

IN THE IOWA SUPREME COURT

No. 20-0268

LIQUOR BIKE, LLC,

Writ of Certiorari Plaintiff,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,

Writ of Certiorari Defendant.

ORIGINAL WRIT OF CERTIORARI PROCEEDING ARISING FROM
A FEBRUARY 10, 2020 RULING BY IOWA DISTRICT COURT FOR
POLK COUNTY, HON. JEANIE VAUDT

**WRIT OF CERTIORARI DEFENDANT'S
AMENDED FINAL BRIEF**

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

As an initial matter plaintiff Vivone, LLC submits this brief on behalf of the Iowa District Court in and for Polk County. *See* Iowa R. App. P. 6.107(5) (“Parties before the district court other than the certiorari plaintiff shall be required to defend the district court and make all filings required of the defendant under these rules unless permitted to withdraw by the supreme court.”).

Vivone, LLC has neither submitted any issue for appeal nor has it filed any request for a writ of certiorari.

ROUTING STATEMENT

This case should be transferred to the Court of Appeals as it does not present any issue pertaining to any of the criteria set forth in Iowa R. App. P. 6.1101(2). Case law concerning conflicts of interest by attorneys is well established.

STATEMENT OF THE CASE

This case is an original proceeding for a writ of certiorari arising from the Iowa District Court in and for Polk County's order disqualifying attorney Billy Mallory and the Brick Gentry law firm from representing Liquor Bike, LLC in a district court proceeding, case number EQCE085101, due to a conflict of interest with plaintiff Vivone, LLC.

STATEMENT OF THE FACTS

Liquor Bike, LLC's 5+ pages of recitation of facts and procedural history can be condensed to the following pertinent facts:

Vivone, LLC ("Vivone") commenced an action in the Iowa District Court in and for Polk County against Liquor Bike, LLC ("Liquor Bike") on September 20, 2019, case number EQCE085101 ("Litigation"). The Litigation arises from Liquor Bike's encroachment on Vivone's real property.

On November 15, 2019, Vivone filed a Motion to Disqualify Counsel and Motion to Stay Deadline to Reply to Counterclaims (App. 19). The Motion to Disqualify articulated that attorney Billy Mallory and the Brick Gentry law firm were disqualified from representing Liquor Bike in the Litigation due to a conflict of interest with Vivone.

The conflict of interest exists based on the following facts: JSV Community Properties, Inc. ("JSV") is a member of Vivone. (Transcript, 15:6-16) (App. 116). JSV is the manager of Vivone. (Transcript 16:20-25, 17:1-12); (App. 114). JSV is the only entity with control over Vivone.

Dr. Eugene Cherny is the only director of JSV, the only officer of JSV, and is the only voting shareholder of JSV. (Transcript, 15:17-25, 16:1-19); (Supp. App. 5); (App. 118). In effect, JSV is controlled wholly by Dr. Cherny. Because Vivone is controlled wholly by JSV, Dr. Cherny is the sole individual behind Vivone. (Transcript 17:13-16).

Dr. Cherny is also the sole shareholder, officer, and director of Heartland Plastic & Reconstructive Surgery, P.C. (“Heartland”). (Transcript 10:5-18). Heartland is wholly controlled by Dr. Cherny. (Transcript 17:17-18).

Dr. Cherny was not aware of Attorney Mallory or the Brick Gentry firm’s involvement in the Litigation until he reviewed Liquor Bike’s Answer and Counterclaims. (Transcript 19:2-21).

Attorney Douglas Fulton of the Brick Gentry law firm represents Heartland in a matter separate from the Litigation. (Transcript 11:1-15); (App. 119-21). Attorney Mallory of the Brick Gentry firm represented Liquor Bike in the Litigation adverse to Vivone. Because Dr. Cherny was the individual behind Vivone and

Heartland, the Brick Gentry firm was disqualified from representing Liquor Bike in the Litigation.

After full briefing and an evidentiary hearing on January 10, 2020, the District Court ruled that the Brick Gentry law firm, including Attorney Mallory, were conflicted and that the Iowa Rules of Professional Conduct required that they be disqualified in the Litigation. The District Court found that Dr. Cherny is: the sole shareholder and sole officer of Heartland (App. 204); President and sole officer of JSV (App. 204); and JSV is the sole manager of Vivone (App. 204). The Court further found: “Brick [Gentry law firm] is on both sides of the fence here as it relates to Dr. Cherny” and “roads for all organizations related to [Vivone] in this matter lead back to Dr. Cherny.” (App. 205). The Court ruled that Iowa. R. Prof. Conduct 32:1.7, comment 6 was on point in that “a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.” (App. 205).

THE DISTRICT COURT'S ORDER DISQUALIFYING BRICK GENTRY AND ATTORNEY MALLORY WAS LAWFUL AND PROPER

A. Preservation of Error

Vivone – in its representation of the District Court per Iowa R. App. P. 6.107(5) – concurs that error has been preserved by Liquor Bike, LLC and that this matter is properly before the appellate court.

B. Standard of Appellate Review

The Supreme Court's review of a district court's disqualification of an attorney is reviewed for abuse of discretion. *Killian v. Iowa Dist. Court for Linn Cty.*, 452 N.W.2d 426, 428–29 (Iowa 1990) (“Hence the trial court's factual findings in disqualification cases will not be disturbed on appeal if they are supported by substantial evidence.”); *Doe ex rel. Doe v. Perry Cmty. Sch. Dist.*, 650 N.W.2d 594, 597 (Iowa 2002); *NuStar Farms, LLC v. Zylstra*, 880 N.W.2d 478, 482 (Iowa 2016) (“A district court abuses its discretion when its ruling is based on clearly untenable grounds.”) (internal citations omitted).

C. Argument

The District Court properly disqualified the Brick Gentry law firm and Attorney Mallory after consideration of ample amounts of evidence of a concurrent conflict of interest. The relief sought by Liquor Bike in its current petition for writ of certiorari should be denied.

(1) Legal Standard for Concurrent Conflict of Interest.

Iowa Rule of Professional Conduct 32:1.7 prohibits an attorney from representing a client that is adverse to another client. Conflicts are imputed to each attorney in a firm. *See* Iowa R. of Prof'l Conduct 32:1.10. Comment 34 to Rule 32:1.7 states:

A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* rule 32:1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, **unless the circumstances are such that the affiliate should also be considered a client of the lawyer**, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

(emphasis added).

Absent informed written consent, a lawyer may not represent one client adverse to another client. Iowa R. of Prof'l Conduct 32:1.7. Regardless of whether the matters for which the representation of each client arise are similar, the Rules of Professional Conduct are clear that an attorney may not represent one party in a litigation against another current client. The purpose of this rule is described in comment 6 of Iowa R. of Prof'l Conduct 32:1.7:

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. **Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.**

(emphasis added).

(2) *Dr. Cherny is the Individual Behind Vivone*

Vivone is the plaintiff in the underlying Litigation. At the inception of Vivone, Dr. Cherny was a 51% member of Vivone. (Transcript, 14:3-11); (Supp. App. 3); (App. 82). In March 2017, Dr. Cherny transferred his ownership interests in Vivone to JSV Community Properties, Inc. ("JSV"). (Transcript, 15:6-16) (App. 116). JSV is Dr. Cherny's holding company for real estate. (Transcript,

15:17-19). Dr. Cherny is the president, secretary, treasurer, and director of JSV. (Transcript, 15:20-25, 16:1); (Supp. App. 5); (App. 118). Dr. Cherny is the only officer of JSV. (Transcript, 16: 2-4); (Supp. App. 5); (App. 118). Dr. Cherny is the only director of JSV. (Transcript, 16:5-6); (Supp. App. 5); (App. 118). Dr. Cherny is the only individual with voting control over JSV. (Transcript, 16: 7-19); (Supp. App. 5); (App. 118). Dr. Cherny considers JSV to be his company. (Transcript 18: 6-7).

JSV, which is wholly controlled by Dr. Cherny, is the manager of Vivone. (Transcript 16:20-25, 17:1-20); (App. 114). Dr. Cherny is in control of Vivone. (Transcript 17:13-16). When there is a question about Vivone's legal rights, it is Dr. Cherny who contacts an attorney. (Transcript 17:21-24). Dr. Cherny considers Vivone to be his company. (Transcript 18:4-5).

(3) *Dr. Cherny is the Individual Behind Heartland*

Dr. Cherny is the sole shareholder of Heartland Plastic & Reconstructive Surgery, PC ("Heartland") (Transcript 10:5-14). Dr. Cherny is the only officer of Heartland. (Transcript 10:15-18). Dr. Cherny is the only individual in control of Heartland. (Transcript

17:17-18). Dr. Cherny considers Heartland to be his company.

(Transcript 18:8-9). If there was a question about Heartland’s legal rights, Dr. Cherny is the individual who speaks with an attorney on behalf of Heartland. (Transcript 17:21-25, 18:1-3). Dr. Cherny is the only individual who may authorize Heartland to take any action. (Transcript 10:22-25).

(4) *Brick Gentry and Attorney Mallory Have a Concurrent Conflict of Interest*

(a) *Brick Gentry Represented Heartland and Dr. Cherny*

Brick Gentry represents Heartland. (App. 119-21). Brick Gentry sent an engagement letter to Heartland, and the engagement letter was addressed to “Dr. Cherney” [sic]. (Transcript 11:1-15); (App. 119). The engagement letter included the following text: “I, Dr. Eugene Cherney [sic] on behalf of Heartland, have read the foregoing . . .” (Transcript 18:18-25); (App. 121). The Brick Gentry engagement letter was signed by Dr. Cherny. (Transcript 12:1-4); (App. 121). Dr. Cherny considers Brick Gentry to be his attorneys. (Transcript 12:5-7); (Transcript 18:10-12).

Dr. Cherny was the only representative of all three entities at issue here. As part of Brick Gentry's representation of Dr. Cherny, he has provided "the most intimate details of [his] professional and financial life, [his] personal financial statements. . ." which were requested by Brick Gentry. (Transcript 12:14-23). The information provided by Dr. Cherny to Brick Gentry includes financial information on Vivone and JSV. (Transcript 12:24-25, 13:1-5). Dr. Cherny would not have provided the intimate information concerning Vivone or JSV or his personal finances to Brick Gentry if they were not his attorneys. (Transcript 13:6-9); (Transcript 18:10-17).¹

¹ In Liquor Bike's brief, it contends that Dr. Cherny's personal and intimate financial information, as well as information about Dr. Cherny's entities such as JSV and Vivone, are matters of public record based on Exhibit 22. Dr. Cherny admitted that the application submitted with the assistance of the Brick Gentry firm - which is Exhibit 22 - is a public record. (Transcript 33:12-25, 34:1-7). However, **nowhere in Exhibit 22 - the only publicly available document - is any information about Dr. Cherny's personal finances or the financial status of any of his other entities** (with the exception of a commitment letter for JSV concerning construction of a surgical facility for the use of Heartland). Dr. Cherny clarified that he provided the Brick Gentry firm with "complete knowledge of [his] personal affairs," more than just what was related to Heartland. (Transcript 33:12-25, 34:1-7). Thus, any argument by Liquor Bike that

The District Court found that under the circumstances, Dr. Cherny was a Brick Gentry client. (App. 205) (“Brick is on both sides of the fence here as it relates to Dr. Cherny. . . whether the cause of action Brick currently represents Dr. Cherny through Heartland for . . .”). There was ample evidence in the record for the District Court to come to this conclusion. Dr. Cherny was the individual who spoke with Brick Gentry about the legal representation. Brick Gentry addressed the engagement letter to Dr. Cherny. Dr. Cherny, on behalf of Heartland, accepted Brick Gentry’s terms of representation. Dr. Cherny provided intimate financial information to Brick Gentry about not only Heartland, but also about Vivone, JSV, and Dr. Cherny individually based on Brick Gentry’s request of Dr. Cherny for such information. Dr. Cherny testified that he believed Brick Gentry were his attorneys. The District Court did not abuse its discretion in determining that Brick Gentry represented Dr. Cherny.

the Brick Gentry firm’s knowledge of Dr. Cherny’s intimate personal and business finances is a matter of public knowledge is simply wrong and does not absolve Attorney Mallory and the Brick Gentry firm from its breach of the duty of loyalty owed to Dr. Cherny.

(b) Brick Gentry's Conflict was Imputed to Attorney Mallory

The District Court disqualified Attorney Mallory and the rest of the Brick Gentry law firm from representing Liquor Bike adverse to Vivone in the Litigation because “Brick is on both sides of the fence here as it relates to Dr. Cherny.” (App. 205). The conflict created by Attorney Douglas Fulton’s (of Brick Gentry) representation of Dr. Cherny was imputed to other attorneys at the Brick Gentry law firm by virtue of Iowa R. Prof. Conduct 32:1.10. Because there are no circumstances herein which permit Brick Gentry and Attorney Mallory from avoiding the imputed conflict of interest, the District Court did not abuse its discretion in determining that there was a concurrent conflict of interest and that Attorney Mallory was precluded from representing Liquor Bike in the Litigation adverse to Vivone.

(c) Dr. Cherny Did Not Consent for His Attorneys to Sue Him

Mr. Mallory: Q. I believe your testimony was that you only raised the conflict of interest after the answer and counterclaim was filed?

Dr. Cherny: A. Well, that was when I found out that my law firm was suing me.

(Transcript 41:12-16).

Liquor Bike attempts to paint Vivone's request to disqualify Attorney Mallory and Brick Gentry as an impermissible legal tactic. Liquor Bike, without any supporting evidence, alleges that Dr. Cherny knew of Brick Gentry's involvement for months, yet only decided to disqualify the Brick Gentry firm after Liquor Bike filed counterclaims.

Liquor Bike is wrong.

Dr. Cherny testified that before he directed his attorneys at the Dickinson, Mackaman, Tyler & Hagen P.C. law firm to file a petition, he was attempting to resolve the matter absent litigation. (Transcript 18:18-25). The negotiations were unsuccessful, so Dr. Cherny directed the Dickinson firm to commence litigation on behalf of Vivone.

(Transcript 18:18-25, 19:1). After the petition was filed, Brick Gentry filed Liquor Bike's answer, affirmative defenses, and counterclaim.

Upon receipt of the answer, affirmative defenses, and counterclaim,

Dr. Cherny reviewed the document and told undersigned counsel

about a conflict of interest because of his ongoing relationship with the Brick Gentry firm. (Transcript 19:2-14). Dr. Cherny was not aware that the Brick Gentry firm was representing Liquor Bike prior to seeing the answer, affirmative defenses and counterclaim. (Transcript 19:17-21). There is no testimony to the contrary.

Liquor Bike filed its answer, affirmative defenses, and counterclaim on October 22, 2019. On November 5, 2019, undersigned counsel wrote to Attorney Mallory, requesting that he withdraw from the Litigation due to a conflict of interest. (Supp. App. 6). Attorney Mallory refused to do so (Supp. App. 7). Undersigned counsel attempted to contact Attorney Fulton at the Brick Gentry firm three times by email and four times by phone, but as of the date the Motion to Disqualify was filed, Attorney Fulton had not responded. (App. 20, ¶ 9).

Any argument by Liquor Bike that relies on the timing of filing of the Motion to Disqualify as a defense to Attorney Mallory's ability to proceed despite the obvious conflict of interest is baseless under both the law and the circumstances of this case.

Moreover, Dr. Cherny did not sign a conflict of interest waiver. (Transcript 40: 7-14). Without a signed conflict waiver, Attorney Mallory and the Brick Gentry firm are disqualified from representing Liquor Bike adverse to Vivone. See Iowa R. of Prof'l Conduct 32:1.7.

(d) The District Court Did Not Abuse its Discretion

The District Court did not abuse its discretion in disqualifying Attorney Mallory and the Brick Gentry firm from representing Liquor Bike in this Litigation and from prohibiting Attorney Mallory from discussing this matter with replacement counsel.

The Court's finding that "Brick is on both sides of the fence here as it relates to Dr. Cherny" was supported by ample evidence showing that Dr. Cherny was the sole individual in charge of Vivone, JSV, and Heartland, that Dr. Cherny was the sole individual who discussed legal matters with attorneys for his entities, and that "[t]he roads for all organizations related to Plaintiff in this matter lead back to Dr. Cherny." (App. 205).

Propositions cited by Liquor Bike in attempting to ignore Attorney Mallory and Brick Gentry's duty of loyalty are not persuasive here. First, Vivone was not required to show any

prejudice or harm as a result of Attorney Mallory and Brick Gentry's conflict of interest. The only exception in the Iowa Rules of Professional Conduct which allows for a lawyer to proceed in litigation despite a conflict is when there is informed, written consent. Liquor Bike's attempt to imply a "prejudice" requirement into the Iowa Rules of Professional Conduct is not convincing. Rule 32:1.7 states "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." The Rule is clear that when a conflict exists, the attorney is not permitted to remain in the litigation.² Likewise, case law in Iowa addressing a disqualification due to current conflict of interest does not even reference a need to show prejudice or harm. *See, e.g., Killian v. Iowa Dist. Court for Linn Cty.*, 452 N.W.2d 426, 430 (Iowa 1990) (holding that even a potential conflict is enough to warrant disqualification); *NuStar Farms, LLC v. Zylstra*, 880 N.W.2d 478, 482 (Iowa 2016) ("The right of a party to choose his or her own attorney is important, **but it must be balanced**

² No comments to Rule 32:1.7 indicate that absent harm or prejudice, a conflicted attorney may continue to run roughshod over the duty of loyalty and continue to remain in the litigation.

against the need to maintain ‘the highest ethical standards’ that will preserve the public's trust in the bar and in the integrity of the court system.”) (emphasis added).

Moreover, even if prejudice or harm is a required element that, in its absence, would allow Attorney Mallory to continue to ignore his ethical obligations, including his duty of loyalty, there is ample evidence in the record showing the harm to Vivone. The Brick Gentry firm has intimate knowledge of Dr. Cherny’s personal and business financials. Intimate knowledge of one’s finances is certainly prejudicial and harmful in litigation, especially when Attorney Mallory and the Brick Gentry firm obtained said intimate financial information **because of their representation of Dr. Cherny**. Indeed, it is difficult to imagine what other information could be more prejudicial to a client.

In light of Attorney Mallory and the Brick Gentry firm’s absolute disregard for the ethical standards and the public’s trust in the bar, the District Court did not abuse its discretion in ordering the disqualification.

This is not a case where a minor shareholder of a company, who has not intimately interacted with counsel, seeks to disqualify an attorney with whom he has no real connection. Here, Dr. Cherny was for all intents and purposes the client. The circumstances of this case, where Dr. Cherny was the only individual to discuss legal matters of the companies, where Dr. Cherny was the only individual with *any* voting control over the entities, and where Dr. Cherny considered the companies to be his companies and the lawyers to be his lawyers, underscore the conclusion that the District Court certainly did not abuse its discretion. *See* Iowa R. of Prof'l Conduct 32:1.7, Comment 34 (prohibiting organization representation when "the circumstances are such that the affiliate should also be considered a client of the lawyer").

The District Court heard and considered ample evidence. The District Court properly applied the Iowa Rules of Professional Conduct in finding that Attorney Mallory and the Brick Gentry firm have a conflict and must be disqualified. The District Court did not abuse its discretion in balancing Liquor Bike's desire to be represented by Attorney Mallory against Dr. Cherny's desire to not

be sued by his attorneys at the Brick Gentry firm and the Court's "need to maintain 'the highest ethical standards' that will preserve the public's trust in the bar and in the integrity of the court system."

See NuStar Farms, 880 N.W.2d at 482.

In Connecticut, the Superior Court ruled that defendant's attorneys must be disqualified because of the attorneys' representation of other entities owned by the owner of plaintiff.

Connecticut Limousine, LLC v. Indus. Roofing & Paving, No.

CV00072256, 2005 WL 648140, at *2 (Conn. Super. Ct. Feb. 17, 2005).

This case has nearly identical facts:

<i>Connecticut Limousine</i>	Present Case
Andrew Anastasio is managing owner of Connecticut Limousine ("Limo"). Limo is plaintiff in litigation.	Dr. Cherny is managing owner of JSV, which is managing owner of Vivone. Vivone is plaintiff in the litigation.
Anastasio is owner via a family trust of several entities, including Limo, Anastasio Trucking and Circle of Life.	Dr. Cherny is owner of several entities via his holding company - JSV - such as Vivone. Dr. Cherny individually owns Heartland.
Limo, Anastasio Trucking, and Circle of Life are not subsidiaries	Vivone, JSV, and Heartland are not subsidiaries of each other, but

of each other, but they work together under common ownership.	they work together under common ownership. ³
Anastasio is the spokesperson for the entities and makes the final decisions for the entities.	Dr. Cherny is the spokesperson for the entities and makes the final decisions for the entities.
In litigation, defendant was represented by Updike law firm.	In litigation, defendant is represented by Brick Gentry law firm.
Updike law firm represented Circle of Life on matters regarding applications with the department of environmental protection.	Brick Gentry firm represents Heartland on matters regarding applications for certificates of need.
Circle of Life's contact with Updike was Anastasio.	Brick Gentry's contact with Heartland is Dr. Cherny.
In its representation of Circle of Life, Updike reviewed Anastasio's family history, background and related companies.	In its representation of Heartland, Brick Gentry reviewed Dr. Cherny's personal intimate financial details, as well as the financial details of his related companies.

After reviewing the facts, which are eerily similar to the case at bar, and after stating that “[d]isqualification of counsel ‘serves to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information,’” the Updike law firm was disqualified from its representation of the defendant in the

³ In fact, Heartland leases real estate from JSV. (Transcript 37:23-25, 38:1).

litigation. *Id.* at *1. The District Court below did not abuse its discretion in disqualifying Attorney Mallory or the Brick Gentry firm under the facts of this case.

Furthermore, the District Court did not abuse its discretion in ruling that Attorney Mallory and the Brick Gentry firm are prohibited from discussing this litigation with Liquor Bike's replacement counsel. The purpose of Rule 32:1.7, which requires the disqualification here, would be violated if Attorney Mallory was permitted to discuss this matter with replacement counsel. Even if Liquor Bike is represented by another attorney, the fact that Attorney Mallory could share information about the matter is *still* a current conflict of interest because Attorney Mallory would be acting adverse to the interest of Dr. Cherny. A disqualification from litigation would be of no effect without a restriction on Attorney Mallory from providing information and continuing to act adversely to Dr. Cherny. Such discussions by Attorney Mallory would violate the text and spirit of the Iowa Rules of Professional Conduct.

CONCLUSION

The District Court did not abuse its discretion in disqualifying Attorney Mallory and the Brick Gentry firm from representing Liquor Bike adverse to Vivone and Dr. Cherny. The District Court properly applied the Iowa Rules of Professional Conduct to the ample evidence in the record establishing Attorney Mallory and the Brick Gentry firm's unethical conduct in this matter.



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Iowa R. App. P. 6.107(5)

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2020, I electronically filed the foregoing document with the Clerk of the Court by using the Iowa Judicial Branch electronic filing system which will send a notice of electronic filing to the following:

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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 this brief contains 3,642 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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 this brief has been prepared in a proportionally spaced type-face using Book Antiqua in 14 pt. font.

/s/ William M. Reasoner
William M. Reasoner

8/11/2020
Date