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# DEFENSE UPDATE

FALL 2023 VOL. XXV, No. 4

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## The Importance of Defending Judges

By Marc E. Williams<sup>1</sup>



Marc E. Williams

One of the things I was told by more experienced mentors when I started practicing is that I needed to “learn how to lose.” Having grown up in a family where my father was a coach, losing was anathema. “Show me a good loser and I’ll show you a loser” was a common refrain in our household. But in my practice of litigation, I quickly learned that winning was relative and losing was inevitable. After all, in any trial, the cards you have to play are largely outside of your control. Our client’s action (or inaction) will dictate how a judge or jury sees our case. And it can sting when you spend weeks in trial, giving up sleep while you maintain that singular focus on your client’s case, pouring your sweat and emotion into the appeal to the jury, only to have them reject what you have been arguing. As one crusty trial warrior told me after a particularly hard result in trial, “they weren’t buying what I was selling.”

But beyond our pride being on the line, all advocates recognize that we are essential participants in the functioning of our system of justice. Judges, jurors, lawyers, and litigants all play a part in facilitating a guarantee of justice for our citizens.

Continued on page 4

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## IDCA President's Letter



**Amanda Richards**  
IDCA President

Dear Fellow Members of IDCA,

I am deeply honored and excited to address you for the first time as the President of Iowa Defense Counsel. As we embark on this journey together, I would like to take a moment to introduce myself and share my vision for our organization's future.

For those of you whom I have not had the pleasure of meeting, my name is Amanda Richards. I am a partner at Betty, Neuman & McMahon, P.L.C. in Davenport, Iowa, where I have practiced civil litigation for the past 20 years. My practice focuses on various aspects of civil litigation, with specialties in personal injury, premises liability, dram shop, labor and employment law, and bad faith and insurance defense. I am a fellow of the Iowa Academy of Trial Lawyers and a member of various legal organizations, including the Association of Defense Trial Attorneys (ADTA), Defense Research Institute (DRI), and the Iowa State Bar Association (where I serve as a member of the civil verdict database committee). In 2021, I had the honor of being asked to serve on the Iowa Rules of Evidence task force.

I have a profound passion for this profession, which I hope is evident in all aspects of my practice. Like many of you, the courtroom is my favorite place to be, and over the years, I have been focused on finding MY PATH in this profession. I truly believe I became a better lawyer by not copying others, but learning from others while staying true to myself. This hasn't always been easy, but it has always been an adventure.

Outside the courtroom, you can find me chasing around my three teenage children and balancing on the tightrope that is working motherhood. From learning the power of the mute button on conference calls while I rocked a sick baby, to placing my camera just right during the pandemic so as not to show my sleepy teens

coming down the stairs, I have spent years striving to show my kids that they can have the family life they have always dreamed of while maintaining a fulfilling professional life. My daughter Jocelyn (17) is a senior heading to Iowa State University next fall to study early childhood education, and my sons Hayden (15) and Landon (13) keep me on my toes (and on the bleachers) as a sports mom. My husband Todd and I have been married for 18 years. We live in Bettendorf, Iowa with our children, and our two dogs and three cats. Yes, there is never a dull day in my world.

Having served approximately a decade with IDCA, I am excited and ready for the year ahead of me. I have served in various leadership roles within our organization and have witnessed the incredible dedication and passion that each of you brings to our shared mission. It is this commitment that has inspired me to take on the role of President, and I am committed to working tirelessly to advance our goals.

When I embark on a big project, I always set my goals, and this year is no exception. I sat down and thought about what I wanted my legacy in this organization to be so as to create a mission and roadmap for the next year. I came up with my three "Cs": Community, Collaboration, and Change. It is these 3 Cs that will guide my goals this year.

### COMMUNITY

*"Alone, we can do so little; together, we can do so much" – Helen Keller.*

When I was a young lawyer, defense attorneys were an independent bunch. Sure, there were mentors and people that shared insight, but in general, the defense bar kept their ideas under their hats, perhaps for fear that if I teach you something, you may take my client. However, over my career I have developed a different approach finding that the more I share with others, the more they share with me, and now both of us can better serve our clients.

It is time for IDCA to become a true community: a place to network, to work together, to lift each other up. I strive to have us come together more than just at the annual meeting. To help form our community, I will work to revamp our website and social media presence to allow us easy access to one another. I will continue to grow the seeds planted by Past President Sam Anderson and encourage growth and involvement on our small groups.

### COLLABORATION

*"Talent wins games, but teamwork and intelligence win championships." – Michael Jordan*



Each of us has unique talents and gifts that we bring to this profession. Can you imagine how we would all grow if we worked together with all these gifts?

As litigation has become for cutthroat and challenging it is more important than ever to work together. When something new hits our desk, we need to reach out for guidance from others to battle that new tactic. One of the best things about our counterparts on the other side of the "v." is that they are a community of collaborators. I am setting a goal for us to catch up with this collaboration.

To do this, I am going to grow our forum to allow us to have an easy place to share ideas, forms, and briefs. With our Reptile Task Force, we will bounce ideas off each other and help each other with complicated legal tricks. My goal is to show each and every one of you that collaborating together is the secret to long lasting success in this profession.

## CHANGE

*"The secret of change is to focus all of your energy not on fighting the old, but on building the new" - Socrates\**

Finally, my goal is "change." I want to see positive change throughout our organization, an IDCA that adapts to the ever-changing needs of this practice. Defense practice is constantly changing, so our organization has to as well. I am going to call on our young lawyer members to help us set new paths so that our youngest members are getting just as much out of this organization as us seasoned members.

We are also growing our legislative committee with an intention of working on bills to push through our state legislature. Together we can make long lasting change for all Iowans.

Overall, I hope my three "Cs" will help foster an environment of collaboration, innovation, and inclusivity. I am dedicated to ensuring that every member's voice is heard and valued. We will continue to build on our strengths while embracing change and adaptability as we face new challenges.

I invite each of you to actively engage with me and the board as we chart the course for IDCA's future. Your input and ideas are invaluable, and together, we can create meaningful change and leave a lasting legacy.

Sincerely,

Amanda

## IDCA WOULD LIKE TO WELCOME THE FOLLOWING MEMBERS WHO JOINED (OR REJOINED) IN 2023:

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Klass Law Firm LLP

**Hayleigh Boardman**  
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Hammer Law Firm, PLC

Continued from Page 1

But while we recognize that losing is inevitable in our system, our clients or interested citizens may not see or appreciate that a judge or jury didn't see things their way. Especially in the case of a hotly contested matter, it's not uncommon to see litigants react in anger at an adverse decision. In my more than three decades of handling civil litigation matters at trial and on appeal, I've had that difficult post-verdict encounter with an adverse party who was not pleased with the result of their case. Inevitably, the comment from the aggrieved litigant is something along the lines of "I don't know how you sleep at night." I try to diffuse the situation by responding politely without saying anything that could amplify the anger. After all, I know that emotions are running hot at that point and time will usually let things cool.

But what about the situation where a litigant or another interested party (or heaven forbid, a lawyer) takes offense at the decision of the judge or jury and strikes out with public statements alleging corruption or threats against the judge? What happens then? Who comes to the judge's defense?

You may think that this predicament is so rare as to not be a realistic possibility, but consider the following situations that have taken place in the last few years:

1. The U.S. Marshall Service reported that in 2021, federal judges were the target of 4,500 threats and other inappropriate communications.
2. In 2022, a former Wisconsin judge was killed in his home in a targeted attack by a man who the judge had sentenced in a criminal case.
3. In 2018, the West Virginia legislature tried to impeach all five justices of the Supreme Court of Appeals. The Chief Justice challenged the impeachment on constitutional grounds and a specially-appointed court agreed, entering an injunction to stop the impeachment trial. The leaders of the West Virginia Senate attempted to ignore the injunction and proceed with the impeachment trial anyway, but no judge would sit and preside over the trial, effectively mooting the proceeding.
4. Political advocates on the left and the right have attacked judges who are rendering decisions that are counter to their preferred outcome. Social media attacks on judges are common, with demands that they be impeached, removed, or voted out of office.

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In the first example, threats of harm and acts of violence against judges are becoming commonplace. In New Jersey, a litigant searched online for the home address of a federal judge and showed up with a gun to confront the judge, killing her son and wounding her husband in the process. This tragedy has resulted in the passage of the Daniel Aderl Judicial Security and Privacy Act, which provides additional security to federal judges and limits internet access to personal information regarding judges.

In the Wisconsin case, the perpetrator had a hit list of other prominent targets for attack, but first targeted the judge who had sentenced him to prison.

In the impeachment fiasco in 2018, the ability of a Court to rely on respect for its decisions was tested. Not surprisingly, in today's polarized political environment, any decision is likely to result in harsh push-back from the other party. But threats to ignore a valid court order degrade the system when they occur in a political echo chamber, repeated on social media without a balancing viewpoint. After all, judges are not supposed to comment about their decisions or speak publicly in response to criticism. So where does the balance come from?

The last example of attacks from the left and right via social media reflect the corrosiveness of our political discourse. We are so divided politically that any holding that fails to comport with a certain ideology is subject to vicious attacks from those who now have a convenient platform to share their displeasure with the ruling. It doesn't matter if it is a political leader leveling personal attacks on a judge who is handling a matter or citizens expressing outrage at a decision and blaming corrupt judges for the ruling. Unjustified criticism harms the system of justice and the public's respect for the courts.

In all of these examples, we can safely assume that the criticisms of the judiciary are inappropriate, whether they be violence directed at judges, a threat to ignore a valid court order, or accusing judges of corruption when they render an unpopular decision. If the criticism of the judiciary is unjustified, uncalled for, or untrue, a lawyer's duty is to come to the defense of the judiciary and object to the unsubstantiated allegations of corruption.

In thinking about this column, I struggled with the interplay of a lawyer's obligation to speak out about unjust criticism of the judiciary and our preservation of free speech under the First Amendment. But keep in mind that we are not seeking to ban such unjust criticism, but only to condemn it. Free speech is a bedrock principle of our republican form of government, but free speech only limits the ability of the government to prevent speech, it does not mean that all speech is insulated from condemnation by free people who find the speech offensive, unjustified, or immoral.

Likewise, if a judge engages in conduct that is inappropriate or which tends to diminish respect for the judiciary, lawyers have a responsibility to speak out in those cases as well. For instance, recent disclosures about financial dealings of United States Supreme Court Justices have resulted in partisan efforts to change the make-up of the high court, or to impose ethical standards on the Justices. While partisan efforts at pressure on the Court should be avoided, it cannot be denied that public perception of the Court has plummeted of late, and the Justices must understand their responsibility to act in ways that will preserve the institution of the judiciary. If that means the transparency from a self-imposed set of ethical rules, so be it.

The preamble of the Model Rules of Professional Conduct (and adopted verbatim in the Iowa Rules of Professional Conduct) contains a list of Lawyers' Responsibilities. I recommend it to you for review. One of the requirements is:

A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

This requirement imposes dual duties on lawyers. Not only is a lawyer required to challenge illegal or unjust official action, but also to defend the legal system when it is subject to unjust attack. Ultimately, a lawyer's guidepost should be to act and speak in ways that preserve and uphold the integrity of the justice system. Any time that a judge is attacked unjustly, especially in situations where the judge cannot respond to the criticism, it is our responsibility to speak out in defense of the system.

In 1986, the American Bar Association empaneled a committee to examine the unjust criticism of the judiciary. The report of that committee's findings included this warning:

The effectiveness of the administration of justice depends in a large measure on public confidence. The reporting of inaccurate or unjust criticism of judges, courts, or our system of justice by the news media erodes public confidence and weakens the administration of justice. It is vital that nonlitigants as well as litigants believe that the courts, their procedures and decisions are fair and impartial . . .

Therefore, cooperation of lawyers and bar associations is necessary to successfully meet inaccurate or unjust criticism of judges and courts.



Keep in mind that the ABA committee made this observation before the advent of social media, before the presence of the 24-hour news cycle, before amateur journalists became ubiquitous, and before the internet. Yet the threats to our system are just as valid. In our polarized country, where it is difficult to list the things where we all agree, it is my hope that as lawyers, we can agree that we all have a responsibility to the system where we ply our trade to protect the integrity of the process. After all, if lawyers don't come to the defense of judges, who will?

<sup>1</sup> Managing partner of Nelson Mullins Riley & Scarborough's West Virginia office. Originally published in the West Virginia Lawyer—Winter 2022-23; Reprinted with permission.

## New Member Profile



**Sahil Kumar**

Sahil Kumar is an associate at Hammer Law Firm PLC in Dubuque. He was sworn in this past September and has been practicing in various fields of civil and criminal law in Dubuque.

He graduated from the University of Iowa College of Law in May 2023 and was part of the Foreign-Trained Lawyers Program. He is dually qualified as an attorney in both the United States

and India. He graduated from the National Law University, Patiala, PB, India, in 2021, specializing in Criminal Law. Outside of his law practice, he is a well-rounded individual with a passion for soccer, FIFA, music, and bowling.



**JON A. VASEY**

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# 2023 IDCA 59th Annual



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## Thank You!

To all of the members and attendees at  
this year's annual meeting.

IDCA hosted the 59th Annual Meeting & Seminar, September 14-15 at the Embassy  
Suites in downtown Des Moines.

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Planning is already underway for 2024: September 12 -13, back at the Embassy Suites.

## Awards



### PRESIDENT'S AWARD

The President's Award is in honor and recognition  
of superior commitment and service to IDCA. The  
following members have worked diligently in furthering  
IDCA's mission:

**Patrick L. Sealey, Heidman Law Firm**



# Meeting & Seminar Recap



## MERITORIOUS SERVICE AWARD

The Meritorious Service Award (formerly the Lifetime Award) is bestowed upon IDCA members whose long-standing commitment and service to the Iowa Defense Counsel Association has helped to preserve and further the civil trial system in the State of Iowa.

**Susan M. Hess, *Hammer Law Firm***

**Randall C. Stravers, *Stravers Law Firm***



## RISING STAR AWARD

The Rising Star Award is bestowed upon IDCA members who have shown outstanding commitment and leadership in the organization and who have been members of the organization for five years or less. Rising Star nominations are from committee chairs and voted on for approval by the Board of Directors.

**Zack Martin, *Heidman Law Firm***



## THE EDDIE AWARD

In 1988 Patrick Roby proposed to the Board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and first president of IDCA and for his continuous, complete dedication to IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, dubbed "The Eddie Award." This award is presented annually to the IDCA Board member who contributed most to IDCA during the year. It is considered IDCA's most prestigious award.

**Joshua R. Strief, *Elverson Law***



## SPECIAL THANKS

Special thanks to IDCA's outgoing board members for their service: Sue Hess, Randy Stravers, Katie Graham, and Courtney Wilson.

## Case Law Update

By Zack A. Martin  
Heidman Law Firm, PLLC



Zack A. Martin

*EST. OF ZDROIK  
BY ZDROIK V.  
OSTROWSKI, 2023  
WL 5602852 (IOWA  
CT. APP. 2023)*

### WHY IT MATTERS

This case recognized the difficulty of satisfying the gross negligence standard in Iowa, particularly in the context of co-employee gross negligence claims brought under Iowa Code

section 85.20. Specifically, plaintiffs are hard-pressed to prove the element that the co-employee accused of gross negligence had "knowledge that injury is a probable, as opposed to a possible, result of the danger."

### FACTUAL & PROCEDURAL BACKGROUND

On October 12, 2017, Anthony Zdroik was an employee of Sheet Piling Services, LLC (SPS). His crew was transferring railroad ties from a bridge to the back of a truck using a grapple and sling, with Zdroik removing the ties from the sling in the bed of the truck. During a transfer, a tie came loose, and Zdroik was struck in the chest. He died from his injuries. The Estate brought suit against the railroad and four individuals associated with SPS, including John Ostrowski (president of SPS) and Brian Ostrowski (vice president of SPS). On a prior appeal, the Estate's claims against the railroad and the two other SPS employees were dismissed, leaving only the claims against the Ostrowskis remaining on remand. *Est. of Zdroik v. Iowa S. Ry. Co.*, 2021 WL 4593177, at \*4, \*6 (Iowa Ct. App. 2021).

On remand, the district court determined that the Ostrowskis were co-employees of Zdroik as a matter of law, for purposes of section 85.20. However, the district court held that, based upon the undisputed material facts, the Estate could not satisfy the necessary elements of a gross negligence claim. The Estate then appealed the district court's grant of summary judgment.

### HOLDING

Because the Estate's evidence failed to support that the Ostrowskis had "knowledge that injury is a probable, as opposed to a possible, result of the danger," the district court did not error in granting the defendants' summary judgment.

### ANALYSIS

Section 85.20 permits claims alleging gross negligence against a co-employee. These claims are an exception to the exclusivity of worker's compensation. A plaintiff must satisfy each of the following three elements to establish a gross negligence claim under section 85.20: (1) knowledge of the danger; (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the danger. The second element is usually determinative because it is exceptionally difficult for plaintiffs to prove that a defendant had the requisite knowledge an injury was probable, rather than merely possible, under the circumstances.

The Court of Appeals affirmed the district court's finding that the Estate failed to satisfy the specific knowledge element in this case. There was no evidence the Ostrowskis had actual knowledge of the danger. There was no evidence of a history of similar accidents for purposes of putting the defendants on constructive notice of the high probability of harm. The Court pointed to the Estate's own allegation in its amended petition that the Ostrowskis "failed to comprehend that injury was a probable, as opposed to a possible, result of the danger." This failure to comprehend showed the Ostrowskis had no actual knowledge of imminent danger, other than the mere foreseeability that accidents might happen.

*JACKSON V. CATH. HEALTH INITIATIVES, INC., 2023  
WL 5602863 (IOWA CT. APP. 2023)*

### WHY IT MATTERS

This case reaffirmed that a compliant certificate of merit affidavit, as required by Iowa Code section 147.140, does not "substantially comply" with the expert witness disclosure requirements of Iowa Code section 668.11. Similarly, Rule 1.500 disclosures which do not sufficiently identify an expert witness do not amount to substantial compliance with the statutory requirements of section 668.11.



## FACTUAL & PROCEDURAL BACKGROUND

Plaintiff's son committed suicide the same day he was discharged from Mercy Medical Center in Des Moines. The mother asserted claims individually and on her son's behalf, alleging medical negligence. Just over thirty days after the defendant's answer, plaintiff filed a certificate of merit affidavit, as required by Iowa Code section 147.140. Plaintiff's required section 668.11 disclosure, due on April 18, 2022, was never filed. In August 2022, Mercy moved for summary judgment because of plaintiff's failure to substantially comply with the requirements of section 668.11.

Plaintiff resisted, arguing that the certificate of merit affidavit and her initial disclosures—attached to her resistance—met the spirit of substantial compliance with section 668.11. Plaintiff did not dispute that her claims required expert testimony to survive summary judgment. The district court granted summary judgment in Mercy's favor, finding Jackson did not substantially comply with section 668.11 by filing the certificate of merit under section 147.140. Plaintiff appealed.

## HOLDING

Plaintiff failed to substantially comply with section 668.11. As a result, Plaintiff's expert was precluded from testifying at trial. The district court properly granted summary judgment in favor of Mercy, as plaintiff's claim failed without the requisite expert testimony.

## ANALYSIS

Section 668.11 requires plaintiffs in professional malpractice cases to disclose expert witnesses within 180 days of the defendant's answer. The failure to substantially comply with the requirements under section 668.11 results in the relevant expert witness being prohibited from testifying at trial, unless the court finds good cause and gives leave permitting the untimely expert to testify.

The Court found this case was similar to *Reyes v. Smith*, 2022 WL 1656238 (Iowa Ct. App. 2022), which held that a certificate of merit affidavit did not substantially comply with section 668.11. In both cases, the plaintiffs failed to provide the defendants with notice of an intention to use the professional listed in the certificate of merit as the expert witness at trial. This failure resulted in plaintiff, just like the plaintiff in *Reyes*, failing to substantially comply with the section 668.11 disclosure requirements. The Court rejected plaintiff's argument that her initial disclosures made this case distinguishable from *Reyes*, noting that the expert was only listed as an individual with discoverable information and was not identified as a witness, expert or otherwise. As plaintiff's good cause argument was based entirely on arguing substantial compliance, the Court

determined that the district court properly ruled that plaintiff failed to show that good cause supported leave to permit a belated disclosure.



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## IDCA Annual Meeting

September 12–13, 2024

### 60TH ANNUAL MEETING & SEMINAR

September 12–13, 2024

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Des Moines, Iowa

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