

# ADDING INSULT TO INJURY: HOW THE *CASHEN* PROTOCOL FAILS TO PROPERLY BALANCE COMPETING CONSTITUTIONAL INTERESTS OF IOWANS

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## I. INTRODUCTION

In its 2010 decision *State v. Cashen*, the Iowa Supreme Court adopted a new protocol to determine whether a criminal defendant can compel the pretrial production of a victim's privileged mental health records in furtherance of a self-defense claim.<sup>1</sup> Stemming from criminal charges of domestic abuse assault and willful injury,<sup>2</sup> the court attempts to strike a balance between the competing constitutional rights of the victim's right to privacy and the defendant's right to due process.<sup>3</sup> The *Cashen* court presents its protocol as the proper balancing test for trial courts to use when determining whether a criminal defendant should be able to access the mental health records of the victim.<sup>4</sup> While the Iowa Supreme Court has previously ruled on several cases of this nature,<sup>5</sup> the *Cashen* decision

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1. See *State v. Cashen*, 789 N.W.2d 400, 407–10 (Iowa 2010).

2. *Id.* at 404 (stating the charges in *Cashen*, which amount to class “D” felonies).

3. See *id.* at 405.

4. *Id.* at 408.

5. See *infra* Part II.A–C.

shocked citizens, organizations, and interest groups throughout the state.<sup>6</sup> Tipping the scales of justice in favor of the criminal defendants, the court's protocol whittles the privacy interests of defenseless victims to a mere reference.

The court's analysis begins by acknowledging the victim's right to privacy in her mental health records, stressing the deeply intimate and personal nature of the information shared between a patient and a mental health doctor.<sup>7</sup> However, the court's focus quickly turns and remains on the criminal defendant's right to present his defense at trial.<sup>8</sup> By issuing the protocol to determine the discoverability of a victim's mental health records,<sup>9</sup> the majority abandons the balancing test and replaces it with a policy judgment favoring compelled disclosure of mental health records.

This Note argues for a revised protocol for determining the discoverability of a victim's privileged mental health records for purposes of preparing the defendant's case or defense for trial. The *Cashen* protocol leads to situations where a criminal defendant can compel disclosure of a victim's mental health records upon the assertion of a legal argument that the records are marginally relevant to the defendant's case.<sup>10</sup> Not only does this approach stand in contrast to Iowa's historic physician-patient privilege,<sup>11</sup> but it also fails to sufficiently recognize the constitutionally rooted right to privacy.

The purpose of this Note is to: (1) outline Iowa's historic use of balancing tests for determining the discoverability of privileged records;<sup>12</sup> (2) illustrate the dangers, flaws, and shortcomings of the *Cashen* decision;<sup>13</sup> (3) show how Iowa's citizens, professional organizations, and interest groups have responded to the decision;<sup>14</sup> and (4) set forth a new protocol for trial courts to use that not only cures the defects of *Cashen*, but recognizes and gives due consideration to both of the competing

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6. *See infra* Part IV.

7. *See Cashen*, 789 N.W.2d at 407.

8. *See id.*

9. *See id.* at 408.

10. *See id.* (holding "that the defendant need only advance some good faith factual basis indicating how the records are relevant to the defendant's innocence" to obtain a subpoena (citing *Commonwealth v. Bishop*, 617 N.E.2d 990, 996-97 (1993), *abrogated by* *Commonwealth v. Dwyer*, 859 N.E.2d 400, 414, 417-19 (2006)).

11. *See infra* Part II.C.1.

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

constitutional rights.<sup>15</sup> Our judicial system can, and must, do better to protect victims of domestic abuse, sexual assault, and all other heinous crimes. Therefore, before compelling disclosure of a victim's privileged documents, a trial court must have the proper mechanism in place to protect the rights of both the victim—as a nonparty member—and the defendant facing criminal charges.

## II. IOWA'S USE OF BALANCING TESTS FOR PRIVILEGED HEALTH RECORDS SINCE 1984

Between 1984 and 2008, the Iowa Supreme Court decided several cases applying balancing tests to determine if a party to a suit is entitled to obtain and review a nonparty's confidential medical records, specifically in criminal trials.<sup>16</sup> Throughout each of these cases, the court's goal—the fair administration of justice—has remained relatively unchanged, yet its approach for reaching this goal has changed considerably.

### A. *The Initial Decision Permitting a Criminal Defendant to Obtain a Nonparty's Mental Health Records*

At the beginning of this venture, the Iowa Supreme Court decided *Chidester v. Needles*, where it initially adopted and applied a balancing test to determine whether a party to a criminal proceeding is entitled to review the confidential medical records of a nonparty individual.<sup>17</sup> In *Chidester*, the plaintiff was the medical records custodian at a mental health facility that provided psychological services for patients both paying privately and through public funding.<sup>18</sup> Certain medical records were subpoenaed from the clinic to investigate alleged fraudulent practices by the clinic in violation of state administrative rules.<sup>19</sup> Upon receiving the subpoena for "specifically-identified records kept by the clinic," the clinic's doctors moved to quash the subpoena, arguing the patients' records were privileged under Iowa Code section 622.10.<sup>20</sup> Notwithstanding the doctors'

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15. See *infra* Part V.

16. See, e.g., *State v. Heemstra*, 721 N.W.2d 549, 563 (Iowa 2006); *McMaster v. Iowa Bd. of Psychology Exam'rs*, 509 N.W.2d 754, 759–61 (Iowa 1993); *Chidester v. Needles*, 353 N.W.2d 849, 853–54 (Iowa 1984).

17. *Chidester*, 353 N.W.2d at 853.

18. *Id.* at 851.

19. *Id.* (alleging that the "fraudulent practices involv[ed] violations of the Iowa Administrative Rules pertaining to medicaid funds").

20. *Id.* The court cited the pertinent part of Iowa Code section 622.10, which provided:

argument stressing that the statute was intended to protect and ensure patients' trust and comfort in their physicians, the court found the statute's privilege was limited.<sup>21</sup> The court rationalized its holding by stating that "[b]ecause it is in derogation of every person's duty to give evidence, [the statute] is subject to special restrictions."<sup>22</sup>

The *Chidester* court held the physician-patient privilege in Iowa Code section 622.10 did not exempt the medical records custodian from obeying the subpoena; however, the court still had to determine whether requiring such records to be disclosed would violate the patients' constitutional right to privacy.<sup>23</sup> The court determined the patients' constitutional privacy interests are "at most a qualified rather than an absolute privilege"; as such, the court should engage in a balancing test to determine the outcome, weighing the patients' interests against the state's interests.<sup>24</sup> Justice Wolle explained that the court would balance the patients' constitutional right to privacy "against such public interests as the societal need for information, and [how] a compelling need for information may override the privacy interest."<sup>25</sup> Furthermore, the court held Iowa Code section 622.10 does "not apply in this case because [the] plaintiff could comply with the subpoena without 'giving testimony,' the only activity explicitly protected by the statute's wording."<sup>26</sup>

While the court seemingly acknowledged the existence of the patients' right to privacy encompassing their mental health records, its

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A practicing attorney, counselor, physician, surgeon, physician's assistant, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

*Id.* at 851–52 (quoting IOWA CODE § 622.10 (1983)).

21. *Id.* at 852.

22. *Id.* (quoting *Head v. Colloton*, 331 N.W.2d 870, 875 (Iowa 1983) (citations omitted)).

23. *Id.* at 853 (noting how the plaintiff argued the First and Fourteenth Amendments of the U.S. Constitution protect the right to privacy for the patients and that compelling the disclosure of such records would be in violation of such right).

24. *Id.*

25. *Id.* (citations omitted) (concluding that it was unnecessary for the court to determine the particular reach of these patients' constitutional right to privacy).

26. *Id.* at 852.

focus remained on the overarching societal interest of obtaining the medical records to ensure a fair criminal trial.<sup>27</sup> In the alleged weighing of the patients' and the state's interest against one another, the *Chidester* court failed to sufficiently consider the subsequent ramifications this decision could have on physicians' future patients, disclosure of personal information to medical professionals, and the private and emotional interests at stake.<sup>28</sup> Under the *Chidester* standard, while a constitutional right to privacy is acknowledged, when the seeking party can demonstrate a compelling need for the records, the right to privacy yields to disclosure.<sup>29</sup>

#### *B. Permitting a Party Under Investigation to Access a Nonparty's Mental Health Records in an Administrative Review Hearing*

In 1993, the Iowa Supreme Court directed a new approach for determining whether a patient's privacy interest in mental health records must give way to a compelling state interest. *McMaster v. Iowa Board of Psychology Examiners* considered whether a professional review board was entitled to obtain the psychology records of a patient when the professional from whom the board was seeking to obtain the records from was not under investigation.<sup>30</sup> This case considered the use of a nonparty's mental health records in an administrative review proceeding,<sup>31</sup> however, the court's approach and discussion is comparable with the approach for criminal trials. While the patient's psychologist refused to comply with the request, the patient also petitioned the court for a temporary and permanent injunction, along with a motion to quash the subpoena for her records.<sup>32</sup> At the hearing on the petition, the trial judge dismissed the petition for permanent injunction and ordered the psychologist to comply

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27. *See id.* at 853.

28. *See id.*

29. *See id.* at 853–54 (concluding that the patients' privacy rights were outweighed by "the State's interest in well-founded criminal charges and the fair administration of criminal justice").

30. *McMaster v. Iowa Bd. of Psychology Exam'rs*, 509 N.W.2d 754, 755–56 (Iowa 1993). The Iowa Board of Psychology Examiners was investigating psychologist Todd Hines, Marsha McMaster's husband. *Id.* at 756. Marsha had previously seen Dr. Hines for services prior to their marriage. *Id.* Subsequent to their marriage, the board received a complaint about Dr. Hines's conduct while Marsha was still his patient. *Id.* Thus, the board subpoenaed all of Dr. Hines's clinical records and also sought to obtain Marsha's records from the psychologist who began treating her after she and Dr. Hines were married. *Id.*

31. *Id.*

32. *Id.*

with the board's subpoena for the patient's mental health records.<sup>33</sup>

In response to this decision, the patient filed an interlocutory appeal—the psychologist did not—on the required disclosure of her records.<sup>34</sup> On appeal, the patient raised three questions: (1) does Iowa Code section 622.10 prevent her medical records from being disclosed; (2) does Iowa Code section 258A.6 allow the board to obtain records of a mental health professional's patient when the subject mental health professional is not under board investigation; and (3) would disclosing the records violate the patient's constitutional right to privacy?<sup>35</sup>

#### 1. *Iowa Code Section 622.10*

Similar to the patient in *Chidester*,<sup>36</sup> the patient in *McMaster* argued Iowa Code section 622.10 precludes her records from being disclosed based on the mental health professional–patient privilege.<sup>37</sup> While the court recognized that psychologists fall within the “category of ‘mental health professionals,’” like in *Chidester*, the court stated the privilege of the code is “limited to disclosure of confidential communications *by the giving of testimony*.<sup>38</sup> Thus, in *McMaster*, the court held the privilege provided for in Iowa Code section 622.10 applied strictly to the disclosure of confidential communications through the giving of testimony and did not apply to any other form of disclosure, such as a subpoena, by a mental health professional.<sup>39</sup> Since the psychologist was not subpoenaed to testify, but rather the board was only seeking to use the subpoena to obtain the records, the court determined the patient's request fell outside the scope and protection of Iowa Code section 622.10.<sup>40</sup>

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33. *Id.* at 757.

34. *Id.* (deciding in a single-justice ruling that the trial court judge's ruling was a final decision and thus appealable as a matter of right).

35. *Id.* at 757–61.

36. See *Chidester v. Needles*, 353 N.W.2d 849, 851–53 (Iowa 1984) (discussing the application of Iowa Code section 622.10 to patient records).

37. *Id.* at 757; *see supra* note 20 (stating the pertinent part of Iowa Code section 622.10 for the purposes of this discussion).

38. *McMaster*, 509 N.W.2d at 757 (citing *Chidester*, 353 N.W.2d at 851–52 (holding that since the subpoena does not require mental health professionals to testify and divulge confidential communications, Iowa Code section 622.10 did not apply)).

39. *See id.*

40. *See id.*

## 2. Iowa Code Section 258A.6

Next, the court was asked to consider whether Iowa Code section 258A.6 allows the board to “subpoena patient records of a psychologist who is not under investigation.”<sup>41</sup> The patient argued that the statute is narrow in its reach and thus its application is limited to patient records of a psychologist who is under board investigation.<sup>42</sup> This interpretation would leave the records of psychologists in good standing outside the scope of the statute.<sup>43</sup> However, the court rejected this argument and explained that the language of the statute was sufficiently clear to authorize the board, via subpoena, to “compel the production of professional records, in the custody of *any* mental health professional,” not only those professionals who are under investigation.<sup>44</sup> While the court established that Iowa Code section 258A.6 permitted this action,<sup>45</sup> the question still remained as to whether any limitations existed.

## 3. Constitutional Right to Privacy

The last question the *McMaster* court considered was whether the patient’s constitutional right to privacy would be violated by allowing the board to obtain her records via subpoena.<sup>46</sup> The court explained that the Fourteenth Amendment implicitly provides for a right of privacy that is constitutionally protected.<sup>47</sup> Two separate privacy interests have been

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41. *Id.* The court cited the pertinent section of Iowa Code section 258A.6, which stated:

[d]isciplinary hearings held pursuant to this chapter shall be heard by the board sitting as the hearing panel. . . . The presiding officer of a hearing panel may issue subpoenas pursuant to rules of the board. . . . *A subpoena issued under the authority of a licensing board may compel . . . the production of professional records . . . whether or not privileged or confidential under law,* which are deemed necessary as evidence in connection with a disciplinary proceeding.

*Id.* (quoting IOWA CODE § 258A.6 (1991)). This Code section was subsequently transferred to section 272C. See IOWA CODE § 272C.6 (1993).

42. *McMaster*, 509 N.W.2d at 757.

43. *See id.* at 757–58 (yielding a much broader interpretation than the plaintiff’s narrow argument).

44. *Id.*

45. *Id.* at 758.

46. *Id.* (addressing the plaintiff’s argument that Iowa Code section 258A.6 was unconstitutional as applied to her—a patient of a mental health provider not under the board’s authority).

47. *Id.* (explaining that the right to privacy falls within the Fourteenth

widely recognized by the courts as falling within the constitutional right to privacy: “[T]he individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions.”<sup>48</sup> Therefore, the patient in *McMaster* argued for a privacy right that had not yet been explicitly recognized by the court—an extension of the right of privacy to include professional records of mental health professionals.<sup>49</sup> In deciding whether to extend the right of privacy to a patient’s mental health records possessed by her mental health professionals, the court held the constitutional protections should be extended to include records held by mental health professionals.<sup>50</sup> The court’s decision was based on the idea that during counseling, a patient reveals her most intimate thoughts and emotions to her mental health professional.<sup>51</sup> If the constitutional right to privacy did not extend to this interest, then patients would be deterred from sharing information vital to receiving proper treatment.<sup>52</sup> Furthermore, extending the right to privacy to this matter was found to be in accordance with the two previously mentioned privacy rights that have been recognized by the courts.<sup>53</sup> Nevertheless, just as in *Chidester*, the *McMaster* court found the constitutional privacy interest was qualified, rather than an absolute privilege.<sup>54</sup> Thus, the court provided a five-step protocol to be applied to determine whether a privacy interest must give way to the societal need for information.<sup>55</sup>

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Amendment’s “concept of personal liberty and as such restricts state action” (citing *Whalen v. Roe*, 429 U.S. 589, 599 n.23 (1977))).

48. *Id.* (quoting *Whalen*, 429 U.S. at 599–600).

49. *See id.* (recognizing that not all courts find a right to privacy for the communications and records in a psychotherapist–patient relationship). At the time of the decision, a majority of state and federal jurisdictions extended the right to privacy to such records, but “not all courts agree[d].” *Id.* (citing *In re Zuniga*, 714 F.2d 632, 638–39 (6th Cir. 1983)). A general federal psychotherapist–patient privilege was subsequently recognized by the U.S. Supreme Court in 1995. *See Jaffee v. Redmond*, 518 U.S. 1, 15 (1996).

50. *McMaster*, 509 N.W.2d at 758.

51. *Id.* (citing *Haw. Psychiatric Soc’y v. Ariyoshi*, 481 F. Supp 1028, 1039 (D. Haw. 1979)) (emphasizing that what a professional learns about a patient during treatment is arguably of greater confidence than what the patient discloses to any other individual in their lives).

52. *Id.* (citing *Haw. Psychiatric Soc’y*, 481 F. Supp. at 1039).

53. *See id.* at 758–59 (holding that both the interest in avoiding the disclosure of personal matters and the interest of keeping certain important decisions personal support the extension of this right).

54. *Id.* at 759 (citing *Chidester v. Needles*, 353 N.W.2d 849, 853 (Iowa 1984)).

55. *See id.* at 759–60 (finding “a compelling need for information may

In *McMaster*, the court applied a new balancing test to weigh the patient's privacy interest against the board's statutory obligation to oversee and monitor mental health professionals.<sup>56</sup> To begin, the court explained the burden is on the board to establish a compelling need to invade the patient's privacy interest since the interest is not only "constitutionally protected,"<sup>57</sup> but also requires a proper showing under Iowa Code section 258A.6(3).<sup>58</sup>

The first step requires the party seeking access to the records<sup>59</sup> "make a minimal showing that the complaint reasonably justifies the issuance of a subpoena in furtherance of the investigation."<sup>60</sup> Second, under Iowa Code section 258A.6(3), the seeking party is required to show the records are necessary as evidence in the pending investigation.<sup>61</sup> In satisfying this requirement, the court focuses on the relevancy of the records and whether they are essential to proving the allegations in the complaint.<sup>62</sup> In order to determine the relevancy of the records, the court shall conduct an *in camera* review of the documents.<sup>63</sup> If the court determines a sufficient

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override the privacy interest" and enumerating the five steps of analysis to balance interests).

56. *Id.* In this case involving the investigation of a psychologist by the state Board of Psychology Examiners, the board's policing obligation is a public policy interest in regulating professional licensees for the protection of the public. *See generally* IOWA CODE ch. 147 (1991) (regulating professionals); IOWA CODE ch. 154B (1991) (regulating the practice of psychology); IOWA CODE ch. 258A (1991) (allowing licensing boards to sanction licensees for improper conduct).

57. *McMaster*, 509 N.W.2d at 759. The court had previously found that "[t]he right of privacy is implicit in the Fourteenth Amendment's concept of personal liberty and as such restricts state action." *Id.* at 758 (citing *Whalen v. Roe*, 429 U.S. 589, 599 n. 23 (1977)).

58. *Id.* at 749 (stating that procedurally this is where the board has to begin the process of overcoming the patient's privacy interest). Iowa Code section 258A.6(3) states that "[u]pon proper showing" the district court can order mental health providers to comply with the subpoena. IOWA CODE § 258A.6(3) (1991).

59. For the purpose of this analysis, the seeking party refers to the Board of Psychology Examiners.

60. *McMaster*, 509 N.W.2d at 759. The court cites a New York Court of Appeals case that applied this standard and explained that the minimal showing will change from case to case. The case provides a variety of examples of what would suffice—some evidence of good faith, substantive knowledge, authenticating details—but illustrates that this is a matter of pleading by the party seeking to access the records. *Id.* (citing *Levin v. Murawski*, 449 N.E.2d 730, 733–34 (N.Y. 1983)).

61. *Id.*

62. *Id.*

63. *Id.*

relationship exists, then the records will be produced to the seeking party, but not before all identifying information has been redacted from the records.<sup>64</sup>

The third step in determining whether a patient's privacy interest must give way to the societal need for information requires the seeking party to notify the patient and request an authorization for a release of her records before a subpoena can be issued.<sup>65</sup> Fourth, the seeking party is required to take reasonable steps to prevent unauthorized disclosure by ensuring adequate safeguards.<sup>66</sup> Finally, the patient's interest will yield to the state's interest if the seeking party can show there is "an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access."<sup>67</sup>

Because this new protocol did not exist prior to the hearing on the interlocutory appeal, the court remanded the case back to the district court.<sup>68</sup> However, in a dissent by Justice Snell, concerns were raised that the *McMaster* approach and five-step protocol compromised the expressed importance of patient–mental health professional confidentiality and the patient's constitutional right to privacy.<sup>69</sup>

Justice Snell explained that in *Chidester*, the state's interest was the fair administration of criminal justice, based on well-founded criminal charges; however, in *McMaster*, the interest of fair administration of criminal justice is not present.<sup>70</sup> Therefore, Justice Snell argued that

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64. *Id.* at 759–60 (citing IOWA CODE § 258A.6(4) (1991) (requiring confidentiality to be maintained for individuals whose constitutional right to privacy has been involuntarily waived)).

65. *Id.* at 760. This appears to be an attempt by the court to include the patient in the process of waiving the constitutional right to privacy; however, this bleak attempt falls short of any meaningful balancing of the patient's interests.

66. *Id.*

67. *Id.* (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)).

68. *Id.* at 761.

69. *See id.* at 762–64 (Snell, J., dissenting). While *McMaster* and *Cashen* were decided eighteen years apart, the issue of allowing access to records of this nature has remained unchanged. *Compare id.* (expressing concern that the protocol compromises the importance of the confidentiality and privacy), *with State v. Cashen*, 789 N.W.2d 400, 411 (Iowa 2010) (Cady, J., dissenting) (expressing concern that the protocol fails to consider the privacy and confidentiality interests of the victim). The *Cashen* dissent will be discussed later in this Note. *See infra* Part III.B.

70. *McMaster*, 509 N.W.2d at 763 (citing *Chidester v. Needles*, 353 N.W.2d 849, 853–54 (Iowa 1984)).

*McMaster* is more comparable to *Newman*—a 1993 Iowa Supreme Court case holding medical records containing information gathered from the patient were considered confidential communications under Iowa Code section 622.10<sup>71</sup>—and less like the narrow reach of *Chidester*, in which the records were disclosed.<sup>72</sup> Moreover, the *McMaster* dissent focused on the majority’s recognition of the patient’s constitutional right to privacy, yet argued it “fractures the principle” by allowing a “sufficient showing of need” by the seeking party to prevail.<sup>73</sup> When dealing with fundamental rights, the dissent points out that ““the Court has held that regulations limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate interests at stake””;<sup>74</sup> however, the majority “leaves the scissors in the hands of licensing boards free to shear off whatever fabric they wish from an individual’s raiment of liberties.”<sup>75</sup> Finally, Justice Snell explained that while an in camera review limits the initial intrusion to the district court judge, more reviewers access the patient’s most personal information through the appeal process.<sup>76</sup>

In sum, the dissent stood for the proposition that “[t]he constitutional right of privacy should not be diminished” and “[n]o citizen should be forced, without compelling reason and adequate constitutional safeguards, to turn over their dreams, fantasies, sins, and shame.”<sup>77</sup> Notwithstanding Justice Snell’s concerns, the *McMaster* court called for an approach that recognizes a constitutional right to privacy; yet upon the showing of a

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71. *Id.* at 762 (citing *Newman v. Blom*, 89 N.W.2d 349 (Iowa 1958)). In *Newman*, the court looked at the statutory protection for confidential patient communication with professionals and determined that “medical records that contained information gathered from a patient were to be considered ‘confidential communications’ under section 622.10 because the records contained information which would be inadmissible at trial as oral testimony from the physician.” *Id.* (quoting *Newman*, 89 N.W.2d at 354–56).

72. *Id.* at 763.

73. *Id.*

74. *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 155 (1973)). This use of language by Justice Snell illustrates that since the constitutional right to privacy is at hand, the court is required to construe statutes narrowly that threaten that right. *See id.*

75. *Id.* Justice Snell continues to argue that [c]hapter 258 is much too broad,” and if “such an infringement on personal liberty” was the true intent of the Iowa legislature, it should have done so through a “much more precise enactment.” *Id.* at 763–64.

76. *Id.* at 764.

77. *Id.*

compelling need for the information, the privacy interest must yield in favor of disclosure.<sup>78</sup>

As the twentieth century came to an end, so did the Iowa Supreme Court's focus and commitment to the constitutional right to privacy. As demonstrated in *Chidester* and *McMaster*, in the 1980s and 1990s, the court focused on and protected the constitutional right to privacy.<sup>79</sup> However, the court makes a stark turn when it hands down the *Heemstra* and *Cashen* decisions, leaving the constitutional right to privacy in the past, diminished to a mere recognition for the future.<sup>80</sup>

### C. Opening the Floodgates: The *Heemstra* Decision

In 2006, the Iowa Supreme Court granted certiorari on a case that swept across Iowa's farmlands. *State v. Heemstra* dealt with a first-degree murder charge that was appealed based on the jury instructions, the district court's refusal to order certain medical records to be produced, and the denial of the defendant's motion for a new trial.<sup>81</sup> While the defendant confessed to shooting the victim—a neighboring farmer—at trial he claimed self-defense.<sup>82</sup> In asserting this defense, the defendant presented evidence to the court that the victim had previously threatened to harm him, was a violent person, and suggested the victim had a history of mental health problems.<sup>83</sup> While the defendant's attorney attempted to obtain the victim's mental health records from two doctors—whom the victim had consulted for anxiety and depression—he was unsuccessful.<sup>84</sup> Therefore, one of the three issues on appeal—and the only issue relevant to this Note—was whether the trial court erred in quashing the defendant's subpoenas for the victim's mental health records from his treating medical professionals.<sup>85</sup>

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78. See *id.* at 759 (majority opinion) ("The privacy interest must always be weighed against such public interests as the societal need for information, and a compelling need for information may override the privacy interest." (quoting *Chidester v. Needles*, 353 N.W.2d 849, 853 (Iowa 1984))).

79. See *id.* at 758 ("The interest is referred to as a right of privacy and is constitutionally protected." (citing *Head v. Colloton*, 331 N.W.2d 870, 876 (Iowa 1983)); *Chidester*, 353 N.W.2d at 853 (recognizing the "patients' constitutional privacy interest"))).

80. See *infra* Parts II.C, III.

81. *State v. Heemstra*, 721 N.W.2d 549, 551 (Iowa 2006).

82. *Id.* at 552.

83. *Id.*

84. *Id.*

85. *Id.*

The defendant claimed he wished to obtain the victim's medical records to further his self-defense claim; yet, when he subpoenaed the records, both the doctors and the victim's estate moved to quash the subpoena.<sup>86</sup> In considering the motion to quash, the court determined an in camera review would be sufficient to determine two pertinent issues: (1) whether there were any recorded threats made by the victim directed toward the defendant; and (2) whether any potential witnesses existed who could reveal any information about the relationship between the victim and the defendant.<sup>87</sup> At the conclusion of the in camera review, the court determined the records contained no evidence concerning either of these two issues.<sup>88</sup>

In response to the court's conclusion, the defendant's attorney asked the scope of the in camera review be expanded, arguing:

[T]he defendant's due process rights and his Sixth Amendment rights to confront his accusers and to compel the production of information that would be relevant and helpful to his defense, [are] broader than those two areas and we can, of course, only trust the court to be sensitive to those due process and Sixth Amendment rights to compulsory process and to confront his accusers.<sup>89</sup>

Without addressing the defendant's Sixth Amendment rights, the trial court denied the defendant's request based on Iowa Code section 622.10(1).<sup>90</sup> Furthermore, the trial court stated Iowa Code section 228.2(1), which deals directly with mental health professionals, specifically calls for the denial of the request and is broader than Iowa Code section 622.10(1) because "it is not limited to 'testimony.'"<sup>91</sup> While the trial court used the

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86. *Id.* at 559.

87. *Id.* The in camera review was limited in scope to only the two areas of interest identified by the court. *Id.*

88. *Id.*

89. *Id.*

90. *See id.* The court cited pertinent parts of Iowa Code section 622.10(1), which stated:

A practicing . . . mental health professional . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

91. *Id.* (quoting IOWA CODE § 622.10(1) (2005)).

91. *Id.* The court cited the pertinent parts of Iowa Code section 228.2(1),

plain language of the code to determine the defendant was not entitled to the victim's mental health records, on appeal the defendant still argued that he should be able to access the records to further his case.<sup>92</sup>

The Iowa Supreme Court first dismissed the defendant's argument that the victim's estate waived his claim of psychotherapist–patient privilege by using the victim's medical records in his civil wrongful death claim against the defendant.<sup>93</sup> However, the court gave great consideration to the defendant's next argument: Iowa Code sections 622.10 and 228.2 do not specifically ban disclosing the victim's medical records to the defendant.<sup>94</sup>

### 1. *The Scope of the Patient Privilege*

As seen in previous cases, the *Heemstra* court noted Iowa Code section 622.10 has been interpreted narrowly, limiting the privilege to prohibiting physicians from disclosing confidential information through testimony.<sup>95</sup> However, it noted subsequent cases have shown a trend toward expanding the medical privilege found in Iowa Code section 622.10 beyond the giving of testimony.<sup>96</sup> This interpretation of Iowa Code section 622.10 may be more "liberal";<sup>97</sup> however, it recognizes the purpose of the statute: to protect the physician–patient privilege. In doing so, the court

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which stated that "[e]xcept as specifically authorized . . . a mental health professional . . . shall not disclose or permit the disclosure of mental health information." *Id.* (quoting IOWA CODE § 228.2(1) (2005)).

92. *See id.*

93. *See id.* at 560 (holding that the psychotherapist–patient privilege should not be deemed waived unless it is "under the clearest of circumstances").

94. *See id.* at 560–63.

95. *Id.* at 560 (citing *In re Hutchinson*, 588 N.W.2d 442, 446 (Iowa 1999) (holding that the privilege found in section 622.10 does not prohibit a physician from disclosing confidential communications in a non-testimonial setting); *McMaster v. Iowa Bd. of Psychology Exam'rs*, 509 N.W.2d 754, 757 (Iowa 1993) (holding that the privilege is limited to "giving testimony"); *Roosevelt Hotel Ltd. P'ship v. Sweeney*, 394 N.W.2d 353, 355 (Iowa 1986) (holding that Iowa Code section 622.10 only "comes into play 'in giving testimony'"); *Chidester v. Needles*, 353 N.W.2d 849, 852 (Iowa 1984) (explaining that since a subpoena does not force the physician to testify, then it does not require the disclosure of privileged information)).

96. *Heemstra*, 721 N.W.2d at 560 ("[T]he privilege extends to medical records that contain information which would be inadmissible at trial as oral testimony from the physician." (quoting *State v. Eldrenkamp*, 541 N.W.2d 877, 881 (Iowa 1995)); *State v. Demaray*, 704 N.W.2d 60, 64–65 (Iowa 2005) (allowing medical records containing the defendant's blood test results to be covered by the privilege)).

97. *Heemstra*, 721 N.W.2d at 560.

recognizes the strong public policy argument in support of greater protection for such communications. The court explained that this recent change in its interpretation of Iowa Code “section 622.10 is logical because the privilege would be virtually meaningless if it prohibited testimony but did not protect the very records upon which such testimony would be based.”<sup>98</sup>

In response to the court’s direction, the defendant argued the victim’s records were needed to further investigate his violent nature; thus, the defendant urged the court to adopt a balancing test to weigh the victim’s privacy interest against the defendant’s need for the information to further his defense.<sup>99</sup> To reject this argument the court turned to *Jaffee v. Redmond*, a U.S. Supreme Court case regarding the psychotherapist–patient privilege.<sup>100</sup> In *Jaffee*, the Court specifically rejected the use of balancing tests based on the notion that if a mental health professional promises confidentiality to his patient, that promise should not be “contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure.”<sup>101</sup> The *Heemstra* court noted that *Jaffee* stated the privilege was not absolute, but rather situations might arise where the privilege must yield to *exceptional circumstances*.<sup>102</sup> Then, turning to Iowa law, the court held that while Iowa’s privilege statutes, in general, are designed to prevent the defendant from obtaining medical records of this nature, the privilege can be overcome and disclosure can be compelled under certain circumstances.<sup>103</sup> Specifically, it noted courts have long recognized that a “criminal defendant’s Sixth Amendment right to confront the witnesses against him means that the government cannot simultaneously prosecute an individual and assert privileges that would inhibit his defense.”<sup>104</sup>

Based on these factors, the *Heemstra* court determined the case

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98. *Id.* (stressing that the purpose for the privilege is to promote open and honest communication between doctors and their patients).

99. *Id.* at 561.

100. *See id.* (citing *Jaffee v. Redmond*, 518 U.S. 1 (1996)).

101. *Id.* (quoting *Jaffee*, 518 U.S. at 17–18).

102. *See id.* at 561–62 (citing *Jaffee*, 518 U.S. at 18) (emphasizing that exceptions may be adopted in certain situations in which significant harm could result). One could reasonably interpret this as simultaneously accepting and rejecting the same principle.

103. *See id.* at 562–63.

104. *Id.* (quoting 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* § 5436, at 887 (1980) (footnote omitted)).

before it presented a “bona fide claim of *compelling* interest sufficient to require a limited disclosure of the privileged information.”<sup>105</sup> The court provided several factors to consider in making this determination, distinguishing *Heemstra* from *Jaffee*: (1) the criminal defendant in this case, if found guilty, will receive the most severe punishment provided for by Iowa law; (2) the victim in this matter is deceased and some of the privileged information is already public knowledge via the estate’s wrongful death suit; and (3) the information the defendant wishes to obtain could be crucial to his self-defense claim—which the court states is the most important factor considered.<sup>106</sup> Therefore, the court ordered limited disclosure of the requested records for an *in camera* review, with the defense and prosecution counsel present.<sup>107</sup> The matter was then reversed and remanded for a new trial in accordance with the court’s decision.<sup>108</sup>

## 2. *The Evils of the Heemstra Decision*

In a 7–2 decision, there were two vehement dissents to the majority’s holding in *Heemstra*, one by Justice Carter and one by Justice Cady.<sup>109</sup> Justice Cady spoke of the “harm to the longstanding protections and sound policies of the physician–patient privilege” the majority caused by its decision.<sup>110</sup> Emphasizing the defendant’s personal knowledge of the victim’s propensity toward violence, Justice Cady argued there was no legitimate need for the defendant to obtain the victim’s medical records because they did not contain anything beyond what the defendant already knew.<sup>111</sup> Not only did the defendant lack a compelling need for the victim’s medical records, but prior to the majority’s decision in this case, records of this nature were protected under the physician–patient privilege—a privilege Iowans have long recognized as extremely important.<sup>112</sup> Justice Cady was willing to acknowledge there may in fact come a time when an exception should be made that goes against the “historic doctrine” of the physician–patient privilege; however, he was not willing to accept that the

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105. *Id.* at 563 (emphasis added).

106. *Id.*

107. *Id.* The court explained that the counsel for each side needed to be present to “aid in the weighing process,” although a protective order prevented further dissemination of the records absent a court order. *Id.*

108. *Id.*

109. *Id.* (Carter, J., dissenting); *id.* at 569 (Cady, J., dissenting).

110. *Id.* at 569 (Cady, J., dissenting).

111. *See id.*

112. *See id.*

facts presented in *Heemstra* reached that level.<sup>113</sup> Criticizing the majority, Justice Cady wrote:

Courts have an obligation to carry forward our bedrock principles of law, such as the physician-patient privilege, so as to provide the same protections for society as in the past. The physician-patient privilege has now been seriously compromised based upon a dubious justification that will mean victims of crimes in the future will be required to open their private, confidential communications with their doctors based upon the same assertions of self-defense. This is an unnecessary invasion of privacy, and could ultimately have a chilling effect on the willingness of patients to openly disclose critical personal information to a physician.<sup>114</sup>

As Justice Cady notes, criminals most certainly have the right to a fair trial; however, if no prejudice toward the defendant results from the court refusing to compel the requested evidence, the time has not yet arrived to make an exception to this principle of Iowa law.<sup>115</sup> When questions of physician-patient privilege and mental health records are presented to the court, Justice Cady argues it must not be forgotten that these are questions of intimate, personal details and sensitive communications that should be handled with the utmost level of respect and dignity.<sup>116</sup> Justice Cady contends that permitting evidence such as this, without the most compelling reason, threatens a patient's trust in medical professionals and exposes the victim to embarrassment and humiliation at court.<sup>117</sup> The court's role is to "protect and preserve the legitimate privacy of individuals from intrusion, not open the door."<sup>118</sup>

### 3. What Now?

Several lingering questions remained after *Heemstra*: In criminal trials, will the defendant's Sixth Amendment right to confront witnesses

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113. *Id.*

114. *Id.*

115. *Id.* ("The rights of a criminal defendant, however, should not tip the scale when prejudice to the defendant will not result.").

116. *See id.* ("No arm of government should be entitled to invade private, sensitive communications between citizens made by them under the belief that the communications would remain private, absent the most compelling reasons.").

117. *See id.* ("This is an unnecessary invasion of privacy, and could ultimately have a chilling effect on the willingness of patients to openly disclose critical personal information to a physician.").

118. *Id.*

against him always prevail when up against a victim's constitutional right to privacy? Or, does it depend on the severity of punishment the criminal defendant faces? If there is a potential defense to the crime, will that alone be enough to tip the scales in favor of disclosure?

### III. IOWA'S CURRENT SYSTEM: THE *CASHEN* DECISION

Justice Cady's 2006 *Heemstra* dissent, warning of the dangers of opening the door to allowing a victim's privileged information to be utilized by the defendant,<sup>119</sup> became particularly relevant to a case that came before the Iowa Supreme Court four years later. In 2010, the court adopted a protocol that is supposed to balance a victim's right to have mental health records kept private against a criminal defendant's right to utilize the records in the case before the jury.<sup>120</sup>

#### A. *Policy Judgments Replace True Balancing: The Cashen Decision*

##### 1. *The Facts*

The facts of *Cashen* are relatively simple and arise out of a domestic dispute between the defendant and the victim.<sup>121</sup> Subsequently, the defendant was charged by the state with domestic abuse assault and willful injury.<sup>122</sup> As part of his defense, the defendant intended to rely on the affirmative defense of self-defense and thus moved the court to authorize the use of an expert witness to review and analyze the victim's mental health records.<sup>123</sup> Furthermore, the defendant wanted his expert to be able to testify at trial regarding the victim's credibility and propensity for violence based on the information the expert obtained from her records.<sup>124</sup> The district court denied the motion on the basis that it had yet to determine whether the defendant would be able to use the victim's records as admissible evidence at trial.<sup>125</sup>

Subsequently, the defendant obtained personal information about the

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119. *See id.*; *see also supra* Part II.C.2.

120. *State v. Cashen*, 789 N.W.2d 400, 408 (Iowa 2010).

121. *Id.* at 403–04.

122. *Id.* at 404. The domestic abuse assault was the defendant's third offense; both offenses are class "D" felonies. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

victim another way: her deposition.<sup>126</sup> The information discovered about the victim included: past abusive relationships, a posttraumatic stress disorder diagnosis, depression, anxiety, a history of extensive counseling and therapy, impulsive and reactive behavior, a tendency to become easily frustrated, and the use of prescription antidepressants.<sup>127</sup> Additionally, the victim also stated in her deposition that she believed her boyfriend, the defendant, had the tendency to be a violent man and that she was often fearful of him.<sup>128</sup>

Perhaps becoming impatient, the defendant used a private investigator to obtain some of the victim's mental health records from different hospitals and medical facilities, likely initiated by the information learned during the victim's deposition.<sup>129</sup> In response, the State filed a motion in limine to exclude, among other things, these records and the victim's history of mental health matters that she revealed in her deposition.<sup>130</sup> The court determined the victim's mental health records and the information they contained—namely her propensity for violence, reactive behavior, and ability to recall events prior to the incident accurately—were relevant to the defendant's affirmative defense of self-defense.<sup>131</sup> For impeachment purposes at trial, the judge permitted the defendant to obtain an expert to review the records and testify regarding the victim's credibility and tendency toward violence.<sup>132</sup>

After the defendant filed two separate motions, the court ordered the victim to sign a waiver permitting the defendant to obtain her records.<sup>133</sup> The State was then forced to file an application for discretionary review, which was granted and transferred to the appellate court, where the sole issue was whether allowing the disclosure of the victim's mental health

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126. *See id.*

127. *Id.* During her deposition, the victim also explained she was taking medication because she worried about her boyfriend (the defendant)'s involvement in the armed services. *Id.*

128. *Id.*

129. *See id.*

130. *Id.*

131. *Id.*

132. *Id.* The court allowed a continuation of the trial for the defendant to secure such expert. *Id.*

133. *Id.* The first motion was to resume the victim's deposition—presumably after the defendant had received her records—and the other motion was for the court to order that defendant be allowed to obtain the victim's records. *Id.* The court granted both motions. *Id.*

records was an error by the district court.<sup>134</sup>

On appeal, the court of appeals affirmed the district court's order that the defendant showed "a compelling need for the mental health records" and affirmed the order requiring the victim to disclose her records.<sup>135</sup> Furthermore, permitting the defendant's expert to testify on the victim's propensity for violence and her credibility, based on what he observed in her mental health records, was also upheld.<sup>136</sup> More significantly, however, the appellate court found the district court did not have the "authority to order the State to secure and produce the patient waiver of a witness, but failed to further address the procedure for the production of the records."<sup>137</sup> The Iowa Supreme Court granted review.<sup>138</sup>

## 2. *Arriving at the Top*

It is important to consider that the Iowa Supreme Court does not clearly state whether this opinion is based upon the U.S. Constitution or the Iowa Constitution, nor does the court acknowledge the applicability of Iowa Code section 622.10.<sup>139</sup> Without plainly disclosing the legal basis for its decision, the court proceeded to supply the analysis trial courts should use when a criminal defendant seeks to compel the production of privileged mental health records of a nonparty individual.<sup>140</sup>

In *Heemstra*, the court allowed the defendant to obtain the medical records of the deceased victim in order to present his affirmative defense of self-defense against a first-degree murder charge.<sup>141</sup> The State primarily

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134. *Id.*

135. *Id.*

136. *Id.* at 404–05.

137. *Id.* at 405. The court stated that normally discovery matters are reviewed for an abuse of discretion. *Id.* (citing *State v. Schuler*, 774 N.W.2d 294, 297 (Iowa 2009)). However, since the issue here was one that was constitutional in nature, the Iowa Supreme Court's review was *de novo*. *Id.* (citing *State v. Reyes*, 744 N.W.2d 95, 99 (Iowa 2008)). Specifically, the supreme court said the issue "rest[ed] on constitutional claims involving [the defendant's] due process right to present a defense," yet it failed to mention the victim's constitutional and statutory right to privacy against invasion into her mental health records. *Id.*

138. *Id.*

139. *See generally id.* at 403.

140. *See id.* at 408; *see also infra* Part IV.B.2.

141. *State v. Heemstra*, 721 N.W.2d 549, 563 (Iowa 2006); *see also supra* Part II.C. It is important to remember that the defendant in *Heemstra* was charged with a crime that carries a sentence of life in prison without the possibility of parole. *Cashen*, 789 N.W.2d at 405 (citing *Heemstra*, 721 N.W.2d at 563).

argued that *Cashen* was different from *Heemstra* because there are no “unique facts” that warrant either the abrogation of the established privilege or justify intrusion into the victim’s privileged records.<sup>142</sup> The majority in *Cashen* responded to this argument by saying that the only difference worth noting between *Heemstra* and the present case “is the severity of the penalty” that the defendant is eligible to receive.<sup>143</sup> The defendant’s charge in *Heemstra* carried a sentence of life in prison without the possibility for parole, while the defendant in this case, if convicted, could serve ten years in prison.<sup>144</sup>

If one were to follow Justice Cady’s dissent from *Heemstra* where he explained that “a case could be envisioned that would support [an] exception carved from th[e] historic doctrine” of physician–patient privilege, which he did not believe was presented in *Heemstra*,<sup>145</sup> it would be difficult to conclude that the facts of *Cashen* are sufficiently exceptional to abrogate the physician–patient privilege.<sup>146</sup> This conclusion would be based not only on the severity of the sentencing, but also on a true balancing of the interests at stake—both the defendant’s interest in presenting evidence to further his defense and the victim’s interest in keeping her mental health records private.<sup>147</sup>

The majority in *Cashen*, however, does not follow Justice Cady’s logic from his *Heemstra* dissent and instead states that “[r]egardless of the charge or the penalty, all defendants have a right to a fair trial.”<sup>148</sup> In support of this position, the Iowa Supreme Court cites *Gentile v. State Bar*

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142. *Cashen*, 789 N.W.2d at 405.

143. *Id.* This is a strange differentiation made by the court considering its weighing of interests is based on the fair administration of justice. *See id.* at 406 (citing *Chidester v. Needles*, 353 N.W.2d 849, 852–53 (Iowa 1984)). If this is the court’s focus, then the severity of the potential sentence should not be of any material value.

144. *Id.* at 405 (citing IOWA CODE § 902.9(5) (2005)).

145. *Heemstra*, 721 N.W.2d at 569 (Cady, J., dissenting); *see also supra* Part II.C.2.

146. Compare *Heemstra*, 721 N.W.2d at 552 (stating that the defendant faced felony first-degree murder charges after admitting to shooting the victim), with *Cashen*, 789 N.W.2d at 403–05 (stating that the defendant was involved in a “domestic disturbance” with a maximum penalty of ten years in prison).

147. *See Heemstra*, 721 N.W.2d at 569 (Cady, J., dissenting) (stating that the right to a fair trial should carry “significant weight” in the balancing of rights, but should not “tip the scales” if no prejudice will befall defendant).

148. *Cashen*, 789 N.W.2d at 405. This position supports the idea that regardless of the charge, all defendants have the right to a fair trial. *See id.* This Note does not challenge nor disagree with this view.

of Nevada and Chief Justice Rehnquist's dissent.<sup>149</sup> Chief Justice Rehnquist wrote that “[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial.”<sup>150</sup> In relying on *Gentile*, the court dismissed the need to consider the severity of the defendant's sentence in *Cashen* differently from the sentence in *Heemstra*—or any other case for that matter—when deciding how to apply the law and when privileged mental health records of the victim should be disclosed.<sup>151</sup>

The court was, however, more willing to accept the State's alternative argument: if the court decides to allow the victim's mental health records to be made available to the defendant's attorney, disclosure must be limited.<sup>152</sup> The court agreed that if it determined the victim's privileged records must be made available to the criminal defendant, then it must be done in accordance with a proper balancing mechanism,<sup>153</sup> and thus, the *Cashen* protocol was born. Before describing the steps for the trial court to take, the court stated the protocol “must be followed to *balance* the patient's right to privacy with the defendant's right to present evidence to a jury that might influence the jury's determination of guilt.”<sup>154</sup> The protocol is specifically intended to be used by the trial court to determine “when and how a defendant's attorney can gain access to a victim's privileged mental health records,” which again, the court stated, includes the balancing of the interests at stake.<sup>155</sup>

### 3. Setting the Stage

Prior to identifying and explaining its new protocol, the court goes into an analysis of prior cases illustrating the use of balancing tests to determine whether a party to a suit is entitled to review a nonparty's confidential medical records.<sup>156</sup> The court uses three specific cases to do this: *Chidester*,<sup>157</sup> *McMaster*,<sup>158</sup> and *Heemstra*.<sup>159</sup> In citing these prior cases,

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149. *Id.* (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (Rehnquist, C.J., dissenting in part)).

150. *Id.* (quoting *Gentile*, 501 U.S. at 1075 (Rehnquist, C.J., dissenting in part)).

151. *Id.* Again, this aspect of *Cashen* is not challenged by this Note.

152. *Id.*

153. *Id.*

154. *Id.* (emphasis added).

155. *Id.*

156. *Id.* at 405–07.

157. *Id.* at 405–06 (citing *Chidester v. Needles*, 353 N.W.2d 849, 851–54 (Iowa 1984)); *see also supra* Part II.A.

the court noted it had been willing to recognize a privacy interest—sometimes explicitly a constitutional interest—held by the nonparty member but also that the interest has never been considered absolute; therefore, a balancing test must be utilized to determine whether the necessity for the information will trump the privacy holder’s interest.<sup>160</sup> With this, the court set the stage to present its new protocol, which it claims will balance the competing interests between the criminal defendant and the nonparty victim;<sup>161</sup> however, in doing so, the court appears to have lost sight of its stated task—to consider the interest of *both* parties, and not just one.

#### 4. *Forgetting Half of the Equation*

In determining which factors to consider when applying this new balancing test, the *Cashen* majority begins by recognizing that a patient—here the victim—has a right to privacy in her mental health records.<sup>162</sup> Using descriptive phrases such as “[p]sychotherapy probes the core of the patient’s personality,” during treatment “[t]he patient’s innermost thoughts may be so frightening . . . that the patient in therapy will struggle to remain sick, rather than to reveal those thoughts,” and that the idea of having to share those thoughts with anyone other than a medical professional may “deter persons from seeking needed treatment,” the court initially acknowledges the deeply personal and private nature of mental health treatment.<sup>163</sup>

The court quickly turns, however, to the other half of the equation: the constitutional right and public interest in allowing the defendant to access the victim’s mental health records in order to present his defense at trial.<sup>164</sup> The court emphasizes that by excluding evidence, specifically in a criminal trial, there is a deep concern about the increased risk of convicting

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158. *Id.* at 406 (citing *McMaster v. Bd. of Psychology Exam’rs*, 509 N.W.2d 754, 755–60 (Iowa 1993)); *see also supra* Part II.B.

159. *Id.* (citing *State v. Heemstra*, 721 N.W.2d 549, 563 (Iowa 2006)); *see also supra* Part II.C.

160. *See Cashen*, 789 N.W.2d at 406.

161. *Id.* at 408 (“The protocol we adopt today strikes the proper balance between a victim’s right to privacy in his or her mental health records and a defendant’s right to produce evidence that is relevant to his or her innocence.”).

162. *Id.* at 407.

163. *Id.* (quoting *McMaster*, 509 N.W.2d at 758).

164. *Id.*

an innocent defendant.<sup>165</sup> From the court's first statement regarding the interest of the defendant, it is immediately apparent that the majority's protocol begins in favor of allowing the defendant to obtain the mental health records before any meaningful balancing has the opportunity to occur. Relying on the U.S. Constitution and U.S. Supreme Court caselaw, the court discussed the importance of a criminal defendant being able to present evidence pertinent to his case and that disclosure of said evidence is favored over suppression.<sup>166</sup> Therefore, the other side of the equation—to be balanced against the victim's right to privacy in her medical records—is the public interest of "a defendant's right to produce evidence that is relevant to his or her innocence."<sup>167</sup>

In support of this right, the court noted that while both state and federal safeguards exist to prevent wrongful convictions of criminal defendants,<sup>168</sup> this interest does not warrant giving the defendant unlimited access to a lifetime of mental health records in their entirety.<sup>169</sup> This begs the question: when does the defendant's constitutional right to due process tip the scale of justice in favor of allowing a defendant to obtain the records, trumping the victim's right to privacy? The court's balancing standard claims to:

[A]llow[] a defendant to obtain the records necessary to put forth evidence tending to show the defendant's innocence, but does not permit the defendant to go on a fishing expedition into a victim's privileged records. Because of the importance of the public interest in not convicting an innocent person of a crime, any standard should resolve doubts in favor of disclosure.<sup>170</sup>

Thus, in expanding the protocol from *McMaster*, the court articulates a new five-step protocol to be applied when the privileged mental health records

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165. *Id.*

166. *See id.* (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987); *Dennis v. United States*, 384 U.S. 855, 870 (1966)).

167. *Id.*

168. *Id.* (citing U.S. CONST. amend. VI (providing criminal defendants the right to a speedy trial through an impartial jury, the right to be informed of the charges against them, the right to confront witnesses, the right to a compulsory process, and the right to counsel); IOWA CONST. art. I, § 10 (providing the right to a speedy trial through an impartial jury, the right to be informed of charges against them, the right to confront witnesses, the right to a compulsory process, and the right to counsel to criminal defendants)).

169. *See Cashen*, 789 N.W.2d at 407.

170. *Id.* at 407–08.

of a nonparty member are sought to be obtained.<sup>171</sup> The court introduces its protocol by emphasizing that it strikes the “proper balance” between the competing public policy and victim interests.<sup>172</sup> However, once the court begins to shape its protocol, the victim’s privacy interest quickly vanishes, leaving little to be balanced. In short, the court presents its ultimate position at the outset: “any standard should resolve doubts in favor of disclosure.”<sup>173</sup>

##### 5. *Five-Step Protocol for Trial Courts to Employ*

a. *Step One.* The process to obtain a victim’s mental health records begins by the criminal defendant filing a motion with the court, establishing a “good faith factual basis” to believe the records sought to be produced will provide evidence relevant to the case and the defendant’s innocence.<sup>174</sup> Furthermore, the motion must be marked confidential, sealed, and has to include specific facts indicating a “reasonable probability” exists that the requested records contain exculpatory evidence.<sup>175</sup> After the defendant has made this minimal showing, which includes a request for the court to issue a subpoena, a subpoena can be issued by the court that requires the records custodian to produce the requested records.<sup>176</sup> Finally, a court order must be issued permitting a subpoena of the victim’s records.<sup>177</sup>

It appears as if the court is only requiring the criminal defendant to take proper procedural steps before the court will order a subpoena.<sup>178</sup> As

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171. *Id.* at 408. The court clarifies that this protocol is to be used when the criminal defendant is represented by counsel. *Id.* The court stated in a footnote that it is not making an opinion as to whether this protocol should be applied with a pro se defendant. *Id.* at n.2.

172. *Id.*

173. *Id.*

174. *Id.* The court writes that it wants to emphasize that a criminal defendant is not permitted to engage in a “fishing expedition” in obtaining the mental health records of a victim. *Id.*

175. *Id.* This standard seemingly requires more than mere relevance. *See id.*

176. *Id.* Again, the necessary showing to the court includes that the defendant has a “reasonable basis to believe the records are likely to contain exculpatory evidence tending to create a reasonable doubt as to the defendant’s guilt.” *Id.* (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987)).

177. *Id.*

178. *See id.* (establishing only a procedure for filing a motion and obtaining a court order to subpoena the victim’s mental health records).

long as a good faith, factual, and reasonable basis is demonstrated to the court—showing the records can help further the defendant’s innocence and is done in accordance with the stated procedural requirements—the court will presumably issue the subpoena for the records.<sup>179</sup> Moreover, the court specifically states the defendant does not have to show the records contain actual information relating to the unreliability of the defendant’s charge or of the witness.<sup>180</sup> The majority explains step one without once mentioning the opposing interest of the privacy holder.<sup>181</sup> While considered in subsequent steps, the balancing of both interests ought to occur from the very beginning to ensure a fair and just outcome.

b. *Step Two.* Next, it is the responsibility of the county attorney to notify the victim that the criminal defendant has requested private, privileged mental health records in furtherance of the defense.<sup>182</sup> In response to the notification, the victim can do one of two things: (1) sign an affidavit consenting to the disclosure of privileged, private records, or (2) sign an affidavit opposing disclosure.<sup>183</sup> If the victim consents, the court will then issue a subpoena for the records to be supplied to the court under seal by the mental health provider.<sup>184</sup>

If the victim opposes the disclosure, which assumingly most victims will, the court is then obligated to hold a hearing on the limited question of whether a “reasonable probability exists that the records contain exculpatory evidence tending to create a reasonable doubt as to the defendant’s guilt.”<sup>185</sup> If the trial judge determines there is a “reasonable probability” that the records sought to be obtained contain evidence relating to the defendant’s innocence or affirmative defense, the court must

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179. *See id.*

180. *Id.*

181. *See id.*

182. *Id.* In presenting step two of the protocol, the court fails to acknowledge that the victim will likely be in need of legal representation as a result of this notification. *See id.* While this consideration is of grave importance, it is outside the scope of this Note.

183. *Id.*

184. *Id.* The court explains that the subpoena will be issued “for the records to be produced” when discussing what will happen procedurally if the victim consents to the disclosure. *See id.* However, the court fails to define the term “records” and whether it means all of the victim’s records are disclosed or if the disclosure is limited in any way. *See id.*

185. *Id.* The court is unclear as to whether the victim will be present at the hearing. *See id.*

issue a subpoena for the records to be produced to the court, against the victim's will.<sup>186</sup>

The court attempts to bring the victim's interest back into the equation by requiring the ordering court to enter a "protective order containing stringent nondisclosure provisions";<sup>187</sup> which include prohibiting any person who is allowed to view the records from "copying, disclosing, or disseminating the information contained in the records to any person, including the defendant, unless otherwise authorized by this protocol or the court."<sup>188</sup> The subpoena must also comply with HIPAA regulations and shall contain language stating that a protective order has been entered in compliance with HIPAA's requirements.<sup>189</sup>

While the court in step two calls for a hearing on whether there is a reasonable probability exculpatory evidence exists in the records, it fails to discuss to what extent, if any, the victim's right to privacy is considered in the determination of whether the records shall be produced.<sup>190</sup> If there is a mere possibility that exculpatory evidence is located within the records, does the victim's privacy interest automatically admit defeat? By step two, the court has departed from sufficiently considering—let alone balancing—

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186. *See id.* (providing the trial court "shall" issue the subpoena to produce the victim's records upon the court's determination that the records are reasonably likely to hold exculpatory evidence).

187. *Id.*

188. *Id.* at 408–09. This requirement places the defense attorney in a strange position since the attorney is allowed to access and obtain knowledge about the records, but is not allowed to share such information with his client until he is authorized to do so by the court.

189. *Id.* at 409 (citing the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2(d)(2) (2003); 45 C.F.R. §§ 164.512(e)(1)(ii)(B), .512(e)(1)(v) (2010)). The Act requires regulations be imposed by the Secretary of the Department of Health and Human Services in order to protect the privacy of privileged records, and thus factors into the court's protocol. *Id.* (citing 42 U.S.C. § 1320d-2(d)(2)). Thus, the court determined that to comply, the protective order must:

(1) prohibit[] the parties from using or disclosing the records or the information contained in the records for any purpose other than the criminal proceedings for which the records were sought, and (2) requir[e] an attorney, county attorney, or third party who is allowed to inspect or review the records under this protocol to destroy the records (including all copies made) at the end of the proceeding.

*Id.* (citing 45 C.F.R. §§ 164.512(e)(1)(ii)(B), .512(e)(1)(v)).

190. *Id.* at 408–09 (noting the lack of consideration given to the privacy interest).

the privacy interest of the victim.

c. *Step Three.* If the defendant's motion to produce the records is successful, the defense attorney who subpoenaed the records has the right to go to the courthouse and inspect the records.<sup>191</sup> However, greatly digressing from past cases utilizing balancing tests such as *McMaster*, the court states in step three that an *in camera* review of the mental health records is insufficient because only the attorneys assigned to the case know what information they are seeking.<sup>192</sup> In departing from this accepted standard, the court relies on a Massachusetts case that argued “[d]espite their best intentions and dedication, trial judges examining records before a trial lack complete information about the facts of a case or a defense . . . and are all too often unable to recognize the significance, or insignificance, of a particular document to a defense.”<sup>193</sup> Therefore, instead of the trial court judge being the sole examiner of the records during an *in camera* review, the attorneys representing the parties are able to scour through the records on their own accord.<sup>194</sup> Most significantly, the court provides for

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191. *Id.* at 409. It is peculiar that the court said in step three “if the records are produced,” since it has left little doubt that the defendant will be successful in obtaining the subpoena. *See id.* at 407–09 (providing the trial court “shall” issue a subpoena upon defendant’s showing a “reasonable probability” exculpatory evidence exists, subject only to procedural and HIPAA protections). The only situation the court has implied thus far that would result in the denial of a subpoena would be if the defendant was unable to show a “reasonable probability” from the demonstration of a “good faith factual basis” that exculpatory evidence is contained in the records. *See id.* at 408 (requiring such showing before issuance of the subpoena). In a case such as *Cashen*, where the victim was questioned and provided answers as to issues of her past relationships and mental conditions, it is entirely possible that the vast majority of cases applying this standard will be able to easily present a “reasonable probability” based on a “good faith factual basis,” especially since defendants now know they can use depositions to demonstrate reasonable probability. *See id.* at 410 (noting that the defendant received deposition answers helpful to his case, which created the requisite probability that the victim’s mental health records would contain exculpatory evidence). The problem is that this burden is much too low for the defendant to provide reasonable safeguards for the victim’s interest.

192. *Id.* at 409; *see McMaster v. Iowa Bd. of Psychology Exam’rs*, 509 N.W.2d 754, 759 (Iowa 1993) (determining that an *in camera* review to determine the relevancy of evidence was “necessarily” done by the district court).

193. *Cashen*, 789 N.W.2d at 409 (quoting *Commonwealth v. Dwyer*, 859 N.E.2d 400, 418 (Mass. 2006)).

194. The court seems to be forgetting that it stated the protocol would not “permit the defendant to go on a fishing expedition into a victim’s privileged records.” *Id.* at 407.

this approach without acknowledging the victim's overarching interest in limiting the number of individuals accessing her privileged, private, and intimate information.<sup>195</sup>

d. *Step Four.* Once the defense attorney has reviewed the victim's mental health records and selected which specific records to use as exculpatory evidence, the attorney must then contact the court and the county attorney.<sup>196</sup> The defense attorney has to inform the court and the county attorney of the specific records selected to further the defendant's position and request the matter be set for hearing.<sup>197</sup>

e. *Step Five.* The fifth and final step of the *Cashen* protocol is for the court to hold a closed hearing to conclude whether selected records contain exculpatory evidence.<sup>198</sup> If the court finds that they do, copies of the specific records are provided to each attorney.<sup>199</sup> These records will subsequently be made available to other individuals, such as expert witnesses, but not until the subject attorney obtains a court order allowing disclosure to the third party.<sup>200</sup> While the court seemingly provides safeguards to protect the victim's records after it has determined which records include exculpatory evidence, it appears little-to-no balancing took place—as the court itself said it would<sup>201</sup>—to determine whether access to

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195. *See id.* It is particularly concerning especially given the extremely high likelihood that victims—like the victim in *Cashen*—will oppose disclosure of their records. *See id.* at 404. Further, the victim would have greatly benefitted from an in camera review with the court alone.

196. *Id.* at 409. Since the defense attorney has to notify others of the records selected to further the self-defense claim, it appears that initially the defense attorney receives full access to the victim's mental health records in their entirety. *See id.*

197. *Id.* Additionally, the county attorney can review the records selected by the defense attorney at the courthouse; however, upon review, the county attorney becomes subject to the protective order's limitations. *Id.*

198. *Id.*

199. *Id.* Before receiving these records, the court has to order all non-exculpatory matters contained in the subject records to be redacted. *Id.* This step is to take place before leaving the courthouse. *Id.* Furthermore, the records will continue to be governed by the protective order issued before the hearing. *Id.*

200. *Id.* at 409–10. Third parties will be bound to the nondisclosure provisions that bind the attorneys. *Id.* at 410.

201. *See id.* at 407 (“We continue to adhere to a balancing test, and now take the opportunity to articulate a standard that judges can consistently apply to identify those circumstances when the defendant's right to a fair trial outweighs the victim's right to privacy.”).

the records should be granted in the first place.<sup>202</sup>

#### 6. *Exclusion Under the Rules of Evidence and Other Alternatives*

At the majority's conclusion of its protocol, one more factor is presented for consideration, seemingly as a disclaimer by the court.<sup>203</sup> The court cautions that its protocol is limited solely to the question of discoverability and thus is not conclusive as to whether the evidence will be admissible at trial.<sup>204</sup> As explained, the records must also be admissible under the Iowa Rules of Evidence to be received into evidence at trial—a determination made separately from this protocol solely regarding discoverability.<sup>205</sup> Even if the records are deemed discoverable, evidentiary rules still apply regarding the admissibility of the records, including considering alternative evidence, stipulations by the parties, and presenting redacted parts of the mental health records.<sup>206</sup>

#### 7. *One Last Attempt*

The State argued the criminal defendant should be required to prove the information contained in the mental health records cannot be obtained from another source before seeking production of the records during

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202. *See id.* at 408–10 (describing the step-by-step procedural protocol with little discussion of weighing competing interests).

203. *See id.* at 410.

204. *Id.*

205. *Id.* (explaining that the evidentiary matters are for the trial court to decide at trial or in ruling on a motion in limine).

206. *Id.* To be discoverable, the information sought does not have to be admissible at trial, it merely has to appear to be “reasonably calculated to lead to the discovery of admissible evidence.” IOWA R. CIV. P. 1.503(1). Therefore, under the governing discovery rules, even if the information contained in the records is not admissible at trial, it is not barred from being discoverable. *See id.* However, the question of admissibility is beyond the scope of this Note, considering there may be countless ways in which this information may be inadmissible at trial. However, if the *Cashen* decision is interpreted as the defendant having a pretrial, constitutional right to certain evidence, then the constitutional right would trump the rules of evidence, specifically Iowa Rule of Evidence 5.403. *See* IOWA R. EVID. 5.403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). Therefore, what the *Cashen* court determines for discovery matters may have an impact on the rules of evidence at trial, which is discussed later in this Note. *See infra* Part IV.B.3.

discovery.<sup>207</sup> However, the court rejects this argument because it does “not believe a patient’s rendition of his or her medical condition and treatment is necessarily reliable.”<sup>208</sup> To assure maximum accuracy and completeness in the victim’s mental health history, as well as ensuring the criminal defendant has all the information he needs to state his case, obtaining the tangible records is a must according to the court.<sup>209</sup> To conclude its presentation of the protocol, the court attempts to bring the victim’s interest back into light by concluding under this protocol, “the invasion of [the victim’s] right to privacy in her mental health records is minimized.”<sup>210</sup>

#### 8. Application to Cashen

During the victim’s deposition, she made several statements the court concluded were relevant to the defendant’s self-defense claim and the victim’s credibility as a witness.<sup>211</sup> Based on this deposition testimony, the district court held the evidence found in the victim’s mental health records contained exculpatory evidence negating the defendant’s guilt and furthering his self-defense claim.<sup>212</sup> Therefore, the victim’s deposition satisfied the protocol’s requirement of establishing “a reasonable probability . . . that the records contain exculpatory evidence,” and the case was remanded to be decided under the new protocol.<sup>213</sup>

#### B. Successfully Abandoning Meets Failure to Acknowledge

In an 8–1 decision, Justice Cady writes another vehement dissent, criticizing the majority for “abandon[ing] the balancing test without acknowledgement,” resulting in the victim being forced to turn over her private, confidential, and privileged mental health records.<sup>214</sup> Stating

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207. *Cashen*, 789 N.W.2d at 410. The victim’s testimony was another source referenced by the court. *Id.*

208. *Id.*

209. *See id.* (stating that a victim may not be fully aware of their own condition, and records may contain information not immediately known or remembered by the victim).

210. *Id.*

211. *Id.* The information about the victim’s past behavior in *Cashen* included: punching the defendant, domestic abuse charges against her towards her ex-husband, posttraumatic stress disorder, becoming easily frustrated, and impulsive behavior. *Id.* Therefore, the court held the victim’s mental health history was relevant to the defendant’s self-defense case. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 411 (Cady, J., dissenting).

clearly what the majority ignored, Justice Cady attacks the majority's replacing of the balancing test with "a policy judgment" holding that allows confidential records to be accessible upon the assertion of a legal argument that makes the victim's records relevant upon the slightest showing.<sup>215</sup> He contends this can occur where facts show a weak need for the defendant to obtain the information in the records and irrespective of the sensitive need to keep the records protected for the victim.<sup>216</sup> Describing this as "one of the weakest tests known to the law in an area of the law that deals with the clash of two of the most compelling and venerable interests known to the law," Justice Cady disappointingly declares this protocol a "step backwards" for Iowans.<sup>217</sup>

This decision hands the criminal defendant more tools than necessary to present his defense, argues Justice Cady, while the vulnerable victim is faced with countless fears and concerns.<sup>218</sup> One of his greatest fears stemming from this decision is the fear that victims of domestic violence, sexual violence, and the like will refrain from reporting these crimes to avoid having their personal and private information revealed—specifically to their alleged abusers.<sup>219</sup>

Justice Cady spends a considerable amount of time in his dissent discussing the history of Iowa's belief that communications between medical professionals and their patients are to remain confidential.<sup>220</sup> Relying on the *Heemstra* opinion, he states that the Iowa Code "precludes physicians from disclosing through testimony any confidential communication by a patient, [and] also prohibits the disclosure of medical records containing confidential communications."<sup>221</sup> Justice Cady stresses

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215. *Id.*

216. *See id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *See id.* (citing IOWA CODE § 622.10 (2007) (codifying Iowa's position on patient-physician confidentiality); 7 Laurie Kratky Doré, IOWA PRACTICE SERIES: EVIDENCE § 5.504:2, at 365 & n.2 (2009) (following the history of the physician-patient privilege in Iowa)) (contending that the physician-patient privilege has been recognized in Iowa for more than 150 years).

221. *Id.* at 412 (citing *State v. Heemstra*, 721 N.W.2d 549, 560 (Iowa 2006)). It is interesting to see Justice Cady use Iowa Code section 622.10 when discussing the importance of physician-patient privilege—and the heightened importance in treatment of mental health patients—while the majority completely ignores the relevance of Iowa Code section 622.10 to this decision. *Compare id.* at 412 (noting the use of Iowa Code section 622.10), *with id.* at 408–10 (majority opinion) (failing entirely

the importance of recalling the rationale behind keeping communications of this nature privileged: to ensure full openness in communications between patients and their healthcare providers, *especially* with mental health patients.<sup>222</sup> “The greater protections in the area of mental health treatment are justified primarily because of the enhanced need for a strong relationship of trust and confidence between the patient and provider and the extremely personal and sensitive information frequently disclosed in the course of mental health counseling,” thus casting even greater concern on the majority decision.<sup>223</sup> Justice Cady goes one step further to conclude the right to protection of the privileged records is not only a strong belief found in the Iowa Code, but “a right with roots found in our constitution.”<sup>224</sup> Additionally, he notes the Iowa legislature has considered this “special interest” and “has provided comprehensive rules prohibiting disclosure [of mental health and psychological information] except under very limited circumstances.”<sup>225</sup>

In analyzing Iowa Code section 622.10, Justice Cady concedes it does not apply explicitly to questions of discovery.<sup>226</sup> However, when looking at the rationale and justification for section 622.10, he finds that it “unmistakably applies” to questions of pretrial discovery.<sup>227</sup> There is no question that defendants in criminal trials have multiple constitutional protections and rights ensuring a fair trial, and Justice Cady discusses many of these protections.<sup>228</sup> However, he also states that what the court is faced with here is a clash between two fundamental and constitutionally

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to discuss Iowa Code section 622.10 and its applicability to the protocol). *See* IOWA CODE § 622.10 (2009).

222. *See Cashen*, 789 N.W.2d at 412 (Cady, J., dissenting) (explaining that if patients fear their communications may later be disclosed, they will be less likely to share all the necessary information with their healthcare provider).

223. *Id.* (citing *Heemstra*, 721 N.W.2d at 561).

224. *Id.* (noting that cases applying Iowa Code section 622.10 “generally reflect ‘great solicitude for the physician-patient privilege’” (quoting *Heemstra*, 721 N.W.2d at 560–61)). While Justice Cady is likely referring to the Iowa Constitution, the dissent is unclear as to the exact basis for its opinion. *See id.*

225. *Id.* at 412–13 (footnote omitted) (citing IOWA CODE ch. 228 (2009) (prohibiting the disclosure of mental health information unless meeting one of the five specifically mentioned exceptions and following procedure for disclosure)).

226. *Id.* at 413; *see* IOWA CODE § 622.10 (2009).

227. *Cashen*, 789 N.W.2d at 413 (Cady, J., dissenting) (citing *Newman v. Blom*, 89 N.W.2d 349, 354–55 (1958)).

228. *See id.* (discussing the right to confront a witness, the right to a fair trial, the right to a full and fair opportunity to present to the court any defenses available, and that evidence should only be denied to the defendant in extreme situations).

protected rights, primarily because the defendant is claiming the affirmative defense of self-defense.<sup>229</sup> Justice Cady notes that this defense brings into question the disposition of the victim—to determine who was the initial aggressor—and thus evidence of being violent in nature, for example, becomes much more pertinent to the case.<sup>230</sup>

In returning to the test employed in *Heemstra*, Justice Cady explains that while the factors the court provided were not exhaustive—the severity of the penalty, the subject of the privileged information being deceased, some of the information already being in the public domain—they provided a general approach trial courts should take when faced with the need to balance conflicting interests in criminal cases.<sup>231</sup> Furthermore, the court considered case-specific facts in making its decision.<sup>232</sup> In *Cashen*, however:

[T]he important case-specific balancing of the competing interests is discarded. As a *clash between constitutional rights*, this approach seems inconceivable. The majority claims to adhere to the balancing process through the use of protocol, but the protocol requires the disclosure of the confidential records based *merely on a showing of relevancy*.<sup>233</sup>

As noted, no consideration for the victim's exceptional need for privacy or the defendant's lack of true need for the records impacts the majority's protocol.<sup>234</sup> Justice Cady states that “[m]ore importantly, [the protocol] fails to balance the competing interests by flushing out a compelling need for the confidential records” and instead assumes if the defendant can show an ounce of relevancy, the victim's privacy interest is ignored.<sup>235</sup>

Alternatives are available to provide the defendant with the pertinent information without the victim being forced to turn over her mental health

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229. *See id.* at 413–14.

230. *Id.* at 414 (citing 7 Laurie Kratky Doré, IOWA PRACTICE SERIES: EVIDENCE § 5.504:3, at 206–08 (2009) (stating that the disposition of the victim can help establish which individual was the initial aggressor and whether the criminal defendant had the requisite state of mind for the defense of self-defense)).

231. *Id.* at 415 (citing *State v. Heemstra*, 721 N.W.2d 549, 563 (Iowa 2006)).

232. *See id.* (noting how the *Heemstra* court's test “focuses on all the facts and circumstances of each case to fully assess a compelling need for the information”).

233. *Id.* (emphasis added).

234. *Id.*

235. *Id.* (stating that the new protocol “realign[s] the interests of the victim from preventing disclosure to minimizing disclosure”).

and medical records: (1) the victim could testify at trial; (2) the defendant has personal knowledge of the victim's character; (3) the defendant could use other witnesses to testify to the victim's character; and (4) the defendant could use expert witnesses to further his defense absent medical records of the victim.<sup>236</sup>

With multiple viable alternatives available for the defendant to prove his case, contends the dissent, the public policy interest in protecting victims of domestic abuse and their mental health records stands stronger.<sup>237</sup> As the state continues to focus on its prosecution of crimes such as domestic violence, the public interest also increases, including the fear that:

If victims of domestic violence must suffer the embarrassing and debilitating loss of their physician-patient privilege once they become a witness in a criminal domestic-abuse prosecution, a chilling effect will be cast over the reporting of domestic abuse, the disclosure of information to treatment providers by victims, the ability of physicians and psychotherapists to treat psychological disorders arising from domestic abuse, and the willingness of victims to testify against their abusers. The relevancy test of the majority fails to consider the impact of simple relevancy-based disclosure on society in general.<sup>238</sup>

Above all else, says Justice Cady, the victim is stripped of her right to privacy without even the smallest prospect of being able to show the court how she will be impacted by the decision to release the medical records.<sup>239</sup> Describing this as a "step back both for victims and for the progress made in addressing domestic violence," Justice Cady declares this "one-size-fits-all test" as presenting a serious risk of injustice in numerous cases—primarily because it fails to allow for investigation of the particular facts and circumstances of each individual case.<sup>240</sup> Because the court decided to "paint with broad brushstrokes," the only way for a victim to ensure a right to privacy is to not report domestic violence.<sup>241</sup> However, in situations where the state decides to prosecute a defendant against the will of the victim—or without considering the victim's position on the matter—the

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236. *Id.* at 415–16.

237. *Id.* at 416.

238. *Id.*

239. *Id.*

240. *Id.* at 417.

241. *See id.* at 416–17 (stating that "victims of domestic abuse with a history of counseling" will only be able to protect privacy by failing to report).

victim is left with no voice in deciding whether she will be brought into a case where her mental health history might be laid out in front of the court.

#### IV. COMMUNITY RESPONSE

Immediately after the *Cashen* protocol was declared by the Iowa Supreme Court, it was apparent that many Iowans, community organizations, and other pertinent entities were shocked by the decision. Articles in the *Des Moines Register* illustrated the highly controversial nature of the decision.<sup>242</sup> While criminal defense attorneys, public defenders, and the like embraced the *Cashen* decision, medical professionals, therapists, mental health workers, victim organizations, and county attorneys came forward in fierce opposition.<sup>243</sup> At the forefront of the concerns from those in opposition was the fear that victims of domestic abuse, assault, or other crimes would no longer come forward, seek help, or press charges.<sup>244</sup>

Describing the decision as “alarming,” a “tool to silence . . . victims,” and “a giant step backwards” for victims, one article states the decision “will have two devastating consequences: First, people will stop reporting victimization to law enforcement or will refuse to cooperate in prosecution. Second, victims will not seek mental and other health care.”<sup>245</sup> Even amongst the decision’s opposition,<sup>246</sup> there is no question strong public policy and constitutional arguments exist in ensuring those criminally charged receive due process of law.<sup>247</sup> However, equally important arguments exist in ensuring victims of crimes such as domestic violence are able to report incidents without the fear that their private and intimate emotions may be exposed.<sup>248</sup>

*Cashen* does not automatically make privileged mental health records

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242. See, e.g., Lee Rood, *Iowa Crime Victims in Iowa Hurt by Ruling, Advocates Say*, DES MOINES REG. (Oct. 4, 2010), <http://www.desmoinesregister.com/article/20101004/NEWS/10040315/Iowa-crime-victims-in-Iowa-hurt-by-ruling> (discussing the *Cashen* decision and its subsequent effect on the state).

243. *Id.* This is not intended to be an exhaustive list of entities supporting or opposing the *Cashen* decision.

244. See *id.* (discussing the impact of *Cashen* on crime victims in Iowa and noting the resulting concerns of victim advocates).

245. Elizabeth Barnhill & Laurie Schipper, Op-Ed., *Iowa Supreme Court Decision Puts Crime Victims at Risk*, DES MOINES REG., July 17, 2010, at 9A.

246. Including the Author of this Note.

247. See *id.*

248. See *id.*

available to the defendant; however, this should not be the bar set for the level of care given to one of Iowa's historic and longstanding privileges.<sup>249</sup> The fear is not whether the information will become readily available to the public at large, but rather, without a fair balancing process, the mental health records of the victim may be brought to light, even if only to a "limited" number of individuals.<sup>250</sup> This protocol allows attorneys and judges access "to confidential information [victims] share[] with a counselor. Although attorneys in these cases are bound by confidentiality, [a victim] would probably not choose them to confide . . . intimate personal experiences."<sup>251</sup> Moreover, the community has responded to *Cashen* by claiming that it preys on those members of society who arguably need the greatest protection: victims of sexual assault and domestic violence.<sup>252</sup> Once an individual becomes a victim of a crime of this nature, often the only way to cope with the fear, stress, and trauma is to seek the help of a mental health professional.<sup>253</sup> Therefore, the *Cashen* protocol may deter victims from reporting crimes or from seeking mental healthcare. A pertinent question for mental health providers becomes whether privacy forms at healthcare facilities should say: "None of these privacy rights may apply if you are or become a crime victim."<sup>254</sup>

In short, the concerns are vast and fierce—and come from a wide array of positions and professionals—about the ramifications this decision has on Iowans. The clear opposition to, and fear of, the *Cashen* decision can be further illustrated through the responses of state organizations and groups, specifically the healthcare provider community and the Iowa Attorney General's office.

#### A. Protecting the Patients: Healthcare Provider Community's Response

Iowa's healthcare provider community instantly recognized the impact this decision and the resulting protocol would have on its patients.<sup>255</sup>

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249. See *State v. Cashen*, 789 N.W.2d 400, 411 (Iowa 2010) (Cady, J., dissenting) (arguing that the physician-patient privilege has existed as a long-lasting and honored privilege in Iowa for over 150 years).

250. See *id.* at 416 (noting that the protocol violates a victim's right to privacy even by unveiling the records to "judges, court staff, attorneys, defendants, and other people connected to the court system").

251. See Barnhill & Schipper, *supra* note 245.

252. See *id.*

253. *Id.*

254. *Id.*

255. Interview with Eric Nemmers, Legislative Counsel, Iowa Medical

Focusing on the best interest of the patients, the healthcare provider community quickly mobilized and worked with likeminded organizations to introduce legislation that would cure the dangerous defects of *Cashen*.<sup>256</sup> Described as “an Act relating to the discovery of privileged medical records, including mental health records, in a criminal case and including effective date provisions,”<sup>257</sup> Senate File 291 was introduced to mend the broken *Cashen* decision by providing an alternative protocol to the one presented by the Iowa Supreme Court.<sup>258</sup> Assuming the protocol issued by the *Cashen* court is not the sole approach to balance the constitutional right of criminal defendants with the constitutional right of the victim—since the *Cashen* court did not explicitly state that its protocol is the only acceptable one<sup>259</sup>—the focus of the legislation was on fusing the constitutional rights with the protocol to cure the disconnect with the *Cashen* decision.<sup>260</sup> Representing a united front, by March 1, 2011, the bill was supported by lobbyists representing countless groups, including, but not limited to: the Association for Marriage and Family Therapy, the Mental Health Counselors Association, the Psychiatric Society, the Iowa Hospital Association, the Iowa Nurses Association, the National

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Society, in Des Moines, Iowa (Feb. 16, 2011).

256. *Id.*

257. Letter from Terry E. Branstad, Governor, Iowa, to the Honorable Matthew Schultz, Sec'y of State, Iowa (Mar. 30, 2011).

258. S. File 291, 84th Gen. Assemb., Reg. Sess. (Iowa 2011); *see also* Interview with Eric Nemmers, *supra* note 255 (discussing the healthcare provider community’s intention in proposing legislation was to provide a better-crafted protocol to protect patients’ records). The bill was introduced and approved by the committee on February 23, 2011. *Bill History for SF 291*, THE IOWA LEGISLATURE, <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=SF&key=0315B&GA=84> (last visited Sept. 7, 2012). On March 1, 2011, the bill passed in the Iowa Senate with a vote of forty-nine ayes, zero nays, and one abstention. *Id.* On March 22, 2011 the bill passed the house with eighty-seven ayes, and eleven nays. *Id.* On March 30, 2011, Governor Branstad signed and approved the bill. *Id.* The law was codified in 2011. *See* IOWA CODE § 228.6 (2011).

259. *See* State v. Cashen, 789 N.W.2d 400, 408 (Iowa 2010). Section D of the *Cashen* decision discusses the rights of a criminal defendant under the U.S. Constitution that are crucial to this decision. *Id.* at 407. However, when proceeding with its protocol, the Iowa Supreme Court did not connect the protocol with said constitutional rights, nor did the court explicitly state that the protocol is the sole way to ensure the defendant’s constitutional rights. *See id.* at 407–11.

260. *See* Interview with Eric Nemmers, *supra* note 255; *see generally* S. File 291, 84th Gen. Assemb., Reg. Sess. (Iowa 2011) (amending the statutory provisions to protect the interests of both criminal defendants and the victims of crime by both establishing a privilege and providing a new procedure for the disclosure of records in criminal cases).

Association of Social Workers, the Iowa Coalition Against Sexual Assault, the Iowa Psychological Association, the League of Women Voters, the Iowa Behavioral Health Association, the Iowa Medical Society, the Iowa Academy of Trial Lawyers, the Iowa Speech Language Hearing Association, the Iowa Academy of Family Physicians, the Iowa County Attorneys Association, and the Polk County Medical Society.<sup>261</sup>

Section (1) of Senate File 291 amended Iowa Code section 228.6,<sup>262</sup> which deals with compulsory disclosures.<sup>263</sup> Previously, subsection 4 of section 228.6 read:

Mental health information may be disclosed in a civil or administrative proceeding in which an individual eighteen years of age or older or an individual's legal representative or, in the case of a deceased individual, a party claiming or defending through a beneficiary of the individual, offers the individual's mental or emotional condition as an element of a claim or a defense.<sup>264</sup>

However, after the passage of Senate File 291, subsection 4 was transferred to subsection (4)(a), with the following now at (4)(b): "b. Mental health information may be disclosed in a criminal proceeding pursuant to section 622.10, subsection 4."<sup>265</sup>

Next, Iowa Code section 622.10 was amended by Senate File 291 to add a new section that would make explicit an absolute right to confidentiality in privileged records, notwithstanding the provided exceptions.<sup>266</sup> While entirely absent before, Iowa Code section 622.10, section 4 now provides:

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261. *Lobbyists Declaration Results*, THE IOWA LEGISLATURE, <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=DspReport&ga=84&type=b&hbill=SF291> (last visited Sept. 7, 2012).

262. S. File 291 § 1.

263. IOWA CODE § 228.6.

264. *Id.* § 228.6(4).

265. *Id.* § 228.6(4)(b). The version of Senate File 291 which was signed by Governor Branstad provided: "b. Mental health information may be disclosed in a criminal proceeding pursuant to section 622.10, subsection 3A." S. File 291 § 1. However, in the codified version, subsection 3A was replaced with subsection 4. *See* IOWA CODE § 228.6(4)(b).

266. *See* S. File 291 § 2. It is interesting to note that Senate File 291 was used to modify Iowa Code section 622.10, since the majority in *Cashen* did not use section 622.10 when presenting its protocol. *See* State v. Cashen, 789 N.W.2d 400, 408–10 (Iowa 2010) (presenting a protocol and discussing disclosure of mental health records without applying Iowa Code § 622.10).

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a. Except as otherwise provided in this subsection, the confidentiality privilege under this section shall be *absolute* with regard to a criminal action and this section shall not be construed to authorize or require the disclosure of any privileged records to a defendant in a criminal action unless either of the following occur:

- (1) The privilege holder voluntarily waives the confidentiality privilege.
- (2) (a) The defendant seeking access to privileged records under this section files a motion demonstrating in good faith a *reasonable probability* that the information sought is likely to contain *exculpatory information* that is not available from any other source and for which there is a *compelling need* for the defendant to present a defense in the case. Such a motion shall be filed not later than forty days after the arraignment under seal of the court. Failure of the defendant to timely file such a motion constitutes a waiver of the right to seek access to privileged records under this section, but the court, for good cause shown, may grant relief from such waiver.<sup>267</sup>
- (b) Upon a showing of a reasonable probability that the privileged records sought may likely contain exculpatory information that is not available from any other source, the court shall conduct an *in camera* review of such records to determine whether exculpatory information is contained in such records.
- (c) If exculpatory information is contained in such records, the court shall balance the need to disclose such information against the privacy interest of the privilege holder.
- (d) Upon the court's determination, in writing, that the privileged information sought is exculpatory and that there is a compelling need for such information that outweighs the privacy interest of the privilege holder, the court shall issue an order allowing the disclosure of only those portions of the records that contain the exculpatory information. The court's order shall also prohibit any further dissemination of the information to any person, other than the defendant, the defendant's attorney, and the prosecutor, unless otherwise authorized by the court.

b. Privileged information obtained by any means other than as

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267. This exception to the forty days requirement if the defendant can show good cause was not in the original version of Senate File 291. *See S. Study B. 1094 § 2*, 84th Gen. Assemb., Reg. Sess. (Iowa 2011).

provided in paragraph “a” shall not be admissible in any criminal action.<sup>268</sup>

The Iowa Code now has several extraordinary differences from the *Cashen* protocol. First, it codified a clear and absolute right of confidentiality in privileged records, yet recognizes there will be some instances where the right to privacy must yield to the criminal defendant’s due process rights.<sup>269</sup> More significant, however, is the code’s use of an *in camera* review by the court to determine whether exculpatory information exists within the records.<sup>270</sup>

The *Cashen* court held that “an *in camera* review of the records by the court is insufficient. Only the attorneys representing the parties know what they are looking for in the records.”<sup>271</sup> However, as demonstrated by the proposed legislation and now codified in the Iowa Code, the healthcare provider community and its supporters are of the opinion that Iowa judges *should* know whether the privileged records contain exculpatory information pertinent to the case presented.<sup>272</sup> Even with the possibility of judges being unable to determine with complete confidence whether exculpatory evidence exists, an *in camera* review of the privileged records is fundamentally fairer than numerous attorneys fishing through the privileged records.<sup>273</sup>

Further, the code calls for a showing of a “reasonable probability that the privileged records sought may likely contain exculpatory information that is not available from any other source.”<sup>274</sup> Under step one of the *Cashen* protocol, the defendant simply has to show there is a “reasonable basis to believe the records are likely to contain exculpatory evidence,” and does not have to demonstrate the information sought is not available from

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268. IOWA CODE § 622.10(4) (emphasis added).

269. *See id.*

270. *See id.* § 622.10(4)(a)(1)(b).

271. *Cashen*, 789 N.W.2d at 409.

272. *See* Interview with Eric Nemmers, *supra* note 255; IOWA CODE § 622.10(4)(a)(1)(b) (minimizing the review of privileged records to *in camera* review by the court).

273. *See* Interview with Eric Nemmers, *supra* note 25. While the *Cashen* court stated that it wanted “to emphasize that a defendant is not entitled to engage in a fishing expedition when seeking a victim’s mental health records,” the court’s protocol certainly appears to provide for exactly that—a fishing expedition. *See Cashen*, 789 N.W.2d at 408.

274. IOWA CODE § 622.10(4)(2)(b).

any other source.<sup>275</sup> The reasonable basis standard imposes a lower burden on the defendant than the reasonable probability standard, yet now pursuant to the Iowa Code, the defendant has to present more credible evidence to the court than required under step one of *Cashen* to satisfy the first requirement.<sup>276</sup>

Finally, and most importantly, Iowa Code section 622.10(4)(2)(a) requires the defendant show a “compelling need” for the records in order to present a defense.<sup>277</sup> This standard is much greater than the *Cashen* balancing test and the “good faith factual basis” standard.<sup>278</sup>

### B. Protecting the People: Iowa Attorney General’s Response

#### 1. Policy Challenges

The Attorney General’s response to *Cashen* manifested itself in a specialized manner. After the State received an unfavorable ruling in the lower court, the county attorney sought the assistance of the Attorney General’s office in seeking discretionary and then further review.<sup>279</sup> The State’s original position on appeal was that the defendant in *Cashen* had not shown the “compelling interest” required under *Heemstra* for limited disclosure of the victim’s mental health records.<sup>280</sup> Subsequently, after the Iowa Supreme Court established the *Cashen* protocol in its decision on further review, the State filed an application for rehearing, arguing the protocol provided insufficient protection for a victim’s privacy interest.<sup>281</sup>

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275. *Cashen*, 789 N.W.2d at 408.

276. Compare IOWA CODE § 622.10(4)(2)(b) (calling for defendants to show reasonable probability without availability of other sources), with *Cashen*, 789 N.W.2d at 408 (requiring a lower standard of initial proof by requiring a mere reasonable basis).

277. IOWA CODE § 622.10(4)(2)(a).

278. See *Cashen*, 789 N.W.2d at 408–10.

279. See *id.* at 403 (indicating that in addition to the county attorneys involved, further action on appeal in the *Cashen* case was handled by the Attorney General’s Office of Iowa, with the attorneys of record on the Iowa Supreme Court Appeal including Thomas J. Miller, Attorney General, Jean C. Pettinger, and Mary Tabor (until withdrawal), Assistant Attorneys General, Jennifer A. Miller, County Attorney, and Suzanne M. Lampkin, Assistant County Attorney).

280. Interview with Jean C. Pettinger, Assistant Attorney Gen., Iowa Attorney Gen., in Des Moines, Iowa (Feb. 16, 2011); see also *State v. Heemstra*, 721 N.W.2d 549, 563 (Iowa 2006) (allowing a defendant to access a victim’s records after presenting a “bona fide claim of compelling interest”).

281. Interview with Jean C. Pettinger, *supra* note 280. The Iowa Supreme Court denied the application by the State; however, it did make a few changes to the

Believing the protocol did not sufficiently protect the rights of the privilege holder, the State argued *Cashen* undermined the purpose and principle behind Iowa Code section 622.10.<sup>282</sup> Not only does Iowa Code section 622.10 require healthcare professionals to keep confidential their clients innermost thoughts,<sup>283</sup> but in doing so, it encourages and allows for candid and open communication between patients and healthcare providers.<sup>284</sup> There is also an extremely compelling public policy argument behind section 622.10: to allow victims of domestic abuse, domestic assault, sexual assault, and other crimes to report incidents without the fear or risk of giving up their right to privacy in the process.<sup>285</sup>

As previously illustrated, a primary criticism of the *Cashen* protocol is the lack of weight or consideration given to the victim's privacy interest—a position that the Attorney General's office urged in its application for rehearing.<sup>286</sup> The protocol appears to automatically require disclosure of the privileged records upon the defendant showing mere relevance between the records sought and his defense.<sup>287</sup> However, Senate File 291 section 2,<sup>288</sup> which was supported by the Attorney General's office,<sup>289</sup> and is now in the Iowa Code, provides a cure for the defect in several ways, requiring the defendant to make a showing that: (1) the desired privileged records are “likely to contain exculpatory information”; (2) such information is “not available from any other source;” and (3) there is “a compelling need for [the records] . . . to present a defense in the case.”<sup>290</sup> While these steps provide considerably more protection for victims, the new law still requires the court to subsequently engage in a balancing test,

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protocol. *See id.*

282. *See id.*; *see also* IOWA CODE § 622.10 (2009) (providing protection for confidential communications between physicians and patients with procedures for obtaining records before 2011 amendments).

283. *See* IOWA CODE § 622.10(1) (requiring a “physician, surgeon, physician assistant, advanced registered nurse practitioner, [or] mental health professional . . . who obtains information by reason of a person’s employment . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person’s professional capacity”).

284. *See* Interview with Jean C. Pettinger, *supra* note 280.

285. *See id.*; *see also* IOWA CODE § 622.10 (2011).

286. *See* Interview with Jean C. Pettinger, *supra* note 280; *see also* State v. *Cashen*, 789 N.W.2d 400, 408–11 (Iowa 2010).

287. *See* Interview with Jean C. Pettinger, *supra* note 280; *Cashen*, 789 N.W.2d at 408.

288. S. File 291 § 2, 84th Gen. Assemb., Reg. Sess. (Iowa 2011).

289. *See* Interview with Jean C. Pettinger, *supra* note 280.

290. IOWA CODE § 622.10(4)(2)(a) (2011).

weighing the existence of exculpatory information against the victim's privacy interest.<sup>291</sup>

The *Cashen* protocol is also subject to criticism for the ambiguity it creates between permitting the attorneys to review the records, yet not permitting a "fishing expedition" by the defendant.<sup>292</sup> If a defendant is able to satisfy step one of the protocol by establishing there is an articulable "reasonable basis to believe the records are likely to contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt,"<sup>293</sup> then certainly a trial judge is able to use that information to determine which specific records contain such information in an *in camera* review<sup>294</sup>—precisely what the new law provides for.<sup>295</sup> While still providing the defendant with the tools necessary to present his case, the statute's approach also protects, acknowledges, and respects the privacy interest of the victim.<sup>296</sup>

## 2. Legal Challenges

Aside from the policy arguments against the protocol, the *Cashen* decision left several legal questions unanswered. Foremost, it is difficult to elicit the basis upon which the Iowa Supreme Court rested its decision—the U.S. Constitution, the Iowa Constitution, or Iowa Code section 622.10.<sup>297</sup> In attempting to discern the legal basis used in *Cashen*, it is helpful to consider the caselaw utilized by the court. The majority cites two

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291. See *id.* § 622.10(4)(2)(c) ("If exculpatory information is contained in such records, the court shall balance the need to disclose such information against the privacy interest of the privilege holder.").

292. See *Cashen*, 789 N.W.2d at 408–09; Interview with Jean C. Pettinger, *supra* note 280.

293. *Cashen*, 789 N.W.2d at 408 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987)).

294. See Interview with Jean C. Pettinger, *supra* note 280 (discussing the ability and appropriateness of an *in camera* review in determining exculpatory information).

295. See IOWA CODE § 622.10(4)(2)(b) ("Upon a showing of a reasonable probability that the privileged records sought may likely contain exculpatory information that is not available from any other source, the court shall conduct an *in camera* review of such records to determine whether exculpatory information is contained in such records.").

296. See Interview with Jean C. Pettinger, *supra* note 280 (discussing the merits of the amendment).

297. See *Cashen*, 789 N.W.2d at 407–11 (presenting a protocol without a clear constitutional or statutory basis for determinations).

U.S. Supreme Court cases, *Pennsylvania v. Ritchie*<sup>298</sup> and *Dennis v. United States*,<sup>299</sup> and one U.S. Supreme Court dissenting opinion in *Gentile v. State Bar of Nevada*.<sup>300</sup> The court's use of *Ritchie* proves extremely odd, given the holding in *Ritchie*: "We find that [the defendant]'s interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the . . . files be submitted only to the trial court for *in camera* review."<sup>301</sup> Furthermore, while the court cites these Supreme Court cases,<sup>302</sup> it certainly does not use the caselaw to support a constitutional basis under the U.S. Constitution for the protocol nor anything beyond stating the constitutional rights held by the defendant. Therefore, while the *Cashen* court uses federal law to show the public interest in allowing defendants access to the privileged records, it is very difficult to ascertain whether in proceeding with its protocol the court is resting its decision on the briefly mentioned federal constitutional rights or is intentionally being ambiguous as to its foundational basis for the decision.

In past cases involving the disclosure of records, the court has discussed Iowa Code section 622.10.<sup>303</sup> In *Cashen*, however, the court completely avoided interpreting the relevant code sections when rendering its decision.<sup>304</sup> The majority's sole mention of Iowa Code section 622.10 is in reference to its discussion of the *Chidester* case.<sup>305</sup> While Iowa Code

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298. *Id.* at 407 (supporting due process rights by stating that "[u]nder the United States Constitution, a criminal defendant has a due process right to present evidence to a jury that might influence the jury's determination of guilt" (citing *Ritchie*, 480 U.S. at 56)).

299. *Id.* (citing *Dennis v. United States*, 384 U.S. 855, 870 (1966)) (supporting the proposition that disclosure of evidence relevant to the defendant's case is favorable, rather than suppression).

300. *Id.* at 405 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (Rehnquist, C.J., dissenting in part)) (supporting the right that all defendants have a right to a fair trial, notwithstanding the nature of the charge against them).

301. *Ritchie*, 480 U.S. at 60.

302. See *Cashen*, 789 N.W.2d at 405–07 (citing *Gentile*, 501 U.S. 1030 (Rehnquist, C.J., dissenting in part); *Ritchie*, 480 U.S. 39; *Dennis*, 384 U.S. 855).

303. See, e.g., *State v. Heemstra*, 721 N.W.2d 549, 560–61 (Iowa 2006) (stressing that the code's purpose is to ensure privileged communications between medical professionals and their patients); *McMaster v. Iowa Bd. of Psychology Exam'rs*, 509 N.W.2d 754, 757 (Iowa 1993) (weighing whether Iowa Code section 622.10 precludes records from being disclosed); *Chidester v. Needles*, 353 N.W.2d 849, 851–53 (Iowa 1984) (discussing the privacy privilege over records under the Iowa Code).

304. See *Cashen*, 789 N.W.2d at 400–11.

305. *Id.* at 406 (citing *Chidester*, 353 N.W.2d at 852–53). Justice Cady makes

section 622.10, in its current and then-existing state, does not make clear an absolute privilege, the court fails to acknowledge the code and its relevance to the case.<sup>306</sup> In previous cases, the court determined, given the facts presented, the matter was simply not governed by Iowa Code section 622.10;<sup>307</sup> however, in *Cashen*, the court made no such attempt to fit the issue outside the parameters of the code or within one of the code's provided exceptions.<sup>308</sup> Instead, the majority ignored the reality—that while Iowa Code section 622.10 may not have been directly on point, it certainly deserved the court's recognition and consideration in formulating and presenting its protocol. Finally, while the court mentions the Iowa Constitution provides several safeguards against wrongful convictions, the court does not go on to state clearly that Article I, section 10 or the Sixth Amendment of the Iowa Constitution is the basis for the protocol.<sup>309</sup> Therefore, the *Cashen* decision and its resulting protocol leave Iowans in a daze as to the legal basis upon which the decision relies.

### 3. Creating Rights

Lastly, there is a troubling fear that the *Cashen* decision becomes the basis for, and sets up, a constitutional right to pretrial discovery,<sup>310</sup> a right that does not exist under the U.S. Constitution.<sup>311</sup> In *Brady v. Maryland*, the U.S. Supreme Court held it is a violation of “due process [when] the evidence is material either to guilt or to punishment” and is withheld by the prosecution.<sup>312</sup> However, in *Cashen* the potentially exculpatory evidence is *not* in possession of the state, but rather in the possession of a third party—the healthcare provider.<sup>313</sup> The proposition is not that *Cashen* violates the

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use of the code in his dissent, discussing how Iowa has recognized privileged communications between healthcare providers and patients for years. *Id.* at 411–12 (Cady, J., dissenting); *see also supra* Part II.A.

306. *Id.* at 400–11 (majority opinion).

307. *See, e.g.*, *McMaster v. Iowa Bd. of Psychology Exam’rs* 509 N.W.2d 754, 757 (Iowa 1993) (holding that Iowa Code section 622.10 is limited to the giving of testimony and thus producing medical records is outside of the code’s scope).

308. *See Cashen*, 789 N.W.2d at 400–11; *see also* IOWA CODE § 622.10(2), (3) (2011).

309. *Cashen*, 789 N.W.2d at 407 (citing IOWA CONST. art. I, § 10; IOWA CONST. amend. VI).

310. *See Interview with Jean C. Pettinger, supra* note 280.

311. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (holding that the Sixth Amendment Confrontation Clause does not create a right to pretrial discovery).

312. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

313. *Cashen*, 789 N.W.2d at 404; *see also* Interview with Jean C. Pettinger, *supra* note 280 (discussing further concerns with the pretrial discovery aspects of

*Brady* rule, but rather a concern that the Iowa Supreme Court, through *Cashen*, has created a state constitutional right to pretrial discovery.<sup>314</sup> If a pretrial discovery right is created, that status would result in the defendant's right receiving greater weight than it should when balanced against the victim's constitutional right to privacy.<sup>315</sup>

#### V. IF AT FIRST YOU DON'T SUCCEED, TRY, TRY AGAIN

The law can, and must, do better to acknowledge, protect, and care about the interests of people, especially some of society's most vulnerable. As Iowa looks toward the future, it must learn from the mistakes of the past in order to ensure true protection and justice for all. Thus, this section of the Note proposes a new protocol, which should be used when balancing the right to privacy against the right to due process.

##### A. *Amending the Books—Codifying the Right to Privacy*

In 2011, critical amendments were made to Iowa Code sections 228.6 and 622.10<sup>316</sup> to ensure that courts cannot avoid relevant code sections in the future.<sup>317</sup> Iowa Code section 228.6 should be amended, again, to include in section (4)(b), "Mental health information may be disclosed in a criminal proceeding but only pursuant to section 622.10, subsection 4." The only difference between this amendment and the current version of the code is the phrase "but only."<sup>318</sup> While seemingly insignificant, this clause would make it abundantly clear to the courts that Iowa Code section 622.10, subsection 4 is the only means by which a criminal defendant can seek to obtain the mental health information of the victim.

Furthermore, as a result of the amendment, Iowa Code section 622.10 now recognizes an absolute confidentiality privilege regarding mental health records.<sup>319</sup> This amendment assists in making it clear that there is no

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*Cashen* decision).

314. *Id.*

315. *See id.*

316. *See* S. File 291, 84th Gen. Assemb., Reg. Sess. (Iowa 2011) (amending Iowa Code sections 228.6 and 622.10).

317. *See Cashen*, 789 N.W.2d at 400–11 (failing to apply Iowa Code section 622.10 in majority opinion); *supra* Part IV.B.2 (discussing the *Cashen* court's shortfall in failing to apply Iowa Code section 622.10 to discussion of confidential records).

318. *See* IOWA CODE § 228.6(4)(b) (2011) ("Mental health information may be disclosed in a criminal proceeding pursuant to section 622.10, subsection 3A.").

319. IOWA CODE § 622.10(4)(a); *see also* S. File 291 § 2 (amending Iowa Code section 622.10).

question as to the privacy holder's constitutional and statutory right against disclosure of privileged records.<sup>320</sup> This amendment is also significant in that while it codifies this absolute right, it still recognizes the possibility that the right might have to yield upon the occurrence of certain events, such as a voluntary waiver or the defendant following the prescribed steps.<sup>321</sup> When the suggested amendments are combined with the 2011 amendments resulting from Senate File 291—now seen in Iowa Code sections 228.6 and 622.10—the stage is properly set for an appropriate five-step protocol to be employed.

#### *B. Heightened Standard, Protecting Rights—A New Five-Step Protocol*

A trial court must start with the notion that it is balancing the constitutional right to due process against the constitutional right to privacy—under both the U.S. and Iowa Constitutions.<sup>322</sup> Only then will the court have the appropriate mindset to diligently and truly balance the conflicting interests. Then, a new five-step protocol should be adopted for the trial courts to use, which permits and encourages the court to take all relevant factors, interests, and rights into consideration.

##### *1. Closed Motion to the Court*

When a defendant in a criminal trial seeks to obtain the mental health records of the victim, before a subpoena is issued, the defendant must file a good faith, closed, *in camera* motion with the court.<sup>323</sup> Open motions, like those called for in *Cashen*, are considered a public record and describe in some detail what the defendant expects to discover within the victim's mental health records.<sup>324</sup> The defendant does not benefit from the motion

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320. See Iowa Code § 622.10(4)(a).

321. See *id.* § 622.10(4)(a)(1)–(2).

322. See generally *Cashen*, 789 N.W.2d at 411 (Cady, J., dissenting) (advocating for a balancing of interests approach he deems abandoned by the majority). This approach also seeks to recognize that records relating to mental health treatment are fundamentally different from medical records. See *id.* at 412 (recognizing an “enhanced need” for privilege in mental health cases due to the “extremely personal and sensitive information” discussed); Interview with Steven Foritano, Bureau Chief, Polk Cnty. Attorney, in Des Moines, Iowa (Mar. 7, 2011).

323. See Interview with Steven Foritano, *supra* note 322 (recommending a closed motion as part of the protocol).

324. See *Cashen*, 789 N.W.2d at 408 (requiring a defendant file a motion with the court demonstrating good faith to obtain a subpoena); Interview with Steven Foritano, *supra* note 322 (describing how the motion process under *Cashen* results in open, public motions regarding mental health records).

being a public record; however, the victim would benefit from the defendant's motion being closed, as it would limit the allegations about the victim's personal life to only the eyes and ears of the court. Seeking to protect the victim's right to the greatest extent possible while still allowing the defendant to begin the process of seeking to obtain the records, the motion to produce should be closed and reviewed only by the trial court judge in camera. Finally, it should be the responsibility of the court, not the county attorney, to notify the victim of the defendant's motion to obtain the victim's privileged records.<sup>325</sup>

## 2. *Compelling Need and Specific Requests*

Next, as is now required by statute, the defendant's motion to the court must demonstrate a *compelling need* for the records sought, as compared to the "good faith factual basis" required under *Cashen*.<sup>326</sup> This heightened compelling interest standard is critical to sufficiently protect the rights of the victim, while still allowing the defendant the opportunity to obtain the records upon satisfying this requirement; the importance of the compelling interest standard cannot be stressed enough.<sup>327</sup> Furthermore, under the new protocol, now aided by statute, the motion must show in good faith that the information sought is unavailable through any other source and that there is a reasonable probability that the records are likely to contain exculpatory evidence relating to the defendant's innocence, the defendant's assertion of self-defense, or both.<sup>328</sup>

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325. *But see Cashen*, 789 N.W.2d at 408. The *Cashen* protocol requires the county attorney to notify the victim of the defendant's request. *Id.* However, this places the county attorney in a strange position considering the county attorney does not represent the victim in the matter. *See Interview with Steven Foritano, supra* note 322 (discussing the practical difficulty of following the *Cashen* court's notification requirements). If notified by the county attorney, the victim may view that individual as being able to represent them in the matter. Furthermore, the victim is likely to need an attorney upon receipt of this notice; however, that discussion is outside the scope of this Note.

326. *Compare* IOWA CODE § 622.10(4)(a)(2)(a) (requiring a "compelling need" to be shown), *with Cashen*, 789 N.W.2d at 408 (requiring a mere "good faith factual basis"). Conceivably, the defendant can obtain this preliminary information in a number of ways, including but not limited to: personal knowledge, depositions, or the victim's statements. *See, e.g.*, *Cashen*, 789 N.W.2d at 410 (allowing the use of depositions to learn preliminary information about the victim's mental health conditions to create reasonable probability).

327. *See Interview with Steven Foritano, supra* note 322.

328. *See* IOWA CODE § 622.10 (requiring a defendant's motion to indicate that potential exculpatory information in the records is "not available from any other

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In addition to what is now contained in the new law, the motion should also contain good faith statements with specific facts regarding the information sought within the privileged records, as well as how such information would further the defendant's defense.<sup>329</sup> Finally, the defendant must set a parameter of records sought, meaning the defendant cannot request the judge to do a full lifetime review of the victim's records, absent good cause. Therefore, the defendant must specify the particular period of mental health records and state how that time period of mental health records is pertinent to the proposed defense.<sup>330</sup>

### 3. *In Camera Review by the Trial Judge*

The new law provides an additional and vital component to the new protocol by requiring upon filing a successful motion that the court conduct an in camera review of the records.<sup>331</sup> In doing so, the court should determine if the specific time period of records requested is permissible based on the allegations in the motion and the defendant's reason for requesting the records. Once the court has determined it is reviewing only those records likely to be relevant to the case, the judge shall proceed with the in camera review of the privileged material.<sup>332</sup>

With the defendant's motion pleading specific facts and detailing how such evidence will further the defense, the *Cashen* court's concern that "[o]nly the attorneys representing the parties know what they are looking for in the records" is greatly diminished.<sup>333</sup> The trial judge would know from the outset what he or she is looking for during the in camera review,

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source").

329. A simple list would suffice, clearly stating what information the defendant is seeking and why such information would help further the defense. The purpose behind such a list would be to assist the judge during the in camera review and to ensure the defendant has a true purpose for the request.

330. Not only does this make the in camera review more manageable for the court, but it also ensures that records entirely unrelated to the defendant's case are not produced for even the court to review. This approach does not harm the defendant, yet greatly protects and furthers the victim's interests.

331. See IOWA CODE § 622.10(4)(a)(2)(c) ("Upon a showing of a reasonable probability that the privileged records sought may likely contain exculpatory information that is not available from any other source, the court shall conduct an in camera review of such records to determine whether exculpatory information is contained in such records.").

332. *See id.*

333. State v. Cashen, 789 N.W.2d 400, 409 (Iowa 2010).

using the specific facts in the defendant's motion as guidance.<sup>334</sup> Furthermore, while the defendant may not have stated every possible issue located in the records relevant to the defendant's defense, the trial judge can decide to produce records believed to be sufficiently similar to those specifically requested. While the *Cashen* protocol seems to undermine the ability of Iowa trial judges to conduct a sufficient in camera review of the records,<sup>335</sup> this approach allows and trusts Iowa's trial judges to make appropriate determinations.<sup>336</sup>

When a victim discovers that records are being sought by an alleged attacker, this alone will likely re-traumatize the victim.<sup>337</sup> Furthermore, the idea of the defendant's attorney, and eventually the defendant, rummaging through the records adds insult to the already injured victim.<sup>338</sup> However, the emotional impact on the victim can be drastically lowered by allowing only the judge to conduct an in camera review.<sup>339</sup> This approach allows the defendant the opportunity to obtain records relevant to a defense, while keeping the trauma imposed on the victim to a minimum.

#### 4. *Balancing and Protecting*

Upon concluding the in camera review, the new law also notes that if the court has determined exculpatory information is contained in the records, the court shall still balance the defendant's need to access the information to further the defense against the victim's interest in keeping the records private and out of the hands of the alleged abuser.<sup>340</sup> If the trial judge determines exculpatory evidence exists and that such records must be produced to the defendant, only the records containing such

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334. See *supra* Part V.B.2 (proposing as part of new protocol that the defendant's required motion to the court contain specific facts and timelines to aid the court).

335. See *Cashen*, 789 N.W.2d at 409 (doubting the court's ability to identify exculpatory information without participation by defense counsel).

336. See Interview with Steven Foritano, *supra* note 322 (supporting the use of an in camera review).

337. See *id.*

338. See *id.*

339. See IOWA CODE § 622.10(4)(a)(2)(b) (2011) (requiring the court to conduct an in camera review of a victim's records after a heightened showing of necessity).

340. See IOWA CODE § 622.10(4)(a)(2)(c) (2011) ("If exculpatory information is contained in such records, the court shall balance the need to disclose such information against the privacy interest of the privilege holder.").

information may be disclosed to the defendant.<sup>341</sup>

The *Cashen* decision was rather vague regarding whether the criminal defendant is able to review the obtained records with his attorney.<sup>342</sup> However, for the criminal defense attorney to render proper legal services, the records the court has determined contain exculpatory evidence would certainly have to be disclosed to the criminal defendant as well. Under the new law, while the defendant, the defendant's attorney, and the prosecutor will receive the records from the court under strict guidelines, any other individual wishing to obtain access to the records must be specifically authorized by the court to do so, including expert witnesses.<sup>343</sup> All individuals who are granted access to the records shall be bound to strict nondisclosure and nondissemination guidelines.<sup>344</sup>

##### 5. *Posttrial Protection of the Records*

Lastly, immediately after the matter has been resolved, all copies of the records, notes taken by anyone about the records or their contents, and any other recorded discussions on the matter must be delivered to the court and destroyed. Furthermore, every individual who had access to the records must certify to the court all records and the like in their possession have been returned to the court for destruction.

#### VI. CONCLUSION

This Note examines the evolution of Iowa's use of balancing tests and varying standards in determining whether a party to a suit can compel the production of a nonparty's privileged mental health records. As long as the *Cashen* protocol is the governing law in Iowa, victims of domestic abuse,

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341. See *id.* § 622.10(4) (allowing disclosure only after heightened showing, in camera review, and balancing of interests).

342. See Interview with Steven Foritano, *supra* note 324; see also State v. Cashen, 789 N.W.2d 400, 409 (Iowa 2010) (allowing the counsel for the defendant to review records without discussing the criminal defendant's involvement).

343. See IOWA CODE § 622.10(4)(a)(2)(d) ("Upon the court's determination . . . that the privileged information sought is exculpatory and that there is a compelling need for such information that outweighs the privacy interests of the privileged holder, the court shall issue an order allowing the disclosure of only those portions of the records that contain the exculpatory information. The court's order shall also prohibit any further dissemination of the information to any person, other than the defendant, the defendant's attorney, and the prosecutor, unless otherwise authorized by the court.").

344. See *id.*

sexual assault, and other appalling criminal offenses will not have their rights and interests sufficiently protected by Iowa courts. The purpose of this Note is to expose the dangers of the *Cashen* decision and to illustrate how in issuing the protocol, the *Cashen* majority failed to provide a meaningful balancing test for two competing constitutional interests. As Iowa moves forward, it must do more to protect the rights of all of its citizens—including criminal defendants—by providing trial courts with an improved protocol that allows all pertinent rights, interests, and policy matters to be considered. Any lesser approach runs a destructive risk of producing a nonparty's innermost thoughts, fears, dreams, and sins upon a mere motion by the criminal defendant and alleged abuser.

*Caroline K. Bettis\**

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\* Associate, Bradshaw, Fowler, Proctor & Fairgrave, P.C.; B.A., The University of Tulsa, 2009; J.D., Drake University Law School, 2012. The Author would like to offer sincere thanks to Eric Nemmers, Jean Pettinger, Steven Foritano, and Laurie Doré for sharing their knowledge and experience relating to this Note. While the opinions of many local professionals were solicited in furtherance of this Note, the Author bears sole responsibility for its contents.