportunity, or (b) where the company is unable to avail itself of the opportunity, or (c) where availing itself of the opportunity is not essential to the company's business, or (d) where the accused fiduciary does not exploit the opportunity by the employment of his or her company's resources, or (e) where by embracing the opportunity personally the director or officer is not brought into direct competition with his or her company and its business. *Connolly*, 484 N.W.2d at 212; *Sauer v. Moffitt*, 363 N.W.2d 269, 273 (Iowa App. 1984).

Remedies

If a plaintiff is successful in a derivative action brought for a breach of one of these rules or duties, the court has broad equitable powers to remedy the defendants' wrongs. Generally, the proper award in such a case is a judgment for restitution. *Holden*, 202 N.W.2d at 358. However, if a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity can devise a remedy to meet the situation even though no

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DERIVATIVE SHAREHOLDER ACTIONS. . . *Continued from page 8*

similar relief has been granted before. *Id.* at 363-64. For instance, the court may appoint a special fiscal agent to take control of the corporation in order to protect the corporation's and the shareholder's rights and interests. *Holi-Rest*, 217 N.W.2d at 527. The court also has the power to liquidate the assets and business of a corporation if, among other things, the acts of the directors are deemed illegal, oppressive, or fraudulent, or the corporate assets are being misapplied or wasted. *Sauer*, 363 N.W.2d at 274; *see also* I.C. § 490.1430. Punitive or exemplary damages may also be awarded by the court upon a showing that some legally protected right of the plaintiff has been invaded, such as by an intentional act of fraud or other wrongful conduct. *Sauer*, 363 N W.2d at 275. In these circumstances, an intentional act of fraud includes "all acts, omissions and concealments which involve a breach of either legal or equitable duties, trust or confidence, justly reposed, which are injurious to another or by which an undue or unconscionable advantage is taken." *Id.* (quoting *Holden*, 202 N.W.2d at 359). Finally, the court may also order the successful plaintiff's attorney fees be paid by the corporation. *See, e.g, Holi-Rest*, 217 N.W.2d at 526. However, attorneys' fees may not be awarded with respect to any individual claims asserted as part of a plaintiff's shareholder derivative action. *Sauer*, 363 N.W.2d at 275.

Corporate Counsel's Role

The attorney for the corporation must, after securing proper client direction, appear and, then, probably should move for a stay to permit an investigation pursuant to Iowa Code § 490.740(2). The concept of investigation stems from the need to separate corporate interests from those of the Board of Directors, officers and majority shareholders. In most cases, independent counsel for the corporation should be retained for this purpose.

The court has discretion in whether or not to stay the proceedings. I.C. § 490.740(2). If the stay is granted, the investigation could take many different forms or directions. It may be wise, before the hearing on the motion to stay, to try to discuss with corporate counsel their plan of investigation if you are counsel for an officer or director. It may also be wise, economically, to try to determine what exactly the plaintiffs want before the hearing on the stay if possible. This method of potential resolution of claims may be advantageous. However, before agreeing to the investigation, you must be sure you have some idea what the result will be. This will require complete candor by the client and cooperation of counsel. In this effort, strategy sessions with co-defense counsel are important and probably will be helpful.

Defense Counsel's Role

The role played by you as defense counsel must depend on the role of your client. The greater your client's involvement, the more you will be involved and the greater the potential conflict between you and corporate counsel. It is also important for you to determine initially if the case should be tried to a jury or to the court. A derivative action is an equitable action, and therefore tried to the court. *See Holi Rest Inc.*, 217 N.W.2d at 523. The individual claims, however, may be tried to a jury. The problem is that in some cases, based on the pleadings, it may be hard to determine whether the case is one or the other, or both. As a result, it may be wise to raise the issue of whether the case should be tried to a jury at the earliest possible stage of the proceedings.

As in all cases, the defense of a derivative shareholder claim will turn on the facts. Before you can determine what defense is advisable, you need to determine if there may be indemnification available to your client through the company, either directly by an indemnification agreement or indirectly through a director's, officer's, or other liability insurance policy. In addition, you probably need to obtain and review the pleadings, the corporate articles and bylaws, any buy/sell agreement, the relevant corporate minutes and all relevant correspondence with your client before answering the petition.

Some affirmative defenses in these claims that should be considered are unclean hands and laches, both of which are equitable in nature. In order to establish the applicability of the unclean hands doctrine, the allegedly wrongful conduct engaged in by the plaintiff shareholder must have in some way injured, damaged, or prejudiced the party pleading the defense. *Midwest*, 353 N.W.2d at 81. Further, the conduct must have been related or connected in some way with the present dispute. *Id.* As for the laches doctrine, it cannot ordinarily be claimed against one who has begun an action within the appropriate statute of limitations unless there has been some special detriment to another. *Id.* If there has been no special detriment, laches is inapplicable. Also, it may be possible to raise the issue of whether the action is derivative or individual in nature as a defense to the particular remedy sought by the plaintiff, if not to the action itself.

Cost of Defense

The defense costs involved in a particular case may dictate the appropriate course of action. For instance, they may dictate that the independent investigation may be in all parties financial best interests. Your judgment should be influenced by the independent nature of the investigation and your client's liability exposure. Before embarking on a course of action you should advise your client that depending on the nature and extent of both the corporate assets and the dispute, it is not unheard of that defense costs could exceed $100,000 and there is the possibility of the company being taxed with the corporate dissenter's fees.

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DERIVATIVE SHAREHOLDER ACTIONS. . . *Continued from page 9*

Settlement

The possibility of settlement should be explored early in the litigation before all sides have invested too much in the case. Appropriate forms of alternative dispute resolution may assist in reaching this compromise. Typically, they will also be a far less expensive undertaking than a full trial. Depending on the way the corporation is set up and what buy/sell agreements are in place, it may be possible to purchase the dissenting shareholder's interests by agreement. In settling any minority shareholder's claims in this manner, it is important to keep in mind that the price paid for one share will most likely affect the value of all shares. A helpful tool in investigating the appropriate value of the minority shareholder's stock would be to check the stock transfer book and corporate minutes book. In addition, professional appraisers will probably be necessary. Regarding the area of settlement, it is important to note that no settlement can be reached in a shareholder derivative action without court approval. I.C. § 490.740(3).

Insurance and Indemnification

A corporation has the option to purchase and maintain insurance on behalf of a director, officer, employee or other agent of the corporation against liability asserted against or incurred by that individual in his or her capacity as or arising from his or her status as a director, officer, employee or agent. I.C. § 490.857. You should determine early on whether such insurance has been secured by the corporation on your client's behalf. The unavailability and high cost of director's and officer's insurance may dictate that, instead of insuring its directors and officers, the corporation will have agreed to indemnify them.

Whether indemnification is available in the context of a shareholder derivative action is controlled by the Iowa Code. The Iowa Code provides that if an individual is named a party to a suit because he or she is or was a director of a corporation, they *may be indemnified* from liability if: (a) the individual acted in good faith; (b) the individual reasonably believed (1) in the case of conduct in the individual's official capacity with the corporation, that the individual's conduct was in the corporation's best interests, or (2) in all other cases, that the individual's conduct was at least not opposed to the corporation's best interests; and (c) in the case of a criminal proceeding, the individual had no reasonable cause to believe the individual's conduct was unlawful. I.C. § 490.851(1). If a proceeding ends by judgment, order, settlement, conviction or the equivalent, this is not, in and of itself, determinative as to whether the director has met the above standard. I.C. § 490.851(3). A corporation shall not indemnify a director under § 490.851 if, in connection with a proceeding by the corporation, the individual is adjudged liable to the corporation or, in any other proceeding, if the director was adjudged liable on the basis that he or she improperly received a personal benefit. I.C. § 490.850(4). Indemnification under § 490.851 is limited to reasonable expenses incurred in connection with the proceeding, including attorneys' fees. I.C. §§ 490.850(3), .851(5). This permissive indemnification also applies to officers, employees, and other agents involved in such suits to the same extent that it does directors. I.C. § 490.856.

Permissive indemnification is only available after a determination has been made that the individual has met the standard set out in § 490.851 of the Iowa Code. I.C. § 490.855(1). This determination can be made by any of the following: (a) by the board of directors by majority vote of a quorum, consisting of directors not at the time parties to the proceeding; (b) if a quorum cannot be obtained under (a) by a majority vote of a committee designated for this purpose by the board of directors, in which designation directors who are parties to the action may participate, consisting of two or more directors not at the time parties to the proceeding; (c) by special legal counsel (1) selected by a board of directors or its committee in the manner set out in (a) or (b), or (2) if a quorum of the board of directors cannot be obtained under (a) and a committee cannot be designated under (b), selected by majority vote of the full board of directors, in which selection directors who are parties to the action may participate; or (d) by the shareholders, but shares owned by or voted under the control of directors who are parties can not be voted on the determination. I.C. § 490.855(2).

Unless the corporation's articles of incorporation provide otherwise, the corporation *must indemnify* a director who has been wholly successful, on the merits or otherwise, in the defense of a proceeding in which he or she was involved because he or she is or was a director. I.C. § 490.852. This indemnification applies to reasonable expenses, including attorney's fees. I.C. § 490.852. Mandatory indemnification also applies to officers, employees, and other agents who are wholly successful in such suits. I.C. § 490.856(1).

There are also instances when, unless the corporation's articles of incorporation provide otherwise, a director, officer or other agent may apply for indemnification from the court. I.C. § 490.854. After giving whatever notice it deems necessary, the court may order indemnification if it determines (a) the individual is entitled to mandatory indemnification under § 490.852, or (b) the individual is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the standards have been met or the individual has been adjudged liable under § 490.851. I.C. § 490.854. However, if the individual was adjudged liable under § 490.851(4), this court-ordered indemnification must be limited to the reasonable expenses incurred, including attorney's fees. I.C. § 490.854. (This provision implies that if the individual is not adjudged liable under § 490.851(4), the court-ordered indemnifi-

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DERIVATIVE SHAREHOLDER ACTIONS. . . *Continued from page 10*

cation can include indemnification of things other than just expenses, but there are no Iowa cases interpreting the provision.)

Except as set out in § 490.851(4)(a) or § 490.851(5), none of the above indemnification provisions are meant to be exclusive of other indemnification rights an individual may have under the corporation's articles of incorporation, by-laws, votes of disinterested shareholders or directors or otherwise. I.C. § 490.858. However, such articles of incorporation, by-laws, votes of disinterested shareholders or directors or otherwise may not provide indemnification for a breach of a director's duty of loyalty to the corporation or its shareholders, for acts or omissions not in good faith or which involve intentional misconduct or knowing violation of the law, for a transaction from which the person seeking indemnification derives an improper personal benefit, or for liability for unlawful distribution under Iowa Code § 490.833. I.C. § 490.858.

A corporation may also pay for or reimburse the reasonable expenses (including attorney's fees) incurred by a director, officer, employee or agent who is party to a proceeding prior to final disposition of the derivative action. I.C. § 490.853(1). This may occur if: (a) the individual furnishes the corporation with a written affirmation of the individual's good faith belief that he or she has met the standard of conduct set out in § 490.85 1, or (b) the individual furnishes the corporation with a written undertaking to repay the advance if it is ultimately determined he or she did not meet that standard of conduct, or (c) a determination is made that the facts then known to those making the determination would not preclude indemnification. I.C. § 490.853(1). This determination must be made in the same way as the decision to indemnify would be made under § 490.855. One way to proceed in this fashion is to provide an affidavit for the court in a form similar to the following:

JOINT AFFIRMATION AND
PERSONAL UNDERTAKING
§ 490.853 CODE OF IOWA (1999)

The undersigned, *John Doe Director,* hereby affirms and certifies under penalty of perjury and pursuant to the laws of the State of Iowa that in all matters pertaining to my decisions and/or my conduct as an officer of the board of directors of *Doe Corporation,* I have acted in good faith. Also, that with regard to all decisions made in said capacity, I have reasonably believed that my conduct and decisions were done in the best interest of the corporation and certainly I have never acted with regard to my members which I felt were in opposition to the corporation's best interests.

FURTHER, I have never been adjudged liable to the corporation for any matters and I have not obtained any improper personal benefit from anybody as a result of my actions as a member of the board.

FINALLY, I hereby acknowledge and agree to reimburse *Doe Corporation* and repay it for any advances that I may receive as a result of being named as a defendant in that certain lawsuit filed in the Iowa District Court in and for Polk County and captioned: *Peter Smith v. Doe Corporation and John Doe Director,* Case No. EQ005555, if it is ultimately determined that I have not met the standards of conduct described in § 490.851 of the Code of Iowa.

_____
John Doe Director

Subscribed ard sworn to before me by _____ this _____ day of _____ 2000.

_____
Notary Public in and for
Polk County, Iowa.

Joint Defense Agreements

The appropriateness of Joint Defense Agreements in the context of shareholder derivative actions, as in most circumstances, depends on the willingness of the parties to cooperate and the potential for conflict. However, in the derivative claim, there appears to be more potential for conflict and less likelihood of cooperation between the majority shareholder and the other officers or directors. This is due to the potential dominance that may have already occurred by the majority shareholder and the fact that the officers and/or directors are often being sued by a minority shareholder for abiding by the majority shareholder's requests. As such, it would be wise to approach these agreements with caution.

Preliminary Steps to Defend

Secure all corporate minutes, the stock transfer book, and all relevant correspondence involving the parties or potential parties. Review the articles of incorporation with all of the amendments, the corporation by-laws, any buy/sell agreements and the pleadings. Confer with your client. After you have done this, it will be possible to meet with co-defense counsel, corporate counsel and plaintiff's counsel. Once this has been done and you have considered some of the topics discussed above, you should be able to decide how best to proceed on behalf of your client.

Good luck. ❐

ALTERNATIVE DISPUTE RESOLUTION. . . *Continued from page 4*

sua sponte or upon a motions of parties would be clarified. The *Final Report* contains the language of proposed legislation regarding the procedural and substantive aspects of the model and should be consulted for further specifics of the family law program.

Outlined in the Mediation Study Group's *Final Report* is a grand experiment in court annexed mediation. It reviews the results of various programs around Iowa and the nation and affirms the societal and legal value of such an alternative. Those who are involved in practicing Alternative Dispute Resolution should be watching closely the debates on the development and perhaps implementation of the family law model as it may well impact other substantive areas of the law in the future. ❑

FIRST IDCA MINI-SEMINAR SUCCESSFUL

The first ever Iowa Defense Counsel Association mimi-seminar was held at the Des Moines Golf and Country Club on February 25, 2000. The morning session was devoted to commercial litigation topics and the afternoon session was devoted to products liability litigation. Over 40 registrants heard a blue ribbon panel of speakers. Watch for announcements of future mini-seminars offered by the Iowa Defense Counsel Association.

PRESIDENTS LETTER . . . *Continued from page 2*

Clark McDermott, Greg Witke, Jaki Samuelson, Paul Morf, Dick Sapp, Dick Rosebrook, Professor Mike Green, as well as Kevin Reynolds. This excellent mini-seminar reflects the desire of the Board to bring more services to our membership.

Also, I want to note that Sharon Greer is responsible for the Drake and Iowa Law School programs. Iowa Law School has requested that the program take place this fall so that it can be coordinated with the schedule of medical students who will also be attending. Sharon advises that the Drake Law School program this spring was very successful. Judge Celeste Bremer, who acted as the trial court judge during the mock trial, has requested that the Iowa Defense Counsel Association put on this program again for the Iowa Osteopathic School in Des Moines.

Finally, I want to remind you of the Joint Trial Advocacy Program which will be held at the University of Iowa Law School on August 10, 11, and 12, 2000. This program is aimed at lawyers new to the practice who want to increase their trial skills. The other sponsors of the program are the Iowa Academy of Trial Lawyers, the Iowa Trial Lawyers Association and the Iowa Chapter of ABOTA. As the list of sponsors reveals there is a high level of cooperation between the Plaintiff's bar and Defense bar in an effort to impart their trial skills to new lawyers. The Iowa Judicial Institute will also be at the University of Iowa Law School in August, and we will draw on their talents for a one-hour program in which lawyers and judges will discuss problems of trial management. We should have the mailings out on this program in July. I encourage you to let others know of the program, regardless of whether they are members of the IDCA. ❑

WELCOME NEW MEMBERS

Mark A. Teigland
Des Moines, Iowa

Sara Sersland
Des Moines, Iowa

E. J. Kelly
Des Moines, Iowa

RECENT CASES OF INTEREST . . . *Continued from page 5*

ment stipulating that actions concerning the agreement may be brought in Iowa. Trial resulted in a judgment in favor of EFCO. Norman pursued the jurisdictional issue among others to the Iowa Supreme court, which affirmed the judgment below.

The parties' written lease agreement provided that actions in respect thereto may be "instituted and litigated in the Iowa District Court for Polk County, Iowa." The agreement further stated that Norman "consents to jurisdiction of such court and agrees that service of process as provided by [Iowa law] shall be sufficient." Norman argued that despite this language in the parties' contract, it did not have the necessary minimum contacts with the State of Iowa to satisfy due process. The record showed that EFCO solicited the lease agreement in Texas through its Texas based employees and the leased equipment was located in Texas, although lease payments were made to Iowa.

Speaking for a unanimous court, Justice Carter stated that a due process analysis was unnecessary given the choice of forum clause in the parties' agreement. Regarding such clauses and due process, the U.S. Supreme Court has specifically observed that personal jurisdiction is an individual right which, like other rights, can be waived. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea,* 456 U.S. 694 (1982). Iowa case law, the Court noted, has also long recognized the notion that jurisdiction may be consented to. *Joseph L. Wilmotte & Co. v. Rosenman Bros.,* 258 N.W.2d 317, 329 (Iowa 1977). Thus, the traditional review of minimum contacts with the forum state was not required.

Norman additionally argued that the lease agreement including the choice of forum clause was a contract of adhesion in that the provision was contained on the reverse side of a form agreement supplied by EFCO on which no signature lines appeared nor had the clause actually been read by the person signing on Norman's behalf. The Court rejected the argument holding that such evidence was insufficient as a matter of law to invalidate the provision.

IBP, Inc. v. Raad Al-Gharib
(Iowa, filed January 20, 2000)

Appellate jurisdiction.

This is an appeal with a rather involved procedural background. Raad Al-Gharib filed a work comp claim against IBP claiming permanent and total disability resulting from physical and mental injuries. The deputy industrial commissioner found in the claimant's favor and IBP appealed to the commissioner. The commissioner deemed the evidence insufficient to support the mental disability claim, but concluded that Al-Gharib was permanent and totally disabled nevertheless.

The commissioner's ruling was upheld on appeal to the district court, and the court deemed it unnecessary to consider the mental injury claim in view of its affirmance of the disability finding. The claimant then filed a Rule 179(b) motion asking that his mental claim be addressed because there were past and future expenses and care that he was asking IBP to pay. Before the district court could rule on the 179(b) motion, IBP filed a notice of appeal which was followed by a timely cross-appeal from Al-Gharib. The district court thereafter issued its ruling on the pending motion ordering the case remanded to the commissioner for further consideration of the evidence of mental disability.

The Supreme Court transferred the case to the court of appeals who, on its own initiative, concluded that by cross-appealing before the lower court's ruling, Al-Gharib waived the issues raised in his 179(b) motion and cross-appeal and cured the interlocutory nature of IBP's appeal. On further review, the Supreme Court held, among other things, that the appellate court erred in so concluding.

The court explained that Iowa case law holds that when the party who has filed a posttrial motion appeals, the appeal is considered one of right and the appellant is deemed to have waived the posttrial motion. If the nonmoving party appeals while a posttrial motion is pending, the appeal is premature because the judgment in the lower court is not yet final and it becomes subject to appellate rule 2 concerning interlocutory appeals. Thus, the situation arises whereby a party like IBP in this circumstance could seemingly use its premature appeal to force the moving party to cross-appeal (which he must do within five days of the notice of appeal) thereby waiving the issues in his posttrial motion.

The court of appeals acknowledged the dilemma facing Al-Gharib, but nevertheless held his cross-appeal waived the issues in his 179(b) motion. The court suggested that he should have either moved to dismiss IBP's appeal, or asked for a limited remand to allow the trial court time to rule on his motion. The Supreme Court, however, agreed with Al-Gharib that he had no guarantee of either a dismissal or a remand and without a ruling within the five-day period to cross-appeal, any subsequent cross-appeal would have been untimely. The court refused to sanction such a result, all brought about because of IBP's premature appeal. In the future, the Court announced that it will "consider as interlocutory a notice of cross-appeal filed in response to an improvidently taken notice of appeal. We now hold that a notice of cross-appeal filed under such circumstances does not act as a waiver of the cross-appealing party's posttrial motion unless an explicit waiver of the motion is contained in the notice." ❐

Check Out Our New Web Site

- Purpose of the Association
- Member Roster
- Officers and Board of Directors
- Calender of Events
- Membership Applications

For Members Only

- Login Area
- IDCA Defense Update
- Member Roster
- Jury Verdict Summaries

IDCA WEB SITE

AND CIVIL JURY VERDICT REPORTING SERVICE

By Mark L. Tripp, Des Moines, Iowa

In its continuing efforts to improve and expand services available to its members, the Iowa Defense Counsel Association has launched its new web site and civil jury verdict reporting service. The web site can be located at *www.iowadefensecounsel.org*. **The site will be operational on May 15, 2000.**

The IDCA web site provides members with ready access to the membership roster, and listing of current IDCA upcoming events. In addition, we have shortened the application procedure and made it possible to apply for membership via the internet.

The web site contains a section which can be accessed by the general public and a section that can be accessed by members only. By logging on to the Members Only section, you will gain access to our new jury verdict reporting service.

As many of you know, Polk County District Court Administrator Ron Branam has been keeping track of jury verdicts in Polk County for many years. These verdict summaries provide valuable information not only in connection with case evaluation efforts but also mediation and settlement efforts. Based on information obtained from the State District Court Administrator's office, we discovered that we would be able to capture over 50% of civil jury verdicts by focusing our efforts on ten counties. Those counties are as follows:

1. Polk
2. Linn
3. Scott
4. Pottawattamie
5. Woodbury
6. Johnson
7. Dubuque
8. Cerro Gordo
9. Black Hawk
10. Story

With the help of IDCA members, we are collecting all civil jury verdicts in all of the above counties on a quarterly basis. These jury verdict summaries will then be included on our web site. The verdict summaries will advise the reader of the type of case, type of injury, specials involved, last demand, last offer before trial and the jury verdict, including percentages of fault assigned and damages awarded. We believe that this new service will be extremely useful to our members. Once we have the service up and running we will consider expanding the number of reporting counties. We anticipate that eventually our jury verdict reporting service will only be accessible by members of the IDCA. In order to get the service up and running, however, and to encourage its use, we are going to make the jury verdict reports available to everyone. Instructions for access to the jury verdict reports will be on the web site. You gain access to the jury verdict reports by clicking the log in area. You must enter "IDCA" in the Password Protected location. We will explore the possibility of having individual code numbers assigned to our members so as to restrict access to this service. We believe this will be a valuable service to our membership which will be put to extensive use.

We owe a special thanks to Tom Walton from the Nyemaster firm and Sean O'Brien from the Bradshaw firm for their efforts in getting the web site up and running. Tom Walton is currently responsible for collecting all of the civil jury verdicts from our reporting attorneys. Please keep in mind that this jury verdict reporting service is not intended to be a dream sheet, so to speak, for either the plaintiffs or defendants. Our goal is to report all civil jury verdicts, whether favorable or unfavorable from a defendants' perspective. Only by reporting all the jury verdicts rendered we will be able to maintain the reliability of the service for use as an evaluation tool or a settlement tool.

Please feel free to direct any questions or comments regarding the web site to IDCA officers or board members. You can find their address and phone numbers listed on the new web site.

FROM THE EDITORS

The lead article in this issue of the *Defense Update* is the IDCA's Client Relation Committee's official report, as approved by the Board of Directors, concerning the recent ethics opinion regarding insurance guidelines. In the report, the committee carefully analyzes the opinion and sets forth a logical and reasonable interpretation of the opinion. The committee further makes recommendations not only for defense counsel, but for insurance companies hiring defense counsel which are both reasonable and workable. Until such time as further guidance in this area is received from the Courts, the committee's analysis and recommendations will serve both defense counsel and insurance companies, and will provide guidance so that insureds continue to receive the best representation possible.

On another note, the Board of Directors has approved Bruce Walker as the latest addition to the editorial board of the *Defense Update*. The editorial staff has been shorthanded since Ken Allers' resignation and, unfortunately, has fallen behind in procuring articles for publication and producing the *Defense Update*. Therefore, there was no January issue of this publication and with the publication of this April issue, it is expected that the Defense Update will once again be published four times a year on a timely basis.

We are pleased to welcome Bruce Walker to the *Defense Update* and as illustrated in this issue, Bruce has immediately broadened our horizons by authoring, together with Andrew Chappell, a very interesting article on Derivative Shareholder Actions. This article by Bruce is a reminder of the breadth of the various areas which our membership practices in. We encourage any and all members who have researched and/or litigated an interesting issue to share their knowledge with the rest of the membership. Everyone is encouraged to submit an article of interest or discuss a topic with any member of the editorial board. The timely publication of the *Defense Update* depends upon participation by the membership through the submission of articles for inclusion in the *Defense Update*. ❑

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