defense UPDATE

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DEFENSE CLAIMS FOR BREACH OF FIDUCIARY DUTY

By: Bruce L. Walker, Iowa City, IA

WHAT DO CLAIMS FOR BREACH OF FIDUCIARY DUTY INVOLVE?

A good definition of fiduciary duty is contained in Restatement (second) Torts Section 874:

"A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Restatement (Second) of Torts §874 comment a, at 300 (1979).

A fiduciary relationship has also been defined as:

> a very broad term embracing both technical fiduciary relationship and those informal relations which exist wherever one man trusts in or relies upon another. One founded on trust or confidence reposed by one person in the integrity and fidelity of another. A "fiduciary relation" arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal. Such relationship exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other. *Black's Law Dictionary* 564 (5th ed. 1979) (citations omitted).
>
> Some relationships necessarily give rise to a fiduciary relationship. Such relationships would include those between an attorney and client, guardian and ward, principal and agent, executor and heir, trustee and *cestui que trust. Id.*

Some of the indica of a fiduciary relationship include the acting of one person for another; the having and the exercising of influence over one person by another; the reposing of confidence by one person in another; the dominance of one person by another; the inequality of the parties; and the dependence of one person upon another. *Kurth v. Van Horn*, 380 N.W.2d 693, 695-6 (Iowa, 1986).

Another good definition comes from *Kendall/Hunt Pub. Co. v. Rowe*, 424 N.W.2d 235, 243 (Iowa 1988). Before deciding the issue of whether there was a fiduciary duty created in an employer-employee relationship the Court held that:

"Such relationship exists when there is a reposing of faith, confidence, and trust, and the placing of reliance by one person upon the judgment and advice of the other" *Kurth supra* at 695-96.

In *Kendall/Hunt* the issue of whether there was a fiduciary duty was not contested. In the *Kurth* case the court held there was no fiduciary relationship between a bank and a depositor.

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MESSAGE FROM THE PRESIDENT

In September and October I attended the Annual Meeting of the Iowa Defense Counsel in Des Moines and the DRI Annual Meeting in Chicago. I believe that the IDCA meeting in Des Moines September 26-28 was quite successful. We had 198 persons attend and heard from 28 different speakers. I would like to express special thanks to Executive Director Bob Kreamer and Associate Director Julie Garrison for their efforts. Vice President Mike Weston of Cedar Rapids is already working on next year' s meeting scheduled for September 25-27, 2002, at the Embassy Suites. Please mark your calendars now.

Mike Ellwanger

During the 2000-2001 year we welcomed 23 new members, 13 of which were approved at the Annual Meeting.

My objectives for my tenure as President are somewhat modest. I don't want to reinvent the wheel (I am, after all, a Republican). I would like to explore ways to get our younger members involved. The Board has discussed the fact that it is increasingly more difficult to get young lawyers trial experience and we would like to find ways to address this issue.

The IDCA has approximately 14 committees, some of which have not been particularly active. I would like to promote projects to enhance their involvement. I would also like to add one new committee to be in charge of monitoring our web site, including the collection and reporting of jury verdicts.

As always, expansion of membership is key to our organization's success. We therefore need to address areas of defense practice which heretofore have not been a major part of our practice, e.g., employment law, worker compensation, etc. We are the only organization which provides an organizational structure for lawyers who defend these types of cases.

I wish to welcome the following officers and Board members who were elected at the Annual Meeting:

- **Richard Santi**, Des Moines - Secretary
- **Sharon Greer**, Marshalltown - Reelected to a three year term as an at-large Board member
- **Gordon Fischer**, Des Moines - Board member from District V to replace Richard Santi
- **Martha Shaff**, Davenport - Elected Board member from District VII
- **Brent Ruther**, Davenport - Elected Board member from District VIII to replace Wendy Munyon

There were also some special awards at the meeting:

- Wendy Munyon of Grinnell received an appreciative plaque for her nine years of service on the Board. She retired due to our nine-year term limit. Wendy will continue to be involved in the organization on the CLE committee.

- The "Eddie Award," named after founder Ed Seitzinger, was given to Jim Pugh of West Des Moines (Farm Bureau). Jim has worked with the organization for many years. He was on the Board of Director of Defense Update for ten years and now serves as Treasurer for the IDCA.

- A special appreciative plaque was given to Tim Schimberg of Denver, Colorado. Tim has been the Regional Director for the Midregion of DRI for three years.

Finally, I want to thank Marion Beatty for the excellent job that he did as President over the last year. I hope I can do as well.

Michael W. Ellwanger

BEYER v. TODD'S FLYING SERVICE, INC.

THE DEMISE OF THE "EMPTY CHAIR DEFENSE" OR ESSENTIALS FOR APPORTIONING FAULT OF A RELEASED PARTY

By: Joseph L. Fitzgibbons, Estherville, IA

Many times, the strategy of a defendant to "blame" or apportion fault to a dismissed party or released party, gives rise to the often-referred term of "the empty chair defense." The "empty chair defense" involves a simple factual situation in which the primary defendant blames a settled party as the real culprit in the scheme of proving its non-liability. (For a thorough discussion of the "empty chair defense", *see Note, Allocating Fault to the Empty Chair: Tort Reform or Deform?*, 76 U. DET. MERCY L. REV. 571 (Winter 1999)). Since the plaintiff settled with a released party (typically a secondarily responsible defendant), the remaining defendant (typically the primary defendant) argues that those organizations or individuals released are primarily at fault, having stepped up to the plate and settled with the plaintiff. The logical conclusion is that the jury should apportion the vast amount of fault to the released party. The death knell, possibly, of the "empty chair defense" was sounded by the Iowa Supreme Court in *Beyer v. Todd*, 601 N.W.2d 35 (Iowa 1999).

The facts of *Beyer* are relatively simple, as stated by the court. Plaintiff Wendy Beyer was injured in a multi-vehicle accident in Ankeny, Iowa. The event triggering the accident occurred when a vehicle being driven by Christopher Gardner stalled at an intersection stop light in a left-hand lane of a four lane divided highway. Gardner did not get out of the car, but signaled cars to go around him. The speed limit in the area was 45 m.p.h. Another motorist, Lucy Comer, was traveling in the same direction and in the same lane as the Gardner vehicle but was a few car lengths behind the Gardner vehicle. Comer was alerted to Gardner's stalled vehicle when a pickup suddenly moved from the left lane to the right lane with no warning. Upon seeing Gardner's stalled auto, Comer applied her brakes and came to a stop without hitting Gardner's vehicle.

Plaintiff Beyer was also traveling in the left-handed lane. She observed the brake lights of Comer's vehicle, applied her brakes and brought her vehicle to a stop. Beyer believed that she had been traveling 40 m.p.h. before stopping. Beyer's vehicle was then struck from behind by a vehicle being driven by defendant Gregory Todd, and owned by defendant Todd's Flying Service, Inc. The force from the impact of the Beyer-Todd collision pushed Beyer's vehicle forward into Comer's vehicle. Beyer's vehicle also collided with a vehicle being driven by Linda Yohe, who was traveling in the right hand lane. Gregory Todd believed he was traveling between 35 and 40 m.p.h. before trying to stop.

Plaintiff Beyer filed an action against Gregory Todd and Todd's Flying Service, Inc., asserting negligence claims and seeking damages for personal injuries and property damage she sustained as a result of the accident. Beyer later amended her Petition, adding as defendants Comer and Gardner and alleged that they were also negligent. Todd filed an Answer and Counterclaim against plaintiff Beyer, asserting that Beyer was negligent, and also filed a Cross-Claim against Comer and Gardner alleging that they were negligent.

Beyer settled with defendants Comer and Gardner, and the matter proceeded to trial concerning Beyer's claims against defendant Todd and Todd's Counter-claim against Beyer and his Cross-Claims against Comer and Gardner. During trial, defendant Todd made an offer of proof of plaintiff Beyer's Amended Petition in which Beyer alleged that Comer, Gardner, and Todd were all negligent in operating their vehicles. The district court sustained Beyer's Objection to Todd's offer of proof and the Amended Petition was not admitted into evidence. Todd also requested the court to instruct the jury that plaintiff had the burden of proving the fault of the released persons, Comer and Gardner, but the court refused. Additionally, Todd requested that the trial court give a sudden emergency instruction to the jury, but the trial court once again refused.

On appeal, Todd asserted that the district court erred by not instructing the jury that it was plaintiff Beyer's burden to prove the fault of Comer and Gardner, the released parties with whom Beyer settled with prior to trial.

In analyzing who has the burden of proving fault of a released person, the Iowa Supreme Court first turned to section 668.3(2)(b), which requires that in the trial of a claim involving the fault of more than one party, the district court shall instruct the jury to answer special interrogatories concerning the percentage of the total fault allocated to each claimant, defendant, third-party defendant, and persons released from liability under section 668.7. Unfortunately, IOWA CODE chapter 668 does not specify who has the burden of proving the fault of a released person. That was the critical issue addressed by the Iowa Supreme Court in *Beyer v. Todd*. In its holding, the supreme court stated as follows:

> "Upon our review, we conclude that the district court did not err by refusing to instruct the jury

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CASE NOTE: TRUTH IN LAWYERING

Hansen, et. al. v. Anderson, Wilmarth & Van Der Maaten, et. al.
630 N.W.2d 818, Iowa Supreme Court, filed July 5, 2001
Attorneys in arm's length transactions owe a duty not to defraud each other.
Negligent tortfeasor may recover full indemnity against joint intentional tortfeasor

By: Kermit Anderson, Des Moines, IA

BACKGROUND

This case presents the latest installment in a long running story involving a number of lawsuits, parties, claims, and issues all flowing from a failed, most would say disastrous, commercial transaction in northern Iowa. The litigation began in 1988 when the purported owner of a business known a Precision Torque Converters of Iowa, Inc. (PTCI) brought an action for wrongful conversion based on the sale of the corporation's assets by the owner's associate, one Rick Riccardi. Before even reaching the merits of the claims asserted, the case made law in 1991 when the Supreme Court reversed the district court's dismissal of the action on the basis of the rarely used doctrine of "judicial estoppel." The plaintiff, M. Harold Ezzone, had denied under oath any ownership interest in the business in other court proceedings, including his dissolution of marriage proceeding in Florida. The defendants argued that he should now be prevented as a matter of law from claiming otherwise in this case. The Supreme Court held the doctrine was inapplicable under the circumstances and remanded the case to the district court. *Ezzone v. Hansen*, 474 N.W.2d 548 (Iowa 1991).

Following remand, the case proceeded ahead to trial. Defendants were Riccardi, attorney Michael Kennedy who represented Riccardi and PTCI in the sale transaction, the buyers Willis Hansen and Dennis Hansen, the Hansens' lender, the State Bank of Lawler, and the business entity itself, which had been reincorporated after sale as Precision of New Hampton, Inc. The plaintiff's wife had also intervened in the proceedings as a plaintiff. In a jury verdict the Supreme Court would later describe as "surprising," the plaintiffs recovered substantial compensatory and punitive awards in the district court against the buyers and their lending bank. Attorney Kennedy settled with the plaintiffs prior to trial, and Riccardi failed to attend. The verdicts were upheld on appeal, except that the punitive awards were determined to be "greatly excessive" and a new trial was ordered unless plaintiffs accepted a remittitur. The court's opinion is lengthy and covers a multitude of issues raised by the parties. *See Ezzone v. Riccardi*, 525 N.W.2d 388 (Iowa 1994).

CURRENT DECISION

The court's latest decision is an outgrowth of a subsequent legal malpractice action brought in 1996 by the Hansens and the State Bank of Lawler against the Hansens lawyers, Anderson, Wilmarth & Van Der Maaten (the "Anderson defendants"). Plaintiffs alleged that the defendants were negligent in their handling of the transaction for the purchase of PTCI and in their defense of the lawsuit brought by Ezzone. The Anderson defendants in turn filed a cross-petition for indemnity against attorney Kennedy. On Kennedy's motion for summary judgment, the district court dismissed the indemnity claim finding no legal duty between attorneys on opposite sides of an arms' length business transaction. The Anderson defendants appealed the lower court's ruling and the Supreme Court reversed and remanded in an opinion filed July 5, 2001 entitled *Hansen v. Anderson, Wilmarth*, 630 N.W.2d 818 (Iowa 2001).

In its opinion, the court found the following facts were alleged by the Anderson defendants and had some support in the record. Kennedy had been the attorney for PTCI and represented both the business and Riccardi in connection with the sale of the business's assets to the Hansens. The Hansens were represented in the transaction by the Anderson firm. The purchase agreement called for Riccardi to provide evidence that he had proper corporate authority to execute the sales documents. At Riccardi's request and to comply with the purchase agreement, Kennedy prepared separate documents entitled "Organizational Meeting of Precision Torque Converters of Iowa, Inc." and "Board Meeting of Precision Torque Converters of Iowa, Inc." The first document stated that 200,000 shares of stock "shall be issued" in Riccardi's name and that Riccardi was elected the sole member of the board of directors. The second stated Riccardi was elected president and secretary-treasurer of PTCI and would be the corporate official with the power to issue deeds and bills of sale on equipment.

Kennedy provided the documents to the buyers' attorney, Calvin Anderson, at closing as evidence of Riccardi's authority to enter into the agreement on behalf of PTCI. According to the Anderson defendants, however, the documents were false and known to be so by Kennedy at the time he presented them to Anderson with the expectation that Anderson would rely on them in allowing the sale to be consummated. In his answer to the cross-

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DEFENSE OF CLAIMS FOR BREACH OF FIDUCIARY DUTY

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A real estate agent or broker can be considered a fiduciary, *see Miller v. Berkowski*, 297 N.W.2d 395 (Iowa 1980).

However, text book or classic definitions do not fully explain the significance of fiduciary claims. In most situations of trust, there are allegations that are very emotional and can, without proof, damage reputations. To properly analyze these cases, attention must be shown to more than legal issues to be able to advise and counsel clients on either side of these issues. Once made, the allegations can have extensive and long lasting impact. Please consider the following as a guide to assist you in the analysis.

FREQUENCY OF CLAIMS

In my practice, claims of breach of fiduciary duty have been encountered with surprising frequency. I have defended two claims made in estates by heirs against executors and one in a business transaction by a buyer against a seller. Before that, I defended a case involving a real estate transaction by a seller against a broker involving a fee dispute. As the applicability of these claims and the potential problems with defense become more well known to plaintiffs counsel, we all will begin to see more of these cases.

As a result, this article may be of assistance to you in your practice to start the process of understanding the issues presented in these cases.

UNIFORM JURY INSTRUCTIONS

The marshaling instruction for breach of fiduciary duty claims (3200.1) provides:

1. The plaintiff must provide the following propositions:
2. On or about the _____ day of _____________, 20___, a fiduciary relationship existed between the plaintiff and the defendant.
3. The defendant breached a fiduciary duty.
4. The breach of the fiduciary duty was a proximate cause of damage to the plaintiff.
5. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff cannot recover damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to recover damages in some amount. *Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986); *Restatement (Second) of Torts*, section 874.

I believe that a concern that must be considered in these cases is who has the burden of proof once plaintiff has proved element number 1. *See* Section V.A. herein for a discussion of the issue.

Iowa Uniform Jury Instruction 3200.2 provides:

Concerning proposition number 1 of Instruction No. ____, a fiduciary relationship is a relationship of trust and confidence on a subject between two persons. One of the persons is under a duty to act for or give advice to the other on that subject. Confidence is placed on one side, and domination and influence result on the other.

Circumstances that may indicate the existence of a fiduciary relationship include the acting of one person for another, the having and exercising of influence over one person by another, the placing of confidence by one person in another, the dominance of one person by another, the inequality of the parties, and the dependence of one person upon another. None of these circumstances is more important than another. It is for you to determine from the evidence whether a fiduciary relationship existed between the parties. *Kendall/Hunt Publishing Company v. Rowe*, 424 N.W.2d 235 (Iowa 1988); *Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986).

Comment

Note: If the relationship is between a bank and a bank customer, the following paragraph should be added to this instruction: A fiduciary relationship does not arise solely from a [bank-depositor] [bank borrower] relationship. *Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986).

Iowa Uniform Jury Instruction 3200.3 provides:

Concerning proposition no. 2 of Instruction No. _____, a fiduciary has a duty to disclose all material facts in dealing with the other party to permit the other party to make an intelligent, knowing decision in such dealings. A fact is material if a reasonable person would consider it to be important in making a decision. A failure to perform the duty is a breach of fiduciary duty. *Sinnard v. Roach*, 414 N.W.2d 100 (Iowa 1987);*Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986).

The duty to disclose leads to substantial factual disagreement. What is clear, is that better record keeping and documentation are mandatory if there is any suspicion of a problem in estates, real estate transactions, business transactions or attorney-client relationships.

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COMPANION OR ANCILLARY CLAIMS

Where a breach of fiduciary duty is asserted, in most cases, other claims are joined. Among the more common companion or ancillary claims are the following:

FRAUD/MISREPRESENTATION

Iowa Uniform Jury Instructions, Chapter 810 and the cases referred to therein are a good start in trying to grasp the issues presented by fraud claims.

The elements of a claim of fraud are:

1. a material misrepresentation;
2. made knowingly;
3. with intent to induce the plaintiff to act or refrain from acting;
4. upon which the plaintiff justifiably relies; and
5. damages; *Airhost Cedar Rapids v. Airport Comm'n.*, 464 N.W.2d 450, 453 (Iowa, 1990); *Sinnard v. Roach*, 414 N.W.2d 100, 105 (Iowa 1987); *Cornell v. Wunshel*, 408 N.W.2d 369, 374 (Iowa, 1987).

As indicated previously, the allegation of fraud or breach of fiduciary duty may damage reputations beyond repair. The claim of fraud is easily made, difficult to refute outside a courtroom, but even more difficult to prove in court. I urge you to give proper consideration before making such claims.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Chapter 2000 of the Iowa Uniform Jury Instructions outlines this area of law. The elements that must be proved are:

1. Outrageous conduct by the defendant;
2. The defendant's intentional causing, or reckless disregard of the probability of causing emotional distress;
3. Plaintiff suffered severe or extreme emotional distress; and
4. Actual and proximate causation of the emotional distress by the defendant's outrageous conduct; *Vaughn v. Ag Processing*, 459 N.W.2d 627, 635-37 (Iowa, 1990).

Since the decision of *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108, 118 (Iowa 1984), there is some doubt whether the burden of proof necessary to submit this issue is so difficult to meet, that these allegations are probably a waste of the court's and counsel's time if the goal is a submissable claim.

In order for the conduct to be considered outrageous it must be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 801 (Iowa 1984) (quoting Restatement (Second) of Torts §464 comment d (1965)); *accord, Haldeman v. Total Petroleum, Inc.*, 376 N.W.2d 98, 104 (Iowa 1985). Substantial evidence of such extreme conduct is required. *Vinson*, 360 N.W.2d at 118.

An employer has a duty to refrain from abusive behavior toward its employees. *Id.* (citing *Hall v. May Dept. Stores Co.*, 292 Or. 131, 138, 637, P.2d 126, 131 (1981); *see* Restatement (Second) of Torts §46 comment e (1965)). When evaluating claims of outrageous conduct arising out of employer-employee relationships, a reasonable level of tolerance is required. *Northrup vs. Farmland Inds., Inc.*, 372 N.W.2d 193, 199 (Iowa 1985). Every unkind and inconsiderate act cannot be compensable. *Id.* At 198-199.

The Restatement of Torts 2d §464 highlights the egregiousness required to elevate or downgrade mere bad conduct to the level of outrageousness:

> It has not been enough that the defendant acted with an intent which is tortuous or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice" or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Restatement (Second) Torts §464 comment d.

It is for the court to determine in the first instance, as a matter of law, whether the conduct complained about may reasonably be regarded as outrageous. *Vinson*, 360 N.W.2d at 118; *Roalson v. Chaney*, 334 N.W.2d 754, 756 (Iowa 1983).

CONTRACT OR BUSINESS INTERFERENCE

Chapter 1200 of the Iowa Uniform Jury Instructions is the starting point to understand these claims.

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The Iowa Supreme Court in *Revere Transdrivers, Inc. v. Deere & Co.*, 595 N.W.2d 751 (Iowa, 1999), held at 763 that:

On a claim for intentional interference with a contract, the party asserting the claim has to prove all of the following:

1. The Plaintiff had written contracts;
2. The Defendant knew of those contracts;
3. The Defendant intentionally and improperly interfered with those contracts; and
4. (A) The interference caused another party to breach the contracts;

OR

(B) The interference caused performance of the contract to be more burdensome or expensive; and

5. The amount of damages caused. *Id.* [*See also*] *Jones v. Lake Park Care Center*, Inc., N.W.2d 369, 377 (Iowa 1997) (quoting *Nesler v. Fisher & Co.*, 452 N.W.2d 191, 198 (Iowa 1990)); *Robert's River Rides v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 303 (Iowa 1994).

To determine whether conduct amounts to intentional/improper interference with a business interest, the jury may consider the following factors:

1. The nature of the conduct.
2. The Defendant's motive.
3. The interests of the party with which the conduct interferes.
4. The interest sought to be advanced by the Defendant.
5. The social interests in protecting the freedom of action of the Defendant and the contractual interests of the other party.
6. The nearness or remoteness of the Defendant's conduct to the interference.
7. The relations between the parties.

See Revere at 767.

NEGLIGENT MISREPRESENTATION

The elements of the tort of negligent misrepresentation are stated in Restatement, Torts 2 §552. In relevant part the Restatement provides:

> 1. One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
> 2. [T]he liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of the limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. *Id.*

The Iowa Supreme Court recognized the tort of negligent misrepresentation in *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969) and applied it in *Larsen v. United Federal Savings and Loan Association,* 300 N.W.2d 281 (Iowa 1981) and *Beeck v. Kapalis*, Iowa, 302 N.W.2d 90, 96-97 (Iowa 1981).

UNDUE INFLUENCE

This claim is found in claims of breach of fiduciary duty filed in estates. Iowa Uniform Jury Instruction 2700.4 provides the elements to establish this claim:

> 1. At the time the Will was made (testator) was susceptible to undue influence.
> 2. ______________ had the opportunity to exercise such influence and carry out the wrongful purpose.
> 3. ______________ was inclined to influence (testator) unduly for the purpose of getting an improper favor.
> 4. The result was clearly brought about by undue influence.
>
> If the plaintiff has failed to prove one or more of these propositions; your verdict will be for the defendant. If plaintiff has proved all of these propositions, your verdict will be for plaintiff. *In re Estate of Davenport*, 346 N.W.2d 530 (Iowa 1984); *In re Estate of Houston*, 238 Iowa 297, 27 N.W.2d 26 (1947).

Iowa Uniform Jury Instruction 2700.5 defines undue influence as follows:

> Undue influence means a person substitutes his or her intentions for those of the person making the Will. The Will then expresses the purpose and intent of the person exercising the influence, not those of the maker of the Will. Undue influence must be present at the very time the Will is signed and must be the controlling factor. The person charged with exercising undue influence need not be personally present when the

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will was being made or signed, but the person's influence must have been actively working at the time the will was being made and signed. *In re Estate of Cory,* 169 N.W.2d 837 (Iowa 1969); *Walters v. Heaton,* 223 Iowa 405, 271 N.W.2d 310 (1937).

Comment

Note: Where the person charged with exerting undue influence is a spouse, consider prefacing 2700.5 with the following statement:

"Undue influence means something more than and different from the natural, wholesome, relationship between wife and husband concerning their mutual interests. The influence growing out of such relation is manifestly not ordinarily 'undue' or improper." *Johnstone v. Johnstone*, 190 N.W.2d 421, 426 (Iowa 1971); *Gillette v. Cable*, 248 Iowa 7, 79 N.W.2d 195 (1956).

Iowa Uniform Jury Instruction 2700.6 provides further guidance in understanding undue influence. It provides:

In deciding if there was undue influence, you may consider the following:

1. Dominance over the maker of the will.
2. Whether the condition of the maker's mind was subject to such dominance.
3. Whether the distribution of the maker's property is unnatural, unjust or unreasonable.
4. The activity of the person charged with exercising the undue influence and whether the person had the opportunity and frame of mind to exercise undue influence. Activities may include suggestion, request and persuasion short of controlling the will of the maker, but they do not alone constitute undue influence. Consider such activities along with any other evidence of undue influence.
5. The intelligence or lack of intelligence of the maker of the will.
6. Whether the maker of the will was physically or mentally weak.
7. Whether the person charged with exercising undue influence was the controlling party in a confidential relationship with the maker of the will.
8. Any other facts or circumstances shown by the evidence which may have any bearing on the question. *In re Estate of Davenport*, 346 N.W.2d 530 (Iowa 1984); *In re Estate of Herm,* 284 N.W.2d 191 (Iowa 1979);*Frazier v. State Central Savings Bank,* 217 N.W.2d 238 (Iowa 1974); *Johnstone v. Johnstone*, 190 N.W.2d 421 (Iowa 1971); *In re Estate of Willesen*, 231 Iowa 1363, 105 N.W.2d 640 (1960); *In re Estate of Burrell*, 251 Iowa 185, 100 N.W.2d 177 (1959); *O'Brien v. Stoneman,* 227 Iowa 389, 288 N.W.2d 447 (1939).

No one of the above circumstances is more important that any other.

Note: If a fiduciary relationship is involved, substitute the word "fiduciary" for confidential in item 7.

LACK OF TESTAMENTARY CAPACITY

This claim has been made in estates in lieu of undue influence or in addition to it. Iowa Uniform Jury Instruction 2700.2 provides that:

"A person has the mental ability to make a Will if (he) (she):

1. knows a Will is being made;
2. knows the kind and extent of (his) (her) property;
3. is able to identify and remember those person (he) (she) would naturally give (his) (her) property to;
4. knows how (he) (she) wants to distribute (his) (her) property." *Id.*

A Will is valid if the person making the Will meets the above tests, even if (his) (her) mental or physical powers are impaired. A person does not have to be able to make contracts or carry on business generally. However, you may consider physical weakness or infirmity, the rational nature of the distribution, along with any other evidence in deciding if a person has the mental ability to make a Will. *In re Estate of Adams*, 234 N.W.2d 125 (Iowa 1975); *Drosos v. Drosos*, 251 Iowa 777, 103 N.W.2d 167 (1960); *In re Estate of Kenny*, 233 Iowa 600, 10 N.W.2d 73 (1943).

Iowa Uniform Jury Instruction 2700.3 defines Unsoundness of Mind Before or After Execution of a Will

Lack of mental ability to make a will must exist at the time the will was made. You may consider evidence of (testator's) condition of mind at other times if you decide such evidence throws some light on (his) (her) mental ability at the time the will was made. *In re Estate of Gruis*, 207 N.W.2d 571 (Iowa 1973).

BREACH OF CONTRACT

Chapter 2400 of the Iowa Uniform Jury Instructions provides an outline of the law in this area. The elements which Plaintiff must prove are found in *Magnusson Agency v. Public Entity*, 560 N.W.2d 20, 25 (Iowa, 1977):

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1. The parties were capable of contracting.
2. A contract existed between the Plaintiffs and Defendant.
3. Consideration.
4. The terms of the contract.
5. The Plaintiffs performed what the contract required the Plaintiffs to do.
6. The Defendant breached the contract.
7. The Plaintiff has suffered damages as a result of the Defendant's breach. *Id.*

PUNITIVE DAMAGES

Iowa Uniform Jury Instructions Chapter 210, are a source of information in this area. The basis for such a claim, however, is Chapter 668A, which provides as follows:

1. In the trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

   (a) Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights and safety of another.

   (b) Whether the conduct of the defendant was directed specifically at the claimant, or at the person which the claimant's claim is derived.
2. An award for punitive or exemplary damages shall not be made unless the answer or finding pursuant to subsection 1, paragraph "a", is affirmative. If such answer or finding is affirmative, the jury or court, if there is no jury, shall fix the amount of punitive or exemplary damages to be awarded, such damages shall be ordered paid as follows:

   (a) If the answer or finding pursuant to subsection 1, paragraph "b", is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.

   (b) If the answer or finding pursuant to subsection 1, paragraph "b" is negative, after payment of applicable costs and fees, an amount not to exceed seventy-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive counsel, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.
3. The mere allegation or assertion of a claim for punitive damages shall not form the basis for discovery of the wealth or ability to respond in damages on behalf of the party from whom punitive damages are claimed until such times as the claimant has established that sufficient admissible evidence exists to support a prima facie case establishing the requirements of subsection 1, paragraph "a".

This issue may arise in the context of any of the typical claims you find appended to a breach of fiduciary duty action. However, if the claim for punitive claim is based on a breach of contract, even if it is intentional, that does not form the basis for punitive damages. *Hockenberg Equipment Co. v. Hockenberg's Equipment and Supply Co., of Des Moines, Inc.*, 510 N.W.2d 153, 156 (Iowa, 1993). Punitive damages are only allowable when conduct breaching a contract is, also, an intentional tort committed maliciously, that meets the statutory standards for the award of punitive damages. *Id.*

Beaman v. Manville Corp. Asbestos Disease Compensation Fund, 496 N.W.2d 247 (Iowa 1993) held that merely being in possession of knowledge that initiates a duty to warn in other claims, does not meet the higher standard necessary for the award of punitive damages.

An award of punitive damages requires a show of actual or legal malice. *Larson v. Great West Cas. Co.*, 482 N.W.2d 170, 174 (Iowa, App. 1992). To do so requires things such as personal spite, hatred or ill will. *Id.* It can also be proven by showing wrongful conduct with willful or reckless disregard for the rights of another. *Id.*

Before punitive damages can be awarded, there must be proof of actual damages in some amount. *Hockenberg, supra.* at 156.

DEFENSE OF BREACH OF FIDUCIARY CLAIMS

REVERSAL OF BURDEN OF PROOF

After the case of *Miller v. Berkowski,* 297 N.W.2d 334, (Iowa 1980) was decided the discussion of whether or not there is a reversal of the burden of proof when there has been a prima facie showing of the fiduciary relationship was heightened. The burden of proof can be shifted to the

continued on page 10

DEFENSE OF CLAIMS FOR BREACH OF FIDUCIARY DUTY . . . *continued from page 9*

defendants to prove there was no breach, rather than requiring plaintiffs to prove the breach. *See* in this regard, *Clinton Land Co. v. MIS Associates, Inc.*, 340 N.W.2d 232, 234-5 (Iowa 1983). Whether the burden of proof shifts depends on whether an accounting of entrusted funds is requested or whether there is proof of self dealing. *Id.* at 234-235. [*See also*], *Paulsen v. Russell*, 300 N.W.2d 289, 294-95 (Iowa, 1981); *Rowen v. Le Mar's Mutual Insurance Co. of Iowa,* 282 N.W.2d 629, 647 (Iowa, 1979) and *Holi-Rest, Inc. v. Trelear,* 217 N.W.2d 517, 525 (Iowa 1974). I urge you, in your analysis of the defense of these cases, to review this authority and consider the potential reversal of the burden of proof as a part of your preparation. The failure to do so can lead to improper analysis or evaluation.

RECORD KEEPING AND RETENTION

If you are consulted before the destruction of documents, urge retention if there is any hint of the potential of reversal of the burden of proof. If it is too late to retain materials, start early to obtain the records from third parties. If no records exist, try to locate contemporary witnesses to establish as much of a record as possible. Early effort will pay dividends during the case especially if your Defendant bears the burden of proof.

SPECIAL AFFIRMATIVE DEFENSES IN FIDUCIARY CLAIMS

1. RESCISSION (IN REAL ESTATE CASES):

Consider offering to rescind any contract that generates a claim of a breach of fiduciary duty. There are many effective arguments that can be made to a jury on the failure of plaintiffs to accept an offer of rescission, for an extortionate asking price to rescind, or the failure to make the premises available for inspection. It could, also, lead to an early resolution of the case.

2. ACCORD AND SATISFACTION (IN CONTRACT CASES):

Agreement of any kind with full disclosure can be an effective defense in these cases. It is also possible that a summary judgment may be granted on this point in favorable factual cases.

3. NOVATION (IN CONTRACT CASES):

If a new agreement can be shown, the potential adverse effects of a prior violation of a fiduciary duty may be avoided.

4. FAILURE TO STATE A CLAIM:

Consider asserting this defense in most cases to see if anything may turn up in discovery. If nothing is found to justify the defense, it should be dismissed.

5. IOWA RULE OF CIVIL PROCEDURE 49(F), (FAILURE TO SERVE ORIGINAL NOTICE):

Seldom is this defense applicable, but it can be effective when service of process is delayed beyond 90 days without good cause.

6. SUBJECT MATTER JURISDICTION:

Raise this defense if potentially applicable, sort out the facts and dismiss if inapplicable.

7. EXCUSE:

This potential affirmative defense can be effective if the basis for, or the reason of, the excuse amounts to an IMPOSSIBILITY OF PERFORMANCE.

For an inclusive list of all other potential affirmative defenses, see *Iowa Practice Vestal & Willson* Section 16.13 Lamarca, Iowa Pleading and Causes of Action, p. 387-388. IRCP 104 and FRCP 8(1).

8. COUNTERCLAIMS:

Valid counterclaims should be aggressively pursued in these cases like all others. Strategy may dictate discretion where a business transaction fails and there are claims of fraud or breach of fiduciary duty asserted. Consider offering to rescind promptly. If this effort fails you will then be left with an opportunity to counterclaim for rescission and in the alternative to enforce the contractual agreement where a buyer refuses to make payments and asserts a breach of fiduciary duty.

It is hard to imagine a better position to be in before a jury than to be able to ask them to help you make this choice of remedies. In addition, in following this course of action, you may also avoid the evidentiary problem created by Iowa Rule of Evidence 408.

CONCLUSION

Defending claims involving breach of fiduciary duty and the ancillary claims is challenging. It requires thought in initial evaluation and planning to avoid potentially disastrous results. With the background this article is intended to provide coupled with a sensitivity for the legal and personal effects these claims can have, you should be in a position to provide the counsel your clients deserve.●

BEYER V. TODD'S FLYING SERVICE . . . continued from page 3

> that plaintiff Beyer had the burden of proving the fault of Comer and Gardner. We believe that the language of Iowa Code Section 668.3, and of Iowa Code section 619.17 by analogy, suggests that it was defendant Todd's burden to prove the fault of Comer and Gardner as part of his defense to Beyer's claim against him. Ordinarily, the burden of proof on an issue is upon the party who would suffer loss if the issue were not established . . . Todd, as the only remaining defendant in Beyer's action for damages, had the most to lose and thus it seems appropriate that Todd have the burden of proving the fault of a released person in order to lessen his own possible percentage of fault. It was therefore Todd's burden to prove the fault of Comer and Gardner. We find no error on this issue."

The decision in *Beyer* has been incorporated into Iowa Civil Jury Instruction 400.10. This instruction states, in part, as follows:

The defendant claims that (released party) was at fault in [one or more of] the following particular(s):

[Insert the grounds of fault pleaded and supported by the evidence]

These grounds of fault have been explained to you in other situations.

The defendant must prove all of the following propositions:

1. (Released party) was at fault. In order to prove fault, the defendant must prove [use the appropriate elements from the marshaling instructions in relevant chapters].
2. (Released party's) fault was a proximate cause of the plaintiff's damage.

If the defendant has failed to prove either of these propositions, you cannot assign any percentage of fault to (released party). If the defendant has proved both of these propositions, then you will assign a percentage of fault against (released party) and include the (released party)'s fault in the total percentage of fault found by you in answering the special verdicts.

In the simple negligence case, the Court's decision in *Beyer* makes substantial practical sense. Typically, the burden of proving the total amount of damages sustained is upon the plaintiff, while the burden of showing to what extent the damages sustained by the plaintiff shall be diminished on account of the negligence attributable to the plaintiff is upon the defendant. *See* 57B Am. Jur.2d *Negligence §1274, at 172 (1989).* In cases factually similar to *Beyer*, pleading and proving the fault of a released party is a burden easily assumed by the defendant, and the practical aspects of putting on the proof relatively simple, such as calling the investigating officer, using a technical investigator, or using the testimony of the parties.

However, the applicability of *Beyer* to Chapter 668 cases becomes impractical, if not impossible. Section 668.11 governs the disclosure of expert witnesses in liability cases involving licensed professionals. Plaintiffs must certify an expert witness within 180 days of the defendant's answer. The defendant must certify expert witnesses within 90 days of plaintiff's certification. In "garden-variety" 668 cases, customarily there are several licensed professional defendants. If one licensed professional defendant settles, the *Beyer* doctrine mandates no fault apportionment to that settling party unless that settling parties' fault is plead and proved.

For a remaining defendant to prove a settling defendant's fault, the non settling defendant must have an expert witness certified and identified who will testify as to the standard of care of, and the deviation from the standard of care, by, the released party. If the remaining defendant has not identified an expert witness who will do so, then the fault of the released party will not be apportioned. It is highly unlikely that the plaintiff will offer expert testimony critical of the released party, as that would only "siphon off" plaintiff's recovery. The remaining defendant, or defendants, are put in the difficult position of proving, with expert testimony, the settling parties fault if the remaining defendant wishes the fault of the settling party apportioned.

In summary, the *Beyer* decision has little practical effect on day-to-day liability cases. However, its applicability to Section 668.11 cases is cumbersome and unfair to defendants because defendants typically do not wish to plead and prove the actionable fault of released parties in any case, particularly Chapter 668 cases, *Beyer* clearly requires more vigilance on the part of defendants in 668 cases if a defendant wishes to apportion the fault of settling parties.●

UPCOMING EVENTS

MINI-SEMINAR

April 12, 2002
Des Moines
Golf & Country Club

ANNUAL MEETING

September 25-27, 2002
Held again at
Embassy Suites
on the River,
Des Moines, IA

CASE NOTE: TRUTH IN LAWYERING . . . *continued from page 4*

petition, Kennedy admitted preparing the documents but denied for lack of information the allegation that the contents were untrue.

The Anderson defendants argued that the above allegations, if proved, gave them a right of indemnity against Kennedy on a breach-of-independent-duty theory. The district court dismissed the claim finding no duty existed between the lawyers as a matter of law. On appeal, Justice Lavorato, writing for the court, defined the question as "whether attorneys representing persons on opposite sides of a transaction owe each other, as opposed to the clients those attorneys represent, a duty to refrain from intentional misrepresentation throughout the course of the transaction." 630 N.W.2d at 824. The court's answer was yes.

Section 98 of the Restatement (Third) of the Law Governing Lawyers, together with its comments, prohibits deceitful statements by lawyers to nonclients, including other lawyers, and was clear authority in the court's view for the existence of such a legal duty. Moreover, case law from a number of states had held that an attorney is subject to liability for fraudulent statements made to a nonclient, even an adversary in litigation. *Id.* at 824-25. From this, the court announced the rule that "once a lawyer responds to a request for information in an arm's length transaction and undertakes to give that information, the lawyer has a duty to the lawyer requesting the information to give it truthfully." *Id.* at 825-26. A breach of this duty can support a claim of equitable indemnity by the defrauded lawyer against the defrauding lawyer. *Id.*

NEGLIGENT TORTFEASOR MAY RECOVER FULL INDEMNITY

Apart from its primary holding concerning the existence of a duty between lawyers, the case is noteworthy as well for its disposition of Kennedy's secondary argument. Kennedy had argued that indemnity should not be permitted because the Anderson defendants, themselves alleged to be negligent in a number of particulars, were really claiming indemnity on the now abandoned active/passive theory. The active/passive theory of indemnity presumed negligent conduct on the part of both the indemnitor and the indemnitee. Here, by contrast, the claim against Kennedy was not one of negligence, but of intentional wrongdoing. The real question then was whether a negligent tortfeasor should be limited to a right of contribution, or did he have a right of full indemnity, against a joint intentional tortfeasor.

With no Iowa case precisely on point, the court cited favorably to a Wisconsin decision, Fleming v. Threshermen's Mutual Insurance Co., 388 N.W.2d 908 (Wisc. 1986). The Fleming case held that a negligent tortfeasor has a right of full indemnity from an intentional joint tortfeasor, even if the result is to allow a causally negligent defendant to escape all liability. In agreement with the Wisconsin court, the court felt to rule otherwise would essentially allow the intentional tortfeasor to recover contribution from the negligent tortfeasor, which is contrary to established law. Iowa Code chapter 668 "does not cover fraud actions." 630 N.W.2d at 827. The court further agreed that public policy is served by shifting full responsibility to the intentional tortfeasor whose conduct "society considers to be substantially more egregious than negligence." *Id.*, citing *Fleming*, 338 N.W.2d at 911.

CONCLUSION

The outcome in this case is neither groundbreaking nor cause for concern among lawyers; rather it rests on established principles. Where the elements of fraud are proved, most would agree that accountability should result. As a matter of policy and for the good of the legal profession, fraudulent or intentionally deceitful conduct in dealings with other lawyers should be actionable. At its most basic level, the case illustrates the fundamental principle, now applicable even to lawyers, that "one who is . . . induced to act by the misrepresentations of [a]nother, is entitled to indemnity for recovery by a third party." W. Page Keeton, et. al., *Prosser & Keeton on the Law of Torts,* § 51, at 342 (5th ed. 1984).●

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A LETTER FROM MARION L. BEATTY

Thank you for the opportunity to have served as your president this past year. It was one of the most rewarding experiences any lawyer can have in this state. There is no finer group of defense trial lawyers in the country than those that belong to the IDCA. The organization is strong and growing. We now have over 400 members, guided by an outstanding team of leaders. Michael Ellwanger is our new president, who has demonstrated his affective leadership most recently by hosting an extremely informative and enjoyable annual meeting. For those of you who didn't write it down, there were 16.25 hours of CLE credit, with 6 hours of federal credit and 2 hours of ethics credit. Over 200 were in attendance for the annual meeting. Michael Weston will serve as our president-elect, Richard Santi as our secretary and James Pugh as our treasurer.

For those of you who were unable to attend the annual meeting, please welcome our new board members:

- Gordon R. Fischer of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, Iowa, District V
- Martha L. Shaff of Betty, Neuman & McMahon, LLP, Davenport, Iowa, District VII
- Brent Ruther of Aspelmeier, Fisch, Power, Warner & Engberg, P.L.C., Burlington, Iowa, District VIII

Undoubtedly, our board will achieve unparalleled success with these new hands on deck.

When I started my year I invited each of you to become involved with the Iowa Defense Counsel Association. I again urge you to do so. You can contact Robert Kreamer, our executive director and lobbyist, or our associate director Julie Garrison, at our offices at 431 East Locust Street, Suite 300, Des Moines, Iowa 50309, to let them know of your interest.

Finally, I thank the fabulous board of directors for the pleasure I had serving with them, and most importantly, you the members for continuing to keep our organization strong and growing.●

EDITORIAL *. . . continued from page 16*

law and changes will be made. The law will impact the amount of medical information that will be available to an insurer, how much we will not know for certain until the compliance date draws nearer. The legislation will not interfere with the authority of the federal or state court's jurisdiction for individual health information. (For more detailed information on HIPAA see **www.naii.org**)

CATHARSIS

The timing of this issue of the Defense Update causes one to renew spiritual and emotional commitments to God, country, family, friends and colleagues.

The events of September 11, 2001 will forever be imbedded in our minds. The very idea of such death and destruction occurring within the United States commissioned by a group of terrorists was virtually unfathomable. When we watched the events on television and personally observed the carnage, then reality began to become reality. We all shared the grief and uncertainty that the event created. Our sympathy and condolences are extended to all impacted by the tragedy.

Out of such adversity has emerged a national and local catharsis. The speech delivered by President Bush to the joint House and Senate members was incredible to observe. Not just for the words spoken, but also for the unity displayed across House-Senate lines and party lines. It provided an opportunity for compassion and camaraderie, not just in the chambers, but outside of the capital reaching out to the entire world. It has provided the impetus for all of us to re-examine our lives and reprioritize what is important to us.

Contemporaneous with these events was the annual meeting for the Iowa Defense Counsel Association. Our compliments to Mike Ellwanger for an outstanding program. The event provided an excellent opportunity to stay abreast of legal topics as well as experience the camaraderie of acquaintances. The IDCA is no stronger than its members. Although we have entrusted an exemplary group of officers for next year, we also need your commitment toward the Association. We are consanguineous in our profession, with an interest in the defense side of the judicial system. Hopefully, this editorial will give you pause to give consideration to increasing your commitment to this outstanding organization and the commonness we share.●

WELCOME NEW MEMBERS

Philip A. Burian
Cedar Rapids, IA

Nicole Claussen
Cedar Rapids, IA

Elizabeth V. Croco
Cedar Rapids, IA

Connie Diekema
Des Moines, IA

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2001 IOWA DEFENSE COUNSEL ANNUAL

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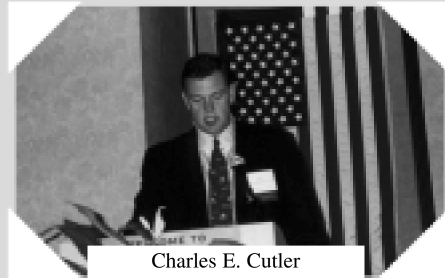
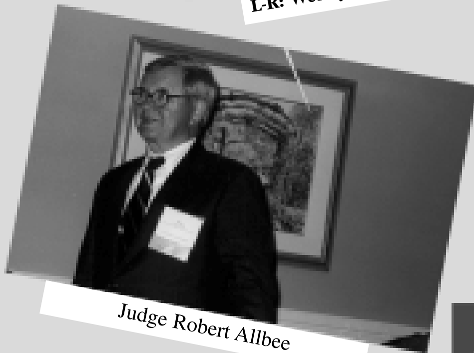
L-R: Richard Santi-*secretary*, James Pugh-*Treasurer*, Mike Ellwanger-*President*, Michael Weston-*President-Elect*

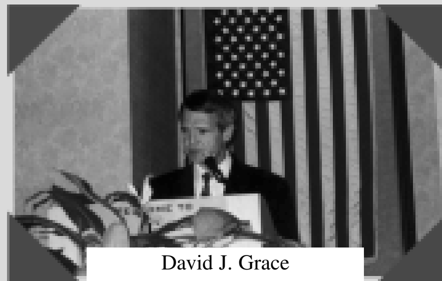
L-R: Wendy Munyon, Marion Beatty



Charles E. Cutler



Judge Robert Allbee



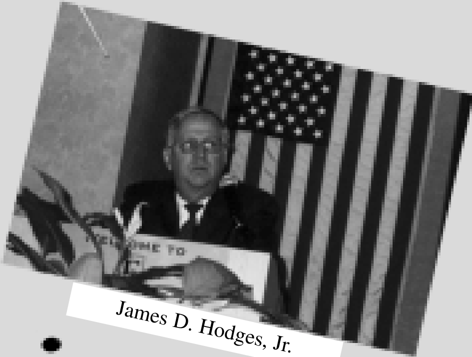
David J. Grace

Chad VonKampen

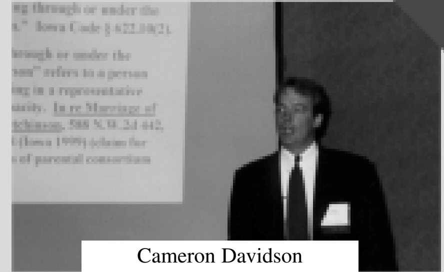
L-R: Mike Ellwanger, Marion Beatty

Marion Beatty

MEETING AND SEMINAR HIGHLIGHTS


James D. Hodges, Jr.

Pam Nelson Presents the Edward F. Seitzinger Award to Jim Pugh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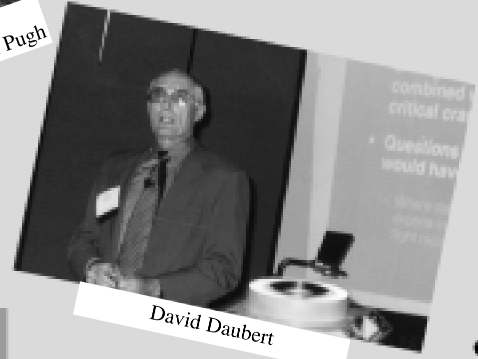
George A. La Marca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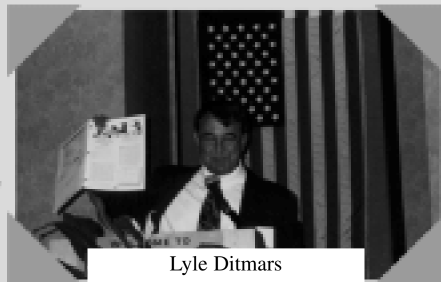
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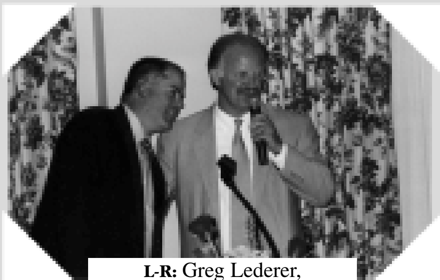
L-R: Greg Lederer, Marion Beatty

The Honorable Mark Bennett

FROM THE EDITORS . . . By Noel McKibbin, West Des Moines, IA

Privacy Initiatives

The Gramm-Leach Bliley Act is a federal statute which restricts the flow of financial information. The primary focus of this legislation is targeted toward financial institutions and the restrictions for sharing/distributing financial information of individuals.

The compliance deadline for this federal statute was July 1, 2001 and the individual states are the regulators/enforcers. Although this statute has limited effect on property casualty insurance, another federal law may have a more direct impact, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191.

This privacy legislation is designed to protect privacy of individual health information. Property casualty insurers are specifically excluded from the direct application of the regulations. However, because the regulations apply to all the activities of covered entities, i.e., health care providers, health plans, health care clearing houses etc., property casualty insurers will be impacted.

The law states that the medical provider must make reasonable efforts to limit information to the **minimum necessary** (emphasis added) to accomplish the intended purpose of the use, disclosures, or request. The consent/medical authorization required to disclose protected health information must: (1) identify specific information being requested; (2) name the person or class of persons authorized for the use of the information including other entities associated therewith; (3) contain an expiration date and a statement explaining the right to revoke; and (4) a signature of the personal representative with a description of the authority to act. On its face, is this legislation going to result in limited medical history to be provided short of a subpoena; will a provider have two sets of medical records, i.e., one which the patient has authorized for disclosure and another that is not authorized; will a provider be permitted to redact a medical record to reflect the limit of the medical authorization?

As the law now exists, the effective date will be 4-14-01 with full compliance being required on 4-14-03. The Department of Health and Human Services is conducting public hearings on the

continued on page 13

The Editors: Kermit B. Anderson, Des Moines, Iowa; Mark S. Brownlee, Fort Dodge, Iowa; Noel McKibbin, West Des Moines, Iowa; Bruce L. Walker, Iowa City, Iowa; Patrick L. Woodward, Davenport, Iowa

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

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