IN THE SUPREME COURT OF IOWA

NO. 20-005
Grievance Commission No. 893

IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD,
Complainant-Appellee,

v.

ERIC TINDAL,
Respondent-Appellant.

APPEAL FROM THE IOWA SUPREME COURT GRIEVANCE COMMISSION FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED SANCTIONS DATED JANUARY 2, 2020
Brian J. Williams, President 613th Division

APPELLANTS' REPLY BRIEF

ALEXANDER E. WONIO
Hansen, McClintock & Riley
520 Walnut Street-5th Floor
Des Moines, IA 50309
Telephone: (515) 244-2141
Facsimile: (515) 244-2931
awonio@hmrlawfirm.com
ATTORNEYS FOR RESPONDENT-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DID THE BOARD PRESERVE ERROR WITH REGARD TO THE DISMISSSAL OF COUNT X OF THEIR COMPLAINT?

Iowa S. Ct. Atty. Disc. Bd. v. Atty. Doe No. 639, 748 N.W.2d 208 (Iowa 2008)

Iowa Ct. R. 36.22

II. DID THE GRIEVANCE COMMISSION ERR IN FINDING RESPONDENT VIOLATED RULE 32:8.4(d)?

Iowa Sup. Ct. Atty Disciplinary Bd. v. Conroy, 845 N.W.2d 59, 65 (Iowa 2014).

Iowa Sup. Ct. Atty Disciplinary Bd. v. Hedgecoth, 862 N.W.2d 354, 363 (Iowa 2014).

III. DID THE GRIEVANCE COMMISSION ERR IN FINDING RESPONDENT'S PRIOR REPRIMAND WOULD HAVE BEEN MORE SEVERE HAD THE ADDITIONAL DEFAULT NOTICES BEEN AVAILABLE IN OCTOBER 2018?

See, *Iowa Supreme Court Attorney Disciplinary Bd. v. Tompkins,* 733 N.W.2d 661, 670 (Iowa 2007)

Iowa Supreme Ct. Atty. Disciplinary Bd. v. Dunahoo, 730 N.W.2d 202, 207–08 (Iowa 2007)

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Alexander, 727 N.W.2d 120, 122–23 (Iowa 2007)

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Sherman, 619 N.W.2d 407, 410 (Iowa 2000)

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Erbes, 573 N.W.2d 269, 270–71 (Iowa 1998)

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Mears, 569 N.W.2d 132, 134–35 (Iowa 1997)

IV. DID THE GRIEVANCE COMMISSION ERR IN RECOMMENDING SUSPENSION OF RESPONDENT'S LICENSE?

APPELLANTS' ARGUMENTS

I. THE BOARD HAS NOT PRESERVED ERROR WITH REGARDS TO THE COMMISSION'S FINDINGS IN COUNT X OF THE COMPLAINT.

By failing to file any notice of appeal or cross-appeal, the Board has failed to preserve error on the Commission's dismissal of Count X of the complaint. Count X of the Board's complaint involves allegations of unethical conduct in Tindal's representation of his client Edward Campbell.

In its findings, the Commission held, "The Commission finds that the Board **HAS NOT PROVEN** the Respondent violated Iowa R. of Prof'l Conduct 32:1.4(a)(2),(3),or(4) in Count X." (App. 56)(emphasis original). The Board did not file a notice of appeal or cross-appeal with regards to the dismissal of Count X.

Nevertheless, the Board's appellate brief contains a lengthy discussion arguing Tindal should be found in violation of Count X. Under the Grievance Commission rules, and the United States Constitution, the Board cannot sustain an appeal of Count X without filing a notice of appeal.

A. The sole method of appealing a dismissed complaint is via Iowa Ct. R. 36.22.

The Commission dismissed Count X of the Board's complaint against Tindal. The Board failed to file a notice of appeal of the Commission's ruling and therefore has failed to preserve error on appellate review. The findings of the Commission with regards to Count X are final.

The only method for the Board to appeal a dismissed complaint is via Iowa Ct. R. 36.22(2). The Grievance Commission Rules of Procedure states:

> The complainant may apply to the supreme court for permission to appeal from a determination, ruling, report, or recommendation of the grievance commission. The application must be filed within 10 days after service of the determination, ruling, report, or recommendation on the complainant.[1]

The rule The Board's failure to file a notice of appeal is mandatory and not directory. *Iowa S. Ct. Atty. Disc. Bd. v. Atty. Doe No. 639*, 748 N.W.2d 208, 210 (Iowa 2008). "The Board must file its application for permission to appeal within ten days from when the Commission files its disposition". *Id.* Accordingly, the Board's failure to file a timely appeal of Count X's dismissal is fatal to their claim and the Commission's dismissal is final.

---

[1] The Grievance Commission rules do not address potential cross-appeals. Regardless, the Board has **not** timely filed a cross-appeal under the Iowa Rules of Appellate Procedure. "[A]ny notice of cross-appeal must be filed within the 30-day limit for filing a notice of appeal, or within 10 days after the filing of a notice of appeal, whichever is later. Iowa R. App. P. 6.101(2)(b). *See also* Iowa Ct. R. 36.22(4) ("After a notice of appeal is filed or permission to appeal is granted, the appeal must proceed pursuant to the Iowa Rules of Appellate Procedure to the full extent those rules are not inconsistent with this chapter").

B. Tindal's appeal does not relieve the Board of their duty to file a notice of cross-appeal.

The Board is still required to file a cross-appeal of the dismissal of Count X and cannot rely on Tindal's appeal to preserve error. The Supreme Court of the United States has noted that attorney discipline cases are **quasi-criminal** in nature. *In re Ruffalo*, 390 U.S. 544 (1968). Under the double-jeopardy clause of the Fifth Amendment, there is **no** right to appeal the dismissal of a complaint against a criminal defendant. U.S. Const. amend. V.

Even in the civil context the Board would still be required to file a cross-appeal of the complaint dismissal. "A prevailing party may support the district court judgment on any ground contained in the record, provided that the affirmance on that ground does not alter the rights of the parties established in the judgment." *Meier v. Senecaut*, 641 N.W.2d 532, 540, fn. 1 (Iowa 2002). "Where a party has not appealed from portion of judgment adverse to himself he is not entitled to a more favorable decision in the supreme court on an appeal prosecuted by the adverse party." *Prestype Inc. v. Carr*, 248 N.W.2d 111, 121 (Iowa 1976).

Here the Commission clearly entered an adverse ruling against the Board. Further, in its brief, the Board is seeking a more favorable decision on appeal without filing a notice of appeal or cross-appeal. As such, error has not

been preserved. Review of the dismissal of Count X is accordingly inappropriate.

C. Iowa Ct. R. 36.21 does not apply in this context.

While the appropriate sanction against an attorney is reviewed *de novo* under Iowa Ct. R. 36.21, the dismissal of a complaint is not. The rule addresses the Supreme Court's review of a Commission recommendation if no appeal is taken by either party. The rule states:

> If no appeal is taken or application for permission to appeal is filed within the 10-day period provided in rule 36.22, the supreme court will set a date for submission of the grievance commission report. The supreme court will notify the parties that they may file written statements with the supreme court in support of or in opposition **to the discipline the grievance commission recommends**. Statements in support of or in opposition to the recommended discipline must be served and filed no later than seven days before the date set for submission. Upon submission, the supreme court will proceed to review de novo the record made before the grievance commission and determine the matter without oral argument or further notice to the parties. Upon de novo review the supreme court **may impose a lesser or greater sanction than the discipline** the grievance commission recommends. (emphasis added).

It is correct that a Grievance Commission recommendation of a public reprimand or suspension will automatically be reviewed *de novo* by the Iowa

Supreme Court. However, on review where no appeal is filed, the Court is reviewing the record to determine whether the sanction is appropriate. The rule does not contemplate review of the dismissal of a complaint. It accordingly has no applicability with regards to Count X.

II. THE GRIEVANCE COMMISSION ERRED IN FINDING RESPONDENT VIOLATED RULE 32:8.4(d)

Reply to Board's Argument. Tindal argued that the Commission's cited legal authority (*Knopf* and *Howe*) did not support finding of a violation of Rule 32:8.4(d). More specifically, Tindal argued that repeated default notices, without more, such as attendant ***dismissals*** **OR** necessitating ***additional court proceedings***, did not support a finding of a violation of this Rule.

In response, the Board attempts to re-couch Tindal's argument. The Board ignores the second attendant circumstance identified above when it describes Tindal's argument under this section:

> *Tindal's argument that a violation of Rule 32.8.4(d), in the context of appellate defaults, should only be found in those cases in which the Court dismissed the appeal.*

(Bd. Proof Brief, p. 55) This inaccurate representation of Tindal's argument is intentional and done to attempt to cast Tindal's argument in a much poorer light. In support of its argument, the Board relies solely on the *Conroy* and

Hedgecoth cases. A review of these cases shows the Board's need to miscast Tindal's argument, but effectively supports the actual argument put forth.

In the *Conroy* case, a lawyer failed to timely file documents to pursue multiple appeals to which he was Court-appointed. *Iowa Sup. Ct. Atty Disciplinary Bd. v. Conroy*, 845 N.W.2d 59, 65 (Iowa 2014). The lawyer defaulted on these appeals, failed to cure the default, and necessitated the Court's intervention to have him removed. *Id.* In finding a violation of Rule 32:8.4(d), the Court reiterated the importance of, not just the misconduct in having defaults issued, but the attendant *dismissal or necessitation of additional court proceedings. Id.* In that case, the Court specifically identified its role in needing to intervene.

The facts and conclusions in *Conroy* are a far cry from those developed in this record. Admittedly, Tindal did receive multiple default notices. However, the similarities end there. Tindal cured each default. Additionally, there was no intervention by the Court necessitated by his misconduct. *Conroy* is more similar, and certainly consistent with the cases cited by Tindal in his Brief. The Court requires something more than repeated default notices standing alone. In *Conroy* that included the failure to cure defaults and

necessitated intervention by the Supreme Court[2]. *Conroy* does not stand for the proposition that default notices, standing alone, constitute violation of Rule 32:8.4(d).

Next, the Board references *Hedgecoth* case for the conclusion that default notices, standing alone, constitute Rule 32:8.4(d) violation. Like *Conroy* above, this case does not support the conclusion the Board asserts.

In *Hedgecoth*, the Court's focus in evaluating Rule 32:8.4(d), and finding a violation, was primarily focused on the lawyer's failure to timely cooperate with the Board. *Iowa Sup. Ct. Atty Disciplinary Bd. v. Hedgecoth*, 862 N.W.2d 354, 363 (Iowa 2014). Like Conroy above, the Court also referenced the fact that Hedgecoth failed to cure multiple defaults and it had to intervene and remove him from multiple court-appointed appeals. *Id.* Again, these facts are not exemplary of this matter. Tindal did not fail to cure defaults, nor did he necessitate the Court's involvement in having him removed and new counsel appointed.

[2] The Court in *Conroy* also references involvement from the District Court and its Clerk. It is not expressly identified what involvement was necessitated, but Tindal speculates it was the process of having replacement counsel appointed and appear. Regardless, none of the cases in this matter include any level of involvement from the District Court or its Clerk.

Tindal believes the case law is clear in that default notices, standing alone, do not constitute a violation of Rule 32:8.4(d), and the legal authorities cited by the Board support his view.

III. THE GRIEVANCE COMMISSION ERRED IN FINDING RESPONDENT'S PRIOR REPRIMAND WOULD HAVE BEEN MORE SEVERE HAD THE ADDITIONAL DEFAULT NOTICES BEEN AVAILABLE IN OCTOBER 2018.

Reply to Board's Argument. Tindal argues that the conduct discussed in this matter is part-and parcel of the same corpus of conduct that supports a public reprimand, not a suspension. Tindal invited the Board to cite any instance where default notices, standing alone, would warrant a suspension. In response, the Board failed to cite any legal authority for the conclusion that a suspension is warranted. Instead, the Board asks the Court to draw a distinction between a "first case" and "second case" in concluding that suspension is warranted here. However, even adopting the Board's logic, suspension is not warranted in this case.

Under the Board's logic, and assuming the conduct in this case is not part or the same pattern of conduct as urged by Tindal, suspension is not warranted. According to the Board's theory, once you have been reprimanded for violations as Tindal has, a suspension is thereafter mandatory. Tindal disagrees.

The Court's prior decisions are littered with instances of multiple reprimands without immediate escalation to suspension. See, *Iowa Supreme Court Attorney Disciplinary Bd. v. Tompkins*, 733 N.W.2d 661, 670 (Iowa 2007)("[W]e believe the appropriate sanction for Tompkins' neglect and failure to respond to the Board's notices is a public reprimand," despite the fact that lawyer had previously received multiple reprimands, including one for neglect.)(citing, *Iowa Supreme Ct. Atty. Disciplinary Bd. v. Dunahoo*, 730 N.W.2d 202, 207–08 (Iowa 2007) (publicly reprimanding an attorney for neglect of one client matter even though the attorney had two prior admonitions and one public reprimand); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Alexander*, 727 N.W.2d 120, 122–23 (Iowa 2007) (publicly reprimanding an attorney where the attorney admitted the charge of neglect, but failed to respond to the Board's notice of investigation); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Sherman*, 619 N.W.2d 407, 410 (Iowa 2000) (publicly reprimanding an attorney for neglect of one client matter and his failure to respond to the Board's inquiries even though the attorney had previously been barred from appellate practice for two years due to neglect and was also publicly reprimanded for neglect); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Erbes*, 573 N.W.2d 269, 270–

71 (Iowa 1998) (publicly reprimanding an attorney for his neglect of a client matter and failure to cooperate with Board); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Mears,* 569 N.W.2d 132, 134–35 (Iowa 1997) (publicly reprimanding an attorney for his neglect of two matters even though the attorney had three prior admonitions for undue delays in processing clients' matters))[3].

These are but a few of the great many examples of a matter's facts and circumstances driving the appropriate sanction, and not an immediate escalation to suspension as suggested by the Board. Admittedly, there is a line, but that must be evaluated on a case-by-case basis, and the underlying facts and circumstances of this case do not warrant suspension. No prior case supports suspension as a sanction for default notices standing alone. This is not the first.

IV. THE GRIEVANCE COMMISSION ERRED IN RECOMMENDING SUSPENSION OF RESPONDENT'S LICENSE.

Reply to Board's Argument. Tindal argued that the Commission failed to identify and apply the two most significant mitigating factors: (1) Lack of

[3] Tindal's argument in Section III(b) is also applicable here as it identifies multiple cases where public reprimand was appropriate despite a prior history of reprimands for neglect AND failing to respond to Board inquiries.

client harm, and (2) Tindal's conduct was done in providing legal representation to underserved parts of the community. In response, the Board argues that a client was harmed, as alleged in Count X of its Amended Complaint.

Tindal begins by noting two significant admissions made in the Board's Brief by its silence: (1) the Board admits that these two significant mitigating factors were not applied by the Commission, and (2) the Board cannot refute the import of the second mitigating factor asserted by Tindal.

In addressing the first mitigating factor that the Commission failed to consider, the Board claims it should not apply because Count X (Campbell) shows that a client was harmed. As an initial matter, the Commission dismissed Count X and its reconsideration here is inappropriate for the reasons stated above in issue I above.

The Board's final portion of the argument on this count is to recite facts and circumstances from the *Tomkins* case, and argue that Tindal's "arrogant indifference" supports a suspension. The recitation of *Tompkins* does not appear to be linked to any substantive argument from the Board, and, as outlined in Tindal's Brief, supports the conclusion he proffers in this matter.

The contention of "arrogant indifference" is more troubling to Tindal, and not for its legitimacy. The Board twice accuses Tindal of displaying "arrogant indifference." The Board does not contend the Commission made such a finding, nor does it cite to any part of the record that would support this false and misleading characterization.

The record is clear, and the Commission properly found, that Tindal has been exemplary in his cooperation with the Board throughout. Moreover, very distinguished witnesses, including Court of Appeals' and District Court Judges, testified to Tindal character and his laudable presentation as an officer of the Court and defender of the underserved. It is improper, and unfortunate, that the Board has elected to resort to this unsupportable conclusory depiction. Tindal meaningfully explained to the Commission what his thought process was regarding the conduct giving rise to this litigation. Tindal is permitted to assert legitimate defenses and explain his actions, and have the same asserted through legal counsel, without unfairly being portrayed as carrying himself with *arrogant indifference*.

The Commission did not find "arrogant indifference," or anything of the sort. More to the point, Tindal has NOT contested the finding of a violation under Rules 32:1.3 or 32:3.2. If the Board's characterization of

Tindal were true, wouldn't he contest these findings? Of course. The truth is that Tindal recognizes this is not appropriate practice, and he has taken steps to remedy that. The fact he seeks to explain himself and show that he is not a brazen lawless lawyer who thought he was above the system, is NOT the same as being arrogantly indifferent. He had a mistaken interpretation of the law.[4] Tindal's approach to the law practice is one of a legal martyr, not one who stands entitled. (App. 294)

Although the Board's false characterization of Tindal is unfortunate, it is not altogether unexpected (a problem in and of itself). From the outset, Tindel recognized this thin line of trying to explain himself versus offering excuses (or being "arrogantly indifferent" as the Board states). (App. 255-56)

Q: Are you here today to make any excuses for the series of Notices of Default you received?

A: No. I don't have any—I have explanations for how things happened and why things happened. I'm not making any excuse…

(App. 256)

It is completely unfair to suggest that, because Tindal did not simply accede to the demands of the Board, he is acting with "arrogant indifference[5]."

---

[4] A literal interpretation that, while inaccurate, is neither "arrogant" nor "indifferent." (Tr. 28, 189-91, 206-08)

[5] Notably, the Commission also did not agree with the lengthier suspension recommended by the Board. Under the Board's approach, this volunteer

Not only did he expressly state at the outset of the hearing that he was not there to make excuses; explain, but not excuse, but he has accepted the finding of Rule violations associated therewith. More to the point, Tindal is a true legal martyr, working for a minimal hourly wage while providing top level legal representation to the most underserved in our community. This is not a rogue lawyer who is a danger to the public.

CONCLUSION

The Supreme Court of Iowa should determine that the violations complained of in this case are part of the same pattern of conduct for which he previously received public reprimand. In the alternative, a public reprimand should warrant.

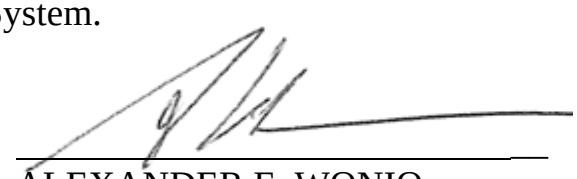
---

group, in refusing to wholly agree with it, was acting with cavalier indifference.

CERTIFICATE OF SERVICE

On the 3rd day of June 2020, the undersigned served the within Appellant's Proof Reply Brief on all parties to this appeal by e-filing it on the State of Iowa's Electronic Data Management System.

I further certify that on the 3rd day of June 2020, I filed this document with the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 E. Court Avenue, Des Moines, Iowa 50319, by e-filing it in the State of Iowa's Electronic Data Management System.



ALEXANDER E. WONIO

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

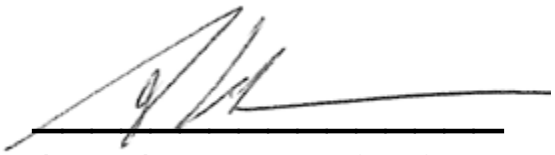
[**X**] this brief contains 3,013 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

[ ] this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Iowa. R. App. P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[**X**] this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman font, or

[ ] this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].



ALEXANDER E. WONIO

June 3, 2020

DATE