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IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

SPRING 2014 VOL. XVI, No. 2

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Litigation Privilege in Iowa Employment Cases

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Frank Harty

"I firmly believe that any man's finest hour, the greatest fulfillment of all that he holds dear, is that moment when he has worked his heart out in a good cause and lies exhausted on the field of battle – victorious."

-Vince Lombardi

"The advocate has a duty to use legal procedure for the fullest benefit of the client's cause . . . "

-Comment to Rule 32:3.1, Iowa Rules of Professional Conduct

Coach Vince Lombardi knew the meaning of "zealous." Trial practice is not for the faint-hearted. Trial lawyers do not become successful and respected by doing "just enough." Success comes from approaching each case like life depends upon it. Sometimes this vigor and conviction may appear to conflict in the abstract with state and federal anti-retaliation laws.

INTRODUCTION

Virtually every anti-discrimination law contains a statutory or common law prohibition on retaliation. The Supreme Court has defined retaliation to include anything that might cause a reasonable individual to refrain from asserting their civil rights.

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WHAT'S INSIDE

IDCA President's Letter

I am proud to be an Iowa lawyer. We have well-qualified judges who are not required to campaign for election. We have many excellent and talented lawyers who work hard, are creative, and know you can be civil while zealously representing a client. Finally, we have reasonable jurors, who are willing to listen, are not easily enflamed, and are willing to follow the laws of our State as provided to them by the Judge. As I attend meetings around the country, I frequently receive compliments about Iowa's Bar and Courts. Those compliments should remind us all to occasionally step back, take stock of our respective practices, and appreciate the many positive aspects of our court system we take for granted as Iowa lawyers.

Recently, the Iowa Defense Counsel Association hosted a reception at the DRI Annual Meeting in Chicago for DRI leaders to congratulate Mike Weston on becoming President of DRI. Recognizing an opportunity to promote Iowa a little, we researched and shared details of the rich history of Iowa's judicial system. Perhaps you will be surprised by what we found.

Did you know in the case of *In Re the Matter of Ralph, 1839,* the Iowa Supreme Court rejected slavery by concluding that a slave named Ralph became free when he stepped onto Iowa soil, 26 years before the end of the American Civil War? This was in fact the Iowa Supreme Court's first written decision.

But there is more!

In the 1868 case of *Clark v. The Board of School Directors*, Alexander Clark sued his city's school board for refusing to admit his African-American daughter into the public schools. The Iowa Supreme Court held that racially "separate but equal" schools violated the Iowa Constitution. Our Iowa Supreme Court made this decision 85 years before the U.S. Supreme Court reached the same conclusion in *Brown v. Board of Education*! Subsequently, in 1879, Alexander Clark's son, Alexander Clark, Jr., became the University of Iowa College of Law's first African-American law student and graduate, decades before many law schools in the country enrolled non-white students.

In 1869, Iowa became the first state in the union to admit women to the practice of law with the Iowa Supreme Court ruling that Iowa may not deny women the right to participate in law in Iowa. Not only was Arabella Mansfield the first woman to have the right to practice law in Iowa, but in the nation!

In 1873, in the case of *Coger v. North Western Union Packet Co.*, the Iowa Supreme Court ruled against racial discrimination in public accommodations, 91 years before the U.S. Supreme Court reached the same decision in Bell v. State of Maryland.

We are all familiar with the more recent landmark decision of the Iowa Supreme Court in V*arnum v. Brien*, rendered in 2009. But did you know *Varnum* followed such a long line of courageous decisions that were likely as equally unpopular in their time? As the five-year anniversary of the *Varnum* decision passes, it is important to note Iowa's judicial history positively reflects on good people, good lawyers, and good judges working together to address tough questions and to make good law. It should be no surprise, then, that a key mission of the Iowa Defense Counsel Association has been, and continues to be, to protect the integrity, the quality, the balance, and the independence of Iowa's judicial system. For these many reasons, I am proud to be a member of the Iowa Bar and the Iowa Defense Counsel Association. I hope you are too! *

Thank you for your membership.

James P. Craig

James P. Craig
IDCA President

*By the way, the *Defense Update* is always on the lookout for articles to publish to inform and educate our members. We encourage our membership to write and submit articles. This is a great way to let your fellow defense counsel members know your areas of expertise and practice. Members can contact any of the members of the Board of Editors for details on how to turn an idea for an article or a case note into a published work!

These concepts might collide during the course of litigation. This is where the "litigation privilege" concept was developed. The premise is simple: a lawyer is a champion – a fighter. He should be free to do everything within the bounds of the Code of Ethics that serves the interest of his clients. And he should not have to worry about drawing a retaliation charge by a litigant or related party.

Iowa courts have adopted this privilege. However, to make it more clear – the Iowa trial bar, the courts, and the legislature should formally recognize the privilege as it applies in employment discrimination litigation. This article discusses the privilege and lays out a simple approach for formalizing the privilege.

LITIGATION PRIVILEGE

In *Earl v. Electro-Coatings of Iowa, Inc.*, No. C02 – 0042, 2002 WL 32172298 (N.D. Iowa Oct. 29, 2002), the United States District Court for the Northern District of Iowa recognized and applied the litigation privilege. There, the plaintiff sued for age discrimination under the Age Discrimination in Employment Act (ADEA). Id. at *1. The defendant counterclaimed, alleging a breach of fiduciary duty by the plaintiff based on his conduct while acting as an officer and director of the company. Id. In response to this counterclaim, the plaintiff sought to amend his complaint to allege that the filing of the counterclaim amounted to actionable retaliation. Id.

The court, reasoning that the litigation privilege applied, denied the plaintiff's motion for leave to amend. Id. at *2. The court explained that litigation privilege "precludes actions taken in litigation which are otherwise redressable through court processes from supporting further litigation." Id. (citing *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998)). The court held, "[a]lthough many different post-termination actions may constitute retaliation, . . . ordinarily, a counterclaim may not." *Earl,* 2002 WL 32172298, at *2. It is only "in the rare case [when] conduct that occurs within the scope of litigation [will] amount to retaliation." Id. (citing Steffes, 144 F.3d at 1075); see also *McFarland v. McFarland*, Nos. C08 – 4047 – MWB, C09 – 4047 – MWB, 2010 WL 2899013, at *7 (N.D. Iowa July 26, 2010) ("Iowa recognizes an absolute privilege from liability for communications which takes place in a judicial proceeding."); *Spencer v. Spencer*, 479 N.W.2d 293, 295 (Iowa 1991) (recognizing Iowa's absolute privilege from liability for defamation which takes place in a judicial proceeding, and noting "[t]he purpose of the absolute privilege is to encourage the open resolution of disputes by removing the cloud of later civil suits from statements made in judicial proceedings.") (citation omitted)). The *Earl* court further noted that companies "'have a constitutional right to file lawsuits, tempered by the requirement that the suits have an arguable basis.'" *Earl,* 2002 WL 32172298, at *3 (quoting *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999)). The court therefore found the litigation privilege protected the defendant from the plaintiff's claim of retaliation. *Id.* at *3.

PRIVILEGE RATIONALE

In applying the litigation privilege, the *Earl* court relied on the reasoning of the Seventh Circuit in *Steffes* . 144 F.3d at 1070. There, the plaintiff and her employer failed to reach an agreement as to the terms of the plaintiff's employment in light of some of her medical conditions. *Id.* at 1071-72. This discord caused the employer to fire the plaintiff, which gave rise to her lawsuit. *Id.* In response to an interrogatory during the pending litigation, the plaintiff informed her former employer that she had found a new job. *Id.* at 1073. The former employer then told her new employer about the plaintiff's medical restrictions and discrimination suit. *Id.* Consequently, the new employer told the plaintiff's temporary employment agency to stop sending her to work until her medical conditions were clarified. Id. at 1073-74.

The plaintiff then instituted a second action against her former employer, alleging the dissemination of information regarding her medical condition and lawsuit amounted to retaliation. *Id.* at 1074. The district court dismissed the retaliation claim, holding Illinois recognizes an "absolute litigation privilege" which protects any communicative acts that fall within the scope of litigation. Id. On appeal, the Seventh Circuit stated that while an absolute litigation privilege is too broad of an approach, it will still be the "rare case in which conduct occurring within the scope of litigation constitutes retaliation prohibited by these statutes." *Id.* at 1075. "'[A]n attempt to obstruct the litigation of the underlying discrimination complaint . . . is inseparable from the litigation of the claim. Accordingly, it is a matter to be resolved pursuant to court rules.'" *Id.* at 1076 (quoting *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 486 (7th Cir. 1996)). The court went on to articulate the rationale for applying the litigation privilege:

> The primary reason for granting attorneys absolute immunity is that their unique function as advocates requires that they be able to present their client's case at trial without intimidation or harassment . . . Conducting discovery under the rules of civil procedure falls within the unique duties of an advocate and such activities are conducted in the adversarial arena where opposing counsel and the trial court can quickly put the brakes on unethical or unlawful behavior.

Steffes, 144 F.3d at 1076 (citation omitted). Thus, the court found the litigation privilege protected the defendant from the plaintiff's retaliation claim, as the defendant's conduct arose out in the context of the discovery process. *Id.*

California courts have also recognized the litigation privilege. In *Gallanis-Politis v. Medina*, a county employee sued her county and a county official, asserting state and federal discrimination claims.

152 Cal. App. 4th 600, 604 (Cal. App. 2d Dist. 2007). In an amended complaint, the employee also brought retaliation claims against her two supervisors, alleging they obstructed her efforts to obtain bonus pay by conducting a pretextual investigation and preparing a false report about her. *Id.*

The court held the litigation privilege barred this employee's retaliation action against her supervisors. *Id.* at 615. The court stated that the primary purpose of the privilege is "to afford litigants and witnesses . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Id.* at 616 (citation omitted). Further, recognition of the privilege "encourage[s] open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation." *Id.* at 616 n.12 (citation omitted). The court did qualify its recognition of the privilege, however, in noting that "[t]he litigation privilege protects only publications and communications; it does not protect noncommunicative conduct." *Id.* at 616. While this limitation may seem to eliminate many litigation-related acts from the privilege's protection, the court recited some of the acts which have been deemed communicative, including "attorney prelitigation solicitations of potential clients and subsequent filing of pleadings in the litigation, and testimonial use of the contents of illegally overheard conversation." *Id.* at 616 n.13. Thus, although California, like the Seventh Circuit and the Northern District of Iowa, refused to apply an absolute litigation privilege, it still recognized that many acts occurring within the scope of litigation cannot constitute retaliation.

CREATING A SAFE HARBOR

While the law seems clear, plaintiffs and plaintiffs' counsel routinely threaten charges of retaliation against defendants and defendants' counsel in response to lawful, ethical litigation tactics. It is for that reason the trial bar and courts should urge the legislature to adopt a successful and clear litigation privilege.

The following model language would suffice:

"Any licensed attorney shall be privileged to engage in any conduct within the scope of the Iowa Rules of Professional Conduct that advances the interests of his/her client."

CONCLUSION

Good Iowa lawyers are renowned for polite and professional advocacy. They are also known for tenacity. The two are compatible and a litigation privilege would serve to advance the professional reputation of the Iowa Bar.

Miranda v. Said - A Small Window for Emotional Distress Damages in Legal Malpractice Actions

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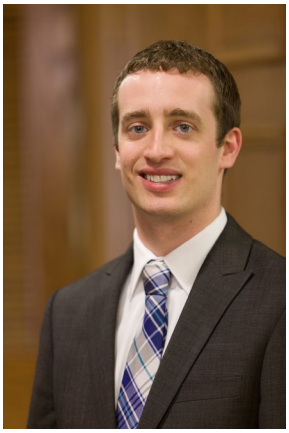

Josh McIntyre

INTRODUCTION

Emotional distress has traditionally been a disfavored class of damages. Difficult to define and impossible to quantify, emotional distress damages are generally recoverable only when caused by outrageous conduct or when accompanied by physical injury. But over more than a century, courts have carved out narrow exceptions in order to permit their recovery when the plaintiff suffered a well-recognized emotional injury and the award will conform to good public policy.

In *Miranda v. Said*, 836 N.W.2d 8 (Iowa 2013), the Iowa Supreme Court applied one such exception to hold for the first time that emotional distress damages may be recovered on a claim for legal malpractice. Key to the Court's holding was that the nature of the legal work at issue—the immigration of a noncitizen client to the United States—made it very likely that negligent conduct would cause the client serious emotional distress. The attorney's conduct was in fact so meritless as to be sanctionable by an award of punitive damages. A narrow reading of Miranda approves of recovery for only a small array of clients: those who have been harmed by reckless legal advice concerning immigration matters. *Miranda* may, however, be more broadly heard as a warning call to attorneys who practice in fields such as marital dissolution, child custody, and criminal defense, where experience teaches that a bad result may likely cause a client's emotional disturbance.

This article examines the circumstances in which emotional distress damages are recoverable and, in particular, cases that have considered emotional harm caused by professional malpractice. This article then examines the *Miranda* decision and reviews the articulated factors for an award of emotional damages in legal malpractice cases.

AVENUES FOR THE RECOVERY OF EMOTIONAL DISTRESS DAMAGES

Emotional distress damages are not intended to compensate a plaintiff for experiencing a horrific event but rather for the impact on the plaintiff's later emotional condition. *Roling v. Daily*, 596 N.W.2d 72, 76 (Iowa 1999). Their availability depends upon the plaintiff's theory of recovery. *Niblo v. Parr Mfg.*, Inc., 445 N.W.2d 351, 353 (Iowa 1989). Iowa recognizes a distinct claim for the intentional infliction of emotional distress, which requires the plaintiff to prove: (1) the defendant's conduct was outrageous; (2) the defendant intentionally caused or recklessly disregarded the probability of causing the distress; (3) the distress was severe; and (4) actual and proximate causation. *Barreca v. Nickolas*, 683 N.W.2d 111, 123 (Iowa 2004) (quoting *Fuller v. Local Union No. 106*, 567 N.W.2d 419, 423 (Iowa 1997)). Courts may use the requirement of outrageousness to deny recovery for harms that result from "trivialities or mere bad manners." *Meyer v. Nottger,* 241 N.W.2d 911, 918 (Iowa 1976). The plaintiff must also show more than that he felt bad for a period of time or was disappointed in a particular outcome; his distress must have been so severe that no reasonable person could be expected to endure it, and it must have manifested in physical symptoms or clearly resulted in notable mental reaction. *Tappe v. Iowa Methodist Med*. Ctr., 477 N.W.2d 396, 404 (Iowa 1991); *Steckelberg v. Randolph*, 448 N.W.2d 458, 461–62 (Iowa 1989).

If the plaintiff proceeds on a negligence theory, he will generally recover for emotional distress only if he suffered physical injury, in which case emotional harm is compensable as "parasitic" damages. *Clark v. Estate of Rice ex rel. Rice*, 653 N.W.2d 166, 170 (Iowa 2002). Absent physical injury, emotional distress is usually non-compensable in negligence because Iowa does not impose a general duty to avoid causing emotional harm to another. *Id.* at 171. There are two exceptions. Under the first, a bystander may recover for serious mental distress caused by his "sensory and contemporaneous observance" of the negligent infliction of serious injury or death on a close relative. *Barnhill v. Davis*, 300 N.W.2d 104, 107-108 (Iowa 1981). This exception is extremely narrow, as family members who do not actually witness the accident are not entitled to emotional damages even though their grief may be as valid and foreseeable. *Moore v. Eckman*, 762 N.W.2d 459, 462–63 (Iowa 2009).

The second and broader exception permits recovery when the parties' relationship imposes a duty upon the defendant to exercise ordinary care to avoid causing emotional harm. *Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990) (citing Niblo, 445 N.W.2d at 354). The negligent act must be so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be

known to the parties from the nature of the [obligation] that such suffering will result from its breach.

Lawrence v. Grinde, 534 N.W.2d 414, 420–21 (Iowa 1995) (quoting Meyer, 241 N.W.2d at 921) (alteration in original). Iowa has only imposed a duty under this exception when the parties are in a contractual relationship for services or acts that involve deep emotional responses in the event of a breach. *Clark,* 653 N.W.2d at 171 (citing *Lawrence*, 534 N.W.2d at 421; *Oswald*, 453 N.W.2d at 639). The negligent performance of those contractual services then gives rise to a claim for the negligent infliction of emotional distress. See *Overturff v. Raddatz Funeral Servs., Inc.,* 757 N.W.2d 241, 245 (Iowa 2008); Restatement (Third) of Torts: Phys. & Emot. Harm § 47, cmt. h (2012) (noting that the claim may sound in tort even though the duty arose from the contractual relationship). The duty extends only to those for whom the contract was made, and there must be a close nexus between the defendant's conduct and the extremely emotional circumstance. Overturff, 757 N.W.2d at 245–46; Lawrence, 534 N.W.2d at 421.

Finally, emotional distress damages may be recovered on a breach of contract claim if serious emotional harm was a particularly likely result of the breach. Meyer, 241 N.W.2d at 920-21 (permitting emotional damages for the breach of a contract to perform funeral services); Restatement (Second) of Contracts § 353.

EMOTIONAL DISTRESS IN PROFESSIONAL MALPRACTICE ACTIONS

In the 1990s, the above framework guided two key cases that examined the award of emotional distress damages for professional malpractice: *Oswald v. LeGrand*, 453 N.W.2d 634 (Iowa 1990), in which the Court permitted the award on a medical malpractice claim; and *Lawrence v. Grinde*, 534 N.W.2d 414 (Iowa 1995), in which the Court denied the award on a legal malpractice claim.

Oswald presented facts ripe for an award of emotional damages. Plaintiff Susan Oswald was five months pregnant when she began to experience painful cramping and bleeding. 453 N.W. 2d at 636. When she sought treatment at the defendant hospital, a nurse told Oswald that if she miscarried, her baby would only be a "big blob of blood." *Id.* Oswald then overheard a doctor complain that he did not want to care for Oswald. *Id.* The doctor later agreed to care for her until his shift ended, but he then left the hospital a half-hour early. *Id.* at 636–37. Minutes later, while left unattended in a hallway, Oswald began to deliver. *Id.* at 637. Nurses delivered her baby and announced it stillborn. *Id.* A physician checked the fetus for gender but made no further examination. *Id.* After it had been left on an instrument tray for nearly half an hour, the father discovered that the baby was still alive. *Id.* The hospital provided intensive care but the newborn died twelve hours later. *Id.*

In their suit against the doctors and hospital, the Oswalds alleged that they suffered severe emotional distress caused by the defendants' negligent medical care. *Id.* at 639. In applying the second exception for negligence claims, the Court recognized that the birth of a child involved a matter of life and death such that negligent conduct would inevitably result in mental anguish. Id. The emotional distress that would normally be suffered due to a child's death was distinguishable, however, from that caused by the defendants' indifference to the child's care. *Id.* at 640. The Court concluded that the Oswalds could recover for their emotional distress and, in fact, did not need expert testimony because the alleged negligence concerned professional civility, a topic within the common knowledge of laypersons. *Id.* at 639–40.

Five years after *Oswald*, the Court considered emotional damages for legal malpractice in *Lawrence v. Grinde*. Larry Lawrence was a business owner who engaged attorney David Grinde to handle his bankruptcy. 534 N.W.2d at 416. Lawrence informed Grinde that he had recently settled a legal claim and transferred the resulting $10,000 payment to his mother-in-law in partial satisfaction of a prior debt. Id. The bankruptcy schedules prepared by Grinde's office, however, failed to disclose the $10,000 settlement. Id. When the federal government later learned of the transfer, it indicted Lawrence for bankruptcy fraud. Id. at 417. Lawrence was eventually found not guilty of all charges, but his case had already received significant public attention in two regional newspapers. Id.

Lawrence sued Grinde for legal malpractice and sought emotional distress damages. *Id.* The Court defined the threshold issue as "whether a bankruptcy attorney, in performing his or her duties, holds a duty to protect the client from emotional distress." *Id.* at 421. The Court noted that in the majority view, emotional distress is not a reasonably foreseeable consequence of legal malpractice unless the matter involves peculiarly personal subject matter. *Id.* at 422. A bankruptcy attorney's duty to his client, however, is not so coupled with emotions that a breach would necessarily cause emotional harm. *Id.* at 423. Further, Lawrence's claimed harm was too far removed from Grinde's negligent conduct: but for the indictment by the federal government, Lawrence would not have suffered emotional harm. *Id.* at 422. The Court concluded that permitting Lawrence's recovery would be a clear departure from the narrow circumstances in which emotional damages have been held recoverable and therefore denied the award. *Id.* at 423.

As with many emotional harm decisions before them, the Oswald and Lawrence holdings were strictly limited to their facts. *Oswald*, 453 N.W.2d at 639–40; *Lawrence,* 534 N.W.2d at 423. They nevertheless set the stage for Miranda v. Said nearly two decades later.

MIRANDA V. SAID

Plaintiffs Klever Miranda and Nancy Campoverde were Ecuadorian citizens who illegally entered the United States. 836 N.W.2d at 11. They lived in the U.S. with their three children for more than a decade, but in 2005, Klever received an order for his deportation. *Id.* Their son, Cesar, then executed a fee contract for attorney Michael Said to represent his parents. *Miranda v. Said*, No. 11-0552, 2012 WL 2410945, at *1 (Iowa Ct. App. June 27, 2012). Cesar had recently married a U.S. citizen and applied for his own citizenship, which Klever and Nancy hoped would provide them with options to remain in the country. *Id.*

Said advised Klever to return to Ecuador. 836 N.W.2d at 11. Said explained that when Cesar obtained full citizenship, he could sponsor his parents by filing a petition with the Department of Homeland Security. *Id.*; 2012 WL 2410945, at *1. Klever and Nancy would then file a petition called Form I-601 with the Ecuadorian consulate, which would ask that the consulate waive their inadmissibility due to the "extreme hardship" their children would experience if Klever and Nancy were not admitted. 836 N.W.2d at 11. Said explained that this plan had a ninety-nine percent chance of success and would only fail if they had committed a crime or if Cesar was not actually their child. *Id.*

Following Said's advice, Klever returned to Ecuador in 2005 and Nancy followed in 2007. *Id.* at 11. Cesar obtained his citizenship and filed the petition to sponsor his parents. *Id.* at 12. The Ecuadorian consulate, however, denied the Form I-601 waivers prepared by Said. *Id.* Klever and Nancy later learned that their children could not sponsor them because Form I-601 only applies if an "extreme hardship" would fall on the applicant's spouse or parent; children are not "qualifying relatives" under the waiver. *Id.* at 13. Because they had been in the U.S. illegally and had left voluntarily, Klever and Nancy were subject to a mandatory ten-year bar from re-entry that would separate them from their children living in the United States. *Id.* at 12; 2012 WL 2410945, at *1.

Klever, Nancy, and Cesar brought a malpractice action against Said and stated claims for economic, punitive, and emotional distress damages. 836 N.W.2d at 13. At trial, Said admitted that he knew the children were not "qualifying relatives" and agreed that no reasonable attorney would have used Form I-601 waivers. *Id.* Said explained that he believed the consulate officials could exercise discretion to grant the waivers. *Id.* Although he claimed that he had been successful in using children to sponsor their parents, Said was unable to produce any documentation of his past success. *Id.* The plaintiffs' expert opined that Said's strategy had zero chance of success because consulate officials do not have discretion to determine who is a "qualifying relative." 2012 WL 2410945, at *2. The expert also testified that Klever and Nancy had other options that would have provided a better than fifty percent chance of obtaining lawful residency. *Id.* Said's own expert admitted that using children as "qualifying relatives" fell below the standard of care. *Id.*

At the close of trial, Said moved for a directed verdict on the emotional distress and punitive damage claims. 836 N.W.2d at 13. The district court granted the motion and submitted only the economic loss claim to the jury. *Id.* The jury found Said negligent and awarded the plaintiffs $12,500. *Id.* The plaintiffs appealed, and the Court of Appeals reversed in part. *Id.* at 13–14. Noting that Said had prepared waivers explaining the "extreme hardship" caused by the family's separation, the appellate court reasoned that Said knew or should have known that emotional distress would necessarily or reasonably result from a breach of his duties. 2012 WL 2410945, at *7. He then took actions that had no chance of success and failed to inform his clients of the risks involved. *Id.* The appellate court remanded for a trial on emotional distress and punitive damages. *Id.* at *12. Said sought further review. 836 N.W.2d at 14.

The Iowa Supreme Court began its analysis with a thorough review of the history of emotional distress damages. *Id.* at 14–30. Because legal malpractice actions sound in tort but derive many principles from contract law, the Court found both types of cases instructive. *Id.* at 23–24. It drew an important lesson from the seminal English case, *Hadley v. Baxendale*[1]: "when parties to a transaction should reasonably have contemplated that emotional distress will naturally flow from a breach of the contract, the foreseeable consequential damages the plaintiff could recover should include damages for emotional distress." *Id.* at 18. Courts must therefore determine whether emotional distress was a particularly likely result of the alleged breach. *Id.* Although emotional distress is not particularly likely for breaches of ordinary commercial or insurance contracts, it might be impliedly contemplated by a contract dealing with sensitive and personal subject matter. *Id.* at 19–20.

The Court examined the *Lawrence* decision and carefully noted that its holding had been confined to bankruptcy attorneys. *Id.* at 24–25. Lawrence had asked whether the interest invaded by the attorney's negligence is important enough to recognize emotional damages as a matter of public policy. *Id.* at 26–27. Emotional damages are more likely to be recognized if economic damages are an inadequate remedy. *Id.* at 27–28. In a critical footnote, the Court explained that the mere foreseeability of emotional harm is not enough; instead, consistent with the Court's analysis in *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009), courts must examine the policy issues in specific categories of activities and relationships in

1 (1854) 156 Eng. Rep. 145, 151, 9 Exch. 341, 354.

order to determine whether a duty to avoid emotional harm should be imposed because that harm is very likely to result from negligent conduct. *Id.* at 28 n.13, 29–30. If the emotional harm is too remote, a duty of care should not be imposed. *Id.* at 30. In contrast, where the plaintiff "is in the direct path of the course of conduct arising from the relationship," emotional harm is likely and a duty of care should apply. *Id.*

To determine whether a duty of care should be imposed when attorneys handle immigration matters, the Court turned to an analogous federal case, *dePape v. Trinity Health Sys*., Inc., 242 F. Supp. 2d 585 (N.D. Iowa 2003). In *dePape*, the defendant law firm had created false documents in a sham attempt to obtain the client's entry into the United States. *Id.* at 595, 597. When the client was denied at the border, he was left stranded with no job, no home, and no possessions. *Id.* at 600. The federal court, applying Iowa law, held that emotional distress damages were recoverable because the client's emotional harm was the direct result of the law firm's illegitimate and unethical attempts to obtain his entry into the United States. *Id.* at 601, 616–17.

The *Miranda* Court derived two lessons from *dePape*: immigration proceedings involve personal interests that justify compensation of emotional harms, and "that although an unsuccessful, but legitimate, attempt at entry might understandably cause emotional distress to the client, the attorney would not be liable for the failed legitimate attempt." *Miranda,* 836 N.W.2d at 32. The Court held that because Said had agreed to pursue an immigration matter that was "charged with emotions," he had a duty to protect his clients from emotional harm caused by his negligent conduct. *Id.* at 33. The Court concluded that this duty arises when the attorney's "acts are illegitimate and, if pursued, are especially likely to produce serious emotional harm." *Id.*

The Court had little difficulty in holding that the punitive damages claim should have been submitted to the jury. *Id.* at 34–35. A jury could find Said acted willfully, wantonly, and recklessly by pursuing a course of action that he knew was contrary to the statute's plain language, without advising his clients of the significant risks involved. *Id.* The Court therefore affirmed the Court of Appeals decision permitting plaintiffs' claims for emotional distress and punitive damages. *Id.*

Justice Waterman dissented. *Id.* at 35. He would not have found *Miranda* to fall within the Lawrence exception because "extremely emotional circumstances" have traditionally been found only in cases of death or personal injury. *Id.* at 35–36. The Justice cautioned that *Miranda* should be limited to its facts and should not open the door to emotional distress awards based upon an attorney's simple negligence. *Id.* at 36, 41. Citing numerous cases in which courts drew a line on public policy grounds, he expressed concern that the decision would have a chilling effect on the practice of immigration law and would open attorneys to claims in dissolution, child custody, and similar cases in which the client's underlying emotional condition would be difficult to distinguish from any harm caused by an attorney's negligence. *Id.* at 37–39, 40.

A TEST FOR EMOTIONAL DISTRESS DAMAGES IN LEGAL MALPRACTICE ACTIONS

Although not explicitly articulated in either decision, Lawrence and Miranda can be read to create the following test for an award of emotional distress damages in legal malpractice actions:

Duty, Part 1: There was a contractual relationship between the parties. The *Miranda* plaintiffs were party to or the intended beneficiaries of an attorney fee contract with the defendant. Miranda left for another day whether a duty to exercise ordinary care to avoid causing emotional harm may be imposed in attorney-client relationships created outside of an engagement contract. Courts have used this contractual privity requirement to strictly define the persons to whom the duty is owed. See, e.g., *Millington v. Kuba*, 532 N.W.2d 787, 793 (Iowa 1995) (declining to extend the duty to parties who shared an emotional relationship but were not in contractual privity). While future courts may decide that an explicit contract is not necessary if an attorney-client relationship has been formed by other means, the duty likely should not extend to protect non-clients. See Restatement (Third) of Torts § 47 cmt. h (noting that a contract is not required but may help define the relationship between the parties that creates the duty).

Duty, Part 2: The legal services were so coupled with emotional issues that the attorney's alleged negligence would necessarily or reasonably result in the client's mental anguish. While the Court suggested the duty would not be imposed in matters dealing only with economic interests, *Miranda* creates the duty in immigration matters and requires future courts to consider other practice areas on public policy grounds. Courts will consider whether economic damages are inadequate to compensate the client for an intrusion on an important sensitive matter. Any remoteness between the negligence and the harm will weigh against imposing the duty. Although primarily an objective analysis, evidence that the parties subjectively contemplated the emotional harm will weigh in favor of the duty.

Breach: The attorney "negligently" pursued an "illegitimate course of action" that was "especially likely to produce" emotional

harm.[2] In *Miranda*, the attorney acted with such willful and wanton disregard as to permit punitive damages, and the Court emphasized that the attorney knew his conduct did not satisfy statutory requirements. Whether an attorney breaches the duty by mere negligence therefore appears undecided. Justice Waterman proposed that the claim should require the level of recklessness needed to prove an intentional infliction of emotional distress. 836 N.W.2d at 41; see M.H. v. State, 385 N.W.2d 533, 539 (Iowa 1986) (defining recklessness to include, but not require, willful and wanton conduct). Future courts might consider whether legal counsel must be reckless in order to be "illegitimate" under *Miranda*.

Causation: In addition to its use under the "duty" analysis, courts might choose to have the "remoteness" factor serve as an articulation of proximate causation / scope of liability. That is, there must be a close nexus between the negligent conduct and the emotional harm such that the plaintiff was in the direct path of harm rather than a remote victim. This element would provide courts the flexibility to decline an award that otherwise falls within a practice area in which the duty applies.

Damages: As the dissent notes, *Miranda* is unclear as to whether the plaintiff's harm must have been "serious" or "severe." See 836 N.W.2d at 33 (alternating uses of "serious emotional harm" and "severe emotional distress"). These are different standards, with the former applied for negligently inflicted emotional harm and the latter applied for the intentional variety. Restatement (Third) of Torts: Phys. & Emot. Harm § 46 cmt. j. (2012). Because the exception applied in *Miranda* falls under the negligence rubric, "serious" emotional harm is more likely the proper requirement. Even if courts elevate the breach element to require recklessness, proof of "severe" emotional distress may be too high a burden to impose when the harm is derivative of professional malpractice. See *Niblo*, 445 N.W.2d at 356–57 (declining to require proof of severe emotional distress caused by retaliatory discharge).

In the end, *Miranda* did not open the door to emotional distress damages in all legal malpractice actions but rather only those dealing with immigration matters; all other practice areas concerning non-economic interests must be considered on a categorical basis to determine whether an award is merited on public policy grounds. Attorneys should take comfort in the requirement that the conduct be "illegitimate": though not yet defined, *dePape* and *Miranda* suggest that conduct is illegitimate only if it has no reasonable basis in law or fact. And because *Miranda* ultimately seeks to protect clients from egregious legal advice, the bar should adopt the Court's affirmation that the rule does not threaten but rather "is consistent with the ideals that protect the integrity of the practice of law." *Miranda,* 836 N.W.2d at 33.

2 Although Miranda states that the "duty arises" under such conditions, the duty has been articulated as one to "exercise ordinary care to avoid causing emotional harm." Lawrence, 534 N.W.2d at 420. Therefore, whether the attorney's conduct was negligent and illegitimate is more likely a factor to determine whether that duty was breached.

An Update on The Iowa Tort Claims Act

Jones v. University of Iowa, 836 N.W.2d 127 (Iowa 2013) Zager

by Carol J. Kirkley, Crawford Sullivan Read & Roemerman PC, Cedar Rapids, IA

Carol Kirkley

The Iowa Supreme Court recently affirmed the district court's denial of plaintiff's motion to compel and granting of defendants' motions for summary judgment. The plaintiff was terminated from his employment at the University of Iowa as Dean of Students and Vice President of Student Services on September 23, 2008, following an investigation by The Stolar Partnership LLP of how university personnel handled a sexual assault incident.

FACTUAL BACKGROUND

On October 15th, 2007, Fred Mims, Associate Athletic Director for Student Services, advised plaintiff of the alleged sexual assault of a female student athlete by two members of the football team. The Department of Athletics (DOA) commenced an investigation into the incident. There was additional contact between plaintiff and Mims & plaintiff and Associate Dean Tom Baker on October 18th and 19th. On October 23rd, the DOA completed a report on the investigation and turned copies over to plaintiff, the Office of Equal Opportunity and Diversity (EOD), and the university's general counsel. The plaintiff scanned the report and filed it because it did not contain a signed formal complaint. The EOD commenced a formal investigation of the incident. While the EOD conducted its investigation, the victim was subject to continued harassment by fellow students. At some point, the victim realized that one of the alleged perpetrators was living with another student on her floor in the dormitory.

On November 13th, the victim's mother contacted plaintiff who denied that he had anything on this incident and did not know who the victim's mother was. On November 15th, the EOD completed a formal written report of its investigation. The following day, plaintiff met with the director of public safety, the victim, and the victim's mother. The victim provided names of students that she contended were harassing her to the plaintiff. The plaintiff sent letters to these students notifying them of the university's anti-retaliation policy. Plaintiff did not initiate any additional contact with the students involved in harassing the victim nor did he take any additional action regarding the alleged sexual assault. The victim's parents wrote two letters, dated November 18, 2007 and May 16, 2008, which were critical of the university's handling of the incident.

Plaintiff received both of the letters and placed them in a general file. The Regents did not see either letter until the letters became public. The two letters became public in mid-July.

On July 22nd, the Regents met and established an advisory committee to address the manner in which the sexual assault incident was handled. The committee was authorized to retain outside counsel. The advisory committee retained the Stolar Partnership LLP to conduct certain specified activities. Stolar conducted its investigation and produced a report. The report was produced on September 18th and was provided to the Regents, the plaintiff, President Mason, and other members of the university community.

The Stolar report was critical of the plaintiff for his statements to the victim's mother that he did not have anything on the assault, did not know her name, and for his inaction in connection with the incident. The Stolar report criticized plaintiff for failing to protect the victim.

President Mason spoke to the plaintiff about the Stolar report. Plaintiff was critical of the report. In contrast, Mason agreed with it. Mason sent plaintiff a letter on September 23rd which terminated his employment on the basis of no longer having confidence in his abilities and the contents of the Stolar Report.

The plaintiff filed suit against the University of Iowa, The Board of Regents, Sally Mason individually ans as the President of the university, and the Stolar Partnership LLP seeking recovery under the following theories: false light and defamation, intentional interference with contract, wrongful discharge, due process, and employment discrimination. The plaintiff filed a motion to compel certain e-mail communication which was denied by the district court. The University of Iowa and Sally Mason, as President of the University of Iowa and individually, as well as The Stolar Partnership LLP filed separate motions for summary judgment arguing that the plaintiff was not entitled to relief under these theories of recovery as of matter of law which were granted by the district court. The plaintiff appealed these rulings and the case was retained by the Iowa Supreme Court for decision.

RATIONALE

The Court affirmed the district court's denial of the plaintiff's motion to compel the e-mail communications between Stolar and the Regents on the basis that the plaintiff failed to demonstrate how he was prejudiced by the ruling; therefore, the court did not reach

the plaintiff's arguments concerning attorney-client privilege. In so doing, the court cited the rule that non-prejudicial error is never grounds for reversal on appeal. *Jones v. University of Iowa*, 836 N.W.2d 127, 140 (Iowa 2013).

The court began its analysis of the ruling on the state defendant's motion for summary judgment regarding the false light and defamation claims. The court found that the state actors were entitled to summary judgment on the basis that defamation claims against the State of Iowa are barred by the terms of the Iowa Tort Claims Act which "prohibits a litigant from bringing '[a] ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.'" *Id.* at 142 (quoting IOWA CODE §669.14(4) (2013)).

The Court's analysis of the false light and defamation claims against Mason (individually) focused on whether Mason was acting within the scope of her employment when she terminated the plaintiff. The court cited the following common law test for scope of employment:

[F]or an act to be within the scope of employment the conduct complained of must be of the same general nature as that authorized or incidental to the conduct authorized. Thus, an act is deemed to be within the scope of one's employment where such act is necessary to accomplish the purpose of the employment and is intended for such purpose. The question, therefore, is whether the employee's conduct is so unlike that authorized that it is substantially different.

Id. at 143. The court found as a matter of law that termination was within the scope of Mason's employment; thus, she enjoyed the same sovereign immunity as the state actors on this issue. Therefore, the Court affirmed the district court's grant of summary judgment to the defendant. Following the same rationale, the Court affirmed the district court's grant of summary judgment to Mason (individually) on the theory of intentional interference. Id.

The court then addressed the wrongful discharge claims against the state defendants. The following elements must be met to establish a claim of wrongful discharge:

(1) the existence of a clearly defined and well-recognized public policy that protects the employee's activity; (2) this public policy would be undermined by the employee's discharge from employment; (3) the employee was engaged in the protected activity, and this conduct was the reason the employer discharged the employee; and (4) the employer had no overriding business justification for the discharge.

Id. at 144. The Court found that the plaintiff failed to meet the first element of the applicable test because he did not allege that "he was terminated for engaging in any activity protected by the University's conflict-of interest regulations" and he was not terminated for following the sexual assault policy. *Id.* at 144. Rather, the evidence showed that the plaintiff was criticized for the manner in which he implemented the policy. For instance, he failed to remove one of alleged assailants from the victim's dorm and he failed to protect the victim from harassment by other students during the investigation. *Id.* at 145. Therefore, the Court affirmed the district court's grant of summary judgment to the defendant on this issue.

The Court next addressed the district court's granting of summary judgment on the due process claim. The Court focused on whether there was sufficient stigma attached to Mason's remarks about the plaintiff to implicate a protected liberty interest.

An employee's liberty interests are implicated where the employer levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges. The requisite stigma has generally been found when an employer has accused an employee of dishonesty, immorality, criminality, racism, and the like.

Id. at 146. The Court found that Mason's comments regarding the plaintiff's job performance did not rise to a level which was sufficient to create the level of stigma required to create a constitutionally protected liberty interest. Therefore, the Court affirmed the district court's grant of summary judgment to the defendant on this issue.

The Court then addressed the plaintiff's claim of employment discrimination. The Court focused its inquiry on whether the plaintiff generated a jury question on the pretextual element of his claim. Defendant Mason produced evidence that plaintiff's termination was based upon the criticisms of plaintiff's performance which were set out in the Stolar Report and the fact that she no longer had confidence in him. The plaintiff argued that Mason terminated him based upon racial stereotypes based upon some of the language used to describe him in the Stolar Report; however, there was no evidence presented that she held these stereotypes. In addition, this argument was inconsistent with the plaintiff's claim that Mason terminated him to protect her position with the university. Further, Mason also terminated the university's general counsel who was white. Therefore, the Court affirmed the district court's grant of summary judgment to the defendant on this issue.

The Court then turned to the plaintiff's claim of defamation against Stolar. The court focused its analysis on whether Stolar demonstrated the existence of a qualified privilege. A defendant must meet the following criteria to establish the existence of a qualified privilege:

(1) the statement was made in good faith, (2) the defendant had an interest to uphold, (3) the scope of the statement as limited to the identified interest, and (4) the statement was published on a proper occasion, in a proper manner, and to proper parties only.

Id. at 149 (quoting *Theisen v. Covenant Med. Ctr.,* Inc., 636 N.W.2d 74, 84 (Iowa 2001)). The privilege may be lost "if the speaker acts with actual malice, or exceeds or abuses the privilege through, for example, excessive publication or through publication to persons other than those who have a legitimate interest in the subject of the statements." Id. The plaintiff's argument was predicated upon the language used to criticize his job performance and the fact that the report was made public. The court found that the comments made by Stolar regarding plaintiff's job performance fell well within Stolar's tasked responsibilities. The evidence also showed that the defendant was very thorough in their investigation. Further, Stolar published their report only to individuals who had a legitimate interest in the outcome of the investigation. Finally, the decision to make the Stolar report public was made by the Regents. Therefore, Stolar met the criteria for the establishment of the defense of qualified privilege. Thus, the Court affirmed the district courts granting of summary judgment to the defendant on this issue. Further, the Court also affirmed the district court's granting of summary judgment to the defendant on claims of intentional interference following this same rationale.

DISCUSSION

This opinion raises a number of cogent points for our consideration. First, in dicta the court notes that plaintiff did not challenge the district's court's decision to file rulings on the motion to compel and motions for summary judgment on the same day. *Id.* at 151 n.4. In addition, the plaintiff did not raise a timing argument below or file a motion to postpone ruling on summary judgment motions until he had a ruling on the motion to compel. *Id.* This serves as an instructive practice pointer because had plaintiff filed a motion to postpone the ruling on the summary judgment motions until after the motion to compel was ruled on, plaintiff would have had an opportunity to file a supplemental brief to structure his arguments in light of the ruling on the motion to compel. Additionally, plaintiff would have had the opportunity to seek an interlocutory appeal pursuant to IOWA R. APP. P. 6.104.

Secondly, the opinion is instructive as to the importance of the necessity of effectively preserving error by demonstrating how your client is prejudiced by the erroneous ruling by the court on the issue. It is critical that you include as part and parcel of your argument precisely how the erroneous ruling impacts your presentation of the case. It is noteworthy that there is another recent Iowa Supreme Court decision decided upon the basis of the failure to adequately preserve error. See *Mitchell v. Cedar Rapids Community School District,* 832 N.W.2d 689 (2013) (holding that the defendant failed to preserve error on the issue of whether the defendant owed plaintiff a duty of care).

Finally, the Court did not reach the issue of whether the district court has the authority under IOWA CODE §669.5(2)(b) to reexamine the facts to determine whether the Attorney General's certification that a state employee was acting within the scope of his or her office. This legislation explicitly gives defendants the right to challenge the Attorney General's failure to certify that an employee was acting within the scope of his or her employment. In contrast, the legislation is silent as to whether a plaintiff has the right to challenge the Attorney General's certification on scope of employment. This is an inconsistency in the statute. There is a presumption that the legislature is aware of the intended effects of its legislation, and one of the fundamental precepts of the doctrine of sovereign immunity is that the sovereign has the ability to define the grounds under which it can be sued. In *Mills v. Iowa Bd. of Regents*, the court held that the Attorney General's certification under § 669.5(2)(b) on this issue is conclusive on the basis that the statue is unambiguous. 770 F. Supp. 2d 986 (S.D. Iowa 2011), In *Mills*, the plaintiff argued that the court should review the Attorney's General's certifications in the same manner that attorney general's certifications under the Federal Tort Claims Act are reviewed. *Id.* The court rejected this argument on the basis that there is an ambiguity in the federal statute which lead to the statute being interpreted to provide for a review of the Attorney General's certification by the court. *Id.* An examination of how other states' tort claims acts were enacted and how they have been interpreted by the respective state Supreme Courts may provide us with some additional persuasive authority on this issue.

Ethical Considerations of Indemnity Provisions

by Megan Dimitt, Lederer Weston Craig PLC, Cedar Rapids, IA

Megan Dimmit

When crafting a release, it has become standard practice for defense counsel to include a provision requiring the plaintiff's attorney to indemnify and hold harmless the defendant and its insurer from any liens or third party-claims. More often than not, these indemnity provisions are drafted to include Medicare and Medicaid liens or claims. However, these provisions have raised ethical questions as to whether a plaintiff's attorney can indemnify defense counsel under a state's rules of professional ethics. To date, at least sixteen states have issued ethics opinions discussing whether these provisions violate any of a lawyer's ethical duties: Ala. State Bar, Office of Gen. Counsel, Formal Op. 2011-01; State Bar of Ariz., Ethics Op. 03-05 (2003); Fla. Bar, Staff Op. 30310 (2011); Ill. State Bar Assoc., Advisory Op. on Prof'l Conduct 06-01 (2006); Ind. State Bar Assoc., Legal Ethics Op. 1 (2005); Kan. Bar Assoc., Ethics Op. 01-05 (2001); Md. State Bar Assoc., Ethics Op. 2012-03; Advisory Comm. of the Sup. Ct. of Mo., Formal Op. 125 (2008); N.Y. City Bar, Formal Op. 2010-3; N.C. State Bar, Ethics Op. RPC 228 (1996); Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances and Discipline, Op. 2011-1; S.C. Bar, Ethics Advisory Op. 08-07 (2008); Sup. Ct. of Tenn., Bd. of Prof'l Responsibility, Formal Ethics Op. 2010-F-154; Va. State Bar, Legal Ethics Op. 1858 (2011); W.V. Ethics Comm'n, Ethics Advisory Op. 2012-02; and Wis. State Bar of Prof'l Ethics Comm., Formal Op. E-87-11 (1998).

The general consensus among these opinions is that indemnity provisions requiring plaintiff's counsel to release a defendant and its insurer run afoul of these Model Rules of Professional Conduct: 1.7(a)(2), 1.8(e), and 8.4(a). Specifically, Model Rule 1.7 governs conflicts of interest with current clients:

a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

   1) the representation of one client will be directly adverse to another client; or

   2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

   1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

   2) the representation is not prohibited by law;

   3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

   4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983). The concern is that an attorney's personal interest in not paying the client's debts would materially limit his or her representation of the client. Some states have noted that even if the conflict could be ameliorated under Model Rule 1.7(b), the indemnity provision would still be in violation of Model Rule 1.8(e).

Model Rule 1.8(e) discusses further rules governing conflicts of interest with current clients:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (1983). By requiring plaintiff's counsel to indemnify the defendant and the insurer, the attorney becomes a guarantor of the client's financial and legal obligations in violation of the Model Rule. While some states have discussed the difference between "direct" and "indirect" financial assistance to the client—noting that it is not a violation of an attorney's ethical duties to assist a client in obtaining financing from a third party to cover the costs of litigation—those states have concluded that requiring a personal guarantee to pay liens and subrogation claims constitutes financial assistance to the client in violation of Model Rule 1.8(e).

Finally, Model Rule 8.4(a) provides that it is professional misconduct for an attorney to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another". **MODEL RULES OF PROF'L CONDUCT** R. 8.4(a) (1983). Several states have concluded that defense counsel violates Model Rule 8.4 when requesting plaintiff's counsel agree to an indemnification provision.

In light of these recent ethics opinions, defense counsel should consult their own state's ethics opinions to determine whether he or she can include an indemnity provision requiring plaintiff's counsel to hold their client harmless. Without these indemnity provisions, defense counsel may find the settlement process more difficult and expensive than before, but the defense bar is not left without recourse. If there is an ethics opinion prohibiting the practice in your state, counsel should take steps to identify all outstanding liens and potential lienholders and obtain lien waivers, if possible. Defense counsel should also consider including a provision requiring plaintiff's counsel to hold a portion of funds in escrow to ensure plaintiff's liens are paid. These extra steps will protect the client and ensure defense counsel observe and adhere to their professional and ethical obligations.

Kami Holmes Named Corporate Counsel Young Lawyer Liaison

Grinnell Mutual Counsel Kami L. Holmes was named Young Lawyer liaison for the Corporate Counsel Committee for Defense Research Institute (DRI), the national organization of defense attorneys and in-house counsel. She also was recently selected as Co-Vice Chair of the Young Lawyer Corporate Counsel Subcommittee. DRI is committed to enhancing the skills, effectiveness and professionalism of defense lawyers.

An active member of the legal community, Holmes currently serves on the Iowa Defense Counsel Association Board of Directors, Insurance Law substantive committee for DRI and co-authored the Iowa chapter on "Writing a Reservation of Rights" Compendium this past fall. She is a member of IDCA, DRI, the Iowa State Bar Association. Holmes also volunteers as a Court Appointed Special Advocate (CASA) and assists with the Iowa Legal Aid Volunteer Lawyers Project.

Holmes oversees litigation for Grinnell Mutual Reinsurance Company in Iowa, Nebraska, and Wisconsin. She earned a Juris Doctor from the University of Iowa College of Law in Iowa City and was admitted to practice in Iowa in 2006.

Young Lawyer Profile

In every issue of *Defense Update*, we will highlight a young lawyer. This month, we get to know Ben Weston at Lederer Weston Craig, PLC, in Cedar Rapids and West Des Moines.

Ben Weston is an attorney at Lederer Weston Craig PLC in the firm's West Des Moines office. Born and raised in Cedar Rapids, Ben graduated from the University of Iowa in 2005 and from law school at Creighton University in 2008. Ben joined Lederer Weston Craig PLC in 2008 and practices primarily in the areas of insurance defense, breach of contract/bad faith defense, and general liability retail defense. Ben is currently the chair of the IDCA's Young Lawyers Committee, which aims to encourage young lawyer participation in the defense bar. He also is IDCA's webinar chair, and sits on the IDCA Board of Directors, the DRI Young Lawyers Steering Committee, and Make-A-Wish Iowa's Board of Directors.

Ben and his wife, Leah, moved from Cedar Rapids to West Des Moines in 2012 when Lederer Weston Craig PLC opened its new office. Leah is a dentist in West Des Moines. Ben and Leah are expecting a daughter in May and have a Maltese named Maverick. They enjoy traveling, attending Hawkeye sports events, and spending time with family and friends. Feel free to contact Ben at bweston@lwclawyers.com for more information about IDCA's Young Lawyers Committee and watch for updates and events leading up to IDCA's 2014 Annual Meeting & Seminar in September.

IDCA's Executive Director Named ISAE 2014 Association Staff Professional of the Year

IDCA Executive Director, Heather Tamminga, CAE (left), receives the Association Staff Professional of the Year Award from ISAE President Trina Flack (right).

The Iowa Society of Association Executives' (ISAE) Association Staff Professional of the Year Award was presented April 28 to Heather Tamminga, CAE, account executive with Association Management, Ltd. Tamminga serves as the executive director for the Iowa Defense Counsel Association.

The award represents one of the most prestigious honors in the association industry and is presented to one individual per year at ISAE's annual business meeting held in West Des Moines.

Tamminga was selected based on demonstrated professionalism, longevity, commitment to the association industry and serving in numerous volunteer roles with ISAE, including her current post as vice president. She was also recognized for her positive impact as a member of AML's team and clients and within her community.

"I am truly humbled and honored to have received this award. I am blessed that my biggest champions are my family, our staff team and AML," Tamminga said. "Associations matter. Together we create change, impact the economy, educate our workforce to remain competitive, and we work to enrich the lives of those we serve. I believe in – and love – what I do."

AML, a Division of Iowa Soybean Association Management Solutions, Inc. based in Ankeny, is an international association management company, providing services for non-profit trade and professional client associations who represent more than 2,000 individual members and 1,000 company members. It's an AMC Institute internationally-accredited firm.

Tamminga joined the AML team in 2005 and earned her CAE designation in 2007. She serves as executive director for three associations including the Iowa Defense Counsel Association. Tamminga has been part of IDCA since 2008. Tamminga provides

"Together we create change, impact the economy, educate our workforce to remain competitive and we work to enrich the lives of those we serve."

leadership, guidance and association management experience to those boards of directors and works with the staff team to ensure members of association clients receive the education, benefits, certifications and the best member experience that they can.

Molly Lopez, CAE, AML president, says the award recognizes Tamminga's dedication to serving the needs of clients and representing the very best of the association management industry.

"Heather exceeds expectations and shares her knowledge with the staff team for the betterment of the company and for our clients," Lopez says. "She is always prepared to bring forth solid strategic direction and offers new ideas for membership, technology, certification, conventions and board management.

"Her contributions to our association clients have helped them grow their associations, increase reserves and implement best practices," she adds. "Most importantly, Heather is a good person who treats others with respect and truly desires what's best for the team and our clients. She gives back to the community, profession and industry she enjoys so much."

IDCA Welcomes 17 New Members

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Upcoming Events

IDCA/IAJ Trial Practice Academy at Drake and Iowa in May

The Iowa Defense Counsel Association and the Iowa Association for Justice have teamed up to hold a Trial Practice Academy for second and third year law school students and new associates. This academy is designed to be interactive and to give law students and new lawyers realistic and practical tips on how to practice law, something they do not necessarily learn from law school courses, the bar review, or the skills seminar new lawyers must attend after they pass the bar review.

Please share this information to new associates who would benefit from attending!

Tuesday, May 20, 2014 - Drake University Law School
Register online: https://IowaJustice.org/DrakeAcademy

Thursday, May 22, 2014 - University of Iowa College of Law
Register online: https://IowaJustice.org/IowaLawAcademy

Both events are held 8:00 a.m. – 5:00 p.m. with a cocktail networking reception following. At this time, registration is $40 and on a space-available basis.

IDCA Cedar Rapids Social

Wednesday, May 28

4:30 - 6:00 p.m.

350 First (located on the top of the Doubletree Hilton), 350 1st Ave. NE, Cedar Rapids, IA 52401

Guest speakers at this event include: Justice Waterman, Judge Collins, Judge Mc Partland, Mike Weston, DRI President, and Connie Alt, Am College President for Iowa. They will each speak a few minutes on their path to leadership starting as young laywers.

If you are interested in organizing an IDCA Social in your area, contact Heather Tamminga, IDCA Executive Director, at staff@iowadefensecounsel.org, for details.

MEMBERS VALUE THE IDCA ANNUAL MEETINGS

FIFTY 50 YEARS
IOWA DEFENSE COUNSEL ASSOCIATION

The IDCA Annual Meeting serves as the magnet that draws members together and the glue that provides defense lawyers from across the state a common bond throughout the year. Annual Meetings began the year the organization was formed, and continue to be a focus for drawing members together from across the state to discuss issues and policy, for education, recognition, as well as networking and socializing.

Statewide

In 1965, of the 147 IDCA members, 75 attended the Annual Meeting at Johnny & Kay's Motor Hotel in Des Moines. A decade later, under IDCA President Ralph Gearhart, membership attendance was an issue. A committee was appointed "for the purpose of determining methods to obtain increased attendance at the Association's Annual Meetings and obtain new members," for the meeting to be held at Johnny & Kay's Hyatt House. The idea of mandatory continuing legal education was discussed. During that time period, the Board voted to invite the Colorado Defense Counsel to be guests at the 1980 Annual Meeting at the Hyatt House Motel. By 1982 IDCA Board reported attendance of 172.

By 1985 there were 195 in attendance at the Airport Hyatt in Des Moines. In 1987 the meeting took place at the Airport Regency. And under President Thomas Hanson, after two decades on the South side of Des Moines, the 1988 IDCA Annual Meeting moved to the University Park Holiday Inn in West Des Moines.

Networking & Socializing

IDCA is noted for building professional relationships as well as long-lasting friendships. Past President Martha Shaff shared how she has benefited from attending IDCA events. "What I've found is that I have a lot of friends because of the Iowa Defense Council. I've gone running with a lot of them, I've joined other organizations because of them... So there are two things, the friendships I've made and the networking I've been able to do. I know a ton of people, and it's not just the female attorneys...I feel free to call and ask them for advice on a case, to talk about a case, to refer cases to them."

IDCA Network Break

Many return year after year for the social side of the IDCA Annual Meetings. As Past President David Phipps recalls, the social side of the IDCA dates back to his first years of membership. "It really was quite the social occasion for a defense lawyer. It was kind of THE event of the year...Some of those dinners were pretty memorable in that way because there were people on the podium who were tremendous story tellers.They were expected to do that and they did, and everybody had a good time. They had some very good after dinner speakers, too, but it was those kind of informal...war stories from trials that people had tried. You just had this sense that these were really people who were doing what we talk about here at the Defense Council and you get the sense of why they did what they did."

IDCA Schedule of Events

May 20, 2014

Trial Practice Academy
8:00 a.m. – 5:00 p.m
with a complimentary cocktail reception following Register online!
Drake University Law School
Register online: https://IowaJustice.org/DrakeAcademy

May 22, 2014

Trial Practice Academy
8:00 a.m. – 5:00 p.m.
with a complimentary cocktail reception following
University of Iowa College of Law
Register online: https://IowaJustice.org/IowaLawAcademy

May 28, 2014

IDCA Cedar Rapids Social
4:30 – 6:00 p.m.
350 First, 350 1st Ave. NE, Cedar Rapids, IA
(located at the top of the Doubletree Hilton)

June 10, 2014

IDCA Webinar:
Practical ESI Discovery Considerations and Approaches for Counsel
with speaker Philip A. Burian
Noon – 1:00 p.m.
Registration on next page.

September 18 – 19, 2014

50th Annual Meeting & Seminar
West Des Moines Marriott
West Des Moines, IA
Registration will open in July. Watch for details.

IOWA DEFENSE COUNSEL ASSOCIATION WEBINAR

"Practical ESI Discovery Considerations and Approaches for Counsel"

Tuesday
June 10, 2014
12:00 p.m. – 1:00 p.m.

Presented by Philip A. Burian, Simmons Perrine Moyer Bergman PLC, Cedar Rapids, IA.

Attendee Information

Name _____

Firm _____

Address _____

City _____

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(515) 334-1164 fax
staff@iowadefensecounsel.org
www.iowadefensecounsel.org

About the Webinar: Participants will learn about key distinctions for cases with ESI, issues to consider before starting, efficient (but defensible) data collection and reduction, working with outside vendors and forensic consultants, dispelling myths, offensive and defensive use of litigation holds, unique ethical considerations, discovery motion strategies, obtaining social media, maximizing value of "meet and confers," when native format is really necessary, how metadata is our friend (really), and advising clients on risk and cost mitigation before and during litigation.

Philip Burian has been practicing in Iowa for 18 years and is a partner in the litigation section of Simmons Perrine Moyer Bergman PLC practicing primarily in the area of commercial, personal injury, and product liability. His practice frequently involves ESI discovery; sometimes the cases involve large volumes, other times the issue may relate to only a few specific electronic documents of critical importance.

Participants will access the webinar from their computers for video and audio **A unique link for the webinar will be distributed to you on June 9, 2014.**

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Deadline to register: June 6, 2014. Payment must be received prior to webinar in order for you to participate and receive access. Written cancellation must be made before June 6, 2014. No refunds made on or after June 6, 2014.

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ONE REGISTRATION FORM PER PERSON RECEIVING CLE.