

## Lawyers Intentionally Inflicting Emotional Distress

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### I. INTRODUCTION

Outrageousness. Of all the standards employed in tort law (negligence, recklessness, malice, etc.), outrageousness, as part of the tort of outrage or intentional infliction of emotional distress (IIED), is one of, if not the most difficult to define. Attempts to define the concept typically involve generally unhelpful platitudes or examples of actions that are *not* outrageous.<sup>1</sup> The *Restatement (Second) of Torts*' explanation that "outrageous" conduct is conduct that would arouse the resentment of the average member of the community against the defendant "and lead him to exclaim, 'Outrageous!'"<sup>2</sup> has elicited chuckles from first-year law students for decades.

Compounding the difficulty is the fact that outrageousness is a relative concept. Much depends on the context and the relationship between the parties.<sup>3</sup> It is black-letter law, for example, that mere insults do not constitute extreme and outrageous conduct.<sup>4</sup> But while a court may have little difficulty applying that rule in the case of an insult or slur uttered by a stranger, a *racial* insult or slur directed by an employer at an employee might produce a different result.<sup>5</sup> Ultimately, the most recurring criticism of the tort is that its lack of clear standards with respect to the concept of "extreme and outrageous"

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<sup>1</sup> See *infra* note 30 and accompanying text.

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977).

<sup>3</sup> See *Lashley v. Bowman*, 561 So. 2d 406, 409 (Fla. Dist. Ct. App. 1996) ("[O]utrageousness is not only highly subjective it is an extremely mutable trait.").

<sup>4</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977).

<sup>5</sup> See *Taylor v. Metzger*, 706 A.2d 685, 694–95 (N.J. 1998) (concluding that a reasonable juror could find racial slur uttered by a sheriff and directed at subordinate officer to be outrageous but that a similar slur spoken by a stranger would not qualify).

conduct—the most important element of the tort<sup>6</sup>—leads to unpredictable results.<sup>7</sup>

Similar line-drawing difficulties emerge in IIED cases involving lawyers as defendants. It is well established that mere legal malpractice on the part of a lawyer, standing alone, cannot form the basis of an IIED claim.<sup>8</sup> And in general, plaintiffs have had little success with their IIED claims against attorneys.<sup>9</sup> But beyond these general observations, things are often less clear. Clients and non-clients have pursued IIED claims against lawyers for a wide variety of misconduct, ranging from trying to coerce clients into having sex,<sup>10</sup> to overly-aggressive cross-examination,<sup>11</sup> to threatening criminal prosecution in an attempt to collect a debt.<sup>12</sup> While most IIED claims against attorneys fail, predicting whether a particular attorney's actions will be determined to have crossed the line into "extreme and outrageous" conduct is sometimes at least as difficult as it is with respect to other defendants.

Of course, one can argue that the outcomes of IIED cases involving attorneys are predictable in the sense that most plaintiffs lose. But there remains the related question of why a finding that a lawyer's misconduct is not extreme and outrageous should be the norm. Why, for example, is it that a lawyer's willful neglect of a client matter rarely rises to the level of extreme and outrageous conduct, even when the results of the neglect are foreseeable and/or extreme (e.g., losing custody of one's child<sup>13</sup> or attempted suicide<sup>14</sup>)? What does it take for a lawyer's conduct to be considered extreme and outrageous

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<sup>6</sup> See Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Even-handedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42–43 (1982) (stating that, in practice, the tort "tends to reduce to a single element—the outrageousness of the defendant's conduct").

<sup>7</sup> See *id.* at 63 ("When the parties are not bound by contract, the cases are fewer, the results more unpredictable, and doctrine virtually nonexistent."); Russell Fraker, Note, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 1003 (2008) (noting the tort's "lack of clear substantive boundaries" and unpredictability of borderline cases).

<sup>8</sup> E.g., *Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir. 1998) (applying Tennessee law); *Timms v. Rosenblum*, 713 F. Supp. 948, 955 (E.D. Va. 1989) (applying Virginia law); *Caddell v. Gates*, 327 S.E.2d 351, 352 (S.C. 1984).

<sup>9</sup> 1 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 6:28, at 742 (2011).

<sup>10</sup> See *infra* Part IV.A.2.

<sup>11</sup> See *infra* notes 221–22 and accompanying text.

<sup>12</sup> See *infra* Part IV.B.3.

<sup>13</sup> E.g., *Thornton v. Squyres*, 877 S.W.2d 921, 922 (Ark. 1994).

<sup>14</sup> E.g., *O'Neil v. Vasseur*, 796 P.2d 134, 141 (Idaho 1990).

for purposes of an IIED claim? As importantly, how can a finder of fact make this determination in any responsible and consistent manner?

The decisional law involving IIED claims against lawyers provides little guidance on these questions. IIED cases involving lawyers present a host of challenging issues. The overall law governing lawyers is replete with references to the special responsibilities lawyers have with respect to their clients and the legal system. Lawyers are often under obligations that are in tension with each other, thus sometimes complicating the analysis of whether a lawyer's conduct is extreme and outrageous for purposes of civil liability. For example, the fact that a lawyer has, in the course of representing a client, violated the ethical duty to refrain from harassing others during the course of representation might cut in favor of a finding of outrageousness.<sup>15</sup> However, the fact that the same lawyer is also under a duty to diligently and zealously pursue the client's interests may cut against such a finding.<sup>16</sup>

Unfortunately, courts tend to decide (often as a matter of law) whether a lawyer's conduct is extreme and outrageous with little regard for the complexities inherent in these kinds of cases. Indeed, as they frequently do in IIED cases involving non-lawyers, courts tend to decide the issue with little reference to any but the most vague of standards. This is a problem that plagues much of IIED law. But, as this Article attempts to demonstrate, in the case of IIED claims against lawyers, the problem is especially pronounced. Therefore, this Article attempts to provide some clarity by proposing an approach for evaluating lawyer conduct that relies on more objective indicia of outrageousness.

This Article examines the tort of intentional infliction of emotional distress as applied to the conduct of lawyers engaging in the practice of law.<sup>17</sup> Part II discusses the basic elements of the tort, with a particular focus on the factors and objective indicia of extreme and outrageous conduct that courts have sometimes relied upon in evaluating a defendant's conduct. In the case of lawyers charged with

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<sup>15</sup> MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2011).

<sup>16</sup> *Id.* R. 1.3 cmt. 1.

<sup>17</sup> Excluded from the discussion are situations in which a lawyer is a defendant but the alleged extreme and outrageous conduct does not primarily involve the lawyer engaging in the practice of law. *See, e.g.,* Brown v. Nutter, McClennen & Fish, 696 N.E.2d 953, 954 (Mass. App. Ct. 1998) (involving a lawyer who allegedly required his secretary to engage in illegal acts, including forging his wife's signature); Bevan v. Fix, 42 P.3d 1013, 1018 (Wyo. 2002) (involving a claim stemming from a lawyer's assault on another).

the intentional infliction of emotional distress, one possible indicator of extreme and outrageous conduct is a violation of an ethical rule.<sup>18</sup> Therefore, Part III explores how these factors and rules might, in theory, apply in the case of an IIED claim against a lawyer. The Article concludes, however, that sole reliance on these factors and the ethical rules governing lawyers will often be inadequate. Part IV examines how courts have dealt with IIED claims brought against lawyers by their clients as compared to the IIED claims of non-clients. Finally, Part V attempts to offer more concrete standards with respect to what qualifies as extreme and outrageous conduct on the part of a lawyer. Specifically, this Part argues that in gauging the outrageousness of a lawyer's conduct, courts should expressly look to the ethical rules governing lawyers, the policies underlying those rules, and most importantly, the formal standards for imposing professional discipline against lawyers.

## II. INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS AND INDICATORS OF EXTREME AND OUTRAGEOUS CONDUCT

The broad contours of the tort of intentional infliction of emotional distress are well established. To recover, a plaintiff must establish that the defendant, by extreme and outrageous conduct, intentionally or recklessly caused severe emotional distress to the plaintiff.<sup>19</sup> While formulations of the elements may vary slightly, every jurisdiction recognizes the tort.<sup>20</sup> However, virtually every jurisdiction also struggles with the concept of extreme and outrageous conduct. The following Part describes some of the approaches courts have taken with respect to defining what constitutes "extreme and outrageous" conduct, the most crucial element of an IIED claim.

### A. *Constraints on the Tort*

The common-law rules governing the tort of intentional infliction of emotional distress are designed to address tort law's longstanding reluctance—based largely on concerns over excessive

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<sup>18</sup> Resort to professional standards to determine a breach of an applicable standard is hardly uncommon in tort law. For example, physician liability in medical malpractice cases is determined with reference to objective standards, namely the professional standards governing physicians. See Joseph H. King, *The Common Knowledge Exception to the Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice*, 59 ALA. L. REV. 51, 51 (2007).

<sup>19</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 (Tentative Draft No. 5, 2007).

<sup>20</sup> Christopher J. Robinette, *The Prosser Notebook: Classroom Biography and Intellectual History*, 2010 U. ILL. L. REV. 577, 604 (2010).

litigation and fraudulent claims—to recognize liability solely for emotional harm,<sup>21</sup> its concerns over allowing tort law to impose liability for mere incivility rather than truly tortious conduct,<sup>22</sup> and the need to preserve doctrinal clarity and distinction between existing torts.<sup>23</sup> In order to address the concerns over fakery and excessive litigation stemming from allowing recovery in the absence of physical harm, a plaintiff alleging intentional infliction of emotional distress must establish that the defendant’s conduct resulted in severe emotional distress.<sup>24</sup> To prevent the tort from trampling upon other torts that are designed to address specific wrongs, numerous jurisdictions view intentional infliction of emotional distress as a “gap-filler” tort that cannot be used to circumvent the restrictions of another tort that more naturally applies to the defendant’s conduct.<sup>25</sup> But perhaps the most important limitation on the tort is the requirement that the defendant’s conduct be extreme and outrageous.<sup>26</sup>

<sup>21</sup> See Givelber, *supra* note 6, at 57 (arguing that the tort’s constraints are based, in part, on the desire “to provide reliable confirmation that the plaintiff’s suffering is genuine and reasonable”); Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197, 1198–99 (2009) (discussing tort law’s historical reluctance to permit recovery for stand-alone emotional distress).

<sup>22</sup> See RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (“[P]laintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.”); Givelber, *supra* note 6, at 57 (arguing that the tort’s constraints are based, in part, on the view that “incivility is so pervasive in our society that it is inappropriate for the law to attempt to provide a remedy for it in every instance”); Rabin, *supra* note 21, at 1205 (explaining the constraints on IIED by reference to the need to “police the boundary between aberrant and acceptable social behavior”).

<sup>23</sup> See RESTATEMENT (THIRD) OF TORTS: LIB. FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. a (Tentative Draft No. 5, 2007) (noting that limitations on the tort “are essential in preventing this tort from being so expansive as to intrude on important countervailing policies”).

<sup>24</sup> RESTATEMENT (SECOND) OF TORTS § 46(1) (1965); see Fraker, *supra* note 7, at 1001 (noting that courts have been reluctant to expand liability under the tort due to concerns over excessive litigation and fraudulent claims).

<sup>25</sup> See, e.g., *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 (Tex. 2005) (“[I]ntentional infliction of emotional distress is ‘a ‘gap-filler’ tort never intended to supplant or duplicate existing statutory or common-law remedies.”); *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004) (stating that the tort was created “for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress”); Fraker, *supra* note 7, at 996 (noting that “in a significant minority of jurisdictions,” courts have found that the tort “cannot overlap with other torts or statutory wrongs”).

<sup>26</sup> RESTATEMENT (SECOND) OF TORTS § 46(1) (1965); Givelber, *supra* note 6, at 42–43 (“[The tort] tends to reduce to a single element—the outrageousness of the defendant’s conduct.”).

As suggested in the Introduction, it is difficult, if not impossible, to state with precision what actions qualify as extreme and outrageous.<sup>27</sup> The authors of the *Restatement (Second) of Torts* provided perhaps the most common explanation of the term. Comment d to section 46 of the *Restatement* explains that “[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>28</sup> Emphasizing the idea that liability is only appropriate in limited circumstances, the *Restatement (Second) of Torts* explains that “liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.”<sup>29</sup>

The reality, however, is that courts frequently offer little explanation for their conclusions as to why conduct is not sufficiently outrageous to satisfy the tort’s chief requirement. In an observation noteworthy for its candor, a Florida appellate court summarized the approach of Florida courts in addressing the outrageousness element:

The appellate courts of Florida have developed an almost “form” opinion for intentional infliction of emotional distress claims: (1) brief recitation of the facts; (2) quotation of Restatement comment d; (3) pronouncement that the conduct does not meet the Restatement test of atrociousness, utter intolerability, passing all bounds of decency and impulsion to exclaim “outrageous!”<sup>30</sup>

Although limited to Florida courts, the court’s observation applies with equal force to most jurisdictions.

#### *B. Indicators of Outrageousness*

Although the question of whether a defendant’s conduct is extreme and outrageous is intensely fact-specific, certain indicators of outrageousness have developed over time. According to the *Restatement (Third) of Torts*, these indicators include “the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor, and

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<sup>27</sup> See *Lashley v. Bowman*, 561 So. 2d 406, 409 (Fla. Dist. Ct. App. 1996); see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. c (Tentative Draft No. 5, 2007) (“Specific rules for when conduct is extreme and outrageous cannot be stated, nor can categories of conduct be identified for formulation into universal rules.”); Givelber, *supra* note 6, at 42 (noting the “extraordinary lack of defined standards” regarding what qualifies as outrageous conduct).

<sup>28</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

<sup>29</sup> *Id.*

<sup>30</sup> *Lashley*, 561 So. 2d at 409.

whether the conduct was repeated or prolonged.”<sup>31</sup> Regarding the relationship of the parties, a relationship of trust—such as that of doctor and patient—may be sufficiently special to establish a lower standard of outrageousness.<sup>32</sup> But even where a relationship of such heightened trust does not exist, any relationship that tort law treats as “special” enough to impose a heightened duty on the defendant—such as innkeeper and guest—may also make it easier for a plaintiff to establish that the defendant’s conduct was extreme and outrageous.<sup>33</sup> Similarly, while insults are generally not considered extreme and outrageous, the existence of a special relationship may lead a court to conclude that the insult is actionable.<sup>34</sup>

Closely related to the idea that a special relationship may help render conduct extreme and outrageous is the notion that conduct may be actionable where the defendant holds a position of authority over the plaintiff and abuses that position.<sup>35</sup> This would also include the situation where the defendant’s position provides the defendant with actual or apparent authority over the plaintiff, or the power to affect the plaintiff’s interests.<sup>36</sup> Most of the other indicators of extreme and outrageous conduct—such as the defendant’s knowledge that the plaintiff was especially vulnerable—are easily understood.

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<sup>31</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. c (Tentative Draft No. 5, 2007). One author lists four main categories of conduct supporting a finding of outrageous conduct:

(1) [A]busing a position of power; (2) emotionally harming a plaintiff known to be especially vulnerable; (3) repeating or continuing conduct that may be tolerable when committed once but becomes intolerable when committed numerous times; and (4) committing or threatening violence or serious economic harm to a person or property in which the plaintiff is known to have a special interest.

John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 803 (2007).

<sup>32</sup> See *McQuay v. Gunthorp*, 986 S.W.2d 850, 851 (Ark. 1999) (taking into account the trust a patient places in a doctor in assessing outrageousness of defendant-doctor’s conduct).

<sup>33</sup> See, e.g., *Hubbard v. Allied Van Lines, Inc.*, 540 F.2d 1224, 1230 (4th Cir. 1976) (noting special relationship of shipper and common carrier in concluding that defendant’s conduct could be considered sufficiently extreme and outrageous for purposes of an intentional infliction of emotional distress claim).

<sup>34</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965); see also *Brown v. Manning*, 764 F. Supp. 183, 187 (M.D. Ga. 1991) (concluding that special relationship between insurer and insured helped render defendant’s obscene statements extreme and outrageous); *Waldon v. Covington*, 415 A.2d 1070, 1076 n.21 (D.C. 1980) (citing examples of common carrier, innkeeper, or public utility as situations in which insults may become actionable).

<sup>35</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. c (Tentative Draft No. 5, 2007).

<sup>36</sup> *Id.*

Although these indicators of outrageousness provide courts with some guidance, they have not led to predictable outcomes in IIED cases. The indicators, although simple enough on their face, are subject to any number of countervailing concerns in a given case. For example, an employer occupies a position of authority over an employee. Thus, at first glance, it would seem that employees alleging IIED against their employers—either for the fact of their firing or for the abuse they endured while employed—would have a relatively high success rate. Yet, the opposite is generally true.<sup>37</sup> The employment at-will rule, which, is subject to numerous exceptions, provides employers with the right to discharge their employees at any time, for any reason, has largely shielded employers from IIED claims based upon the fact of a firing.<sup>38</sup> And while it is certainly possible that an employer's abusive treatment of an employee during an employment relationship might rise to the level of extreme and outrageous behavior, the at-will employment rule provides courts with a ready response to such claims: the at-will rule is designed to preserve management prerogative, and inherent in that concept is the notion that management must be given wide latitude in running their workplaces as they see fit, even if it means foreseeable emotional distress on the part of employees.<sup>39</sup>

<sup>37</sup> See Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 8–10 (1988) (summarizing case law); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 110 (2003) (noting that employees who have sued their employers for IIED have generally fared poorly); see also *Hollomon v. Keadle*, 931 S.W.2d 413, 417 (Ark. 1996) (taking a “strict view in recognizing a claim for the tort of outrage in employment-relationship[s]”).

<sup>38</sup> See, e.g., *Sperber v. Galigher Ash Co.*, 747 P.2d 1025, 1028 (Utah 1987) (“Mere discharge from employment does not constitute outrageous or intolerable conduct by an employer.”); Martha Chamallas, *Discrimination and Outrage: The Migration From Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2181 (2007) (“[The tort] is not intended to change the at-will employment doctrine or interfere with management’s prerogative to terminate [at-will] employees.”); Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1697 (1996) (“[A]n at-will employee implicitly submits to being terminated without notice or cause and so cannot claim that such conduct against him is outrageous.”).

<sup>39</sup> See Austin, *supra* note 37, at 8 (“The courts accord employers wide latitude in directing their employees’ activities in ways that cause them emotional distress.”); Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against the “Tortification” of Labor and Employment Law*, 74 B.U. L. REV. 387, 422 (1994) (“[T]he goal of such torts, as applied, is to attack the employer’s decision making . . .”). One of the most commonly-discussed issues in recent years is the ability of intentional infliction of emotional distress claims to address the problem of “workplace bullying,” with many commentators questioning the tort’s effectiveness in this regard. See Corbett, *supra* note 37, at 119–22 (discussing the increased attention



*C. Objective Indicia of Outrageous Conduct*

The list of indicators provided in the *Restatement (Third) of Torts* is not exhaustive. Extortionate conduct, for example, may satisfy the outrageousness requirement.<sup>40</sup> The central problem in defining outrageous conduct, however, is that there are relatively few reliable, objective indicators of such conduct.<sup>41</sup> In deciding whether a plaintiff's case is strong enough to withstand summary judgment, courts must draw their own conclusions as to whether a defendant's conduct is within the bounds of social acceptability. Yet, as Professor Daniel Givelber argued nearly thirty years ago, this is an exceptionally difficult task. There is no reason to believe that judges are particularly adept at divining the public's sense of what is socially tolerable.<sup>42</sup> This may be because judges are not particularly tuned in to prevailing societal norms of acceptable conduct or because there is disagreement within the community as to what the norm is.<sup>43</sup> Regardless, judges often have little to go on when deciding whether there is a genuine issue of fact concerning the issue. Finally, judges may have difficulty in deciding whether a defendant's conduct is "utterly intolerable in a civilized community" because there is disagreement on the question between the community of which the defendant is a member (e.g., the business community or medical profession) and the broader community as a whole.<sup>44</sup>

That said, if one is seeking to determine whether the relevant community considers a particular act intolerable, there may be at least some objective indicators that are potentially relevant. For example, the fact that a defendant's conduct offends some well-established and clearly-defined public policy should logically factor into assessing whether the conduct is so transgressive of community standards as to be extreme and outrageous. Indeed, as discussed below, some courts have explicitly relied on statements of public policy in helping to make the outrageousness determination.

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being devoted to workplace bullying and the ability of IIED claims to address the problem).

<sup>40</sup> See, e.g., *Lashley v. Bowman*, 561 So. 2d 406, 410 (Fla. Dist. Ct. App. 1996).

<sup>41</sup> See Duffy, *supra* note 39, at 422 ("[A]nalysis of outrageousness in a given case depends not on concrete standards . . . but, instead, upon the court's own response to what it considers to be particularly egregious facts."); Givelber, *supra* note 6, at 56 (noting the lack of "external standards for outrageousness").

<sup>42</sup> Givelber, *supra* note 6, at 52.

<sup>43</sup> *Id.* at 53.

<sup>44</sup> *Id.*

# 1. The General Role of Public Policy in the Outrageousness Determination

“Public policy” is a concept almost as elusive as outrageousness. However, courts have frequently relied on the fact that a defendant’s actions somehow offended public policy in considering questions of liability. Where, for example, a court concludes that a contractual provision offends public policy, the provision may be unenforceable on that basis.<sup>45</sup>

In assessing whether a defendant’s actions offend public policy, courts typically look to positive expressions of public policy contained in constitutional or statutory provisions.<sup>46</sup> Courts also sometimes look to other sources of public policy, such as administrative regulations.<sup>47</sup> Others have been willing to conclude that at least some professional standards of conduct may be reliable indicators of public policy.<sup>48</sup>

In the tort context, most courts have been willing to conclude that public policy may limit an employer’s ability to discharge an employee. The tort of wrongful discharge in violation of public policy represents an exception to the default rule of employment at-will. Thus, where an employer’s discharge of an employee threatens substantial public policy—for example, where an employer fires an employee for performing jury duty—the employee may have a remedy in tort.<sup>49</sup>

Similarly, several courts have expressed the idea that conduct that violates public policy may constitute extreme and outrageous conduct for purposes of an IIED claim.<sup>50</sup> For example, in *Macey v. New York State Electric & Gas Corp.*, a New York case, the plaintiff al-

<sup>45</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981); Alex B. Long, *Attorney-Client Fee Agreements that Offend Public Policy*, 61 S.C. L. REV. 287, 291 (2009).

<sup>46</sup> RESTATEMENT (SECOND) OF CONTRACTS § 178(1) cmt. a (1981).

<sup>47</sup> *Id.*

<sup>48</sup> See *Post v. Bregman*, 707 A.2d 806, 818 (Md. 1998) (concluding that Maryland disciplinary rule governing fee-sharing agreements between lawyers articulates a public policy and refusing to enforce an agreement that violated rule).

<sup>49</sup> See, e.g., *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975).

<sup>50</sup> *Leone v. New England Commc’ns*, No. CV010509752S, 2002 WL 1008470 (Conn. Super. Ct. Apr. 10, 2002); *Howard Univ. v. Best*, 484 A.2d 958, 986 (D.C. 1984); *Macey v. New York State Elec. & Gas Corp.*, 436 N.Y.S.2d 389, 391-92 (N.Y. App. Div. 1981); see also *Sethi v. Yaglidere*, No. CV044003034S, 2009 WL 2963283, at \*13 (Conn. Super. Ct. Aug. 24, 2009) (considering the “strong public policy expressed by statute in our state, dating to colonial times, prohibiting illegal entry and detainer” in evaluating whether defendant’s conduct was extreme and outrageous); *Myers v. Hot Bagels Factory, Inc.*, 721 N.E.2d 1068, 1076-77 (Ohio Ct. App. 1999) (stating that Ohio recognizes two versions of IIED, the second of which is “premised on public policy”).

leged that a public utility refused to restore power to the plaintiff until she separated from her husband.<sup>51</sup> There is a longstanding and well-recognized policy against encouraging the dissolution of marriage.<sup>52</sup> Thus, according to the court, if the plaintiff's allegations were true, the defendant's actions would offend public policy and could also amount to extreme and outrageous conduct.<sup>53</sup>

## 2. Statutes as Indicia of Outrageousness

Courts have also sometimes taken into account the fact that a defendant's actions violate a statute in deciding whether a jury question exists on the outrageousness issue.<sup>54</sup> The fact that a legislature views a problem as being substantial enough to warrant a legislative solution provides at least some indication that the defendant's intentional conduct in violation of the statute is socially intolerable. One obvious example would be employment discrimination statutes, such as Title VII of the Civil Rights Act of 1964.<sup>55</sup> These statutes "represent the social judgment that racism in the workplace is a profound social evil."<sup>56</sup> Thus, for example, in *Howard University v. Best*, the District of Columbia Court of Appeals pointed to the fact that the defendant's repeated instances of sexual harassment violated public policy, as articulated in the D.C. Human Rights Act, in concluding that the defendant's conduct could be considered extreme and outrageous for purposes of an IIED claim.<sup>57</sup>

<sup>51</sup> *Macey*, 436 N.Y.S.2d at 391-92.

<sup>52</sup> *See Baskerville v. Baskerville*, 75 N.W.2d 762, 768 (Minn. 1956).

<sup>53</sup> *Macey*, 436 N.Y.S.2d at 391-92.

<sup>54</sup> *See Sethi*, 2009 WL 2963283, at \*13 (considering the "strong public policy expressed by statute in our state, dating to colonial times, prohibiting illegal entry and detainer" in evaluating whether defendant's conduct was extreme and outrageous); Givelber, *supra* note 6, at 65.

<sup>55</sup> *See, e.g., McCurdy v. Dillon*, 98 N.W. 746, 748 (Mich. 1904) (stating that "[p]ublic policy is interested in maintaining the family relation" and refusing to enforce an agreement giving a lawyer a contingent fee in a divorce case).

<sup>56</sup> Givelber, *supra* note 6, at 66. Title VII prohibits other forms of discrimination as well, including sex-based discrimination. To be clear, there is nothing approaching uniformity in the courts' approaches in these types of cases. Some courts have concluded that IIED claims that essentially amount to unlawful harassment are preempted by state civil rights statutes or the exclusivity provisions of workers' compensation statutes. Chamallas, *supra* note 38, at 2136-38. Other courts, perhaps attempting to preserve the distinction between statutory and tort theories involving the workplace, have seemingly required IIED plaintiffs to show "something more than discrimination or even persistent harassment to establish outrageousness in the employment context." *Id.* at 2131.

<sup>57</sup> 484 A.2d 958, 986 (D.C. 1984); *see also Leone v. New England Commc'ns*, No. CV010509752S, 2002 WL 1008470, at \*3 (Conn. Super. Ct. Apr. 10, 2002) (stating that "there is a strong public policy expressed by statute in our state prohibiting dis-

Similarly, in *Lawrence v. Leech*, a Tennessee case, the defendant-veterinarian was accused of intentionally inflicting emotional distress upon the plaintiff by threatening to “do away with” the plaintiff’s dog unless the plaintiff’s bill was paid in full.<sup>58</sup> The veterinarian sought refuge in a state statute dealing with such situations.<sup>59</sup> Specifically, the statute authorized a veterinarian to turn over an animal to the humane society for disposal if the veterinarian provided written notice ten days in advance to the owner of the animal.<sup>60</sup> In *Lawrence*, the veterinarian argued that his threat was not extreme and outrageous because he had substantially complied with the requirements of the statute.<sup>61</sup> However, the Tennessee Supreme Court noted that substantial compliance is not actual compliance and that “[t]he statute [could] afford no shelter to the defendants in this particular case because the threats to do away with the animal” were not authorized by the statute.<sup>62</sup> Accordingly, the court concluded that a reasonable juror could find the defendant’s conduct to be extreme and outrageous.<sup>63</sup>

Of course, not every legislative enactment reflects the same type of clear social judgment. Enactments that are mainly technical in nature, for example, are unlikely to be reliable indicators of accepted social norms.<sup>64</sup> Similarly, even where the statute in question articulates a substantial public policy (such as in the case of anti-discrimination statutes), not every violation of a statute amounts to extreme and outrageous conduct.<sup>65</sup> For example, disability discrimination sometimes involves seemingly benign stereotypical assumptions about individuals with disabilities. Indeed, the discriminator may believe he or she is acting in the best interests of an individual with a disability in enacting some overly protective rule that excludes

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crimination on the basis of race, sex or national origin” and concluding that employer who made repeated racial slurs engaged in extreme and outrageous conduct).

<sup>58</sup> 655 S.W.2d 927, 930 (Tenn. 1983).

<sup>59</sup> *Id.* at 928.

<sup>60</sup> *Id.* at 931.

<sup>61</sup> *Id.* at 929.

<sup>62</sup> *Id.* at 930.

<sup>63</sup> *Id.*

<sup>64</sup> RESTATEMENT (SECOND) OF CONTRACTS § 180 cmt. a (1981).

<sup>65</sup> See *Hoffman v. Hill & Knowlton, Inc.*, 777 F. Supp. 1003, 1005 (D.D.C. 1991) (concluding that defendant’s age discrimination in violation of D.C. Human Rights Act was not outrageous); *Sethi v. Yaglidere*, No. CV044003034S, 2009 WL 2963283, at \*13 (Conn. Super. Ct. Aug. 24, 2009) (concluding that defendant’s actions were not outrageous despite the violation of statute expressing strong public policy).

the individual.<sup>66</sup> These forms of discrimination are, of course, illegal and therefore intolerable; however, perhaps they are not “*utterly* intolerable” in the same way as, say, repeated instances of harassment or abusive behavior on the basis of disability.<sup>67</sup> At a minimum, however, where a statute provides a reliable indicator of a societal judgment about the wrongfulness of a defendant’s actions, reliance on the statute by courts and juries in aiding the outrageousness determination seems appropriate in an area that cries out for some predictable standards.

### 3. Violation of Professional or Ethical Standards as Indicia of Outrageousness

Courts have also occasionally looked to relevant professional or ethical standards in determining whether a defendant’s conduct was extreme and outrageous. In several cases involving physicians as defendants, the fact that the defendants’ conduct complied with the standards of the medical profession led the courts to conclude that the defendants’ conduct was not extreme and outrageous.<sup>68</sup> In other instances, courts have pointed to a defendant’s failure to conform his or her conduct to applicable professional standards as being a relevant consideration in the outrageousness analysis.<sup>69</sup> For example, in *Conradt v. NBC Universal, Inc.*, a federal court in New York concluded that the fact that the defendant violated numerous self-enforced professional standards of the journalism field was relevant for purposes of determining whether the defendant’s conduct was extreme and

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<sup>66</sup> See Jeanette Cox, *Crossroads & Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 198 (2010) (explaining that the text and legislative history of the Americans with Disabilities Act expresses a belief that paternalistic attitudes and overprotective rules are a form of discrimination).

<sup>67</sup> See Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1120 (2002) (“Harassing conduct inflicted on an individual relating to the individual’s disability is clearly included in the [intentional infliction of emotional distress] tort, as long as the conduct and the harm reach the requisite level of severity.”).

<sup>68</sup> See, e.g., *Chizmar v. Mackie*, 896 P.2d 196, 209 (Alaska 1995) (finding that doctor’s actions were not extreme and outrageous where actions conformed to applicable professional standards); *Bain v. Wells*, 936 S.W.2d 618, 622–23 (Tenn. 1997) (concluding that because defendants’ conduct did not violate applicable medical standards, it could not be regarded as extreme and outrageous).

<sup>69</sup> See *Cawood v. Booth*, No. E2007-02537-COA-R3-CV, 2008 WL 4998408, at \*10 n.8 (Tenn. Ct. App. Nov. 25, 2008) (“In determining whether the complained of conduct rises to the requisite level, the fact finder is allowed to consider the relevant professional or ethical standards governing a particular group or community.”).

outrageous.<sup>70</sup> The court concluded that although “unethical conduct, by itself, does not necessarily equate to outrageous conduct,” the failure to abide by relevant professional standards may be relevant on the question of outrageousness.<sup>71</sup>

In some instances, a violation of a professional standard may be an indicator that the conduct exceeds broader notions of acceptable behavior. Professional standards and ethics codes sometimes provide clear statements as to what forms of misconduct are impermissible within a defined context.<sup>72</sup> In many instances, professional codes of conduct develop precisely because the profession recognizes that the actions of its members may have adverse consequences on the public interest and the broader community.<sup>73</sup>

This of course does not mean that every violation of a professional standard amounts to extreme and outrageous conduct. For example, some ethical standards create a strict liability or negligence standard;<sup>74</sup> thus, a defendant’s innocent or negligent violation would be fairly weak evidence of outrageous conduct.<sup>75</sup> But, again, to the extent a standard defines inappropriate behavior by reference to an important underlying policy consideration, formalized standards and rules of professional conduct may potentially aid in the determination of the outrageousness of a defendant’s conduct.

Moreover, in some ways, resort to professional codes of conduct in assessing outrageousness creates fewer potential problems for courts than reliance on discrimination statutes and similar legislative enactments. In the latter instances, courts have had to wrestle with the question of whether to recognize a common law IIED claim

<sup>70</sup> 536 F. Supp. 2d 380, 397 (S.D.N.Y. 2008).

<sup>71</sup> *Id.* But see *Keates v. City of Vancouver*, 869 P.2d 88, 92 (Wash. Ct. App. 1994) (concluding that expert’s opinion that defendant’s actions “were so lacking in the expected professional standard of care as to be callously outrageous” did not create a triable issue because opinion amounted to a legal conclusion).

<sup>72</sup> See Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 668 (2001) (stating that the trend of ethics codes has been “away from broad standards and toward clearly defined rules”).

<sup>73</sup> See generally *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996) (“[I]n order to qualify as public policy, the ethical provision [of a professional code of ethics] must be designed to serve the interests of the public rather than the interests of the profession.”); *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980) (stating that a professional code of ethics “designed to serve only the interests of the profession” is not sufficient to qualify as an expression of public policy).

<sup>74</sup> See Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 34 (2010) (discussing whether a negligence or strict liability standard applies to a lawyer’s duty to maintain client confidentiality).

<sup>75</sup> Nor would it satisfy the tort’s intent or recklessness requirement.

where recovery might also be possible under a statute.<sup>76</sup> In other words, where a claim could sound in tort or statute, courts have had to decide whether to treat IIED as a gap-filler tort, to be permitted only where a plaintiff has no other remedy, or as a free-standing tort that can serve as a compliment to an existing theory of recovery.<sup>77</sup> Resort to a voluntarily-adopted professional code of ethics does not involve this same problem. While a member of a profession may be subject to professional discipline for violation of an applicable ethical provision, professional ethics codes do not and cannot, standing alone, create a remedy for an aggrieved party.<sup>78</sup> Thus, courts can look to such codes in judging the outrageousness of a defendant's conduct without worrying about creating overlapping remedies and theories of recovery while also undermining the policy choices underlying an existing statute or tort theory.

### III. APPLICATION OF THE RULES REGARDING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS TO THE SPECIAL CASE OF LAWYER MISCONDUCT

In light of the numerous positive expressions of what constitutes impermissible attorney behavior, one might assume that the resolution of IIED claims against lawyers would be more predictable. However, tort law has long had difficulty dealing with the special case of lawyer liability. Thus, if anything, the fact that the defendant is a lawyer in many cases tends to complicate the resolution of IIED claims.

#### A. *For Outrageousness*

Several of the well-established indicators of outrageousness would seem, at first glance, to cut in favor of a finding of outrageousness in the case of a lawyer charged with intentional infliction of emotional distress. First, the law governing lawyers is replete with references to the special nature of the attorney-client relationship.<sup>79</sup> Lawyers occupy a position of special trust and confidence with respect to their clients and their duty is one of "*uberrima fides*"—one of "most abundant good faith, requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or de-

<sup>76</sup> See *supra* text accompanying note 54.

<sup>77</sup> See Gergen, *supra* note 38, at 1697 (suggesting that the IIED tort should "disappear in the shadow of other, more specific doctrines in contract or tort law").

<sup>78</sup> *Vallinoto v. DiSandro*, 688 A.2d 830, 837 (R.I. 1997).

<sup>79</sup> See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 8, intro. note (2000) (noting the special relationship between lawyers and clients).

ception.”<sup>80</sup> Many of the conflict of interest rules are premised on the notion that a client is entitled to view his or her lawyer as the client’s “advocate and champion” and would feel a particular sense of betrayal if the lawyer represented a party with adverse interests, even in a completely unrelated matter.<sup>81</sup> Therefore, at least in the case of a client’s IIED claim against his or her lawyer, conduct that might not otherwise be considered extreme and outrageous may rise to that level based on the special relationship between lawyer and client.

A lawyer may also be in a position to know of a client’s particular vulnerability, thus potentially making it easier for a plaintiff to satisfy the extreme and outrageous conduct requirement.<sup>82</sup> For example, the disciplinary rules governing solicitation of clients known to be in need of legal services are premised, in part, on the notion that such individuals are particularly vulnerable and susceptible to overreaching on the part of unscrupulous lawyers.<sup>83</sup> In many instances, lawyers can be assumed to be aware of a client’s emotionally vulnerable state,<sup>84</sup> thus potentially rendering their conduct outrageous where it otherwise might not be.

Even when an IIED plaintiff is an adversary and not a client, the fact that the defendant-lawyer has violated an ethical rule may be an indicator of outrageous conduct.<sup>85</sup> Unlike most IIED defendants, lawyers are subject to a professional code of ethics and are subject to professional discipline for their violations thereof. And unlike many professional ethics codes, the ethical rules governing lawyers are technically promulgated and enforced by a state’s highest court, a co-equal branch of government.<sup>86</sup> Thus, lawyer disciplinary rules possess

<sup>80</sup> *Herbin v. Hoeffel*, 806 A.2d 186, 197 (D.C. 2002).

<sup>81</sup> *See* *Grievance Comm. v. Rottner*, 203 A.2d 82, 84 (Conn. 1964) (stating that a client is “entitled to feel that . . . he has the undivided loyalty of the [attorney] upon whom he looks as his advocate and his champion”).

<sup>82</sup> *See supra* note 31 and accompanying text.

<sup>83</sup> *See Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 461 (1978) (“The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation.”); MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 1 (2011) (noting that a prospective client “may already feel overwhelmed by the circumstances giving rise to the need for legal services” and that special rules are needed in such cases because “[t]he situation is fraught with the possibility of undue influence, intimidation, and over-reaching”).

<sup>84</sup> *See In re Witherspoon*, 3 A.3d 496, 506 (N.J. 2010) (“Most clients are under stress and feel vulnerable when consulting with counsel . . .”).

<sup>85</sup> *See supra* notes 68–78 and accompanying text.

<sup>86</sup> Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043, 1081–82 (2008).



statute-like qualities that many other professional codes do not. Finally, most of the specific rules contained in lawyer disciplinary codes are not technical in nature or designed solely to protect the narrow interests of the legal profession. Instead, the disciplinary process is designed to further the administration of justice and protect the public's interest in a competent and ethical legal profession.<sup>87</sup> Ultimately, lawyer ethics codes frequently impose heightened standards of conduct in order to protect the public's interest.

As a result, most courts have been willing to recognize that at least some of the rules contained in lawyer ethics codes are expressions of public policy.<sup>88</sup> Accordingly, a lawyer who violates an ethical rule governing the formation of a fee agreement with a client may, as a matter of contract law, be unable to enforce the agreement on the grounds that the agreement offends public policy.<sup>89</sup> A lawyer's violation of a disciplinary rule may have implications for a tort claim grounded upon the violation of public policy. Courts have been willing to afford a remedy to lawyers who have been discharged by their law firms for attempting to comply with their legal obligations on the theory that such a discharge offends public policy.<sup>90</sup>

A lawyer's violation of an ethical rule may have other implications in the tort context. Although it is well-established that a lawyer's violation of an ethical rule does not, by itself, provide a tort remedy for an aggrieved party, the Scope preceding the American Bar Association's (ABA) Model Rules notes that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."<sup>91</sup> The most obvious example would be where a plaintiff introduces evidence of a lawyer's breach of a disciplinary rule as evidence of the lawyer's negligence in a malpractice action.<sup>92</sup> However, courts also sometimes point to a lawyer's violation of a disciplinary rule in assessing whether the lawyer should be subject to liability under some other tort theory, such as fraud.<sup>93</sup>

<sup>87</sup> See *Lawyer Disciplinary Process v. Artimez*, 540 S.E.2d 156, 164–65 (W. Va. 2000) ("The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice.") (citations omitted).

<sup>88</sup> Long, *supra* note 86, at 1065.

<sup>89</sup> See Long, *supra* note 45, at 301–21 (discussing examples).

<sup>90</sup> See Long, *supra* note 86, at 1049–62 (discussing examples).

<sup>91</sup> MODEL RULES OF PROF'L CONDUCT Scope ¶ 20 (2011).

<sup>92</sup> See *Martinson Bros. v. Hjellum*, 359 N.W.2d 865, 875 (N.D. 1985) (stating that violation of disciplinary rule may constitute some evidence of negligence).

<sup>93</sup> See *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310, 312 (Ind. 1994) (referencing disciplinary rule regarding fraud); Alex B. Long, *Attorney Deceit Statutes: Promoting Profes-*

In at least some cases, a lawyer's violation of an applicable ethical rule would seem likely to tip the balance in favor of a finding of outrageousness. Logically, this would be most likely where the lawyer has violated a duty lying at the core of what it means to be a lawyer, such as the lawyer's duties of loyalty and confidentiality. However, a violation of an ethical rule could, in theory, also help a non-client establish the outrageousness requirement. At least some ethical rules establish duties to non-clients that involve conduct that could quite naturally form the basis of an IIED claim. This includes the rules prohibiting the destruction or alteration of evidence and the rule prohibiting lawyers from engaging in conduct having no purpose other than to harass or intimidate another individual.<sup>94</sup> Thus, the fact that a lawyer—an officer of the court upon whom the law and the legal profession impose special obligations<sup>95</sup>—engages in misconduct that adversely impacts non-clients could, in theory, potentially be an indicator of outrageousness for purposes of an IIED claim.

### B. *Against Outrageousness*

At the same time, there are several potential objections to relying on the standards contained in lawyer ethics codes as indicators of outrageousness for purposes of IIED claims. More broadly, there are several potential objections to expanding lawyer tort liability in general and expanding liability for intentional infliction of emotional distress in particular. These include concerns over the impact on zealous advocacy and permitting recovery for emotional distress.

#### 1. Violation of a Disciplinary Rule as an Indicator of Outrageousness

The Model Rules observe that a lawyer's violation of an ethical rule may be evidence of the lawyer's breach of an applicable standard of conduct.<sup>96</sup> However, some courts have been reluctant to allow evidence of a lawyer's ethical violation to serve any role in tort litigation.<sup>97</sup> Even where a court is willing to consider evidence of a lawyer's ethical violation, there remains the problem of when a violation is re-

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*nalism Through Criminal Prosecutions and Treble Damages*, 44 U.C. DAVIS L. REV. 413, 420–28 (2010) (discussing disciplinary rules of potential relevance in a fraud or deceit action).

<sup>94</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4(a), 4.4(a) (2011).

<sup>95</sup> *Amalfitano v. Rosenberg*, 903 N.E.2d 265, 269 (N.Y. 2009).

<sup>96</sup> See *supra* note 91 and accompanying text.

<sup>97</sup> See BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 175–76 (2010) (discussing the use of rules of professional conduct in malpractice actions).

levant to the question of whether the lawyer's conduct was extreme and outrageous.

Some rules, such as the rule articulating a lawyer's duty to maintain client confidentiality, speak to deeply-held principles of the legal profession.<sup>98</sup> At first glance, a violation of a rule that is fundamental to the administration of justice and the legal profession's values would seem to provide strong evidence of outrageousness on a lawyer's part. However, Model Rule 1.6(a)—the rule that articulates a lawyer's duty not to reveal information relating to the representation of a client—is arguably a strict liability rule.<sup>99</sup> At most, the rule requires mere negligence on a lawyer's part before there is a violation.<sup>100</sup> In contrast, the concept of outrageous conduct implies willfulness, amounting to an extreme departure from relevant standards. Although it is certainly conceivable that a lawyer's reckless disregard of client confidentiality could amount to outrageous conduct, the negligent or innocent violation of Rule 1.6(a) is not the kind of extreme conduct the *Restatement (Second) of Torts* contemplates.<sup>101</sup>

Other ethical rules establish important prohibitions on lawyer misconduct. However, some of these standards address garden-variety misconduct, which would not, in the typical case, rise to the level of extreme and outrageous conduct. For example, the fact that a lawyer violates the ethical prohibition on dishonest conduct<sup>102</sup> might have some relevance on the question of outrageousness. However, if the violation occurred in the course of the lawyer's private rather

<sup>98</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2011).

<sup>99</sup> See Moore, *supra* note 74, at 34 (discussing this issue).

<sup>100</sup> See *id.* (discussing this issue and concluding that a negligence standard should apply).

<sup>101</sup> A lawyer's intentional or reckless violation of a fundamental duty owed to a client would logically provide a stronger indicator of extreme and outrageous conduct. However, in some cases a client may already have a remedy for such misconduct in the form of a breach of fiduciary duty claim. See *Pietro v. Sacks*, No. B208953, 2010 WL 298240, at \*11 (Cal. Ct. App. Jan. 27, 2010) (involving breach of fiduciary duty claim based on lawyer's alleged threat to disclose confidential information in order to prevent client from terminating representation); *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. Ct. App. 1991) (involving breach of fiduciary duty and IIED claims based on lawyer's disclosure of confidential information to district attorney). In a jurisdiction that views IIED as a gap-filler tort that can only be asserted where no other theory of recovery would permit recovery, a lawyer's intentional or reckless violation of a fiduciary duty enshrined in an ethical rule may mean that a client cannot proceed on an IIED claim.

<sup>102</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2011).

than professional life, there would be little reason to view the lawyer's dishonesty as any more outrageous than a non-lawyer's dishonesty.<sup>103</sup>

In contrast, a lawyer's violation of the ethical rule prohibiting false statements of material fact to another person while *in the course of representing a client* might have greater relevance on the question of outrageousness due to the fact that the lawyer's actions interfere with the administration of justice and undermine respect for the legal process.<sup>104</sup> Even in this situation, however, a violation of this ethical rule may have limited value in terms of establishing the outrageousness of a lawyer's conduct. For example, a violation of the ethical rule regarding competence tends to carry considerable weight in a malpractice action in terms of establishing the lawyer's breach of the duty of care owed to a client.<sup>105</sup> But false statements of material facts come in all shapes and sizes, only some of which amount to conduct utterly intolerable in a civilized society. Indeed, a comment to the relevant Model Rule notes that the making of false statements of material fact in the course of representing a client is, in some limited circumstances, actually permissible, despite the literal language of the ethical rule prohibiting such conduct.<sup>106</sup> Not surprisingly then, plaintiffs have had little success arguing that a violation of a disciplinary rule is, per se, extreme and outrageous conduct.<sup>107</sup>

## 2. Zealous Advocacy Concerns

There are also more general concerns about expanding lawyer liability for intentional infliction of emotional distress. Chief among them is the concern that expanded liability might have an adverse impact on the duty of zealous advocacy. One of the most cherished values of the legal profession is the notion of a lawyer's duty of zealous advocacy on behalf of a client.<sup>108</sup> Although numerous commenta-

<sup>103</sup> Numerous courts have concluded that "conduct by an attorney arising in the attorney's other, non-professional pursuits is also a proper subject of disciplinary proceedings." *Attorney Grievance Comm'n v. Shaw*, 732 A.2d 876, 885 (Md. 1999).

<sup>104</sup> See MODEL RULES OF PROF'L CONDUCT R 4.1(a) (2011) (prohibiting false statements of material fact in the course of representing a client).

<sup>105</sup> See *Martinson Bros. v. Hjellum*, 359 N.W.2d 865, 875 (N.D. 1985) (citing *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980)) (stating that evidence of a violation of a disciplinary rule constitutes "rebuttable evidence of legal malpractice").

<sup>106</sup> See MODEL RULES OF PROF'L CONDUCT R 4.1 cmt. 2 (2011) (stating that certain types of statements, such as statements regarding a party's intentions as to an acceptable settlement, are not treated as statements of fact for purposes of rule).

<sup>107</sup> *Nestlerode v. Fed. Ins. Co.*, 414 N.Y.S.2d 398, 400 (App. Div. 1979).

<sup>108</sup> See Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 470 (1992) (listing zealous advocacy as one of the central components of professionalism) (citing Monroe H. Freedman, *The Golden Age of Law*

tors have criticized the tendency of lawyers to use the idea of zealous advocacy as a shibboleth for dishonest and unethical behavior, the value of zealous advocacy on behalf of a client remains deeply embedded in the collective psyche of the legal profession.<sup>109</sup>

The commitment to ensuring that lawyers are able and willing to act as zealous advocates on behalf of their clients is also deeply embedded in tort law. For example, a lawyer who is participating in a judicial proceeding is absolutely privileged to publish defamatory material concerning another, provided the communication has some relation to the proceeding.<sup>110</sup> This litigator's privilege is designed to ensure that lawyers are not dissuaded from acting zealously on behalf of clients for fear of facing civil liability.<sup>111</sup> For this reason, the privilege is absolute in nature.<sup>112</sup> The litigator's privilege is also far reaching. Although originally developed in the defamation context, the privilege has been extended in some jurisdictions to reach a variety of litigation-related torts, including malicious prosecution and even misrepresentation.<sup>113</sup>

The *Restatement of the Law Governing Lawyers* expresses a similar theme in the context of IIED claims. A comment to section 56 emphasizes that "[v]igorous advocacy is important in adversary proceedings."<sup>114</sup> Consequently, "a lawyer's partisanship in presenting evidence and argument, drafting and serving pleadings, and comparably pressing a client's case in such a proceeding is not considered extreme and outrageous and is privileged from [IIED] liability to the opposing party."<sup>115</sup>

The concern over the impact of expanded tort liability on a lawyer's duty of zealous advocacy also manifests itself in tort law's traditional refusal to recognize that a lawyer owes a duty of care to a non-client. Although there are exceptions, the general rule is that a law-

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That Never Was, *LEGAL TIMES*, Dec. 17, 1990, reprinted in *THE LAWYER AS PROFESSIONAL* (T.W. Floyd & W.F. Newton eds., 1991)).

<sup>109</sup> See generally Allen K. Harris, *The Professionalism Crisis—The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 568–70 (2002) (criticizing lawyers' reliance on the value of zealous advocacy to justify unprofessional behavior).

<sup>110</sup> RESTATEMENT (SECOND) OF TORTS § 585 (1977).

<sup>111</sup> See *id.* § 586 cmt. a (stating that the privilege "is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients").

<sup>112</sup> *Id.*

<sup>113</sup> Long, *supra* note 93, at 433.

<sup>114</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. g (2000).

<sup>115</sup> *Id.*

yer does not owe a duty to a non-client.<sup>116</sup> This is particularly true in the case of adversarial parties.<sup>117</sup> Part of the rationale for the reluctance to impose civil liability against lawyers for conduct that harms non-parties is that it would place lawyers in the position of owing conflicting duties to clients and non-clients.<sup>118</sup> Although this no-duty rule is cited most commonly in negligence cases, the rule and its rationale also sometimes find their way into the courts' analyses of intentional tort claims against lawyers.<sup>119</sup>

### 3. The Reluctance to Permit Recovery for Emotional Distress

A final concern about expanding lawyer liability for intentional infliction of emotional distress is that it would conflict with tort law's longstanding reluctance to permit recovery for emotional distress damages against lawyers. As a general matter, tort law has long expressed reluctance to permit recovery for emotional distress unaccompanied by any physical harm.<sup>120</sup> For example, some jurisdictions require that the emotional distress be "manifested by objective symptomatology and substantiated by expert medical testimony."<sup>121</sup>

This reluctance also happens to coincide with the majority rule prohibiting plaintiffs from recovering emotional distress damages in attorney malpractice actions.<sup>122</sup> The limitation is based primarily on the notion that emotional distress resulting from a lawyer's mishandling of a matter is not foreseeable.<sup>123</sup> Courts have noted that "a citizen's encounter with the legal process is a source of great anxiety" even under the best of circumstances and even if represented by the best of counsel.<sup>124</sup> The rule is also based in part on the fear that lawyers would be subjected to a barrage of lawsuits from disgruntled clients should emotional distress damages be permitted.<sup>125</sup> In addi-

<sup>116</sup> *Id.* § 51.

<sup>117</sup> See Long, *supra* note 93, at 431.

<sup>118</sup> See *id.* at 432 (stating that courts frequently justify the rule on grounds that a contrary rule might result in decreased loyalty to a client).

<sup>119</sup> *Id.*

<sup>120</sup> See *supra* notes 21–24 and accompanying text.

<sup>121</sup> Payton v. Abbott Labs, 437 N.E.2d 171, 181 (Mass. 1982).

<sup>122</sup> See Wehringer v. Powers & Hall, P.C., 874 F. Supp. 425, 429 (D. Mass. 1995) (predicting that Massachusetts courts would hold that recovery is only permitted in exceptional circumstances); 3 MALLIN & SMITH, *supra* note 9, § 21:11, at 38.

<sup>123</sup> Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the "Captured" Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 478–79 (2002).

<sup>124</sup> Singleton v. Stegall, 580 So. 2d 1242, 1247 (Miss. 1991).

<sup>125</sup> *Id.* at 479; Kessler, *supra* note 123, at 479.

tion to generalized worries over excessive litigation, the particular concern in allowing excessive litigation against lawyers is that it will have an adverse effect on the willingness of lawyers to serve as zealous advocates for their clients. Thus, regardless of whether a plaintiff's claim against a lawyer sounds in negligence or intentional infliction of emotional distress, the legal profession's concerns over the impact on zealous advocacy remain substantial.

#### IV. LAWYER IIED CASES AND HOW THEY ILLUSTRATE THE ABOVE POINTS

Despite the *Restatement (Second) of Torts*' observation that the question of whether conduct is extreme and outrageous is a jury question—where reasonable minds could differ—numerous courts take the position that it is a question of law for the court.<sup>126</sup> Even those courts that treat the question as generally being one for the jury often engage in especially rigorous scrutiny of a defendant's conduct in IIED cases.<sup>127</sup> And in cases involving claims of extreme and outrageous conduct on the part of lawyers, courts often engage in exceptionally rigorous scrutiny.

A review of the decisional law involving IIED claims against attorneys reflects the tensions present in these cases as well as the overall doctrinal confusion surrounding the IIED tort. One can discern a strong judicial reluctance to permit liability, particularly in the case of lawyer's liability to a non-client. Courts frequently conclude, as a matter of law, that a lawyer's misconduct was not extreme and outrageous. Yet, there are enough instances in which plaintiffs have managed to raise a triable issue regarding whether a lawyer's conduct was extreme and outrageous that it is difficult to speak in terms of bright-line rules. Indeed, one of the more troubling aspects of the decisional law in this area is the failure of courts to articulate, in any meaningful way, why a lawyer's conduct is or is not extreme and outrageous.

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<sup>126</sup> See, e.g., *Atkinson v. Denton Publ'g Co.*, 84 F.3d 144, 151 (5th Cir. 1996) (applying Texas law); *Gray v. State*, 624 A.2d 479, 484 (Me. 1993) ("The determination of extreme and outrageous conduct from undisputed facts is an issue for the court."); RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1977).

<sup>127</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. f (Tentative Draft No. 5, 2007).

A. *Liability to Clients*

## 1. Incompetence and Lack of Diligence

Clients have had little success with IIED claims premised on an attorney's failure to live up to the duty of competence. The IIED tort requires not only that a plaintiff demonstrate extreme and outrageous conduct, but also that the defendant acted with intent or in a reckless manner.<sup>128</sup> Although disgruntled clients have sometimes tacked IIED claims on to their malpractice claims or attempted to categorize their attorneys' negligence as extreme and outrageous behavior, courts have typically dispensed with such claims on the grounds that the required mental state was lacking or that the defendant's actions were not extreme and outrageous.<sup>129</sup> Thus, lawyers have escaped IIED liability for negligently conducting title searches,<sup>130</sup> failing to conduct adequate investigations,<sup>131</sup> failing to secure or interview witnesses,<sup>132</sup> and failing to notify clients of their rights under applicable statutes.<sup>133</sup> Plaintiffs' attempts to characterize a lawyer's shortcomings in more grandiose terms—such as the failure to zealously advocate on the client's behalf—have similarly failed where the failure amounts to little more than garden-variety malpractice.<sup>134</sup>

<sup>128</sup> See *supra* note 19 and accompanying text.

<sup>129</sup> See, e.g., *Williams v. Callaghan*, 938 F. Supp. 46, 51–52 (D.D.C. 1996) (concluding that lawyer's failure to, inter alia, conduct adequate investigation, was not extreme and outrageous conduct); *Galu v. Attias*, 923 F. Supp. 590, 597–98 (S.D.N.Y. 1996) (holding that criminal defense attorney's failure to make a motion did not amount to extreme and outrageous conduct); *Thornton v. Squyres*, 877 S.W.2d 921, 923 (Ark. 1994) (holding that attorney's failure to file an answer on behalf of client could not form the basis of IIED claim, despite harm to client); *Amstead v. McFarland*, 650 S.E.2d 737, 742 (Ga. Ct. App. 2007) (holding that attorney's alleged malpractice in the form of failing to notify client of lawyer's potential conflict of interest and client's rights under statute did not amount to extreme and outrageous conduct); *Young v. Hecht*, 597 P.2d 682, 687 (Kan. Ct. App. 1979) (affirming summary judgment in favor of lawyer due to lack of evidence of intent to inflict emotional distress).

<sup>130</sup> See, e.g., *Caddell v. Gates*, 327 S.E.2d 351, 352 (S.C. 1984); see also *Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir. 1998) (affirming summary judgment in favor of lawyer who negligently misrepresented that client's property was unencumbered by a lien).

<sup>131</sup> See, e.g., *Williams v. Callaghan*, 938 F. Supp. 46, 51–52 (D.D.C. 1996).

<sup>132</sup> See, e.g., *id.*; *Timms v. Rosenblum*, 713 F. Supp. 948, 955 (E.D. Va. 1989).

<sup>133</sup> See, e.g., *Amstead*, 650 S.E.2d at 742.

<sup>134</sup> See, e.g., *Williams*, 938 F. Supp. at 51–52; see also *Estate of Becker v. Callahan*, 96 P.3d 623, 629 (Idaho 2004) (concluding that lawyer's failure to provide for bequest for husband in wife's will could not support husband's claim of negligence or intentional infliction of emotional distress).



Clients have had perhaps slightly greater success where the attorney's departure from the established duty of care involves a lack of diligence—more than a lack of skill or knowledge. Although closely related to the duty of competence, a lawyer's duty to diligently represent a client's interests is listed separately from competence in the *Model Rules*.<sup>135</sup> A comment explains that diligence involves pursuit of a client's matter “despite opposition, obstruction or personal inconvenience to the lawyer” and using “whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.”<sup>136</sup> A comment to the rule expressly notes the potential that neglect of a client matter may result in emotional distress to the client.<sup>137</sup>

More often than not, attorneys have prevailed in IIED cases involving charges of willful neglect, even where neglect of client matters appears to be standard operating procedure for the lawyer in question.<sup>138</sup> For example, *Thornton v. Squyres* involved a lawyer's failure to file an answer in a child custody matter, resulting in the client losing custody of her daughter.<sup>139</sup> The client pursued an IIED claim against the attorney, and at trial introduced evidence of “Squyres's total lack of any docket control system in disregard of his clients' interests [and] his failure to answer phone calls for three weeks.”<sup>140</sup> If true, this was not merely carelessness on the part of the attorney. This was a pattern of conscious neglect in the face of a high probability of injury to clients. In addition, “when confronted with the result of his omission, Thornton aver[ed] Squyres implied that he deliberately did not file an answer because he was not paid in full.”<sup>141</sup> Despite this, the trial judge stated that “this is just a matter of negligence on the part of an attorney” and issued a directed verdict for the attorney.<sup>142</sup> If the defendant's actions could be considered extreme and outrageous, the trial court reasoned, then any simple malpractice

<sup>135</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3 (2011).

<sup>136</sup> *Id.* cmt. 1.

<sup>137</sup> See *id.* R. 1.3 cmt. 3 (“[U]nreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.”).

<sup>138</sup> See *O'Neil v. Vasseur*, 796 P.2d 134, 141 (Idaho 1990) (concluding that lawyers' failure to act in a case for nearly four years was not extreme and outrageous); see also *Williams*, 938 F. Supp. at 51–52 (granting summary judgment for attorney where attorney failed to adequately investigate claims or interview witnesses); *Timms v. Rosenblum*, 713 F. Supp. 948, 955 (E.D. Va. 1989) (concluding that plaintiff failed to state a claim based on lawyer's failure to interview or secure necessary witnesses).

<sup>139</sup> 877 S.W.2d 921, 922 (Ark. 1994).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 923.

case could become an IIED case.<sup>143</sup> On appeal, the Arkansas Supreme Court agreed with the trial judge's reasoning and affirmed the judge's conclusion that the attorney's actions could not rise to the level of extreme and outrageous conduct sufficient to support a verdict for the client.<sup>144</sup>

In contrast, *Bowman v. Doherty* involved a criminal defendant who alleged that he repeatedly asked his attorney to obtain a continuance due to the fact that he was out of town.<sup>145</sup> The attorney assured the client that it would be no problem to obtain the continuance, but failed to do so.<sup>146</sup> After the client was arrested for failing to appear for his scheduled hearing, he sued his lawyer for malpractice.<sup>147</sup> Citing the majority rule that there can be no recovery for emotional distress in a malpractice action, the defendant moved for partial summary judgment on the plaintiff's claims for emotional distress.<sup>148</sup> On appeal, however, the Kansas Supreme Court stated that this general rule does not apply "in cases of a wrong where the act is wanton or willful or where the act is committed with malice and intended to cause mental distress."<sup>149</sup> A defendant acts "wantonly," the court explained, when the defendant acts with "reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act."<sup>150</sup> The court ultimately concluded that because the lawyer "should have known full well" that his client would end up in jail if he failed to live up to his duty of competence, a jury could reasonably conclude that the lawyer acted wantonly or recklessly.<sup>151</sup> Similarly, in *Lancaster v. Stevens*, a Mississippi case, a convicted murderer's IIED claim against his attorneys survived summary judgment where his habeas appeal had been dismissed due to his attorneys' failure to prosecute the appeal.<sup>152</sup>

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> 686 P.2d 112, 116 (Kan. 1984).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 115–16.

<sup>148</sup> *Id.* at 117.

<sup>149</sup> *Id.* at 118.

<sup>150</sup> *Id.* (quoting *Vaughn v. Murray*, 521 P.2d 262, 267 (Kan. 1974)).

<sup>151</sup> *Bowman*, 686 P.2d at 119. Although the *Bowman* court treated the client's claim as fitting within a narrow category of exceptions to the general rule that emotional distress damages are not recoverable in a malpractice action, the client's legal theory was virtually indistinguishable from an IIED claim. *See id.*

<sup>152</sup> 961 So. 2d 768 (Miss. Ct. App. 2007). Interestingly, the court permitted the claim to proceed despite its conclusion that the habeas appeal would have failed even if the attorneys had pursued the matter. *Id.*

*Thornton*, *Bowman*, and *Lancaster* all involved lawyers who, at a minimum, acted in reckless disregard of the probability of emotional distress,<sup>153</sup> a mental state sufficient to support a finding of IIED under the *Restatement* approach.<sup>154</sup> The potential consequences of the lawyers' neglect were dramatic in each case, and there was almost certainly a violation of the duty of diligence on the part of each of the lawyers. Thus, a finding of extreme and outrageous conduct in each case hardly seems a stretch. Yet, the split in outcomes illustrates how difficult it may be to predict whether a court will permit an IIED claim against an attorney to proceed.

## 2. Demands for Sexual Favors

One recurring scenario that has triggered numerous disciplinary complaints and IIED claims has involved attorneys who have demanded sexual favors from clients.<sup>155</sup> In some cases, the attorney's conduct has amounted to harassment. In others, the demands have been accompanied by explicit or implicit threats to withhold legal services or offers to accept sexual favors in lieu of payment.<sup>156</sup> Although clients have not always succeeded on their IIED claims due to some of the other restrictions of the tort, courts have generally been willing to conclude that sexual demands from clients amount to extreme and outrageous conduct where the harassment is pervasive or is accompanied by these types of threats or offers.<sup>157</sup>

<sup>153</sup> As *Bowman* illustrates, some courts have been willing to recognize a specific exception to the rule that emotional distress damages are unavailable in a legal malpractice action when the malpractice results in the loss of liberty. *E.g.*, *Wagenmann v. Adams*, 829 F.2d 196, 222 (1st Cir. 1987); 3 MALLIN & SMITH, *supra* note 9, § 21:11, at 38.

<sup>154</sup> See *supra* note 19 and accompanying text. Some jurisdictions require that a defendant acted with the specific intent of causing distress. See, e.g., *Ely v. Whitlock*, 385 S.E.2d 893, 897 (Va. 1989).

<sup>155</sup> See, e.g., *McDaniel v. Gile*, 230 Cal. App. 3d 363, 373 (Ct. App. 1991); *Brett v. Berkowitz*, 706 A.2d 509, 513 (Del. 1998); *Doe v. Roe*, 681 N.E.2d 640, 643 (Ill. App. Ct. 1987); *Cleveland Bar Ass'n v. Feneli*, 712 N.E.2d 119 (Ohio 1999); *Buckman-Peirson v. Brannon*, 822 N.E.2d 830, 836 (Ohio Ct. App. 2004); *Vallinoto v. DiSandro*, 688 A.2d 830, 838 (R.I. 1997); *In re Bergren*, 455 N.W.2d 856, 856 (S.D. 1990). See generally *Suppressed v. Suppressed*, 565 N.E.2d 101 (Ill. App. Ct. 1990) (involving legal malpractice claim based on similar conduct); Malinda L. Seymore, *Attorney-Client Sex: A Feminist Critique of the Absence of Regulation*, 15 YALE J.L. & FEMINISM 175, 176 (2003) (describing a variety of disciplinary cases involving lawyers who have had sex with clients).

<sup>156</sup> See, e.g., *McDaniel*, 230 Cal. App. 3d at 370; *Buckman-Peirson*, 822 N.E.2d at 836; *Vallinoto*, 688 A.2d at 833.

<sup>157</sup> See, e.g., *Buckman-Peirson*, 822 N.E.2d at 836 (concluding that plaintiff's claim failed due to lack of evidence regarding emotional distress and causation); *Vallinoto*, 688 A.2d at 838 (concluding that plaintiff's claim failed due to inability to produce

Clients have had noticeably less success when the claim does not involve an allegation of sexual coercion or a pattern of harassment and is instead based primarily on the mere fact that a sexual relationship between lawyer and client existed.<sup>158</sup> Courts have historically been disinclined to recognize IIED claims involving spurned lovers and matters of the heart.<sup>159</sup> However, sex between lawyers and their clients arguably implicates special concerns. ABA Model Rule 1.8(j) generally prohibits a lawyer from engaging in sexual relations with a client.<sup>160</sup> The comment accompanying the rule explains that the rule is based, in part, on the fact that there is almost always a disparity of power in the lawyer-client relationship.<sup>161</sup> Further, because a lawyer “occupies the highest position of trust and confidence,” there is the potential for a lawyer to exploit the trust of the client.<sup>162</sup> In imposing discipline against lawyers for engaging in sexual relationships with clients, courts have noted that clients may be particularly vulnerable due to their need for legal representation, thus increasing the risks of emotional harm stemming from a lawyer’s exploitation of client trust.<sup>163</sup> Despite these special concerns, courts have been reluctant to

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admissible evidence of “physical symptomatology resulting from the alleged improper conduct”).

<sup>158</sup> See, e.g., *Guiles v. Simser*, 804 N.Y.S.2d 904, 905 (Sup. Ct. 2005) (dismissing IIED claim where lawyer and client engaged in a consensual sexual relationship “characterized by an exchange of many expressions of loving endearments”); *Sanders v. Rosen*, 605 N.Y.S.2d 805, 811–12 (Sup. Ct. 1993) (concluding that attorney who terminated relationship with client had not engaged in extreme and outrageous conduct); *Gaspard v. Beadle*, 36 S.W.3d 229, 238 (Tex. Ct. App. 2001) (concluding that lawyer’s act of billing client after he broke off sexual relationship with her did not amount to extreme and outrageous conduct).

<sup>159</sup> See, e.g., *Quinn v. Walsh*, 732 N.E.2d 330, 338–39 (Mass. App. Ct. 2000) (dismissing former husband’s IIED action against wife’s paramour on the grounds that it was barred by heart balm statute or, alternatively, was not outrageous); *id.* at 339 (noting that majority of courts have concluded that adulterous conduct is not extreme and outrageous for purposes of IIED claim); *M.N. v. D.S.*, 616 N.W.2d 284, 288 (Minn. Ct. App. 2000) (concluding that plaintiff’s IIED claim based on defendant’s fraudulent promise to leave his wife was barred by state statute abolishing “heart-balm” actions); *Sanders*, 605 N.Y.S.2d at 811–12 (noting that New York does not permit IIED claims stemming from marital disputes or the termination of a romantic or sexual relationship).

<sup>160</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8(j) (2007).

<sup>161</sup> *Id.* cmt. 17.

<sup>162</sup> *Id.*

<sup>163</sup> See, e.g., *People v. Beecher*, 224 P.3d 442, 450 (Colo. 2009) (“[M]ost parties to a divorce action are extremely emotionally vulnerable.”); *In re Disciplinary Proceeding Against Halverson*, 998 P.2d 833, 838 n.4 (Wash. 2000) (stating that by engaging in sexual relationships with clients, lawyer was exposing clients “to greater risks of emotional harm”), *abrogated on other grounds by In re Disciplinary Proceedings Against Anschell*, 69 P.3d 844, 853 n.5 (Wash. 2003); see also Okla. Bar Ass’n Legal Ethics

allow IIED claims stemming from consensual relationships between lawyers and clients to reach juries.

In contrast, when a lawyer's sexual advances are unwelcome and are either repeated or involve implied threats to withhold services, courts are more willing to classify the conduct as outrageous. Lawyers have faced significant disciplinary sanctions for engaging in such conduct.<sup>164</sup> However, in addressing IIED claims against attorneys who requested sexual favors in return for legal services, courts have tended not to rely upon the violation of applicable rules of professional conduct in deciding whether a lawyer's actions were outrageous for purposes of an IIED claim. Courts have, however, pointed to the concerns underlying the prohibition on sexual relations with clients in concluding that a lawyer's actions were outrageous. Specifically, courts have pointed to the special relationship of trust between lawyer and client, the lawyers' knowledge of the fact that a client is often in an emotional or vulnerable state resulting from the need for legal representation, and the potential for exploitation of these realities.<sup>165</sup> Ultimately then, it is not the existence of a sexual relationship per se that is extreme and outrageous, "but rather the attorney's attempt to exploit the professional relationship to gain unsolicited sexual favors."<sup>166</sup>

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Comm., Ethics Op. No. 308 (noting that "clients involved in domestic, child custody, criminal, and pro bono cases" are particularly vulnerable to the use of confidential client in an attempt to manipulate the client into a sexual relationship). *See generally In re Berg*, 955 P.2d 1240, 1243 (Kan. 1998) (involving lawyer who had sex with suicidal divorce client).

<sup>164</sup> *See, e.g., In re Piatt*, 951 P.2d 889, 891–92 (Ariz. 1997) (censuring attorney for harassing female clients and threatening to withdraw from representation if clients did not consent); Iowa Supreme Court Attorney Disciplinary Bd. v. McGrath, 713 N.W.2d 682, 703–04 (Iowa 2006) (indefinitely suspending lawyer for engaging in "sex-for-fees arrangement"); Attorney Grievance Comm'n v. Culver, 849 A.2d 423, 451 (Md. 2004) (disbarring attorney for, inter alia, threatening to withdraw from representation unless the client consented to sexual contact); *In re Witherspoon*, 3 A.3d 496, 506–07 (N.J. 2010) (suspending lawyer for one year for attempting to barter legal services for sex); Cleveland Bar Ass'n v. Feneli, 712 N.E.2d 119, 121 (Ohio 1999) (suspending lawyer for eighteen months for attempting to barter legal services for sex); *In re Bergren*, 455 N.W.2d 856, 857 (S.D. 1990) (suspending lawyer for one year for engaging in sexual relationships with clients). *But see In re Witherspoon*, 3 A.3d at 512 (LaVecchia, J., dissenting) ("Any new attorney, fresh from the law school study of ethics and professional responsibility, will wonder how any penalty short of disbarment would be appropriate discipline for respondent's behavior.").

<sup>165</sup> *See, e.g., McDaniel v. Gile*, 230 Cal. App. 3d 363, 373 (Ct. App. 1991); *In re Witherspoon*, 3 A.3d at 506 ("Most clients are under stress and feel vulnerable when consulting with counsel.").

<sup>166</sup> *Sanders v. Rosen*, 605 N.Y.S.2d 805, 808 (Sup. Ct. 1993).

For example, *Buckman-Peirson v. Brannon* involved a client's allegation of repeated sexual harassment by her attorney.<sup>167</sup> On the lawyer's motion for summary judgment, the trial court observed that, on its face, the lawyer's conduct was not beyond all bounds of decency; however, the fact that the defendant was a lawyer "complicated" matters.<sup>168</sup> The court explained that due to the fact that litigation was ongoing, the client "may have felt compelled to put up with many of defendant's shenanigans in order to successfully conclude her litigation."<sup>169</sup> Thus, there was sufficient evidence for a jury to conclude that the defendant's conduct was extreme and outrageous.<sup>170</sup>

### 3. Permitting or Concealing Conflicts of Interest and Other Breaches of Loyalty

Another possible scenario involves the attorney who permits or conceals a conflict of interest or who otherwise breaches the duty of loyalty owed to a client.<sup>171</sup> Loyalty to clients is one of the fundamental values of the legal profession.<sup>172</sup> Thus, there is a potentially strong argument that an intentional betrayal of that duty could, in appropriate circumstances, rise to the level of extreme and outrageous conduct.

#### a. Conflicts of Interest

One component of a lawyer's duty of loyalty is the duty to avoid conflicts of interest.<sup>173</sup> While conflicts may arise from any number of sources, perhaps most common are the situations in which a lawyer represents multiple clients with adverse interests or represents a client in the same or substantially related matter in which the lawyer formerly represented a client.<sup>174</sup> In the former instance, one of the primary concerns is the sense of betrayal and the loss of trust a current client may feel upon learning that his or her lawyer—the client's

<sup>167</sup> 822 N.E.2d 830, 832 (Ohio Ct. App. 2004).

<sup>168</sup> *Id.* at 835.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 836.

<sup>171</sup> See, e.g., *Meyers v. Sudfeld*, No. Civ.A.05-2970, 2006 WL 401855, at \*6–7 (E.D. Pa. Feb. 1, 2006); *Silberg v. Anderson*, 786 P.2d 365, 368 (Cal. 1990); *McMahon v. West*, No. B154225, 2003 WL 22245881, at \*2 (Cal. Ct. App. Oct. 1, 2003); *Sellens v. Am. States Ins. Co.*, No. 90976, 2004 WL 2160770, at \*3 (Kan. Ct. App. Sept. 24, 2004); *Kingsley v. Neumeier*, No. 06-P-732, 2007 WL 2458480, at \*1 (Mass. App. Ct. Aug. 30, 2007); *Goodman v. Kotzen*, 647 A.2d 247, 248 (Pa. Super. Ct. 1994).

<sup>172</sup> See *Saunders v. State*, 10 So. 3d 53, 94 (Ala. Crim. App. 2007) (stating that the duty of loyalty to a client is "fundamental").

<sup>173</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 4 (1986).

<sup>174</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2011); *id.* R. 1.9(a).

“advocate and . . . champion”—is representing another party with interests that are in conflict with those of the client.<sup>175</sup> In the case of former client conflicts, the primary concern is the danger that, in order to adequately represent the current client, the lawyer will use relevant, confidential information provided by the former client to the former client’s disadvantage.<sup>176</sup> Disciplinary authorities sometimes view the fact that a lawyer benefits from a conflict of interest as an aggravating factor in deciding what type of professional discipline is appropriate.<sup>177</sup>

Regardless of the type of conflict at issue, breach of fiduciary duty and legal malpractice claims are fairly common.<sup>178</sup> Where the lawyer in question intentionally conceals a conflict from a client, a fraud claim might be more appropriate.<sup>179</sup> However, at least one court has imported a rule from the law regarding legal malpractice and held that in order to prevail on such a fraud claim, a client must establish that the conflict actually caused the client to lose on the underlying claim.<sup>180</sup> Thus, causation may be a problem for some clients alleging fraud.<sup>181</sup>

Accordingly, an IIED claim might theoretically be an alternative. In the few decided cases involving this issue, however, plaintiffs have had little success convincing courts that intentional concealment of a conflict of interest or continued representation in the face of an ob-

<sup>175</sup> *Grievance Comm. v. Rottner*, 203 A.2d 82, 84 (Conn. 1964).

<sup>176</sup> MODEL RULES OF PROF’L CONDUCT R. 1.9 cmt. 3 (2011) (“Matters are ‘substantially related’ for purposes of this Rule if . . . there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.”).

<sup>177</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 4.31 (1986) (stating that disbarment is generally appropriate when lawyer has a conflict of interest and, *inter alia*, seeks to benefit).

<sup>178</sup> *See, e.g., Kan. City Mall Assocs., Inc. v. McAnany, Van Cleave & Phillips, P.A.*, No. 102,151, 2010 WL 920847, at \*1 (Kan. Ct. App. Mar. 5, 2010) (involving negligence and breach of fiduciary duty claims stemming from alleged conflict of interest); *Trs. of Ohio Carpenters’ Pension Fund v. U.S. Bank Nat’l Ass’n*, 938 N.E.2d 61, 62–63 (Ohio 2010) (same). Although there is potential overlap between these theories, “[p]rofessional negligence implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty and honesty.” *Sherwood v. Danbury Hosp.*, 896 A.2d 777, 797 (Conn. 2006).

<sup>179</sup> *See Kingsley v. Neumeier*, No. 06-P-732, 2007 WL 2458480, at \*1 (Mass. App. Ct. Aug. 30, 2007) (involving misrepresentation claim against attorney based on concealment of conflict of interest).

<sup>180</sup> *Id.* at \*1–2.

<sup>181</sup> *But see Meyers v. Sudfeld*, No. Civ.A.05-2970, 2006 WL 401855, at \*7 (E.D. Pa. Feb. 1, 2006) (concluding plaintiff who alleged fraudulent concealment of a conflict on the part of attorney had stated a claim for fraud).

vicious conflict amounts to extreme and outrageous conduct.<sup>182</sup> For example, in the New York case of *Sherbak v. Doughty*, an attorney allegedly represented both sides in a real estate transaction and then took actions contrary to the plaintiff's interests, including instituting a lawsuit against him.<sup>183</sup> The court—in one sentence and without explanation—concluded that although the plaintiff may have stated a claim for malpractice, the attorney's actions did not, as a matter of law, rise to the level of extreme and outrageous conduct.<sup>184</sup>

An exception to the trend away from finding liability or explaining conclusions regarding the outrageousness of the defendant's action is the Kentucky case of *Goebel v. Arnett*.<sup>185</sup> In *Goebel*, the plaintiff contacted an adoption agency about putting her expected child up for adoption.<sup>186</sup> The agency referred her to a lawyer, Arnett.<sup>187</sup> However, the agency failed to inform the plaintiff that Arnett was also the sole shareholder of the agency.<sup>188</sup> Arnett informed the plaintiff that a couple wished to adopt the child and would pay for the plaintiff's legal and medical expenses.<sup>189</sup> However, Arnett failed to inform the plaintiff that the agency would also be receiving a separate fee.<sup>190</sup> Finally, when the child's father challenged custody, Arnett persuaded the plaintiff to perjure herself.<sup>191</sup> In concluding that the plaintiff's IIED claim should survive summary judgment, the court opined that Arnett's conduct "fell outside the bounds of common decency and most assuredly constituted allegations of serious violations of the Code of Professional Conduct governing all attorneys."<sup>192</sup> Based on the existence of an attorney-client relationship, the plaintiff "was entitled at all times to rely on Arnett's duty of loyalty and to expect can-

<sup>182</sup> See *id.* at \*6 (dismissing claim because "a cause of action for outrageous conduct does not exist under Pennsylvania law"); *Amstead v. McFarland*, 650 S.E.2d 737, 741–42 (Ga. Ct. App. 2007) (concluding that lawyer's failure to advise client about potential conflicts posed by his representation of both client and her ex-husband was not extreme and outrageous); *Kingsley*, 2007 WL 2458480, at \*2 ("[Plaintiff] failed to claim or provide evidence that defendant's conduct was extreme and outrageous.").

<sup>183</sup> 420 N.Y.S.2d 724, 725 (App. Div. 1979).

<sup>184</sup> *Id.*

<sup>185</sup> 259 S.W.3d 489 (Ky. Ct. App. 2007).

<sup>186</sup> *Id.* at 490.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Goebel*, S.W.3d at 491.

<sup>192</sup> *Id.* at 493.



did advice tailored to promote her best interests.”<sup>193</sup> Instead, Arnett deceived and took advantage of the plaintiff’s known vulnerable condition.<sup>194</sup> Thus, the plaintiff’s claim survived summary judgment.<sup>195</sup>

b. Other Breaches of Loyalty

Decisional law involving IIED claims premised upon other breaches of loyalty to clients is decidedly more mixed. As is the case more generally, lawyers have tended to prevail on the question of extreme and outrageous conduct where their actions allegedly represent a betrayal of trust.<sup>196</sup> In some instances, the betrayals have been quite serious.<sup>197</sup> For instance, in *Green v. Leibowitz*, the lawyer affirmatively lied to the client about the status and filing of the client’s claim for disability benefits.<sup>198</sup> A New York appellate court concluded that, despite the lawyer’s fiduciary duty to the client and despite the fact that the client had stated a claim for fraud, the lawyer’s actions, as a matter of law, were not extreme and outrageous.<sup>199</sup> As is common when courts find that a lawyer’s conduct does not qualify as extreme and outrageous, the court reached its conclusion merely by referencing the *Restatement’s* “beyond all bounds of decency” standard and summarily stating that the lawyer’s conduct did not satisfy this standard.<sup>200</sup>

Yet, in other instances, clients have enjoyed more success on their IIED claims based on similar breaches. In *Singleton v. Foreman*, the lawyer entered into an unethical contingent fee agreement with his client in a divorce proceeding.<sup>201</sup> When the client expressed a desire to her attorney to settle her case, the attorney “exploded into a

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 494.

<sup>196</sup> See, e.g., *Jones v. Law Firm of Hill & Ponton*, 223 F. Supp. 2d 1284, 1290–91 (M.D. Fla. 2002) (concluding that lawyer’s improper withdrawal from representation and failure to provide imprisoned client with notice of withdrawal, deliver necessary papers, or allow client time to employ another lawyer was not extreme and outrageous); *Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman*, 978 P.2d 922, 932 (Kan. 1999) (failing to keep client “apprised of the progress of his case and in failing to notify him of the settlement hearing was a serious breach of fiduciary duty” but did not rise to level of extreme and outrageous conduct); *Sawabani v. Desenberg*, 372 N.W.2d 559, 565 (Mich. Ct. App. 1985) (publishing allegedly defamatory statements about client to client’s insurer was not extreme and outrageous).

<sup>197</sup> See, e.g., *Green v. Leibowitz*, 500 N.Y.S.2d 146, 148 (App. Div. 1979).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 148–49.

<sup>200</sup> *Id.* at 148; see *supra* notes 28–30 and accompanying text.

<sup>201</sup> 435 F.2d 962, 969 (5th Cir. 1970).

torrent of abuse, refused to allow her to settle, and threatened to ruin both Mrs. Singleton and her husband.”<sup>202</sup> Pointing to the lawyer’s ethical responsibility to not allow his personal feelings to impact his representation of the client, the court concluded that the client had stated an IIED claim.<sup>203</sup> In a Mississippi case, a client won a substantial jury award based on the fact that his lawyer had engaged in an adulterous affair with his wife.<sup>204</sup>

#### 4. Disclosure of Confidential Information

Another situation in which clients have had at least some success in pursuing IIED claims against their attorneys has been when the attorneys have wrongfully disclosed confidential client information.<sup>205</sup> In *Herbin v. Hoeffel*, the plaintiff brought an IIED claim against his attorney, alleging that the attorney had breached his duty of confidentiality by disclosing information in order to assist the prosecution.<sup>206</sup> The D.C. Court of Appeals referred to a lawyer’s duty to maintain client confidences as one of “*uberrima fides*” and noted that the duty applied not just to information protected by the attorney-client privilege but to unprivileged secrets as well.<sup>207</sup> Citing a lawyer’s ethical duties, the court stated that “[a]ctions which violate public policy may constitute outrageous conduct sufficient to state a cause of action for infliction of emotional distress.”<sup>208</sup> Ultimately, the court concluded that “[i]n light of the high value we place on a lawyer’s duty of loyalty and to preserve client confidences,” the attorney’s actions, if proven, could amount to extreme and outrageous conduct for purposes of an IIED claim.<sup>209</sup>

#### B. Liability to Non-Clients

Clients have had mixed success with their IIED claims against lawyers. Non-clients face an even more formidable challenge. A lawyer and a non-client typically do not have a relationship of trust. Similarly, one of the well-established rules of tort law as applied to law-

<sup>202</sup> *Id.* at 970 (internal quotations omitted).

<sup>203</sup> *Id.* at 970–71.

<sup>204</sup> *Pierce v. Cook*, 992 So. 2d 612, 615 (Miss. 2008).

<sup>205</sup> *See, e.g., Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265–67 (Tex. Ct. App. 1991) (reversing summary judgment in favor of lawyers on client’s IIED and breach of fiduciary duty claims based on lawyers’ disclosure of client information to prosecutors).

<sup>206</sup> 806 A.2d 186, 197 (D.C. 2002).

<sup>207</sup> *Id.* at 197.

<sup>208</sup> *Id.* (quoting *Howard Univ. v. Best*, 484 A.2d 958, 986 (D.C. 1984)).

<sup>209</sup> *Id.*

yers is that lawyers owe no duty of care to non-clients.<sup>210</sup> Given these realities, it may be especially difficult for a non-client to establish that a lawyer's conduct was extreme and outrageous for purposes of an IIED claim.<sup>211</sup> The burden is only heightened when the lawyer and non-client are on opposite sides of a matter and therefore have an adversarial relationship. But as is the case more generally with IIED, it is sometimes difficult to predict the outcomes in these cases.

# 1. Litigation-Related Misconduct and Incivility

## a. Litigation-Related Misconduct

An opposing party's tort claims against a lawyer based on the lawyer's alleged misconduct during the litigation process raise concerns about the chilling effect on zealous advocacy on behalf of a client.<sup>212</sup> Perhaps for this reason, opposing parties have had little success against lawyers on their IIED claims based on litigation-related behavior. For example, it is nearly black-letter law at this point that the filing of a legal action is not, by itself, extreme and outrageous conduct.<sup>213</sup> Even if the filing of a legal action could qualify, the absolute litigation privilege might nonetheless shield an attorney from liability.<sup>214</sup>

<sup>210</sup> Estate of Becker v. Callahan, 96 P.3d 623, 628 (Idaho 2004).

<sup>211</sup> See Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 697 S.E.2d 551, 555 (S.C. 2010) (affirming summary judgment in attorney's favor on plaintiff's IIED claim due to lack of attorney-client relationship).

<sup>212</sup> Young v. Allstate Ins. Co., 198 P.3d 666, 682–83 (Haw. 2008).

<sup>213</sup> See, e.g., Tappen v. Ager, 599 F.2d 376, 382 (10th Cir. 1979) (affirming dismissal on IIED claim stemming from, inter alia, the filing of a baseless lawsuit resulting from attorney's inadequate investigation); Savell, Williams, Cox & Angel v. Coddington, 335 S.E.2d 436, 437 (Ga. Ct. App. 1985) ("The behavior attributed to the [defendants] in this case cannot reasonably be characterized as humiliating, insulting, or terrifying, being confined, as it was, to the preparation and filing of legal pleadings.") (citations omitted); see also Cantu v. Resolution Trust Corp., 6 Cal. Rptr. 2d 151, 169 (Ct. App. 1992) (concluding that defendant's filing of interpleader action did not amount to extreme and outrageous conduct); Rolleston v. Huie, 400 S.E.2d 349, 351 (Ga. Ct. App. 1990) ("[T]he mere filing of a lawsuit is not the type of humiliating, insulting or terrifying conduct which will give rise to a claim for the intentional infliction of emotional distress."); Beecy v. Pucciarelli, 441 N.E.2d 1035, 1040 (Mass. 1982) (concluding that attorney did not engage in extreme and outrageous conduct by commencing collection action against plaintiffs on behalf of client); Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 32 (Utah 2003) ("An allegation of improper filing of a lawsuit or the use of legal process against an individual is not redressable by a cause of action for intentional infliction of emotional distress.").

<sup>214</sup> See Bennett, 70 P.3d at 32.

Despite plaintiffs' general lack of success in this area, it is certainly conceivable that filing a complaint or motion or threatening to do so could rise to the level of extreme and outrageous conduct. When, for example, a demand letter is accompanied by extortionate threats, an IIED claim might be a possibility.<sup>215</sup> IIED plaintiffs, however, have had little success establishing that a threat made during the course of representation satisfied the "extreme and outrageous" threshold.<sup>216</sup>

Engaging in vexatious or harassing litigation tactics might also possibly rise to the level of extreme and outrageous conduct. Lawyers are, of course, ethically prohibited from asserting frivolous claims.<sup>217</sup> They are also prohibited from engaging in actions that "have no substantial purpose other than to embarrass, delay, or burden a third person."<sup>218</sup> Lawyers are also ethically prohibited from engaging in dishonest behavior during the litigation process, including destroying evidence and knowingly introducing perjured testimony.<sup>219</sup>

But, as a whole, IIED plaintiffs have had little success on claims involving possibly overly zealous representation. Although there is sometimes the same tendency in these cases for a court to simply recite the *Restatement's* "beyond all bounds of decency" language and include boilerplate citation to precedent, courts are more likely in this context to explain their conclusions with reference to the concern over chilling legitimate advocacy.<sup>220</sup> For example, in *East River*

<sup>215</sup> See *Flatley v. Mauro*, 139 P.3d 2, 5 (Cal. 2006) (involving allegations of civil extortion, intentional infliction of emotional distress, and wrongful interference with economic advantage stemming from demand letter).

<sup>216</sup> See, e.g., *Ulmer v. Frisard*, 694 So. 2d 1046, 1049 (La. Ct. App. 1997) (concluding that lawyer's threat to force opposing party into bankruptcy if he did not accept settlement offer was not extreme and outrageous); see also *Keller v. Ray, Quinney & Nebeker*, 896 F. Supp. 1563, 1573 (D. Utah 1995) (concluding that attorney's threat to put plaintiff out of business, "take everything he owned," and "follow Plaintiff to his grave" unless plaintiff dropped matter against defendant was not extreme and outrageous). Instigating criminal proceedings against a party during a civil proceeding stands on somewhat different footing and is discussed in greater detail *infra* Part IV.B.3.a.

<sup>217</sup> MODEL RULES OF PROF'L CONDUCT R. 3.1 (2010).

<sup>218</sup> *Id.* R. 4.4(a).

<sup>219</sup> *Id.* R. 4.1; *id.* R. 8.4(c); *id.* R. 3.4(a). See generally *Kachig v. Boothe*, 99 Cal. Rptr. 393, 402–03 (Ct. App. 1971) (involving IIED claim based upon introduction of false evidence); *Mongardi v. Kiely*, No. 015367, 2002 WL 31379946, at \*2 (Mass. Dist. Ct. Sept. 18, 2002) (involving IIED claim based upon perjured testimony); *Sharonville v. Am. Emp'r Ins. Co.*, 846 N.E.2d 833, 835 (Ohio 2006) (involving claims of spoliation of evidence and IIED based upon alleged cover-up of evidence by police officers).

<sup>220</sup> See, e.g., *Devlin v. Fishman*, 224 Cal. Rptr. 6, 10 (Ct. App. 1986) (concluding that filing a lawsuit known to be vulnerable to a statute of limitations defense was not

*Savings Bank v. Steele*, a Georgia court held as a matter of law that a lawyer who accused the plaintiff of perjury during cross-examination and threatened to bring perjury charges against the plaintiff did not engage in extreme and outrageous conduct, despite the fact that the statements allegedly led the plaintiff to suffer a heart attack.<sup>221</sup> While referring to the lawyer's "severe cross-examination" as "discourteous and unprofessional," the court was concerned about the impact that subjecting the lawyer to tort liability would have on lawyers' willingness to engage in rigorous cross-examination:

Litigation and, more particularly, cross-examination are by design rough-and-tumble, fraught with stress and tension. . . . Cross-examination is the cornerstone of our trial system. Through probing and challenging questioning by a zealous advocate, the jury and the judge are aided in evaluating the witness, and ultimately perceiving the truth. While it is the duty of the trial court to protect a witness from abuse, the widest possible latitude must be given to the advocate in order to ensure a thorough and sifting cross-examination.<sup>222</sup>

Courts have likewise been reluctant to classify delaying or misleading behavior during the discovery process as extreme and outrageous.<sup>223</sup>

Ordinarily, the fact that individuals are on opposite sides of litigation negates any possibility of a relationship of trust for purposes of tort law. For example, a litigant generally has no cause of action for negligent misrepresentation against the attorney for the other side

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extreme and outrageous); *Heim v. Cal. Fed. Bank*, 828 A.2d 129, 141 (Conn. App. Ct. 2003) (concluding that attorney who allegedly engaged in a variety of misconduct, including withholding documents and refusing to withdraw a motion for a deficiency judgment after it had been dismissed by the court, did not engage in extreme and outrageous conduct); *Wong v. Panis*, 772 P.2d 695, 700 (Haw. Ct. App. 1986) (concluding attorney's acts of filing counterclaims and submitting allegedly abusive interrogatories on behalf of clients was not extreme and outrageous); *Preis v. Durio*, 649 So. 2d 600, 603 (La. Ct. App. 1994) (granting lawyer's motion to dismiss IIED claim based on lawyer's discussion with children of father's adulterous behavior during divorce proceeding); *see also* *Vasile v. Dean Witter Reynolds, Inc.*, 20 F. Supp. 465, 496 (E.D.N.Y. 1998), *aff'd*, 205 F.3d 1327 (2d Cir. 2000) (noting that "[a]dvocating on behalf of one's client" does not constitute extreme and outrageous conduct). *But see* *Green v. Fischbein, Olivieri, Rozenholz & Badillo*, 522 N.Y.S.2d 529, 531 (App. Div. 1987) (denying summary judgment to lawyer who, on behalf of client, "engaged in a concerted course of conduct designed to harass, intimidate and interfere with plaintiff's tenancy," including filing numerous meritless eviction proceedings).

<sup>221</sup> 311 S.E.2d 189, 190 (Ga. Ct. App. 1983).

<sup>222</sup> *Id.* at 191. *See generally* *Nestlerode v. Fed. Ins. Co.*, 414 N.Y.S.2d 398, 400 (App. Div. 1979) (holding that lawyer who made intimidating remarks to opposing party during recess at trial did not engage in extreme and outrageous conduct).

<sup>223</sup> *See, e.g.,* *Cunningham v. Jensen*, No. 29770, 2004 WL 2034988, at \*6 (Idaho Ct. App. Sept. 14, 2004).

due to the absence of any duty of care on the part of the attorney.<sup>224</sup> But, an exception exists when the lawyer invites reliance and assumes a duty toward the other litigant.<sup>225</sup> Similarly, a plaintiff pursuing an IIED claim against an opposing attorney for litigation-related misconduct may have difficulty establishing that the opposing attorney's conduct was extreme and outrageous due to the fact that the attorney did not violate a relationship of trust—one of the hallmarks of extreme and outrageous conduct.<sup>226</sup> A finding of extreme and outrageous conduct under such circumstances is not, however, completely out of the circumstances.

In *Silberg v. Anderson*, for example, a husband brought a variety of claims, including IIED, against his former wife's divorce attorney, Anderson.<sup>227</sup> As part of the dissolution proceedings, the parties agreed to psychological evaluation and counseling.<sup>228</sup> With the husband's approval, Anderson recommended a psychologist named Adler.<sup>229</sup> However, Anderson allegedly failed to inform the husband that she had a romantic relationship with Adler.<sup>230</sup> When Adler's evaluation of the husband turned out to be less positive than the husband would have liked, thus allegedly resulting in less advantageous visitation rights, the husband sued Anderson for IIED.<sup>231</sup> The trial court sustained Anderson's demurrer, but on appeal, the appellate court gave the husband leave to amend his IIED claim to include an allegation of deception.<sup>232</sup>

*Silberg* illustrates that the fact that the plaintiff and defendant are on opposite sides of litigation does not necessarily prevent the plaintiff from proceeding on an IIED claim. In *Silberg*, the appellate court conceded that there was no relationship of trust between the plaintiff and the defendant.<sup>233</sup> But, the court also observed that, as alleged, Anderson had abused her position "as an officer of the court" to the detriment of Silberg, thus implying that Anderson's actions were

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<sup>224</sup> Long, *supra* note 93, at 434.

<sup>225</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2) (2000).

<sup>226</sup> See *supra* note 32 and accompanying text.

<sup>227</sup> 786 P.2d 365, 367–68 (Cal. 1990).

<sup>228</sup> *Id.* at 367.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 367–68.

<sup>231</sup> *Id.*

<sup>232</sup> *Silberg v. Anderson*, 249 Cal. Rptr. 697, 701–02 (Ct. App. 1988), *overruled by* 786 P.2d 365 (Cal. 1990).

<sup>233</sup> *Id.* at 702 (noting lawyers owe no duty of care to opposing parties).

more egregious by virtue of her status as a lawyer.<sup>234</sup> In addition, as the underlying matter involved the dissolution of marriage and child custody issues, Anderson, as a lawyer, had knowledge of Silberg's particular susceptibility to emotional distress.<sup>235</sup>

Nonetheless, *Silberg* also illustrates the difficulty IIED plaintiffs face when attempting to hold an opposing attorney liable for litigation misconduct. On appeal, the California Supreme Court concluded that the litigator's absolute privilege for statements made in the course of litigation applied and shielded Anderson from liability.<sup>236</sup> According to the court, the privilege is "the backbone to an effective and smoothly operating judicial system" and is essential to preserving the ability of lawyers to zealously advocate on behalf of their clients.<sup>237</sup> Courts have applied this privilege with respect to other forms of litigation-related conduct, including the filing of a lawsuit and the making of defamatory statements in connection with litigation.<sup>238</sup> In other instances, courts have concluded that a lawyer's actions on behalf of a client in connection with the litigation process are privileged more generally, without specific reference to the litigator's privilege.<sup>239</sup> Thus, even where a lawyer's conduct toward an opposing party is so egregious that it satisfies the "extreme and outrageous" threshold, the absolute litigator's privilege may prevent recovery.

#### b. Incivility

One of the more common refrains in the legal profession (and society more generally) is that there has been a steady decline in civil-

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*; see *supra* note 163 and accompanying text (discussing litigants' particular susceptibility to emotional distress in such cases).

<sup>236</sup> *Silberg*, 786 P.2d at 374.

<sup>237</sup> *Id.* at 370.

<sup>238</sup> *E.g.*, *Rose v. Wissinger*, 439 A.2d 1193, 1199 (Pa. Super. Ct. 1982); *Bennett v. Jones, Waldo, Holbrook & McDonough*, 70 P.3d 17, 32 (Utah 2003); see also *Chauncey v. Niems*, 227 Cal. Rptr. 718, 727 (Ct. App. 1986) (concluding that defendant's act of filing lengthy interrogatories knowing they alleged false and fraudulent facts to mislead opposing part and the court was privileged); *Sullivan v. Birmingham*, 416 N.E.2d 528, 534 (Mass. App. Ct. 1981) (concluding that lawyer's inclusion of an *ad damnum* clause in complaint in violation of state statute was privileged); *Rabinowitz v. Wahrenberger*, 966 A.2d 1091, 1097–98 (N.J. Super. Ct. App. Div. 2009) (concluding that privilege applied to lawyer's rigorous questioning of father during a deposition in a case involving the death of father's child); *Abrams v. Pecile*, 924 N.Y.S.2d 51, 53 (App. Div. 2011) (concluding that lawyer's refusal to return allegedly stolen photograph in an attempt to force plaintiff to settle underlying case was privileged).

<sup>239</sup> See *Rohda v. Franklin Life Ins. Co.*, 689 F. Supp. 1034, 1044 (D. Colo. 1988) (concluding lawyer was privileged to move for new trial on behalf of client).

ity in recent decades.<sup>240</sup> Tales and disciplinary decisions involving unprofessional behavior on the part of lawyers during the litigation process abound.<sup>241</sup> The legal profession has attempted to address this perceived rise in incivility in various ways, ranging from the promotion of inns of court to the promulgation of civility and professionalism codes.<sup>242</sup> Another possibility for a party aggrieved by a lawyer's rude and uncivil behavior might be an IIED claim.<sup>243</sup>

An attorney's discourteous behavior might implicate a number of disciplinary rules. For instance, lawyers have faced discipline for engaging in conduct intended to disrupt a tribunal.<sup>244</sup> Discipline is also possible for the attorney who engages in behavior having no substantial purpose other than to harass another.<sup>245</sup>

A party seeking to bring such a claim, however, may run face-first into the well-established rule of thumb that liability does not exist under an IIED theory for mere insults and uncivil behavior.<sup>246</sup> One author has suggested that the courts' restrictive view of the IIED tort developed because "the courts wanted to protect themselves from being overwhelmed with attempts to turn mere bad manners or petty incivilities into court cases."<sup>247</sup> Add to this the fact that many courts view litigation as a "rough and tumble" process in which tempers often run high, and non-parties face a formidable task in attempting to establish that a lawyer's incivility amounts to extreme and outrageous

<sup>240</sup> See Harris, *supra* note 109, at 568–70 (discussing decline of civility in the practice of law).

<sup>241</sup> See, e.g., *In re Disciplinary Proceedings Against Coe*, 665 N.W.2d 849, 857 (Wis. 2003) (imposing discipline for incivility); Debra Cassens Weiss, *Lawyers Sanctioned for E-Mail Insults, Including 'Scum Sucking Loser' Comment*, A.B.A. J. (Jan. 3, 2011, 6:00 AM CST), [http://www.abajournal.com/news/article/lawyers\\_sanctioned\\_for\\_email\\_insults\\_including\\_scum\\_sucking\\_loser\\_comment](http://www.abajournal.com/news/article/lawyers_sanctioned_for_email_insults_including_scum_sucking_loser_comment) (detailing discipline of two lawyers "who called each other a 'retard' and 'scum sucking loser' in escalating e-mail insults").

<sup>242</sup> Elliot L. Bien, *Toward a Community of Professionalism*, 3 J. APP. PRAC. & PROCESS 475, 478 (2001); Adam Owen Glist, Note, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 FORDHAM L. REV 757, 757–58 (2000).

<sup>243</sup> See *Hannes v. Pechner*, No. C042624, 2004 WL 937985, at \*1 (Cal. Ct. App. Apr. 30, 2004) (involving IIED claim based on altercation in courthouse involving opposing attorneys).

<sup>244</sup> See *In re Turner*, 631 N.E.2d 918 (Ind. 1994) (involving lawyer who told a judge that the judge ran a "Mickey Mouse court" and walked out of court); MODEL RULES OF PROF'L CONDUCT R. 3.5(d) (2011) (prohibiting such conduct).

<sup>245</sup> See *In re Williams*, 414 N.W.2d 394, 395 (Minn. 1987) (publicly reprimanding lawyer for using means having no substantial purpose other than to embarrass, delay, or burden a third person, including posing questions designed to degrade witness).

<sup>246</sup> See *supra* note 29 and accompanying text.

<sup>247</sup> Andrew L. Merritt, *Damages for Emotional Distress in Fraud Cases: Dignitary Torts in a Commercial Society*, 42 VAND. L. REV. 1, 20 (1989).



conduct. Thus, name-calling might potentially lead to professional discipline,<sup>248</sup> but it is unlikely to amount to extreme and outrageous conduct for purposes of an IIED claim.<sup>249</sup>

For example, in *Haller v. Phillips*, a lawyer representing a complainant in a criminal investigation allegedly telephoned the plaintiff at home and called him a “son of a bitch.”<sup>250</sup> An Ohio appellate court observed that although the lawyer’s behavior was “rude and abusive,” it was not “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.”<sup>251</sup> Similarly, in *Nestlerode v. Federal Insurance Co.*, a lawyer made several statements to the opposing party during a recess at trial that, in the court’s words, “were unfortunate and better left unsaid.”<sup>252</sup> The “unfortunate” comments included the lawyer questioning whether the plaintiff realized how much he had to lose in the lawsuit and that the lawyer was “going to go all the way.”<sup>253</sup> While the lawyer’s statements were certainly rude, vaguely threatening, and probably in violation of the ethical rule prohibiting communication with a represented party, they were not so extreme as to be “utterly intolerable in a civilized community.”<sup>254</sup>

## 2. Debt Collection

Overly-aggressive debt collection attempts have generated any number of legal claims.<sup>255</sup> Consumer protection statutes may provide a remedy for individuals who have been subject to such attempts.<sup>256</sup> Lawyers are not immune to such claims. In 2010, for example, the Supreme Court held that the Fair Debt Collection Practices Act,

<sup>248</sup> See *Lawyer Disciplinary Bd. v. Turgeon*, 557 S.E.2d 235, 239 (W. Va. 2000) (involving lawyer who referred to other lawyer as a “coke dealer” in front of jury); see also *Have a Nice Day*, LEGAL PROF. BLOG (Sept. 24, 2010), [http://lawprofessors.typepad.com/legal\\_profession/2010/09/have-a-nice-day.html](http://lawprofessors.typepad.com/legal_profession/2010/09/have-a-nice-day.html) (discussing disciplinary charges brought against an attorney who referred to another attorney as a “piece of shit”).

<sup>249</sup> See *Keller v. Ray, Quinney & Nebeker*, 896 F. Supp. 1563, 1573 (D. Utah 1995) (concluding that lawyer’s statement that he would crush opposing party “like a peanut” did not rise to level of extreme and outrageous conduct); *Ulmer v. Frisard*, 694 So. 2d 1046, 1049 (La. Ct. App. 1997) (concluding that lawyer’s threat to “clean [plaintiff’s] clock” did not rise to level of extreme and outrageous conduct).

<sup>250</sup> 591 N.E.2d 305, 306 (Ohio Ct. App. 1990).

<sup>251</sup> *Id.* at 307.

<sup>252</sup> 414 N.Y.S.2d 398, 400 (App. Div. 1979).

<sup>253</sup> *Id.* at 399.

<sup>254</sup> *Id.* at 400.

<sup>255</sup> See, e.g., *Vanderbilt Mortg. & Finance, Inc. v. Flores*, 746 F. Supp. 2d 819 (S.D. Tex. 2010) (involving fraud and RICO claims).

<sup>256</sup> See The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (2006).

which is designed to eliminate abusive debt collection practices, does not provide debt collectors and their attorneys with a good faith defense to liability for misinterpretations of the law.<sup>257</sup>

IIED claims remain another possibility. The *Restatement (Second) of Torts* cites debt-collection attempts as a special situation in which IIED liability might arise.<sup>258</sup> Even prior to the *Restatement's* recognition of the IIED tort, several courts had allowed for recovery for purely emotional harms stemming from abusive collection tactics.<sup>259</sup> On occasion, lawyers have faced IIED claims stemming from their attempts to collect a debt on behalf of a client and from a client.

a. IIED Claims Stemming from Attempts to Collect a Debt on Behalf of a Client

Lawyers, like other defendants, may potentially face liability for attempting to collect a debt in a harassing or otherwise extreme manner.<sup>260</sup> A comment to section 46 of the *Restatement (Second) of Torts* provides that an individual does not face liability for asserting a legal right in a permissible way.<sup>261</sup> This is true even where the defendant knows that emotional distress may occur.<sup>262</sup> But, where the attempt to collect debt involves harassment or other impermissible means, liability remains a possibility.<sup>263</sup>

<sup>257</sup> *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1624 (2010).

<sup>258</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965); see also Fraker, *supra* note 7, at 990 (“One of the most prominent lines of cases in the evolution of IIED arose from . . . the pressure tactics of humiliating debtors into repayment . . .”).

<sup>259</sup> Fraker, *supra* note 7, at 991.

<sup>260</sup> See, e.g., *Perk v. Worden*, 475 F. Supp. 2d 565, 570 (E.D. Va. 2007) (concluding that plaintiff stated a claim where lawyer allegedly used abusive language and lied to plaintiff in order to obtain a default judgment); *Carney v. Rotkin, Schmerin & McIntyre*, 206 Cal. App. 3d 1513, 1527 (Ct. App. 1988) (holding that plaintiff had stated a cause of action based on law firm’s attempts to collect a debt on behalf of client, including falsely telling plaintiff that there was a warrant out for her arrest); *Champlin v. Wash. Trust Co.*, 478 A.2d 985, 990 (R.I. 1984) (concluding that lawyer did not engage in extreme and outrageous conduct in the absence of any finding of abusive or threatening conduct).

<sup>261</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1977) (“The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.”); see also *Nelson v. Ford Motor Credit Co.*, 621 S.W.2d 573, 575–76 (Tenn. Ct. App. 1981) (concluding that attempts to collect a debt, even in a rude and insolent manner, are not extreme and outrageous conduct).

<sup>262</sup> *Champlin*, 478 A.2d at 989.

<sup>263</sup> See RESTATEMENT (SECOND) OF TORTS § 46 cmt. g, illus. 7 (1977) (providing an example of an overly-aggressive form and actionable form of debt collection); see also *MacDermid v. Discover Fin. Servs.*, 488 F.3d 721, 729 (6th Cir. 2007) (concluding

The few cases permitting plaintiffs to proceed on their IIED claims stemming from a lawyer's attempts to collect a debt on behalf of a client have typically involved some combination of threats, falsehoods, and misuse of the judicial system. For example, a California appellate court held in *Carney v. Rotkin, Schmerin & McIntyre* that a plaintiff had stated a claim when a law firm, in an attempt to collect a debt on behalf of client, falsely told a seventy-four-year-old woman that there was a bench warrant out for her arrest and that the firm would not recall the warrant until the debt was paid in full.<sup>264</sup> In *Perk v. Worden*, a lawyer, seeking to collect a debt on behalf of a client, "blatantly lied" to the plaintiff so that she would not appear for a court hearing and he could obtain a default judgment against her.<sup>265</sup> In addition, the lawyer knowingly filed state actions against her in an incorrect venue and was verbally abusive to her on the telephone.<sup>266</sup> According to the court, the plaintiff stated a claim for extreme and outrageous conduct.<sup>267</sup> Although both decisions are probably correct, neither offers much in the way of explanation as to why the conduct of the respective lawyers could be considered extreme and outrageous.

b. IIED Claims Stemming from Attempts to Collect a Debt from a Client

Lawyers have also faced IIED claims stemming from their aggressive attempts to collect a fee from a former client.<sup>268</sup> These cases involve the same complexities and uncertainties as the cases described above, but with one additional wrinkle: the recipient of the threat in these cases is a former client.

While the lawyer-client relationship may technically be over, there remains at least some element of a special relationship in the case of a lawyer and a former client. Although the same level of trust

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that husband stated a claim for IIED based upon defendant's attempts to collect a debt that resulted in wife's suicide); *Bennett v. City Nat'l Bank & Trust Con.*, 549 P.2d 393, 397 (Okla. Civ. App. 1976) (concluding plaintiff stated an IIED claim based upon bank employee's abusive telephone calls attempting to collect a debt).

<sup>264</sup> 206 Cal. App. 3d 1513, 1518–19 (Ct. App. 1988).

<sup>265</sup> 475 F. Supp. 2d 565, 570 (E.D. Va. 2007).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> See, e.g., *Moore v. Greene*, 431 F.2d 584, 589 (9th Cir. 1970) (applying California law); *Cummings v. Pinder*, 574 A.2d 843, 845 (Del. 1990); *Amstead v. McFarland*, 650 S.E.2d 737, 743 (Ga. Ct. App. 2007); see also *Miller v. Stonehenge/Fasa-Texas, JDC, L.P.*, 993 F. Supp. 461 (N.D. Tex. 1998) (involving IIED claim against attorney based on attorney's invasion of privacy of debtor's possessions).

may no longer exist, a client does not become a stranger—either as a practical or a legal matter—when the lawyer-client relationship concludes. For example, a lawyer’s duty of confidentiality remains even after the termination of the relationship.<sup>269</sup> In addition, a lawyer is ethically prohibited from representing a new client in a matter that is the same or substantially related to the matter in which the lawyer formerly represented a client.<sup>270</sup> The existence of special ethical obligations regarding former clients perhaps explains why courts have been willing to allow IIED claims to proceed where they might not in other instances.

For example, in an attempt to collect legal fees, the attorney in *Moore v. Greene*, a decision from the Ninth Circuit Court of Appeals, subjected a former client to “a barrage of offensive and insulting remarks unbecoming a sane human being” in a series of letters.<sup>271</sup> Among other remarks, the attorney warned that he would “flay” the client and advised the client that if he was “too damn dumb to understand what is said to you plainly, get smart.”<sup>272</sup> The court concluded that the statements satisfied the extreme and outrageous conduct element of the client’s IIED claim, despite the general rule that insults and threats do not rise to that level.<sup>273</sup> Although there is little explanation from the court’s opinion as to why the insults and threats in this case rose to that level, one can perhaps infer that the fact that the insults and threats were directed at a former client may have influenced the decision.

As a general rule, an attorney is not liable under an IIED theory for resorting to litigation in order to retain a fee, even where the fee agreement is determined to be unenforceable.<sup>274</sup> But, prolonged abuse of the legal process against a former client through the use of vindictive and frivolous litigation has been found in at least one instance to rise to the level of extreme and outrageous conduct if the

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<sup>269</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 18 (2011).

<sup>270</sup> *Id.* R. 1.9(a).

<sup>271</sup> *Moore*, 431 F.2d at 591.

<sup>272</sup> *Id.* at 591 n.4.

<sup>273</sup> *Id.* at 591.

<sup>274</sup> See *Margrabe v. Sexter & Warmflash, P.C.*, No. 07-CV-2798, 2009 WL 361830, at \*9 (S.D.N.Y. Feb. 11, 2009) (filing defamation action against client, allegedly in an attempt to pressure client to drop a counterclaim against lawyer in a fee dispute, did not rise to level of extreme and outrageous conduct); *Amstead*, 650 S.E.2d at 743 (concluding that lawyer’s resort to litigation to retain his attorney’s fee did not amount to extreme and outrageous conduct).

abuse is prolonged.<sup>275</sup> The fact that the attorney's "vindictive, obstreperous, and dilatory tactics" were directed toward a former client seemed to influence the court's view as to the reprehensibility of the lawyer's actions.<sup>276</sup>

*Cummings v. Pinder*, a Delaware case, illustrates the sometimes blurry line between a current client and a former client.<sup>277</sup> The lawyer in *Cummings* helped his client obtain a settlement in the underlying matter.<sup>278</sup> As part of a fee dispute, the lawyer caused a stop-payment order on a check issued by the other side in the underlying matter and endorsed to the client.<sup>279</sup> As a result, the client overdrew her bank account and incurred bank charges.<sup>280</sup> The client then sued on an IIED theory.<sup>281</sup> Although an attorney-client relationship probably still existed as a technical matter at the time of the lawyer's actions, the lawyer had essentially performed the duties for which he had been hired. The Delaware Supreme Court concluded that the jury was justified in concluding these actions were extreme and outrageous in light of the fact that they arose from "a relationship of 'trust and confidence.'"<sup>282</sup>

Another possible scenario involves the situation in which a lawyer threatens to disclose confidential client information in order to collect a fee. There appear to be few reported IIED cases involving this scenario. However, there have been several disciplinary actions taken against lawyers for such action.<sup>283</sup> Given the breach of loyalty such action would entail, it is easy to imagine a court classifying this conduct as extreme and outrageous for purposes of an IIED claim.

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<sup>275</sup> See *In re DuBarry*, 814 So. 2d 1273, 1276 (La. 2002) (awarding damages in IIED case stemming from lawyer's use of "vindictive, obstreperous, and dilatory tactics" in the course of a long fee dispute with a client); *In re Boydell*, 760 So. 2d 326 (La. 2000) (involving same case, but a different lawyer).

<sup>276</sup> See *In re DuBarry*, 814 So. 2d at 1281 ("Most troubling is respondent's exhibition of a complete indifference for the emotional distress inflicted on her client for a decade.").

<sup>277</sup> 574 A.2d 843 (Del. 1990).

<sup>278</sup> *Id.* at 845.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> See *Lindenbaum v. State Bar*, 160 P.2d 9, 17 (Cal. 1945) (suspending lawyer for six months); *In re Huffman*, 983 P.2d 534, 549 (Or. 1999) (suspending lawyer for three years); *In re Disciplinary Proceeding Against Boelter*, 985 P.2d 328, 342 (Wash. 1999) (suspending lawyer for six months).

3. Threatening or Initiating Criminal Prosecution in Order to Gain an Advantage in a Civil Matter
  - a. Threatening or Initiating Criminal Prosecution in Order to Gain an Advantage in a Civil Matter On Behalf of a Client

One situation in which a lawyer's debt collection attempts might conceivably cross the line into extreme and outrageous conduct is when a lawyer threatens a party with criminal prosecution in order to obtain an advantage in a civil proceeding on behalf of a client.<sup>284</sup> Closely related is the situation in which a lawyer initiates or attempts to initiate criminal proceedings against another in order to gain an advantage on behalf of a client.<sup>285</sup> Both situations present difficult challenges.

The legal profession has decidedly mixed views on whether threatening criminal prosecution in order to attain an advantage in a civil proceeding is beyond all bounds of accepted conduct for lawyers. Initially, the ABA's *Model Code of Professional Responsibility* prohibited a lawyer from threatening to present criminal charges solely to obtain an advantage in a civil matter.<sup>286</sup> At least one court concluded that a client who alleged a lawyer had violated this rule had stated a claim for intentional infliction of emotional distress.<sup>287</sup> However, when the ABA replaced the older *Model Code of Professional Responsibility* with the *Model Rules of Professional Conduct*, it omitted the prohibition on threatening criminal prosecution to gain an advantage in a civil proceeding.<sup>288</sup> ABA Ethics Opinion 92-363 noted that the omission was deliberate and that such threats were permissible

provided that the criminal matter is related to the civil claim, the lawyer has a well founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts,

<sup>284</sup> See, e.g., *Kinnamon v. Staitman & Snyder*, 136 Cal. Rptr. 321 (Ct. App. 1977).

<sup>285</sup> See, e.g., *Kalika v. Stern*, 911 F. Supp. 594, 604 (E.D.N.Y. 1995).

<sup>286</sup> MODEL CODE OF PROF'L RESPONSIBILITY DR 7-105 (1980).

<sup>287</sup> *Kinnamon*, 136 Cal. Rptr. at 321. *Kinnamon's* reliance on the lawyer's ethical violation as supporting a finding of extreme and outrageous conduct, and its refusal to extend the litigation privilege to the lawyer due to the ethical violation, have since been the subject of repeated criticisms among California courts. See, e.g., *Silberg v. Anderson*, 786 P.2d 365, 369 (Cal. 1990) (disapproving decisions refusing to extend absolute privilege to such cases); *Ross v. Creel Printing & Publ'g Co.*, 122 Cal. Rptr. 2d 787 (Ct. App. 2002) (rejecting the notion that violation of an ethical rule equates to extreme and outrageous conduct).

<sup>288</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-363 (1992).

and the lawyer does not attempt to exert or suggest improper influence over the criminal process.<sup>289</sup>

The opinion also noted, however, that if any of these preconditions were not met, the lawyer's actions would likely violate one or more separate ethics rules.<sup>290</sup> In addition, the opinion noted that a lawyer's threats could conceivably amount to extortion or compounding under the criminal law.<sup>291</sup> Finally, despite the ABA's decision to omit the prohibition on threatening criminal prosecution when it promulgated the Model Rules, a near majority of jurisdictions have retained the prohibition.<sup>292</sup> Thus, it is possible to imagine a lawyer who, in bad faith, threatens criminal prosecution in order to gain an advantage in a civil matter facing professional discipline and an IIED claim, regardless of whether a disciplinary rule specifically prohibited such action. The fact that a lawyer violates a rule specifically prohibiting threats of criminal prosecution would seem to increase the likelihood of a finding of extreme and outrageous conduct.

IIED cases involving a lawyer's initiating or threatening to initiate criminal prosecution in order to obtain an advantage present a particularly challenging issue. Courts have sometimes been willing to recognize a *nonlawyer's* threats of criminal prosecution in order to coerce a more favorable settlement as rising to the level of extreme and outrageous conduct.<sup>293</sup> Similarly, some courts have been willing to conclude that making false reports of criminal activity against an individual may qualify as extreme and outrageous conduct,<sup>294</sup> espe-

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> See ALA. RULES OF PROF'L CONDUCT R. 3.10 (2010); CAL. RULES OF PROF'L CONDUCT R. 5-100(A) (2010); COLO. RULES OF PROF'L CONDUCT R. 4.5(A) (2010); CONN. RULES OF PROF'L CONDUCT R. 3.4(7) (2010); D.C. RULES OF PROF'L CONDUCT R. 8.4(g) (2010); FLA. RULES OF PROF'L CONDUCT R. 3.4(g) (2010); GA. RULES OF PROF'L CONDUCT R. 3.4(h) (2010); HAW. RULES OF PROF'L CONDUCT R. 3.4(i) (2010); IDAHO RULES OF PROF'L CONDUCT R. 4.4(a) (2010); ILL. RULES OF PROF'L CONDUCT R. 8.4(g) (2010); KY. RULES OF PROF'L CONDUCT R. 3.4(f); LA. RULES OF PROF. CONDUCT R. 8.4(g) (2010); ME. RULES OF PROF'L CONDUCT R. 3.6(e) (2010); N.J. RULES OF PROF'L CONDUCT R. 3.4(g) (2010); N.Y. RULES OF PROF'L CONDUCT R. 3.4(e) (2010); MASS. RULES OF PROF'L CONDUCT R. 3.4(h) (2010); OHIO RULES OF PROF'L CONDUCT R. 1.2(e) (2010); S.C. RULES OF PROF'L CONDUCT R. 4.5 (2010); TENN. RULES OF PROF'L CONDUCT R. 4.4(b) (2010); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 4.04(b); VT. RULES OF PROF'L CONDUCT R. 4.5 (2010); VA. RULES OF PROF'L CONDUCT R. 3.4(i) (2010); WYO. RULES OF PROF'L CONDUCT R. 4.4(c) (2010).

<sup>293</sup> *FDIC v. S. Prawer & Co.*, 829 F. Supp. 439, 450 (D. Me. 1992).

<sup>294</sup> See, e.g., *Mroz v. Lee*, 5 F.3d 1016, 1019–20 (6th Cir. 1993) (applying Michigan law and concluding that defendant's acts of falsely informing others that defendant engaged in criminal activities and using this misinformation to manipulate the legal system to plaintiff's detriment could qualify as extreme and outrageous conduct).

cially if done by an individual occupying a position of trust or authority.<sup>295</sup> The fact that a lawyer commits these acts only complicates the analysis. On the one hand, the fact that it is a lawyer—an individual with special responsibilities regarding the administration of justice—who commits these acts arguably makes the acts more egregious. On the other, a lawyer's duty of diligent representation may cut against a finding of extreme and outrageous conduct.

Generally, courts have come down on the diligent representation side of the conflict. When a lawyer, with probable cause, threatens criminal prosecution on behalf of a client, courts have been reluctant to classify such conduct as extreme and outrageous.<sup>296</sup> At least one court has held that the absolute litigation privilege applies to such statements.<sup>297</sup> But often there is little explanation as to how the court arrived at its conclusion that these threats do not amount to extreme and outrageous conduct. Courts have sometimes shielded lawyers from IIED claims even where a lawyer is alleged to have knowingly made a false statement about the plaintiff to law enforcement authorities. In a Pennsylvania case, a husband alleged that his wife's lawyer, in an attempt to gain an advantage in an anticipated child custody proceeding, told police that the father had sexually molested his own daughter and knew, or should have known, that the statement was false.<sup>298</sup> The court concluded, without explanation, that the father's IIED complaint could not withstand a motion to dismiss on the grounds that the alleged conduct was not extreme and outrageous as a matter of law.<sup>299</sup> The court reached this conclusion despite

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<sup>295</sup> See, e.g., *Carter v. District of Columbia*, 795 F.2d 116, 139 (C.D. Cal. 1986) (concluding that police officers' acts of making false reports of criminal activity on plaintiff's part could qualify as extreme and outrageous conduct); *RESTATEMENT (SECOND) OF TORTS* § 46 cmt. e (1965) ("[P]olice officers, school authorities, landlords, and collecting creditors have been held liable for extreme abuse of their position."). But see *Gruenberg v. Aetna Ins. Co.*, 103 Cal. Rptr. 887, 891 (Ct. App. 1972) (concluding that defendant's false statements about plaintiff to authorities during criminal investigation did not rise to the level of extreme and outrageous conduct), *overruled by* 510 P.2d 1032 (Cal. 1973).

<sup>296</sup> See, e.g., *Burton v. NCNB Nat'l Bank of N.C.*, 355 S.E.2d 800, 803 (N.C. Ct. App. 1987) (concluding that a lawyer who, in attempting to collect a debt on behalf of client, stated that client was considering filing criminal charges for the filing of an inaccurate financial statement did not engage in extreme and outrageous conduct); see also *Kalika v. Stern*, 911 F. Supp. 594, 604 (E.D.N.Y. 1995) (concluding that lawyer's act of pursuing criminal charges related to civil representation was not extreme and outrageous conduct where lawyer had probable cause to believe there was a violation of law).

<sup>297</sup> *Ruberton v. Gabage*, 654 A.2d 1002, 1006 (N.J. Super. Ct. App. Div. 1995).

<sup>298</sup> *Motheral v. Burkhart*, 583 A.2d 1180, 1189–90 (Pa. Super. Ct. 1990).

<sup>299</sup> *Id.* at 1190.



the horrific nature of the false allegation and despite the fact that the lawyer's actions in the case, as alleged, could potentially have subjected the lawyer to significant disciplinary sanctions, including the suspension of her license.<sup>300</sup>

b. Threatening Criminal Prosecution and Other Aggressive Attempts to Collect a Fee from a Former Client

A lawyer who threatens criminal prosecution in an attempt to collect a fee might also potentially face an IIED claim. Although there are few reported IIED cases involving this scenario, lawyers have faced professional discipline for engaging in this behavior.<sup>301</sup> The fact that a lawyer has continuing ethical duties with respect to a former client may increase the likelihood that the lawyer's actions would be found to be extreme and outrageous. For example, a lawyer who threatens to disclose confidential information in order to obtain a warrant for a client's arrest in connection with a fee dispute has arguably engaged in extreme and outrageous conduct even absent an ethical rule specifically prohibiting a lawyer from threatening criminal prosecution in order to obtain an advantage in a civil proceeding.<sup>302</sup>

C. *A Brief Summary*

At least three themes emerge from the preceding study of IIED cases involving lawyer-defendants. First, plaintiffs only occasionally prevail. Second, despite plaintiffs' general lack of success, results are difficult to predict and clear standards as to what qualifies as extreme and outrageous conduct on the part of an attorney are elusive. This lack of predictability stems, at least in part, from the failure of courts to articulate a meaningful standard for evaluating a lawyer's misconduct. Third, despite this uncertainty, clients are more likely to be

<sup>300</sup> See MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2011) (prohibiting a lawyer, in the course of representing a client, from knowingly making a false statement of material fact); *id.* R. 4.4(a) (prohibiting a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person); *cf.* Cuyahoga City Bar Ass'n v. Wise, 842 N.E.2d 35 (Ohio 2006) (suspending lawyer for six months for threatening aunt with criminal prosecution for kidnapping in order to gain advantage in a custody proceeding where lawyer admitted he never suspected aunt of kidnapping). See generally Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ronwin, 557 N.W.2d 515 (Iowa 1996) (disbarring lawyer for making false accusations of criminal conduct against judges and lawyers in court filings).

<sup>301</sup> See, e.g., *In re Yarborough*, 488 S.E.2d 871, 874 (S.C. 1997).

<sup>302</sup> *Cf.* *People v. Farrant*, 852 P.2d 452, 455 (Colo. 1993) (concluding that a lawyer's threat to disclose confidential client information in connection with a fee dispute, standing alone, warranted suspension from the practice of law).

successful on their IIED claims than are plaintiffs with no attorney-client relationship with the defendant. This is generally consistent with the outcomes in other IIED cases, in which plaintiffs with contractual relationships with defendants are more likely to prevail.<sup>303</sup>

These conclusions should not be surprising. As a matter of contract law, the existence of a contractual relationship imposes upon the parties a duty of good faith and fair dealing.<sup>304</sup> And as a matter of tort law, courts could naturally be expected to infer from this a somewhat heightened standard of decent behavior and fairness when dealing with a contractual partner, the violation of which could more readily be characterized as “extreme and outrageous.”<sup>305</sup> In the case of lawyers and their clients, there is not only a contractual relationship but a relationship built upon “the utmost trust and confidence.”<sup>306</sup> In the case of lawyers and non-clients, the law governing lawyers has gone to great lengths to limit any sense on the part of non-clients that lawyers owe them any duty other than to refrain from intentionally harming them.<sup>307</sup> Many of the non-clients who sue lawyers for intentional infliction of emotional distress have an adversarial relationship with the lawyers in question, lawyers who owe a duty of zealous advocacy to their own clients. Accordingly, courts appear to be inclined to require that a lawyer’s conduct be even more egregious than the typical IIED defendant in order to satisfy the “extreme and outrageous” element.

Nor is it terribly surprising that the area lacks clear standards with regard to what constitutes extreme and outrageous conduct on the part of a lawyer. As discussed, IIED law is riddled with uncertain-

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<sup>303</sup> In 1982, Professor Daniel Givelber concluded:

When the parties have a pre-existing economic relationship based or apparently based on contract, courts are frequently willing to uphold determinations of outrageousness. These cases reflect a common theme—they require a basic level of fair procedure and decency in dealings between people who occupy unequal bargaining positions and are bound (or apparently bound) by voluntary agreements. When the parties are not bound by contract, the cases are fewer, the results more unpredictable, and doctrine virtually nonexistent.

Givelber, *supra* note 6, at 63.

<sup>304</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

<sup>305</sup> See Givelber, *supra* note 6, at 63 (noting that, in the case of parties with contractual relationships, the cases “require a basic level of fair procedure and decency”).

<sup>306</sup> Demov, Morris, Levin & Shein v. Glantz, 428 N.E.2d 387, 389 (N.Y. 1981).

<sup>307</sup> See *supra* notes 116–17 and accompanying text; see also Yorgan v. Durkin, 715 N.W.2d 160, 166–67 (Wis. 2006) (“[A]bsent fraud or certain policy considerations, an attorney is not liable to third parties for acts committed in the exercise of his duties as an attorney.”).

ty and vague standards. The complexities involved in lawyer IIED cases only exacerbate the problem. What is at least mildly surprising (and certainly disappointing) is the failure of courts to articulate any meaningful standards with regard to the extreme and outrageous determination. In light of the wealth of positive law and clear policy pronouncements concerning proper behavior on the part of lawyers, courts have at least some tools at their disposal to develop such standards. Regrettably, the courts have largely failed to take advantage of them.

#### V. A NEW APPROACH TO LAWYER IIED CASES

As the foregoing discussion should illustrate, courts often engage in exceptionally rigorous scrutiny of the alleged outrageousness of a lawyer's conduct in IIED cases. However, the standards that courts apply in these cases are far from clear. If courts are going to engage in this type of close scrutiny, they should be clearer about to what standard a defendant's conduct is being compared.

Disciplinary rules establish standards of conduct and duties that lawyers owe to their clients. Therefore, the fact that a lawyer's conduct amounts to a violation of a disciplinary rule should be a relevant consideration in the outrageousness analysis. However, for the reasons discussed previously, the mere violation of a disciplinary rule is not always a reliable indicator of outrageousness.<sup>308</sup> Courts should also look to positive expressions of the policies underlying the disciplinary and legal rules governing lawyers' conduct in an attempt to determine whether a lawyer's conduct may qualify as "extreme and outrageous." But, as discussed previously, even this approach may sometimes lead to contradictory or incomplete conclusions.<sup>309</sup> Although a completely satisfactory definition of "extreme and outrageous" conduct will probably always remain outside the reach of courts, when external standards exist that may aid in the determination, they should be utilized. The following Part argues how, in addition to relying on disciplinary rules and the policy values underlying the law governing lawyers, courts may use the ABA *Standards for Imposing Lawyer Sanctions* ("Standards") and prior disciplinary decisions to help determine whether a lawyer's conduct is extreme and outrageous.

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<sup>308</sup> See *supra* notes 102–07 and accompanying text.

<sup>309</sup> See *supra* notes 15–16 and accompanying text.

A. *Extreme and Outrageous Conduct and the Sanction of Disbarment*

Disbarment is the ultimate professional sanction for a lawyer.<sup>310</sup> In deciding whether disbarment is the appropriate sanction for professional misconduct, courts and disciplinary authorities frequently note the purpose of professional discipline is not primarily to punish an offending attorney. Instead, professional discipline serves the goals of “protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future.”<sup>311</sup> Accordingly, disbarment is only appropriate in the most serious cases—those cases in which an attorney’s continued practice threatens those goals.<sup>312</sup>

In describing what conduct merits the ultimate sanction of disbarment, courts and disciplinary authorities have used a variety of descriptive terms. Many of these terms would sound quite at home in the context of a decision involving a claim of intentional infliction of emotional distress. Courts have stated that disbarment is reserved for “extreme” misconduct,<sup>313</sup> “outrageous” conduct,<sup>314</sup> “atrocious acts,”<sup>315</sup> conduct that puts an attorney “beyond the bounds of what the . . . legal community expects of its members”<sup>316</sup> or that represents a “a wide

<sup>310</sup> *In re Morse*, 7 A.3d 1259, 1266 (N.H. 2010).

<sup>311</sup> *Id.*; see also *In re Torres*, No. 96–O–04035, 2000 WL 282930, at \*12 (Cal. Bar Ct. Mar. 7, 2000) (“[T]he primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession.”).

<sup>312</sup> See *In re Sniadecki*, 924 N.E.2d 109, 120 (Ind. 2010) (“Disbarment is reserved for the most serious misconduct.”).

<sup>313</sup> *In re Cleaver-Bascombe*, 892 A.2d 396, 412 n.15 (D.C. 2006) (referring to disbarred lawyer’s misconduct as “extreme”); *In re Disciplinary Action Against Kaszynski*, 620 N.W.2d 708, 713 (Minn. 2001) (stating that “extreme client neglect and non-communication” may warrant disbarment); *In re Imbriani*, 694 A.2d 1030, 1033 (N.J. 1997) (concluding that disbarment was appropriate given finding that lawyer’s misconduct was “extreme and extended”); *In re Disciplinary Proceeding Against Tasker*, 9 P.3d 822, 832 (Wash. 2000) (concluding that disbarment was the appropriate sanction “given the extreme nature of the misconduct”).

<sup>314</sup> *In re Welcker*, 701 So. 2d 186, 188 (La. 1997) (permanently disbaring attorney based on finding of “outrageous, inexcusable and contemptible” behavior); *In re Breen*, 552 A.2d 105, 116 (N.J. 1989) (concluding that lawyer’s “outrageous conduct” warranted disbarment); *Cincinnati Bar Ass’n v. Al’Uqdah*, 792 N.E.2d 1074, 1077 (Ohio 2003) (disbaring attorney based on lawyer’s “outrageous pattern of misconduct”); *In re Adams*, 534 S.E.2d 278, 281 (S.C. 2000) (disbaring attorney based on “outrageous pattern of misappropriation”).

<sup>315</sup> *In re X*, 577 A.2d 139, 140 (N.J. 1990) (“[R]espondent’s atrocious acts justify his disbarment.”).

<sup>316</sup> *Mississippi Bar v. Sweeney*, 849 So. 2d 884, 890 (Miss. 2003) (Cobb, J., concurring in part and dissenting in part).

departure” from the expectations of the legal profession,<sup>317</sup> “the most egregious misconduct,”<sup>318</sup> “intolerable conduct,”<sup>319</sup> and conduct that manifests a willingness to violate “common decency” in pursuit of the lawyer’s goals.<sup>320</sup> Summing up the decisional law about as well as one could hope for, one court has stated that “[t]he common thread that runs through cases resulting in disbarment is that the conduct is so offensive and obnoxious both to common decency and to principles of justice that there can be no other result.”<sup>321</sup>

Tort law and the lawyer disciplinary process serve different purposes. However, the rationales underlying the standards of “extreme and outrageous” conduct and conduct warranting disbarment are the same. Both standards address conduct that cannot be tolerated if society is to function. Lawyers play a fundamental role in the administration of justice.<sup>322</sup> As the Ohio Supreme Court noted while ordering the disbarment of a lawyer, “[a] civilized society cannot long remain without implicit confidence in those who occupy responsible positions of public trust, including . . . members of the Bar who are ‘officers of the court.’”<sup>323</sup> Therefore, conduct that warrants disbarment is conduct that the legal profession and society more generally cannot tolerate if its legal institutions are to function. It is conduct that is intolerable in a civilized society. Stated differently, it is extreme and outrageous conduct.

<sup>317</sup> *Commonwealth ex rel. Pike Cnty. Bar Ass’n v. Stump*, 57 S.W.2d 524, 527 (Ky. 1933); *see also In re Goldstein*, 104 N.E.2d 227, 230 (Ill. 1952) (Schaefer, J., dissenting) (opining that disbarment is appropriate where attorney engages in “a wide departure from the standards required of members of the legal profession”).

<sup>318</sup> *Disciplinary Counsel v. Hoskins*, 891 N.E.2d 324, 340 (Ohio 2008); *see also Lawyer Disciplinary Bd. v. Coleman*, 639 S.E.2d 882, 892 (W. Va. 2006) (“[D]isbarment is a sanction reserved for only the most egregious of disciplinary proceedings.”).

<sup>319</sup> *In re Witherspoon*, 3 A.3d 496, 510–11 (N.J. 2010) (LaVecchia, J., dissenting) (stating that the disbarment was an appropriate sanction for an attorney’s “intolerable” misconduct); *see also Fla. Bar v. Dove*, 985 So. 2d 1001, 1019 (Fla. 2008) (stating that disbarment is appropriate for “intolerable acts of deception”); *In re Morris*, 241 S.E.2d 911, 913 (S.C. 1978) (concluding that the lawyer’s “disregard of his clients’ interest in favor of his own is intolerable” and that disbarment was, therefore, appropriate).

<sup>320</sup> *In re Hirschfeld*, 960 P.2d 640, 644 (Ariz. 1998); *see also Copren v. State Bar*, 183 P.2d 833, 841–42 (Nev. 1947) (stating that disbarment is appropriate where necessary “to promote the maintenance of the proper decency . . . in the legal profession”).

<sup>321</sup> *In re Vincenti*, 704 A.2d 927, 942–43 (N.J. 1998).

<sup>322</sup> *See* MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 1 (2011) (“[A lawyer is] ‘a public citizen having special responsibility for the quality of justice.’”).

<sup>323</sup> *Cleveland Bar Ass’n v. Fatica*, 274 N.E.2d 763, 765 (Ohio 1971); *see also* MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 13 (2011) (“Lawyers play a vital role in the preservation of society.”)

The California State Bar Court (the court charged with ruling on disciplinary cases) has drawn a similar connection between extreme and outrageous conduct in the IIED context and conduct warranting disbarment. *In re Torres* was a disciplinary case involving an attorney who engaged in an extended pattern of harassment against a client, including making over one hundred telephone calls to the client's house, often late at night.<sup>324</sup> In considering the appropriate discipline for the lawyer's misconduct, the court relied heavily on the fact that the client had successfully sued the lawyer on an intentional infliction of emotional distress theory for the same conduct.<sup>325</sup> Ultimately, in the court's view, what made the conduct intolerable was the fact that it was committed by a lawyer.

It is also important to note the depravity of this misconduct in its relation to the legal profession. Here is a lawyer that turns on his client, without provocation, through a pattern of harassment and the intentional infliction of serious emotional distress for the purpose of causing the client grief. Such duplicitous conduct by a lawyer makes the legal profession not a highly essential aid to society, but a detriment.<sup>326</sup>

According to the California *Standards for Attorney Sanctions for Professional Misconduct*, the presumptive discipline in such cases is actual suspension or disbarment.<sup>327</sup>

*B. The ABA Standards for Imposing Lawyer Sanctions and IIED Claims*

The goal of the ABA *Standards for Imposing Lawyer Sanctions* is to establish clear and appropriate standards of professional discipline.<sup>328</sup>

<sup>324</sup> No. 96-O-04035, 2000 WL 282930, at \*3 (Cal. Bar Ct. Mar. 7, 2000).

<sup>325</sup> *Id.* at \*6-7.

<sup>326</sup> *Id.* at \*11.

<sup>327</sup> *Id.* at \*12. The court imposed a sanction of three years' actual suspension with a condition that the lawyer undergo mental health counseling. *Id.* at \*14. The court rejected (incorrectly, I would argue) the sanction of disbarment suggested by the hearing officer on the grounds that the lawyer's conduct was not as bad as similar conduct on the part of other lawyers that had resulted in disbarment, and the lawyer did not display a "total lack of remorse." *Id.* at \*13 (emphasis in original). Neither of these seem like particularly strong reasons to allow a lawyer who terrorized his client to the point that she became so emotionally unstable that she lost her job to continue to practice. *Id.* at \*10.

<sup>328</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 1.3 (1992); Moore, *supra* note 74, at 18. The ABA has also produced the *Model Rules for Lawyer Disciplinary Enforcement*, which are less specific than the *Standards* and which "address the lawyer disciplinary process holistically." Jennifer Carpenter & Thomas Cluderay, *Implications of Online Disciplinary Records: Balancing the Public's Interest In Openness with Attorneys' Concerns for Maintaining Flexible Self-Regulation*, 22 GEO. J. LEGAL ETHICS 733, 735 n.14

Most states have adopted the *Standards*.<sup>329</sup> While state courts vary in terms of how frequently or rigorously they actually apply the *Standards* in practice,<sup>330</sup> the *Standards* have become well established since their publication in 1986.

The *Standards* provide courts and disciplinary authorities with guidance in determining the appropriate sanction after a lawyer has been found to have engaged in a violation of a disciplinary rule. In devising the *Standards*, the authors collected data regarding “what types of sanctions have been imposed for similar misconduct in reported cases.”<sup>331</sup> Thus, to some extent, the *Standards* reflect the legal profession’s collective judgment concerning the seriousness of different types of misconduct. The *Standards* also adopt what one author has described as a two-tiered analysis to the issue of sanctions.<sup>332</sup> According to the Preface, when assessing the appropriate sanction, a disciplinary authority should look “first at the ethical duty and to whom it is owed, and then at the lawyer’s mental state and the amount of injury caused by the lawyer’s misconduct.”<sup>333</sup>

According to the authors’ description of the analytical framework, “[i]n determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to *clients*.”<sup>334</sup> Thus, in general, a violation of an ethical duty owed to a client is more likely to lead to serious disciplinary sanctions than a violation of a duty owed to the public, the legal system, or the legal profession.<sup>335</sup> Examples of duties owed to clients include the duty of loyalty (including preserving client property, maintaining client confidences, and avoiding con-

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(2009). Because one of the premises of this Article is that greater clarity and specificity is needed in the IIED context, the *Standards* provide a more useable standard.

<sup>329</sup> See Rachna K. Dhanda, Note, *When Attorneys Become Convicted Felons: The Question of Discipline by the Bar*, 8 GEO. J. LEGAL ETHICS 723, 731 n.53 (1995) (stating that with the exceptions of New York, the District of Columbia, and Mississippi, virtually every jurisdiction has “substantially adopted provisions of the Standards”).

<sup>330</sup> See, e.g., *In re LaMartina*, 38 So. 3d 266, 271 (La. 2010) (explicitly referencing and applying the *Standards*); *Bd. of Prof’l Responsibility v. Allison*, 284 S.W.3d 316, 327 (Tenn. 2009) (same); *In re Disciplinary Proceeding Against Preszler*, 232 P.3d 1118, 1126 (Wash. 2010) (same).

<sup>331</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Preface, at 3 (1986).

<sup>332</sup> Rachel Tarko Hudson, *Pick Your Poison: Abuse of Legal Versus Illegal Substances as Mitigation in Attorney Discipline Cases*, 22 GEO. J. LEGAL ETHICS 911, 913 (2009).

<sup>333</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Preface, at 3 (1986).

<sup>334</sup> *Id.* at 9.

<sup>335</sup> See generally *id.* (explaining that in considering the nature of the ethical duty violated, one must inquire whether the duty was owed to the client, the public, the legal system, or the profession).

flicts of interest), the duty of diligence, the duty of competence, and the duty of candor.<sup>336</sup> Dishonest conduct could be a violation of a duty owed to the clients, the public, the legal system, or the legal profession, depending upon to whom the misrepresentation is directed.<sup>337</sup>

The next step in the analysis is to determine the lawyer's mental state and the amount of injury caused by the misconduct. Not surprisingly, the *Standards* explain that "[t]he most culpable mental state is that of intent."<sup>338</sup> In determining the appropriate sanction for a violation of a disciplinary rule, one must also consider the extent of the actual or potential injury the lawyer's misconduct caused, with options ranging from "little or no injury" to "serious injury."<sup>339</sup> Finally, the *Standards* suggest consideration of any aggravating or mitigating factors, such as a dishonest or selfish motive, a pattern of misconduct, the vulnerability of the victim, or illegal conduct.<sup>340</sup>

The *Standards* then apply this framework to various ethical breaches and lay out the presumptive sanction in each instance. For example, the failure to preserve a client's property is a breach of duty to the client—the most serious type of breach.<sup>341</sup> As a result, "[d]isbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client."<sup>342</sup>

Courts can easily apply the general analytical framework of the *Standards* to IIED cases involving lawyers. In some respects, the *Standards* already reflect the general approach of courts in IIED cases involving lawyers. Lawyer misconduct directed at a client is considered the most serious type of disciplinary offense under the *Standards*.<sup>343</sup> Due to the relationship of trust between lawyer and client, such misconduct is also more likely to amount to extreme and outrageous conduct than misconduct directed at a non-client. Disbarment is more likely under the *Standards* where a lawyer acts with intent and

<sup>336</sup> *Id.* at 5.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 6.

<sup>339</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS 6 (1986). The standards define "potential injury" as harm "that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." *Id.* at 7.

<sup>340</sup> *Id.* at 11 & Standard 9.

<sup>341</sup> See *supra* note 334 and accompanying text.

<sup>342</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 4.11 (1986).

<sup>343</sup> See *id.* at 5 ("In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients.").



serious injury results. Similarly, the IIED tort requires either intent or recklessness and “serious injury” in the form of severe emotional distress.

Application of the *Standards* to lawyer IIED cases would add something new to the existing approach to evaluating IIED claims. The *Standards* provide more concrete analytical standards by classifying various forms of attorney misconduct and assessing the seriousness of each. The *Standards* also make value judgments regarding the seriousness (or outrageousness) of a lawyer’s misconduct, based upon prior decisional law. These judgments as to which offenses are particularly egregious may be particularly relevant for courts seeking to assess the outrageousness of a lawyer’s misconduct. Thus, for example, the *Standards* explain that disbarment is generally appropriate in the case of intentional conversion of client property that leads to injury.<sup>344</sup> Notably, the *Standards* make a value judgment about the seriousness of this type of misconduct by only requiring “injury” rather than “serious injury” as it does in most other cases before concluding that disbarment is the appropriate sanction. This approach provides a level of specificity and concreteness lacking in IIED cases.

In addition, the *Standards* reflect the common-sense notion that the offensiveness or outrageousness of an action may be heightened by the injury or potential injury that the actor’s conduct causes. For instance, a lawyer who abandons her practice without notice to the client, thereby leaving the client with no legal remedy, has caused serious injury. The *Standards* make clear that disbarment is appropriate in such a case.<sup>345</sup> Outside the disciplinary context, courts have been more willing to overlook their traditional reluctance to permit emotional distress damages when a defendant’s conduct results in harm or potential harm that is especially likely to produce emotional distress. For example, while emotional distress damages are typically not available in a breach of contract action, the *Restatement (Second) of Contracts* provides that emotional distress damages are permissible when “the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result”<sup>346</sup>

This is true for the tort law governing lawyers as well. For instance, while many courts are unwilling to allow recovery for emotional distress damages in malpractice actions, an exception often exists when a client is incarcerated or endures a similar loss of liberty as

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<sup>344</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 4.11 (1986).

<sup>345</sup> *Id.* Standard 4.41(a).

<sup>346</sup> RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (1981).

a result of a lawyer's malpractice.<sup>347</sup> Similarly, the *Restatement (Second) of Torts* notes that the fact that a defendant knows that an individual is particularly susceptible to emotional distress is a factor that may lead to a finding of outrageousness.<sup>348</sup> Thus, in many instances, a defendant's conduct is extreme and outrageous because it was committed with full knowledge that it could lead to serious injury, which in turn could be expected to result in severe emotional distress. The *Standards* reflect this approach in directing courts and disciplinary authorities to consider the harm or potential harm caused by a lawyer's misconduct.

Thus, the standards for extreme and outrageous conduct on the part of a lawyer for purposes of an IIED claim and the *Standards for Imposing Lawyer Sanctions* should be coterminous. In making the initial determination as to whether a lawyer's conduct was sufficiently egregious to submit the issue of outrageousness to the jury or to qualify as extreme and outrageous as a matter of law (in those jurisdictions where this is a question of law), courts should rely on the *Standards*. If disbarment is the presumptive sanction for the lawyer's misconduct under the *Standards*, a court should submit the case to the jury (assuming there are triable issues regarding the other elements of the IIED claim) with the instruction that the jury may draw an inference of outrageousness from the fact that the lawyer's conduct satisfies the disbarment threshold. Where the question of outrageousness is one for the court, a court should, in the absence of any mitigating circumstances, conclude that a lawyer's misconduct is extreme and outrageous when disbarment is the presumptive sanction for the misconduct.<sup>349</sup>

A jurisdiction's prior disciplinary decisions may also aid in the extreme and outrageous analysis. One of the purposes of the disciplinary process is to educate other lawyers, thereby deterring future misconduct.<sup>350</sup> Thus, existing disciplinary decisions may serve to put lawyers on notice as to the permissible bounds of conduct. Where prior disciplinary decisions have established clear markers of conduct

<sup>347</sup> *E.g.*, *Wagenmann v. Adams*, 829 F.2d 196, 222 (1st Cir. 1987); 3 MALLEN & SMITH, *supra* note 9, § 21:11, at 38.

<sup>348</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1965).

<sup>349</sup> Under this approach, if a disciplinary proceeding has already been completed, the fact that a lawyer has been found to have violated a rule or that the sanction of disbarment has been recommended or imposed would have whatever evidentiary effect the jurisdiction gives to such evidence in other contexts. Thus, a prior disciplinary decision would not necessarily have any automatic effect on the plaintiff's tort claim against the lawyer.

<sup>350</sup> *See* STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 1.1 cmt. (1986).

that crosses the line into conduct “so offensive and obnoxious both to common decency and to principles of justice” that disbarment is presumptively appropriate, courts should rely upon them in deciding whether conduct qualifies as extreme and outrageous. By linking the outrageousness and disbarment standards, courts can draw upon the wealth of disciplinary decisions and draw more meaningful comparisons between conduct. Courts would not be limited to the *Restatement (Second) of Torts*’ vague “beyond all possible bounds of decency” standard, nor would they be forced to draw comparisons between a lawyer’s conduct and that of a doctor, a teacher, or business person in IIED cases. Instead, in assessing whether a lawyer’s conduct was extreme and outrageous, courts could compare apples to apples.

One admitted weakness of this approach is that sometimes disciplinary authorities and courts do not impose the sanction of disbarment when the *Standards* would seem to call for this result.<sup>351</sup> While disbarment should be rare,<sup>352</sup> it is perhaps even rarer than it should be.<sup>353</sup> Thus, there are undoubtedly numerous situations in which the bar has been set so high in the disciplinary context that a finding of extreme and outrageous conduct would be unlikely if courts simply compared the conduct of the lawyers in question.<sup>354</sup> In

<sup>351</sup> See *supra* note 327 and accompanying text.

<sup>352</sup> See generally Roger W. Badeker, *Struck Off: The Path to Disbarment*, 64 J. KAN. B.A. 24, 26 (1995) (“[D]isbarment is a rare sanction.”).

<sup>353</sup> Michael S. Frisch, *No Stone Left Unturned: The Failure of Attorney Self-Regulation in the District of Columbia*, 18 GEO. J. LEGAL ETHICS 325, 345 (2005) (referring to the D.C. Board of Professional Responsibility’s “institutional reluctance to impose disbarment in cases where the client has been subjected to gross mistreatment”).

<sup>354</sup> See, e.g., *In re Boydell*, 760 So. 2d 326 (La. 2000) (involving a lawyer who, over the course of ten years, engaged in vindictive and dilatory behavior in a fee dispute with a client and who, by his own admission, falsely countersued the client for attorney’s fees not owed); see also *In re DuBerry*, 814 So. 2d 1273, 1276 (La. 2002) (involving same case). In prolonging the litigation, the lawyer misled the client to believe that she could lose all of the proceeds she had previously received. *Id.* at 1281. As a result, the client was afraid to spend any of the proceeds, despite the fact that “she was, at times, in dire need of the funds.” *Id.* None of the attorney’s numerous counter actions were deemed meritorious. *Id.* at 1276. A lower court found the lawyer liable for intentional infliction of emotional distress based on the lawyer’s abuse of the legal process and knowledge of the former client’s vulnerability. *Id.* In the disciplinary proceeding against the lawyer, the disciplinary board concluded that in addition to violating his duties to the public and the legal system, the lawyer had violated his duty to his client, *In re Boydell*, 760 So. 2d at 331–32, the most serious type of infraction. The board concluded that disbarment was the baseline sanction for the lawyer’s misconduct, based on the fact that the lawyer’s actions “were knowing and intentional, and caused a great amount of actual injury.” *Id.* at 331; cf. STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 6.2 Commentary (1986) (stating that disbarment is appropriate where a lawyer intentionally misuses the legal process “to benefit the lawyer or another when the lawyer’s conduct causes injury or

addition, sometimes lesser sanctions are imposed due to the presence of mitigating factors that may not be present in other cases. Thus, to the extent there is a conflict between the proper presumptive result stemming from an application of the *Standards* and prior results in disciplinary cases, application of the *Standards* should prevail.

C. *Applying the Approach to Lawyer IIED Cases*

Regardless of whether courts formally put lawyer IIED cases and lawyer disciplinary cases on the same analytical track in terms of judging the outrageousness of a lawyer's conduct, utilizing aspects of the approach of the *Standards* would be beneficial. It would certainly help provide needed doctrinal clarity in the area. The following section examines how the approach might work in practice.<sup>355</sup>

1. Liability to Clients

a. Incompetence and Lack of Diligence

The *Standards* impose a high standard for disbarment in the case of mere incompetence. According to Standard 4.51, absent aggravating circumstances, "[d]isbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not un-

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potentially serious injury to a party"). Indeed, the board was unable to find "any prior case dealing with 'such egregious conduct.'" *In re Boydell*, 760 So. 2d at 331. Yet, the lawyer had no prior disciplinary record, so the board concluded that this mitigating factor warranted a reduction in the sanction imposed to suspension for three years. *Id.* On appeal, the Louisiana Supreme Court approved the recommended sanction, despite its conclusion that "[a] review of the jurisprudence of this state indicates there are no decisions involving vexatious litigation rising to the magnitude of that perpetuated by respondent" and that the baseline sanction for similar misconduct in other jurisdictions was disbarment. *Id.* at 332. In addition to the lawyer's lack of a prior record, the court noted that the lawyer had cooperated with the disciplinary process (which, of course, he was ethically required to do anyway) and had been subject to significant monetary sanctions. *Id.* Yet, a quick glance at the *Standards* reveals at least five relevant aggravating factors: the lawyer's dishonest or selfish motive, a pattern of misconduct, multiple offenses, vulnerability of the victim, and substantial experience in the practice of law. STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 9.22 (1986). Thus, one has difficulty imagining what it would take for a first-time offender to be disbarred in Louisiana for abusing the legal process as part of a fee dispute with a client.

<sup>355</sup> Although not addressed in this Article, potential IIED claims might also exist based on other forms of misconduct, such as a lawyer's conversion of client property, *see* STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 4.11 (1986) ("Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client."), and dishonesty or fraud directed at a client, *id.* Standard 4.61 ("Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client.").

derstand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client."<sup>356</sup> While it is possible to imagine a scenario in which a lawyer acts recklessly by undertaking action in full awareness of the fact that the lawyer does not understand "the most basic fundamental legal doctrines or procedures," such cases are likely to be rare.

The standard for disbarment on the basis of lack of diligence is decidedly lower. Absent aggravating circumstances, disbarment is generally appropriate when "a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client."<sup>357</sup> Violation of this standard should likewise amount to *prima facie* evidence of extreme and outrageous conduct.

A lawyer's duty of diligent representation is one of the fundamental values of the legal profession.<sup>358</sup> A lawyer who knowingly fails to act on behalf of a client has violated the trust of that client, and, simultaneously, engaged in an extreme departure from the standards of the profession. Where that action causes serious or potentially serious injury to the client (such as imprisonment),<sup>359</sup> the lawyer's violation is compounded. Accordingly, "outrageous" is hardly too strong a term to describe the lawyer's conduct in such instances.

#### b. Demands for Sexual Favors

A lawyer who attempts to persuade a client to enter into a sex-for-services arrangement has engaged in a violation of a duty to a client, the most serious type of ethical breach. Courts have characterized such action in a variety of ways; however, the common thread is that the conduct amounts to a violation of the lawyer's duty of loyalty. In disciplining lawyers for this sort of behavior, courts have concluded that sexual harassment of a client amounts to creating a conflict of interest: a lawyer who harasses a client in this manner places

<sup>356</sup> *Id.* Standard 4.51.

<sup>357</sup> *Id.* Standard 4.41(b). Suspension is appropriate where the lawyer knowingly fails to perform services but the injury to the client is less severe. *Id.* Standard 4.42(a); *see also In re Johnson*, 444 N.E.2d 153, 155 (Ill. 1982) (suspending lawyer who failed to enter a divorce decree for over three years). *See generally* *Clemencia v. Mitchell*, 956 A.2d 76, 80 (D.C. 2008) ("[W]e have held that where an attorney's neglectful failure . . . in handling a client's case . . . amount[s] to conduct outrageously in violation of . . . [the attorney's] implicit duty to devote reasonable efforts in representing his client, it may warrant relief under Rule 60(b)(6).") (internal quotations omitted).

<sup>358</sup> *See, e.g.,* Fred Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1315–18 (1995).

<sup>359</sup> *See Bowman v. Doherty*, 686 P.2d 112 (Kan. 1984); *supra* notes 145–54 and accompanying text.

“his own prurient interests above those of his clients.”<sup>360</sup> In addition, a lawyer who uses the threat of abandoning a client unless the client consents to a sexual relationship may also violate a lawyer’s duty of diligence by failing to provide due notice to a client and failing to protect a client’s interests upon withdrawing from representation.<sup>361</sup> In the process, the lawyer’s multiple violations of professional responsibility may jeopardize the client’s interests, thereby creating the potential for serious injury. Disbarment in these kinds of cases is not uncommon.<sup>362</sup> Accordingly, such conduct should ordinarily qualify as extreme and outrageous for purposes of an IIED claim.

c. Permitting or Concealing Conflicts of Interest and Other Breaches of Loyalty

i. Conflicts of Interest

Standard 4.31 addresses when disbarment is appropriate based upon a lawyer’s conflict of interest. In the case of a lawyer with a conflict of interest involving a current client, disbarment is generally appropriate when the lawyer knows of the conflict, continues the representation with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.<sup>363</sup> In the case of a conflict involving a former client, disbarment is generally appropriate when the lawyer “knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.”<sup>364</sup>

Again, the bar for disbarment is set high in the case of permitting conflicts of interest. A lawyer must knowingly betray a client’s trust for the benefit of the lawyer or another *and* the betrayal must result in serious or potentially serious injury. This is most likely to be

<sup>360</sup> *In re Witherspoon*, 3 A.3d 496, 500 (N.J. 2010); *see also In re Piatt*, 951 P.2d 889, 891 (Ariz. 1997) (stating that such conduct amounts to a conflict of interest because the lawyer’s action “serves the lawyer’s interest and not the client’s”).

<sup>361</sup> *See In re Estate of Brandon*, 902 P.2d 1299, 1318 n.21 (Alaska 1995); MODEL RULES OF PROF’L CONDUCT R. 1.16(d) (2011); STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 4.51(a) (1986).

<sup>362</sup> *See, e.g., Iowa Supreme Court Attorney Disciplinary Bd. v. McGrath*, 713 N.W.2d 682, 703–04 (Iowa 2006) (indefinitely suspending lawyer for engaging in “sex-for-fees arrangement”); *Attorney Grievance Comm’n v. Culver*, 849 A.2d 423, 451 (Md. 2004) (disbarring attorney for, inter alia, threatening to withdraw from representation unless consented to sexual contact); *see also Attorney Grievance Comm’n v. Hall*, 969 A.2d 953, 970 (Md. 2009) (suspending indefinitely attorney who engaged in sexual relationship with client knowing her fragile emotional state).

<sup>363</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 4.31 (1986).

<sup>364</sup> *Id.*

the case where a lawyer “exploit[s] the lawyer-client relationship by acquiring an ownership, possessory, security or other pecuniary interest adverse to a client without the client’s understanding or consent.”<sup>365</sup> In light of the fundamental role that the duty of loyalty plays in the practice of law, conduct satisfying ABA Standard 4.31 should ordinarily qualify as extreme and outrageous.

## ii. Other Breaches of Loyalty

Some of the other previously-discussed examples of breaches of loyalty—such as lying to clients or refusing to allow a client to settle<sup>366</sup>—that have led to IIED claims actually involve a breach of the duty of diligence as well as a breach of loyalty. For example, the *Standards* treat a lawyer’s breach of the duty of proper communication with a client as a violation of the duty of diligence.<sup>367</sup> As honesty is also an essential component of a lawyer’s fiduciary duty to a client, both duties are implicated when a lawyer lies to a client.<sup>368</sup> Depending on the seriousness of the injury caused or risked, it is conceivable that lying to a client could amount to extreme and outrageous conduct.<sup>369</sup> Consideration of the sanctions imposed in similar disciplinary cases may also aid a court in making this determination in close cases.<sup>370</sup>

These kinds of scenarios also illustrate how courts can rely on the policies underlying the law governing lawyers to aid in the extreme and outrageousness determination. For example, clients have

<sup>365</sup> *Id.* Standard 4.3 Commentary (noting that it is rare that an attorney knowingly uses information relating to representation of a former client with the intent to benefit the lawyer or another and causes serious or potentially serious injury to a client).

<sup>366</sup> See, e.g., *Green v. Leibowitz*, 500 N.Y.S.2d 146 (App. Div. 1979); see also *Singleton v. Foreman*, 435 F.2d 962 (5th Cir. 1970); *supra* notes 196–204 and accompanying text.

<sup>367</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS 9 (1986).

<sup>368</sup> See *In re Brousseau*, 697 A.2d 1079, 1080 (R.I. 1997) (concluding that lawyer who lied to client about status of claim violated duties of diligence and communication and stating that “[a]n attorney who intentionally lies to the client about the status of the client’s claim violates his fiduciary duty of honesty to the client”).

<sup>369</sup> Cf. STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 4.61 (1986) (“Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.”).

<sup>370</sup> Cf. *Fla. Bar v. Fredericks*, 731 So. 2d 1249, 1254 (Fla. 1999) (suspending lawyer who lied to client about status of matter); *In re Mays*, 495 S.E.2d 30, 31 (Ga. 1998) (disbarring lawyer with prior disciplinary history who allowed statute of limitations to run and lied to client about status).

an absolute right to decide whether to settle a matter.<sup>371</sup> A provision in a fee agreement that seeks to limit that right may be declared unenforceable in violation of public policy.<sup>372</sup> Given the importance that the law governing lawyers attaches to a client's right to settle, it is not surprising that courts have sometimes imposed significant disciplinary sanctions against lawyers who have sought to deny clients that right.<sup>373</sup> Where a lawyer's refusal to permit a client to settle is coupled with other forms of misconduct and causes or risks serious injury, a reasonable jury could certainly conclude that the lawyer's conduct is extreme and outrageous.

d. Disclosure of Confidential Information

Standard 4.2 deals with the failure to preserve a client's confidences. The standard focuses on whether the lawyer discloses confidential information for the lawyer's own benefit and whether the client was injured or put at risk of injury by the disclosure: "Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client."<sup>374</sup> Again, given the fundamental role that client confidentiality plays in the practice of law, "extreme and outrageous" is hardly too strong a term to describe a lawyer's actions that satisfy ABA Standard 4.2.

In addition, this is a situation in which the rules of professional conduct and the expressions of policy underlying the law governing lawyers may provide courts with meaningful guidance in difficult cases. The ABA *Model Rules of Professional Conduct* and various state codes contain clear statements of policy as to the fundamental importance of maintaining client confidences.<sup>375</sup> Courts view the duty of confidentiality as being essential to the administration of justice.<sup>376</sup> Moreover, Model Rule 1.6 and its state equivalents delineate with some pre-

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<sup>371</sup> *E.g.*, *Barnes v. Quigley*, 49 A.2d 467, 468 (D.C. 1946); MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2011).

<sup>372</sup> Long, *supra* note 45, at 312.

<sup>373</sup> *See, e.g.*, *In re Lansky*, 678 N.E.2d 1114, 1117 (Ind. 1997) (suspending lawyer who included a provision in fee agreement that limited client's right to settle); *In re Wysolmerski*, 702 A.2d 73, 75 (Vt. 1997) (suspending lawyer who settled matter without client's permission).

<sup>374</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 4.21 (1986).

<sup>375</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2011).

<sup>376</sup> *See, e.g.*, *Port of Portland v. Or. Ctr. for Env'tl. Health*, 243 P.3d 102, 106 (Or. Ct. App. 2010).



cision the scope of permissible disclosure.<sup>377</sup> Model Rule 1.6(a) is clear that a lawyer's duty of confidentiality applies not just to privileged information but to all information relating to the representation of a client.<sup>378</sup> Model Rule 1.6(b) lists the various exceptions to that duty.<sup>379</sup> Given the importance the legal profession and the public attach to a lawyer's duty of confidentiality and the potential harm that may result to a client due to a breach, a court may be justified in concluding that an intentional violation of this duty might amount to extreme and outrageous conduct.

## 2. Liability to Non-Clients

Under the approach described in this Article, analysis of a non-client's IIED claim against a lawyer would proceed in essentially the same manner as that discussed in the preceding section. The *Standards* treat lawyer misconduct involving breach of a duty to a non-client as presumptively less serious than misconduct involving clients.<sup>380</sup> Accordingly, disbarment and findings that a lawyer's conduct is extreme and outrageous for purposes of an IIED claim should be uncommon in such cases.

In the case of litigation-related misconduct, reliance on the *Standards* may be especially helpful insofar as the *Standards* already take into account what weight the policy of zealous advocacy should carry in establishing appropriate sanctions for misconduct. Thus, courts would not be limited to high-level, abstract discussions of how to balance the goals of zealous advocacy and civility and respect for the legal process in considering the appropriate discipline.

Courts and disciplinary authorities have generally only imposed the ultimate sanction of disbarment for litigation-related misconduct when a lawyer has abused the legal process through a pattern of filing frivolous motions<sup>381</sup> or subverted the trial process by attempting to

<sup>377</sup> See generally *Humphers v. First Interstate Bank of Or.*, 696 P.2d 527, 534 (Or. 1985) (noting the use of professional standards to establish the fiduciary's duty of confidentiality).

<sup>378</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2011).

<sup>379</sup> *Id.* R. 1.6(b).

<sup>380</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Preface (1986); see *supra* note 335 and accompanying text.

<sup>381</sup> See *In re Crumacker*, 383 N.E.2d 36, 52 (Ind. 1978) (disbarring attorney based on pattern of filing harassing litigation and making discourteous statements to opposing parties and lawyers); *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ronwin*, 557 N.W.2d 515, 523 (Iowa 1996) (disbarring attorney for filing frivolous lawsuits and making false accusations of criminal conduct against other lawyers and judges); *In re Disciplinary Proceeding Against Sanai*, 225 P.3d 203, 212 (Wash. 2009) (disbarring attorney based on pattern of filing frivolous motions); see also *In re Discip-*

commit fraud upon the court or similar misconduct.<sup>382</sup> Disbarment for incivility is even less common, with public reprimands being more typical.<sup>383</sup> Although incivility might violate a disciplinary rule, it rarely causes or risks serious injury—the outcome typically required under the *Standards* before disbarment is appropriate in the case of a violation of a duty owed to one other than a client.<sup>384</sup>

The approach would also work in other IIED cases involving non-client claims. Many of the IIED cases stemming from a lawyer's attempt to collect a debt involve some type of dishonesty, harassment, or misuse of the legal system.<sup>385</sup> The *Standards* address these forms of misconduct in various ways that can be applied by courts in a consistent fashion.<sup>386</sup> Particularly in the case of a lawyer who misuses the legal system, courts often emphasize the special policy concerns involved when a lawyer engages in such action.<sup>387</sup> Thus, in close cases,

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*linary Proceeding Against Sanai*, 225 P.3d at 210 (Chambers, J., dissenting) (arguing in favor of disbarment where lawyer's conduct in litigation was described by trial judge as "an indescribable abuse of legal process [involving] the most abusive and obstructive litigation tactics this Court has ever encountered").

<sup>382</sup> See *Fla. Bar v. St. Louis*, 967 So. 2d 108, 123 (Fla. 2007) (stating that the court will typically disbar a lawyer who intentionally deceives the court); *N.C. State Bar v. Telford*, 556 S.E.2d 344, 353 (N.C. 2001) ("The North Carolina State Bar has also disbarred attorneys who demonstrated an intention to perpetrate a fraud upon the court, subvert the trial process, or disrupt the court's functioning."); see also STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 6.11 (1986) (providing that where a lawyer's litigation-related misconduct involves fraud upon a court, disbarment is generally appropriate when the lawyer's actions cause "serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding").

<sup>383</sup> See *In re Ramunno*, 625 A.2d 248, 250 (Del. Super. Ct. 1993) (publicly reprimanding lawyer for use of profanity and insulting conduct toward opposing counsel); *In re Goude*, 374 S.E.2d 496, 497 (S.C. 1988) (publicly reprimanding lawyer for engaging in discourteous behavior in court).

<sup>384</sup> See *Fla. Bar v. Ratiner*, No. SC08-689, 2010 WL 2517995, at \*5 n.3 (Fla. June 24, 2010) (reducing recommended sanction of disbarment to suspension due to lack of evidence that respondent's conduct caused serious or potentially serious harm).

<sup>385</sup> See discussion *supra* Part IV.B.2.

<sup>386</sup> According to the *Standards*, disbarment is appropriate in cases of abuse of the legal process where the lawyer intentionally misuses the legal process "to benefit the lawyer or another when the lawyer's conduct causes injury or potentially serious injury to a party, or serious or potentially serious interference with a legal proceeding." STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 6.2 cmt. (1986).

<sup>387</sup> See, e.g., *In re Bithoney*, 486 F.2d 319, 322 n.1 (1st Cir. 1973) ("Lawyers have an obligation as officers of the court not to indulge in any of these practices."); *Fla. Bar v. Rightmyer*, 616 So. 2d 953, 955 (Fla. 1993) ("We can conceive of no ethical violation more damaging to the legal profession and process than lying under oath . . . . An officer of the court who knowingly and deliberately seeks to corrupt the legal process can logically expect to be excluded from that process").

courts can draw upon such statements to help focus the inquiry as to the extreme and outrageous nature of the conduct.

Threatening or initiating criminal prosecution in an attempt to gain an advantage in a civil proceeding presents a slightly more complicated problem. In those jurisdictions where no disciplinary rule prohibits this behavior, the jurisdiction has made clear that such behavior is within the permissible bounds of the practice of law.<sup>388</sup> Thus, a lawyer who takes such action in good faith should not be subject to IIED liability.

When, however, a jurisdiction has a disciplinary rule in place prohibiting such conduct, or when the lawyer lacks a good faith belief that criminal charges are warranted, discipline is appropriate. If a lawyer's threats or acts amount to criminal conduct involving "intentional interference with the administration of justice, false swearing, misrepresentation, fraud, [or] extortion," disbarment would be appropriate under the *Standards* even absent any injury to the opposing party.<sup>389</sup> Hence, such conduct should also be prima facie extreme and outrageous. Similarly, threatening or initiating criminal proceedings without a good faith belief as to the charges has been found to violate the disciplinary rule prohibiting conduct having no substantial purpose other than to embarrass, delay, or burden another.<sup>390</sup> This implicates a lawyer's duty to the legal system as an officer of the court and may amount to abuse of the legal process.<sup>391</sup> Where serious injury or potential injury (such as arrest or relinquishment of a legal right) results, disbarment is appropriate;<sup>392</sup> thus, such action should also be considered extreme and outrageous.<sup>393</sup> Similarly, the *Standards* list the vulnerability of the victim as an aggravating factor in determining the appropriate level of discipline.<sup>394</sup> The fact that a lawyer has threatened or initiated criminal prosecution against a former

<sup>388</sup> See *supra* notes 288–92 (discussing ABA Ethics Opinion 92-363).

<sup>389</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 5.11(a) (1986).

<sup>390</sup> See, e.g., La. State Bar Ass'n v. Harrington, 585 So. 2d 514, 520 (La. 1990); Robertson's Case, 626 A.2d 397, 401 (N.H. 1993); Utah State Bar Ethics Advisory Op. Comm., Ethics Op. No. 03-04, ¶ 16 (2003), available at [http://www.utahbar.org/rules\\_ops\\_pols/ethics\\_opinions/op\\_03\\_04.html](http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_03_04.html).

<sup>391</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 6.0 (1986).

<sup>392</sup> *Id.* Standard 6.21.

<sup>393</sup> Threatening or initiating criminal prosecution without a good faith belief that charges are warranted may implicate a number of disciplinary rules. See *supra* note 290 and accompanying text. The *Standards* explain that a lawyer's commission of multiple offenses is an aggravating factor in the determination of the appropriate sanction, thus possibly increasing the potential for disbarment. STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 9.22 (1986).

<sup>394</sup> STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 9.22 (1986).

client—a person who may be particularly vulnerable to emotional distress given the special relationship of trust created by the attorney-client relationship<sup>395</sup>—may be considered an aggravating factor in the outrageousness determination.

## VI. CONCLUSION

By design, the tort of intentional infliction of emotional distress is reserved for the most egregious of misconduct, conduct that is beyond all bounds of decency so as to be regarded as intolerable in a civilized society. By design, disbarment is a sanction that is reserved for the most egregious of lawyer misconduct, conduct that is utterly intolerable within the legal profession. Realistically, courts will never be able to adequately define the concept of extreme and outrageous conduct for purposes of intentional infliction of emotional distress claims. Clearer standards are, however, within the courts' reach in some instances.

Given the crucial role lawyers, as public citizens, play in the administration of justice, conduct that warrants disbarment is conduct that cannot be tolerated in a civilized society. By linking the standards for disbarment with the standard for extreme and outrageous conduct, courts can provide courts and litigants with greater clarity as to the permissible bounds of conduct. In the process, they may also help promote public confidence that lawyers who engage in a wide departure from the standards established to protect the public are ultimately held to the same standards as non-lawyers for purposes of civil liability.

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<sup>395</sup> See *People v. Rhodes*, 107 P.3d 1177, 1183 (Colo. 2005) (noting “the vulnerability of any client who depends upon his/her attorney to act with integrity in their affairs” and considering it an aggravating factor in imposing discipline). But courts may be hesitant to assign much weight to this factor, due to the fact that “presumably clients will usually be in a trust relationship with their attorneys.” *In re Johnson*, 826 P.2d 186, 193 (Wash. 1992).