

IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 20-1004

**IOWA SUPREME COURT ATTORNEY DISCIPLINARY
BOARD,
Appellee**

vs.

**STEPHEN WARREN NEWPORT
Respondent-Appellant.**

**APPEAL FROM IOWA SUPREME COURT
GRIEVANCE COMMISSION**

**RESPONDENT/APPELLANT'S BRIEF AND
REQUEST FOR ORAL ARGUMENT**

JOHN O. MOELLER
601 Brady Street, Ste. 303
Davenport, Iowa 52803
Tel: (563) 323-3014
Fax: (563) 594-6838
E-mail:
john@johnmoeller.com
Attorney for
Respondent – Appellant

Table of Contents

STATEMENT OF THE ISSUES	6
ROUTING STATEMENT	7
STATEMENT OF THE CASE	7
STATEMENT OF FACTS	8
BACKGROUND	8
THE SETTING FOR JD1’S ALLEGATIONS	9
MR. NEWPORT’S REPRESENTATION OF JD1	12
1) <i>CHILD IN NEED OF ASSISTANCE PROCEEDING REGARDING CHILD ABUSE AND NEGLECT IN JUVENILE COURT</i>	12
2) <i>CHILD CUSTODY</i>	13
3) <i>PERSONAL INJURY CASE – JD1 VS. PEOPLE’S MINI STORAGE</i>	13
THE INITIATION OF ETHICS COMPLAINT AND CRIMINAL INVESTIGATION	16
PHONE AND EMAIL TIMELINE JANUARY 18TH AND 19TH ANNOTATED	18
<i>JANUARY 18TH – P.M.</i>	18
<i>JANUARY 19TH – A.M.</i>	20
<i>JANUARY 19TH – P.M.</i>	Error! Bookmark not defined.
RELEASE WITNESSED BY ROSALIE BERGERT ON THE 19TH	25
JD1’S TIME OF ARRIVAL AT MR. NEWPORT’S OFFICE ON THE 19TH	28
JD1 FIRST TOLD POLICE HER MEETING WAS FROM 11 TO NOON	30
THE FAXED RELEASE	32
MRS. NEWPORT’S WHEREABOUTS AND ACTIVITIES	32
KELSIE SLAY	33
ARGUMENT I	35
THERE WAS NO CRIMINAL ACT BY MR. NEWPORT PROVEN BY A CONVINCING PREPONDERANCE OF THE EVIDENCE	35

PRESERVATION OF ERROR	35
STANDARD OF REVIEW	35
CREDIBILITY OF MR. NEWPORT AND JD1.....	36
JD1 HAS A CNA LICENSE AND HAS WORKED AS A CNA	37
JD1 DELETED INFORMATION FROM HER PHONE	37
EXITING MR. NEWPORT’S OFFICE.....	38
THE CLAIMS BY JD1 TO KNOW PERSONAL INFORMATION	38
A) <i>CANCER.....</i>	39
B) <i>SEXUAL DEVICE or URINARY FUNCTION VALVE</i>	40
C) <i>TUBES COMING OUT OF HIS STOMACH AND A SQUARE IMPLANT</i>	41
D) <i>THE SCAR</i>	42
E) <i>REDISH PUBIC HAIR</i>	43
G) <i>RECTANGULAR DEVICE ON RIGHT ABDOMEN THAT COULD BE SEEN AND FELT.....</i>	44
H) <i>2-7-18 PHONE CALL AND 2-15 IN PERSON RECORDED MEETING ..</i>	45
I) <i>“IN LIEU OF PAYMENT”</i>	47
J) <i>FINAL SETTLEMENT NEGOTIATION CALL ON 1-19-18</i>	49
K) <i>NO ONE WAS AT THE OFFICE</i>	49
L) <i>JD1 WAS INSTRUCTED BY POLICE NOT TO CONTACT MR. NEWPORT</i>	50
M) <i>RIGHT HAND – LEFT HAND</i>	51
THE FAILURES OF DETECTIVE PAYTON	51
1. <i>NO TRAINING FOR SEXUAL ABUSE ALLEGATION CASE</i>	52
2. <i>BIASED AND PREDETERMINED OUTCOME</i>	53
3. <i>FAILURE TO INTERVIEW WITNESSES</i>	53
a. <i>ROSALIE BERGERT</i>	53
b. <i>ARTHUR BUZZELL</i>	54
c. <i>KELSIE SLAY</i>	54
d. <i>JD1’S MOTHER</i>	55
4. <i>NO RECORDED INTERVIEWS WITH JD1</i>	55
5. <i>DID NOT INVESTIGATE CHILD ABUSE, NEGLECT OR OTHER ALLEGATIONS OF SEXUAL ASSAULT TO JD1 OR HER FAMILY.....</i>	56
6. <i>PAYTON’S GOAL WAS TO “CONFIRM” JD1’S STORY RATHER THAN INVESTIGATE THE FACTS</i>	56
7. <i>ANY MEETING OR CONTACT ON JANUARY 18</i>	58

8. EXCULPATORY EVIDENCE58

9. PRESERVATION LETTER59

10. FAILURE TO REQUEST REVIEW OF MR. NEWPORT’S COMPUTER,
TELEPHONE OR CALENDAR59

11. TELEPHONE DUMP OF JD1’S PHONE.....60

ARGUMENT II.....64

**THERE WAS NO SEXUAL HARASSMENT BY MR. NEWPORT PROVEN BY
A CONVINCING PREPONDERANCE OF THE EVIDENCE64**

PRESERVATION OF ERROR AND STANDARD OF REVIEW64

RELEVANT FACTS AND ANALYSIS.....64

ARGUMENT III68

**EVEN IF JD2’S RECOLLECTIONS CONSTITUTE SEXUAL HARASSMENT,
THEY ARE NOT A PATTERN OF CONDUCT AND THE COMMISSION’S
RECOMMENDED SANCTION IS TOO SEVERE.....68**

REQUESTED RELIEF68

REQUEST CONCERNING ORAL ARGUMENT69

CERTIFICATE OF COMPLIANCE.....70

CERTIFICATE OF SERVICE70

TABLE OF AUTHORITIES

Cases

<i>Board v. Freeman</i> , 603 N.W.2d 600, 603 (Iowa, 1999).....	6, 35
<i>Board v. Keels</i> , 795 N.W.2d 507, 509 (Iowa 2011)	6, 35
<i>Board v. Lickiss</i> , 766 N.W.2d 860, 864 (Iowa 2010)	6, 35

Other Authorities

<u>False Allegations of Adult Crimes</u> , FBI Law Enforcement Bulletin, September 2012, available at https://leb.fbi.gov/archives	6, 52
--	-------

Rules

Iowa Court Rule 6.1101(2)(e).....	7
Iowa Rules of Professional Conduct 32:8.4.....	7

STATEMENT OF THE ISSUES

Issue I. Whether the Board has proven by a convincing preponderance of the evidence that Mr. Newport committed a criminal act with respect to JD1.

Board v. Freeman, 603 N.W.2d 600, 603 (Iowa, 1999)

Board v. Lickiss, 766 N.W.2d 860, 864 (Iowa 2010)

Board v. Keels. 795 N.W.2d 507, 509 (Iowa 2011)

False Allegations of Adult Crimes, FBI Law Enforcement Bulletin, September 2012, available at <https://leb.fbi.gov/archives>

Issue II. Whether the Board has proven by a convincing preponderance of the evidence that Mr. Newport engaged in sexual harassment of JD1 or JD2.

Board v. Freeman, 603 N.W.2d 600, 603 (Iowa, 1999)

Board v. Lickiss, 766 N.W.2d 860, 864 (Iowa 2010)

Board v. Keels. 795 N.W.2d 507, 509 (Iowa 2011)

False Allegations of Adult Crimes, FBI Law Enforcement Bulletin, September 2012, available at <https://leb.fbi.gov/archives>

Issue III. Whether the sanction proposed, if the Court determines Mr. Newport engaged in sexual harassment of JD2, is excessive.

ROUTING STATEMENT

This attorney discipline matter shall be retained by the Supreme Court. Rule 6.1101(2)(e).

STATEMENT OF THE CASE

The Board filed a complaint on October 16th, 2019 alleging violations of Iowa Rules of Professional Conduct 32:8.4(b) and 32:8.4(g). A. 4. The matter was presented to the Commission on February 20th and 21st, 2020. The Commission's ruling was filed on July 31st, 2020. A. 10. The Commission issued a decision with dissents. John Miller and Mikkie Schiltz expressly found that no criminal act was committed by Mr. Newport but agree that Mr. Newport committed sexual harassment. A. 21. Mr. Miller suggested a suspension of six months was appropriate. A. 24. Mikkie Schiltz believed a one-year suspension was appropriate. A. 24. The other commissioners believed a two-year suspension appropriate. A. 21.

Respondent filed his notice of appeal on 8-7-20. Confidential Appendix (Hereinafter "CA.") 459.

STATEMENT OF FACTS

BACKGROUND

Mr. Newport was licensed to practice law in 1978 and has practiced in Scott County for more than 40 years. JD1 filed a complaint with the Board on October 16, 2019, alleging that Mr. Newport committed criminal acts and sexual harassment. JD2 did not file a complaint. After the publicity of Mr. Newport's arrest, JD2 contacted police to offer a statement concerning her recollections and opinions about experiences with Mr. Newport that she believes were inappropriately sexually suggestive. She would not waive her attorney-client privilege. She was called as a witness by the board against Mr. Newport.

The criminal charges were tried prior to the hearing by the commission. The State of Iowa twice presented to jurors in Scott County, Iowa in lengthy criminal trials, its claim that Mr. Newport committed three criminal offenses. Two separate juries selected from the community rejected the prosecution's claims that Mr. Newport committed any criminal violation.

Even after JD1's criminal allegations were rejected by two different juries, the Board claimed that her allegations of criminal conduct and sexual harassment satisfy the lesser standard of proof in these proceedings. The Board also presented a complaint of sexual harassment and a new allegation by JD2 of sexual

harassment concerning statements allegedly made by Mr. Newport in 2012 or 2013. Now in this third effort, the prosecutor claims in this edited version of the criminal prosecution that you should believe JD1 and ignore her credibility issues and contradictions with the other evidence. Mr. Newport disputes every material allegation concerning alleged criminal conduct and sexual harassment.

THE SETTING FOR JD1'S ALLEGATIONS

JD1's personal injury lawsuit has fallen apart on the eve of trial. On Jan. 18th Mr. Newport desperately tries to determine some settlement that will satisfy her and pay litigation expenses, liens and perhaps something for attorney fees. He reasonably believes JD1 will end up with nothing if the matter proceeds to trial because defense counsel Chad VonKampen has successfully used the failure of JD1 to disclose to her doctor similar prior injuries and treatment by other doctors prior to the injury that is alleged in the personal injury lawsuit. Mr. Newport pleads with JD1 to agree to some net settlement amount to her that will satisfy her. JD1 agrees that she will settle if she receives \$7500 "in her pocket". (Transcript of Commission Hearing (Hereinafter "Tx.") p. 68). CA. 61. The following day, Jan. 19th, Mr. Newport negotiates with defense counsel and with subrogation lienholders and secures a settlement offer that will provide to JD1 \$8000. Several days later JD1 tells police that while these settlement discussions were occurring,

her attorney sexually assaulted her. JD1, the Attorney General in the criminal matters, and now the prosecutor in this matter want everyone to believe that while pleading with his client for authority to settle the personal injury case, Mr. Newport assaulted her. It is not plausible that any attorney explaining that the client's case is a loser and begging his client for settlement authority would assault a client while trying to obtain settlement authority.

The criminal allegations of JD1 are not supported by physical or forensic evidence. No bruise on her right (or left) wrist. No witness. No statement made by JD1 about the event to her close friend of 14 years, Kelsie Slay, who she met in person moments after the alleged assault. No testimony from her mother who was in frequent phone communication with her on the day of the alleged assault.

MR. NEWPORT'S HEALTH

In the fall of 2017 Mr. Newport requested the assistance of attorney Arthur Buzzell in JD1's personal injury case. JD1 acknowledged knowing Steve's poor health in the early to mid-fall of 2017. (Tx. 152). CA. 109. At the time of the hearing, Mrs. Newport described that her husband was diagnosed with Parkinson's Disease approximately ten years ago, has Myasthenia Gravis, and is a cancer survivor. (Tx. 347). CA. 226. She described her husband's condition as declining

significantly. (Tx. 348). CA. 227. Mr. Newport's cognitive abilities are limited, and it was difficult for him to assist his own defense of the charges in this matter. (Tx. 348-49). CA. 227-28. His attorney described to the Commission his concern that his client was not competent to defend himself, but for Cheryl's assistance. Without her assistance he did not "think that I could have defended him in this case." (Tx. 348-49). CA. 227-28. Steve's physical and speech limitations could be observed at the hearing and on the video of the police questioning on 3-14-18 when Mr. Newport went to the station after being strip searched by three officers. (Exb. 6).

Mrs. Newport testified Mr. Newport's short term and long-term memory is impaired, and this is evident on a daily basis. (Tx. 350-351). CA. 229-30. Mrs. Newport was asked during the hearing if Mr. Newport was asked what happened on or in the JD1 case, for example, two years ago, would he be able to remember the details of the case. Her answer at Tx. 351 (CA. 230): "He would do his honest best, but, no, he would not be able to do that, I don't think". Mrs. Newport testified she had to help respond to discovery requests due to Mr. Newport's inability and limitations. (Id). CA. 230.

MR. NEWPORT'S REPRESENTATION OF JD1

1) CHILD IN NEED OF ASSISTANCE PROCEEDING REGARDING CHILD ABUSE AND NEGLECT IN JUVENILE COURT

Mr. Newport's representation of JD1 began in November 2003 and until April 2005 when he was court appointed to represent her in an Iowa Department of Human Services (DHS) child in need of assistance proceeding after her children were removed from her care. JD1 was appointed another attorney but was unhappy with that attorney's representation and asked for the previous attorney to be "removed off the case" and another appointed. (Tx. 104). CA. 80. JD1 does know how to complain to remove even a court appointed attorney. Mr. Newport was then appointed by the Court to represent her. (Tx. 105). CA. 81.

Mr. Newport had multiple contacts with JD1 during the CINA juvenile proceeding. He represented her at the Adjudication Hearing, Disposition Hearing, Permanency Hearing and many status hearings. Mr. Newport assisted in drafting guardianship documents for the placement of her children. Seventeen months of hearings and contacts and including a home visit. 76 hours were billed. (Exb. J). It is reasonable to assume that JD1 would not have employed Mr. Newport with her own funds to represent her in the next matter if she had any complaints about Mr. Newport during those 17 months.

2) *CHILD CUSTODY*

Eight years later, in May of 2013, JD1 privately retained Mr. Newport and paid a \$500.00 retainer fee for a custody dispute with that child's father. Mr. Newport secured a successful resolution of her case. This representation concluded on March 14, 2014. It is reasonable to assume that JD1 would not have employed Mr. Newport to represent her in the personal injury matter if she had any complaints about Mr. Newport during that year. (Exb. J). CA. 429.

3) *PERSONAL INJURY CASE – JD1 VS. PEOPLE'S MINI STORAGE*

Eight months later in November 2014, JD1 once again employed Mr. Newport for representation concerning her claimed personal injury at a storage unit when a garage door allegedly fell and struck her. (Tx. 43). CA. 39. JD1 signed a contingency fee agreement for Mr. Newport's representation. In 2016 Mr. Newport filed a petition on behalf of JD1 against People's Mini Storage. JD1 acknowledged she was aware of his continued deteriorating health condition in the early fall of 2017 and the necessity for the assistance of Mr. Buzzell. She agreed that Steve's speech was "mush-mouth" and "slurred" and described his speech as "changed" with some "slur days". (Tx. 151-52). CA. 108-9.

The personal injury case was set for trial in late January 2018. Dr. Dolphin, the treating physician and surgeon, was the expert witness needed to establish the

causal connection between the claimed injury, treatment and the accident. His expert witness services were paid for by Mr. Newport. (See Exb. J). CA. 429. Dr. Dolphin's deposition was taken by attorney Arthur Buzzell in December 2019. In that direct examination deposition, Dr. Dolphin made a causal connection between the claimed injury and the accident. Time constraints required that cross examination to be held on a later date. During cross examination by the defense attorney, Chad VonKampen, Dr. Dolphin was provided with records of injuries and treatment not previously disclosed by JD1 to Dr. Dolphin. He retracted the causal connection based on the records and JD1's failure to disclose that information to him. (Exb. D, D-1). Without an expert witness to make the causal connection between the claimed injury and the accident the case was likely worthless. Mr. Newport explained to JD1 she would lose at trial. JD1 was not happy.

JD1's civil personal injury case also failed due to her false sworn statements in the civil matter. When asked in an interrogatory, under oath on August 29, 2016 whether she had ever been in any other incident that resulted in any personal injury, she answered: none. (Tx. 114). CA. 86. When asked a second time the same question she again answered under oath on January 17, 2017: none. (Id). Her case failed on the eve of trial due to her dishonesty with her treating physician for more

than three years. Her case failed on the eve of trial due to her now being dishonest under oath on 8-29-16 and second time on 1-17-17. JD1 now desires to recover for herself or her mother the attorney fees owed to Mr. Newport in the personal injury case. (Tx. 141-45). CA. 99-103.

Mr. Newport began efforts to salvage the case by a settlement. There were thousands of dollars of Medicaid bills paid by the State of Iowa through Title 19 on behalf of JD1 that were claimed medical expenses because of her treatment. He requested JD1 identify a bottom dollar, net-in-her-pocket amount, to settle the case. She agreed to settle the case for \$7500. (Tx. 68). CA. 61. She was angry she was not receiving more money.

Detective Payton testified at Tx. 238 (CA. 163) as follows:

Q. You were aware that this settlement effort was not in line with her expectations as to how the case would be settled or what the financial value of her case was?

A. Correct.

Q. In fact, she probably complained more about fees and the amount of the settlement and not going to trial than she did about any of the sexual complaints that you were involved with; correct?

A. I would say she obviously wasn't happy about it.

Mr. Newport requested JD1 sign a release the following day so that he could contact Title 19 representatives to negotiate their lien claim. On January 19, 2018, JD1 came to the office and signed a Release in the presence of Rosalie Bergert. (Exb. Q). CA. 456. The phone records described in the phone and email section of

this brief suggest Mr. Newport did not have in person contact with JD1 on January 19, 2018. In the afternoon there were phone negotiations to accomplish a settlement with JD1, the defense attorney and Mr. Newport. The case was settled at approximately 3:00 p.m. The defense attorney then contacted Court Administration at 3:12 indicating the case was settled and there was no need for a trial. (Exb. E). CA. 412.

THE INITIATION OF ETHICS COMPLAINT AND CRIMINAL INVESTIGATION

On 1-24-2018, JD1 filed a complaint with the Bettendorf Police Department.

On 2-7-2018 JD1 called, at the request of officer Payton, and unknown to Mr. Newport, that call was recorded by the Bettendorf PD. She continued to lead Mr. Newport to believe that there was no objection to the settlement of her injury case, and that she would be in to sign the releases.

On 2-15-18 JD1 met with Mr. Newport in what was supposed to be the signing of the release and settlement check to conclude the settlement. Unknown to Mr. Newport, this in person meeting was audio and video recorded with the assistance of Bettendorf PD. This meeting lasted one hour and twelve minutes. During this meeting JD1 tells Mr. Newport she may have changed her mind on the settlement. In 72 minutes, not once did Mr. Newport act inappropriately or say

anything inappropriate, despite the efforts of JD1 and Detective Payton to accomplish that. She testified before the commission that as of 2-15-18 she refused to sign the release and settlement check. (Tx. 165-66). CA. 117-18.

On 2-23-18 JD1 filed in District Court a Motion to Continue her injury trial and “asking court to have my attorney withdraw”. (Exb. G). CA. 427. In the Motion to Continue she alleged the following:

I am requesting to have a Stephen Newport removed off my case due to misrepresentation and dishonesty. He has refused to give any of my files per request and with questions I have inquired with Mr. Newport he has been dishonest. I DON'T AGREE TO WHATEVER AGREEMENT HE CAME UP WITH THE ATTORNEY WHOM REPRESENTING PEOPLES MINI STORAGE. Mr. Newport's behavior has been unprofessional and inappropriate with me, I don't feel comfortable to complete anything further with him. (Emphasis added)

On 3-13-2018 Mr. Newport received the ethics complaint that is the basis of this action.

On 3-14-2018 Mr. Newport first learned of the criminal investigation when the Bettendorf Police executed a search warrant to search his office and strip search and photograph the private areas of his body. He voluntarily returned to the office so that he could be strip-searched and photographed. He then went to the police station by himself to give an interview to Detective Payton. (Exb. 6).

PHONE AND EMAIL TIMELINE JANUARY 18TH AND 19TH ANNOTATED

[See Exb. K (CA. 439) for JD1 phone records, Exb. M (CA. 455) for Mr. Newport phone records, and other exhibits as indicated in the timeline.]¹

JANUARY 18TH – P.M.

[Unless otherwise indicated, all JD1 calls on the 18th pinged off of cell tower 13445, her home area tower.]²

3:34	MR. NEWPORT CALLS JD1 (2 min 28 seconds)
3:54	MR. NEWPORT CALLS JD1 (2 min 20 seconds)

1 Guide to phone numbers found in Exb. K (CA. 439) and M (CA. 455)

(309) 207-9788	JD1 does not know who this number belongs to
(319) 366-7641	Attorney Chad VonKampen
(319) 432-3213	Attorney Chad VonKampen secondary line
(520) 403-0712	JD1's mother
(563) 249-3095	JD1 does not know who this number belongs to
(563) 349-3192	Mr. Newport's cell phone
(563) 386-9076	Mr. Newport's office secondary line
(563) 386-9500	Mr. Newport's office
(563) 421-7160	JD1 does not know who this number belongs to
(563) 505-9709	Kelsie Slay
(563) 676-9244	JD1

2 Guide to Cell/Ping Towers

13433	Moline (Detective Payton testified it is near 13453, 13455, and 13461)
13434	West Davenport, near Kelsie Slay's residence
13437	West Davenport, near Kelsie Slay's residence
13445	JD1 home area tower
13453	Moline (Detective Payton testified it is near 13433, 13455, and 13461)
13455	Moline (Detective Payton testified it is near 13433, 13453, and 13461)

4:08	JD1 OUTGOING CALL
4:24 to 6:01	MR. NEWPORT CALLS JD1 (96 min 41 seconds)
4:51	JD1 INCOMING CALL (while on the 4:24 call with Mr. Newport)
5:52	JD1 ROUTED AND UNDETERMINED CALL (while on the 4:24 call with Mr. Newport)
6:33	JD1 OUTGOING TEXT TO HER MOTHER
6:36	JD1 INCOMING CALL FROM HER MOTHER (40 min 52 seconds) [This call pinged off of tower 33451]
7:39	JD1 INCOMING TEXT
7:52 to 7:56	JD1 TWO INCOMING TEXTS AND TWO OUTGOING TEXTS
10:23 to 10:33	JD1 ONE OUTGOING TEXT TO AND ONE INCOMING TEXT FROM KELSIE SLAY

When Mr. Newport reviewed his calendar it shows an in-person meeting scheduled with JD1 that apparently changed times on January 18, 2018. (Exb. T-1 and T-2). CA. 457 and 458, respectively. Perhaps the “meeting” on the calendar was to be or became a phone call rather than in-person meeting. After receiving the

cell phone records it is clear there were many calls between Mr. Newport and JD1 on the 18th. This is when the need to settle and authority to discuss settlement with JD1 was obtained. The conversations with the defense counsel were on the 19th as evidenced by phone calls and the emails attached to court filing to enforce settlement. (Exb. E). CA. 412.

JANUARY 19TH – A.M.

6:25 to 6:26	JD1 ONE OUTGOING TEXT AND ONE INCOMING TEXT
7:21	JD1 THREE OUTGOING TEXTS
7:45 to 7:47	JD1 OUTGOING CALL (1 min 51 seconds)
7:49 to 7:51	JD1 OUTGOING CALL (2 min 26 seconds)
7:56	JD1 ONE INCOMING AND ONE UNDETERMINED CALL
7:58	JD1 ROUTED
8:04	JD1 INCOMING CALL FROM ILLINOIS
8:15 to 9:05	JD1 OUTGOING CALL TO SAME ILLINOIS NUMBER (JD1 claims to not know who she talked to for nearly 50 minutes) (Tx. 79)
9:06	JD1 OUTGOING TEXT
9:12	JD1 TWO OUTGOING AND ONE INCOMING TEXT WITH KELSIE

9:25 JD1 OUTGOING TEXT TO HER MOTHER

[All of the above communications were sent from JD1's home area, as shown by pinging off tower 13445. The below 9:25 call is the first time JD1's phone records indicate she left her home, as it pings off tower 13461 located in Moline, Illinois. This is consistent with a call from Mr. Newport's office. Then between 9:31 and 11:48 her calls ping off towers 13453 and 13455 in Moline, Illinois.]

9:25 to 9:28 JD1 FOUR OUTGOING CALLS TO HER MOTHER (All between 35 and 45 seconds)

9:29 to 9:30 JD1 TWO OUTGOING TEXTS

9:31 JD1 OUTGOING CALL TO HER MOTHER (34 seconds)

9:33 to 9:34 JD1 TWO INCOMING, ONE UNDETERMINED TEXTS

9:34 JD1 OUTGOING CALL TO HER MOTHER (40 seconds)

9:35 to 9:36 JD1 THREE OUTGOING AND TWO INCOMING TEXTS

9:38 JD1 INCOMING CALL FROM HER MOTHER (13 min 33 seconds)

9:58 to 10:00 JD1 THREE OUTGOING TEXTS TO HER MOTHER

10:01 to 10:08 JD1 INCOMING CALL FROM HER MOTHER

10:16 MR. NEWPORT IS AT THE FAX MACHINE IN THE KITCHEN AREA OF HIS OFFICE FAXING THE SIGNED

RELEASE TO THE STATE OF IOWA (Exb. Q)

10:34 to 10:45 JD1 THREE INCOMING AND FOUR OUTGOING TEXTS

(Three to her mother, others from Kelsie Slay)

[JD1's phone now begins to ping off the Moline tower 13461]

10:45 JD1 INCOMING CALL

10:46 to 10:49 JD1 TEN OUTGOING AND FOUR INCOMING TEXTS
FROM KELSIE SLAY

10:53 JD1 INCOMING TEXT FROM KELSIE SLAY

10:55 JD1 OUTGOING TEXT TO HER MOTHER

11:01 to 11:08 JD1 TEN OUTGOING AND FOUR INCOMING TEXTS
(First five texts are outgoing to her mother, the rest are an
exchange between JD1 and Kelsie Slay)

11:18 MR. NEWPORT INOMING CALL FROM HY-VEE
PHARMACY

11:20 MR. NEWPORT OUTGOING CALL TO HY-VEE
PHARMACY

11:22 to 11:25 JD1 TWO OUTGOING AND ONE INCOMING TEXTS
FROM KELSIE SLAY

11:23 MR. NEWPORT OUTGOING CALL TO HY-VEE

PHARMACY

11:45 JD1 ONE UNDETERMINED AND ONE ROUTED CALL
11:56 to 11:58 MR. NEWPORT TWO OUTGOING CALLS TO MRS.
NEWPORT. (Mrs. Newport testified they had lunch at home at
noon together) (Tx. 362-363).

At this time JD1's phone activities are as follows:

JANUARY 19TH – P.M.

12:03 JD1 INCOMING CALL (2 min 16 seconds) [This call pinged
off JD1's home residence area tower, 13445]
12:25 JD1 INCOMING TEXT FROM KELSIE SLAY
12:31 JD1 INCOMING CALL [This call pinged off tower 33451]
12:32 to 12:35 JD1 THREE OUTGOING AND THREE INCOMING TEXTS
FROM KELSIE SLAY
12:44 JD1 INCOMING CALL FROM HER MOTHER (2 min 0
seconds)
12:49 JD1 OUTGOING CALL
[The above two calls pinged off JD1's home residence area tower, 13445]
12:52 JD1 OUTGOING CALL (5 min 9 seconds, same unknown
number she called for 50 minutes earlier that morning.) [This

call pinged off tower 33451]

1:00 to 1:02 JD1 TWO INCOMING AND THREE OUTGOING TEXTS
FROM KELSIE SLAY

1:03 JD1 INCOMING CALL (3 min 49 seconds, Same unknown
number she called for 50 minutes earlier that morning). [This
call pinged off tower 13437, in west Davenport near Kelsie
Slay].

1:06 to 1:09 JD1 ONE INCOMING AND TWO OUTGOING TEXTS TO
KELSIE SLAY

1:18 MR. NEWPORT OUTGOING CALL TO ATTORNEY
VonKAMPEN (after lunch)

1:34 MR. NEWPORT OUTGOING CALL

1:36 JD1 ONE INCOMING TEXT FROM KELSIE SLAY

1:40 to 1:46 JD1 NINE OUTGOING AND FIVE INCOMING TEXTS
FROM KELSIE SLAY

1:54 to 1:57 JD1 THREE OUTGOING AND THREE INCOMING TEXTS
FROM KELSIE SLAY

1:59 MR. NEWPORT INCOMING CALL

2:15 to 2:16 MR. NEWPORT THREE OUTGOING CALLS TO MR.

VonKAMPEN

2:29 JD1 TWO OUTGOING TEXTS TO KELSIE SLAY

2:36 JD1 OUTGOING CALL TO KELSIE SLAY (24 seconds) [In JD1's phone records, this call pings off tower 13437, located in west Davenport near Kelsie Slay's residence.]

2:38 to 2:40 JD1 FOUR OUTGOING CALLS TO MR. NEWPORT'S OFFICE (2 seconds each)

[JD1 claims these calls were made from the parking lot of Mr. Newport's office, but they pinged off of towers 13437, 33437, 13434, and 33434, which are in west Davenport near Kelsie Slay's residence. JD1 claims she made these calls immediately after the alleged assault but kept hanging up because she was angry. However, at this time, there was a power outage in Bettendorf, and the phones at Mr. Newport's office were down, so the calls did not go through. (This outage is pointed out by both Mrs. Newport and Commission member Mikkie Schiltz.) (Tx. 392 and 399). This is further confirmed by the fact that subsequent communications with Mr. Newport are to and from his cell phone.]

2:49 to 3:09 MR. NEWPORT CALLS JD1 AND MR. VonKAMPEN

[Shows as pinging off tower 13434, near Kelsie Slay's residence. In JD1's phone records as separate calls to Mr. Newport and shown in Mr. Newport's phone

records as one call with call waiting as he transfers between Chad VonKampen and JD1, to discuss the settlement, as shown by the email from Mr. VonKampen in the next email advising Court Administrator that a settlement had been reached.]

3:12 EMAIL FROM CHAD VonKAMPEN TO COURT
ADMINISTRATION THAT A SETTLEMENT HAD “JUST
[BEEN] SETTLED A FEW MINUTES AGO” (Exb. E)

3:18 JD1 INCOMING TEXT

3:36 JD1 OUTGING TEXT

3:47 JD1 THREE INCOMING TEXTS

4:07 JD1 ONE ROUTED AND ONE UNDETERMINED CALL

4:20 JD1 ONE INCOMING AND ONE UNDETERMINED CALL

4:23 JD1 OUTGING TEXT TO KELSIE SLAY

[This is the last communication between JD1 and Kelsie Slay on January 19th. The gap between this message and the last contact with Kelsie at 2:36 suggest that this is the time that JD1 was at Kelsie Slay’s residence on the 19th in the afternoon and not mid-morning. This is further supported by JD1’s calls during this period pinging off of tower 13437.]

RELEASE WITNESSED BY ROSALIE BERGERT ON THE 19TH

During the long telephone conference on January 18, 2018 between Mr.

Newport and JD1, JD1 agreed to stop at the office the next morning and sign the release that was needed for Mr. Newport to negotiate the State's Title 19 subrogation claims. (Tx. 407). CA. 242. JD1 signed the release that was witnessed by the morning receptionist, Rosalie Bergert as shown in Exb. Q. CA. 456. At the commission hearing, JD1 testified she did not recall "signing anything that morning". (Tx. 95). CA. 74. When further pressed, she admitted she signed the document – it was her signature and dated January 19th. (Id). After acknowledging her signature and date on the Release, she attempted to deny that Ms. Bergert witnessed her signature as follows at Tx. 95 (CA. 74):

A. I don't recall signing anything that morning.

Q. Well, I hand you what I have marked as Exhibit Q. Do you recognize your signature on that document?

A. Yes, I do.

Q. Do you see that that document is witnessed by another person?

A. I didn't see her sign it. She wasn't in there then, but I see a signature....

Q. Well, then, you don't know who you gave that form to, do you?

A. I don't even know who gave me this form...

Exb. Q clearly shows Rosalie Bergert witnessed her signature on January 19, 2018.

JD1 does not claim the form was provided to her by Mr. Newport. Mrs. Newport testified Rosalie Bergert would not be given this form if Mr. Newport was going to be meeting with this client or if he was present. (Tx. 369). CA. 235. Mrs. Newport testified Rosalie Bergert would have not witnessed the Release or have

the Release if Mr. Newport planned to meet with JD1. (Id). Mr. Newport was not present when JD1 signed the Authorization (Exb. Q) on January 19, 2018. The phone records and the physical activities of both Mr. Newport and JD1 on January 19, 2018 and Mrs. Newport's testimony support Mr. Newport's denial of meeting in person with JD1 on January 19, 2018.

Detective Payton admitted the release signed by JD1 did not show that she met with Mr. Newport on January 19, 2018 but merely that she was present in Mr. Newport's office at some point that morning. (Tx. 233). CA. 159. Detective Payton admitted Mr. Newport gave him the release witnessed by Rosalie Bergert and signed by JD1 after the search warrant was executed when Steve voluntarily came to the police station to give an interview. Mr. Newport knew JD1 had stopped at the office and signed the release. He gave Detective Payton this release to show she was in the office, but he was not. The prosecutor alleges Mr. Newport lied on this issue, but the release speaks for itself. The phone records and release corroborate Mr. Newport. (Exb. K). CA. 439.

JD1'S TIME OF ARRIVAL AT MR. NEWPORT'S OFFICE ON THE 19TH

The first time JD1's phone records indicate that she left home is a phone call made at 9:25. She testified at Tx. 159 (CA. 112) as follows:

Q. You stated earlier that you went midmorning to Mr. Newport's office;

correct

A. Yes

Q. The incident happened towards the end of the meeting; is that correct?

A. Yes.

Payton testified the cell tower associated with the Newport office is 3461.

The four phone calls she claims to have made at 2:38 come from 3437 and 3434.

(Tx. 199). CA. 140. JD1 said she was in the parking lot where Payton said he tested a call. From 9:26 to 2:38 JD1's phone pings off six different towers. The claim that JD1 was at his office from several minutes before the first call to her mother until 2:38 when she made four phone calls from the parking lot of the office building is not possible. (Exb. K p. 13). CA. 450.

Payton testified towers 3461, 3453 and 3455 were in close proximity with one another. (Tx. 197). CA. 138. 3434 and 3437 are near Kelsie Slay's apartment. (Tx. 192). CA. 133. JD1's four phone calls, purportedly from the parking lot of the law office, starting at 2:38 p.m. did not ping off of tower 3461. The records show it pinged off tower 3437 by Kelsie Slay's. It is not possible to be in the parking lot of Mr. Newport's law office and ping off of tower 3437. At Tx. 198 (CA. 139) Payton conceded JD1 had to be in a geographical area by Kelsie Slay's residence when those calls were placed, and not in the parking lot of Mr. Newport's law office. He further conceded he has little knowledge on the subject of ping towers as shown at Tx. 223 (CA. 151):

Q. Now, if you had the cell tower location, do you know how the range and that sort of thing works? I take it that you're not a cell tower expert.

A. I'm not a cell tower expert.

Q. But you have a rough idea that cell phones tend to go through cell towers close by rather than one further away?

A. Typically, it goes to the strongest signal, or if a tower is full, it can bounce to another. That's what I'm aware of.

Q. So there are a lot of vagaries?

A. True.

Q. And if the cell phone is moving, do you expect it, if you're driving down the road, to move from tower to tower?

A. Yes, they can hand off to different towers.

JD1 FIRST TOLD POLICE HER MEETING WAS FROM 11 TO NOON

JD1 reported to Officer Kelling that her meeting was from 11 to Noon as shown at Tx. 222 (CA. 150):

Q. You have would the report that suggested 11 to Noon?

A. Yes.

Q. That was her first report when she went to the Bettendorf police station and talked to Officer Kelling?

A. Uh-huh.

Q. Correct?

A. I believe so.

JD1 claimed she needed to talk to her mother before she would agree to a settlement. She alleged that call was made just prior to the alleged assault. JD1's cell phone records do not show a call to her mother from 11 to Noon, only text messages. Her cell phone records indicate two incoming calls from her mother, one at 9:38 and one at 10:01 a.m. JD1 told the commission they should rely on her

account given to Officer Kelling on January 24, 2018 regarding the time of the alleged meeting as follows on Tx. 99 (CA. 76):

Q. Do you recall describing to Officer Kelling that this assault occurred between 11 and noon on the 19th?

A. My recollection of that day I came into his office - - my timeframe isn't as clear as it was on that day.

Q. I'm sorry, you that that on the 24th when you talked to Officer Kelling your statement concerning the time is probably more accurate than now or the other way around?

A. It would be more accurate around that time.

When asked what the lunch hour meant to her, she responded at Tx. 98 (CA. 75) as follows:

Q. What is your testimony concerning the time that you were physically present at Mr. Newport's office on the 19th?

A. The timeframe I was there?

Q. Correct

A. Midmorning to approximately lunchtime, between 12 and 1, whatever he - - I don't know. Lunchtime is different for everybody.

Q. Well, when you used the term "lunchtime," is that the noon hour?

A. Usually, yes.

Continuing at Tx. 156 (CA. 110) she testified as follows:

Q. There was a discussion with Steve that nothing was going to happen over the noon hour, according to you; is that correct?

A. He said, we are at lunchtime hours. We are not going to hear from him for a while, so me might as well quit sitting around here waiting, and I will go have lunch, and I will call you back.

At Tx. 159 (CA. 112):

Q. You stated earlier that you went midmorning to Mr. Newport's office; correct

A. Yes

Q. The incident happened towards the end of the meeting; is that correct?

A. Yes.

THE FAXED RELEASE

The first documented time Mr. Newport was in his office on 1-19-18 was 10:16 a.m. when he faxed the signed release (Exb. Q) (CA. 456) to the State of Iowa, Title 19 benefits department. Mr. Newport had to send this new signed release to the State of Iowa to negotiate their subrogation claim to any recovery in the matter. JD1 does not claim Mr. Newport left the meeting at 10:16 a.m. to fax a document to the State of Iowa.

MRS. NEWPORT'S WHEREABOUTS AND ACTIVITIES

Mrs. Newport testified she is the Clinton County Assistant Attorney for child abuse and neglect cases for the past thirteen years. (Tx. 346, 354). CA. 225, 231. On 1-19-18 she was scheduled to be in Scott County for a pre-hearing conference that was set at 10:00 for a conflict case assigned to her. (Tx. 363). CA. 233. She testified she left the house that morning sometime after 9:30 a.m. and closer to 9:40 a.m. for the fifteen-minute drive to the Scott County Courthouse. (Id). She was in no hurry to be early as pre-hearing conferences are informal processes without the necessity of a Judge and is simply meeting with attorneys for court scheduling dates. She testified that on 1-19-18 Mr. Newport left their home

after she left that morning. (Id).

KELSIE SLAY

JD1 claims that after being assaulted by Mr. Newport and calling Mr. Newport four times from the parking lot that she drove straight to the home of Kelsie Slay, her friend of 14 years. (Tx. 139-40). CA. 97-98. JD1 testified the visit with Ms. Slay had been “previously arranged”. (Tx. 65). CA. 58. The meeting with Ms. Slay was arranged the day before or even “a couple days before”. (Tx. 66). CA. 59.

There were 70 text messages and phone calls between JD1 and Kelsie that day. (Exb. K). CA. 439. Kelsie Slay testified JD1 had a preset time to come over to babysit her baby while she went to an appointment. (Tx. 296). CA. 191. Ms. Slay believed that appointment and JD1 visit occurred in “mid-morning” or “afternoon”. (Tx. 294). CA. 190. When asked a second time she testified “probably midmorning”. (Tx. 296). CA. 191.

Kelsie Slay was asked if JD1 came to her home after meeting with her attorney. JD1 came to her home, not necessarily after an appointment with her attorney (Tx. 293)(CA. 189) but was upset about the settlement of her personal injury case. JD1 never suggested in any way she had just been allegedly sexually assaulted as shown at Tx. 296 (CA. 191):

Q. So it may have been a prearranged visit?

A. Yeah.

Q. And if you had an appointment, would she be an occasional childcare provider for you?

A. At that time, yeah, we were close.

Q. During this occasion was there any complaint made that somebody had sexually assaulted her or did something sexually offensive?

A. No.

Meeting your close friend minutes, according to JD1, after being assaulted, JD1 does not say one word about it to her friend? In fact, her good friend testified the only thing she recalls JD1 being upset about her settlement amount at Tx. 297 (CA. 192) as follows:

Q. Ms. Slay, when JD1 first came to your apartment on a day in January, 2018, did JD1 seem upset?

A. Maybe a little bit, if I remember right, kind of. Her phone was ringing all the time. That's what I do remember, or she was on her phone.

I don't know who she was talking to. Maybe at one point she said that it was her mom, but she seemed upset, but the only thing she mentioned was something about a settlement, and that was it. I didn't go into detail with her about anything, or she wasn't settling for something.

JD1 claimed after arriving at Ms. Slay's home she received "calls". Mr. Newport's US Cellular records show there was one continuous call from him to JD1 and Mr. VonKampen for settlement negotiations commencing at 2:49 and ending at 3:10 with call waiting.

Ms. Slay further testified she was never interviewed by Bettendorf police. (Tx. 299). CA. 194.

ARGUMENT I

THERE WAS NO CRIMINAL ACT BY MR. NEWPORT PROVEN BY A CONVINCING PREPONDERANCE OF THE EVIDENCE

PRESERVATION OF ERROR

This matter is preserved in the filings, exhibits, hearing transcript and ruling of the Commission for *de novo* review by this Court.

STANDARD OF REVIEW

This court reviews attorney disciplinary proceedings *de novo* to determine if a violation occurred and the appropriate discipline. The discipline depends upon the nature of the alleged violation, the need for deterrence, protection of the public, maintenance of the reputation of the profession as a whole, and the respondent's fitness to continue in the practice of law. *Board v. Freeman*, 603 N.W.2d 600, 603 (Iowa, 1999).

The Board must prove attorney misconduct by a convincing preponderance of the evidence. *Board v. Lickiss*, 766 N.W.2d 860, 864 (Iowa 2010). This is more than the preponderance standard required in a typical civil case, but less than proof beyond a reasonable doubt. *Board v. Keels*. 795 N.W.2d 507, 509 (Iowa 2011).

CREDIBILITY OF MR. NEWPORT AND JD1

The Board claims that Mr. Newport is not credible because he told Detective Payton he had never been to JD1's home. He did not recall the home visit on February 14, 2004, more than a decade earlier. (Exb. J). CA. 429. This mistake was corrected during the opening statement when counsel advised the Board that after reviewing the office billings records it was determined that Mr. Newport had been to her home one time. The Board also claims that Steve is not believable because he only denied that the device implanted was a sexual device rather than volunteering that he has a device for urinary incontinence.

The Board claims that in his answer where he admitted a meeting on or about the 19th of January and then denied that the meeting occurred on the 19th after reviewing his calendar, file, cell phone and email records and court records is deceptive. At the same time the Board asks you to believe everything JD1 said and to excuse any contradiction or impossibility as a mistake.

The Board claims that Mr. Newport is not a credible witness and ignores or denies the significance of any testimony or exhibit that contradicts or impeaches JD1. The Board claims even the incorrect and inconsistent statements of JD1, some while under oath, should be ignored.

The Commission majority ruling does not explain the credibility of JD1. See

CA. 19. The cellphone records are carefully reviewed and described in the Relevant Facts Section of this brief. The argument will address the other significant credibility issues, some of which are adopted by the dissent.

JD1 HAS A CNA LICENSE AND HAS WORKED AS A CNA

JD1 is a Certified Nurse's Aide. She worked at multiple health care facilities providing elder care including bathing and dressing individuals and assisting them with "whatever medical needs are required by their plan". (Tx. 103). CA. 79. She provided this type of care in homes and facilities for ten years. She testified she provided care to hundreds of patients, "too many...I can't even remember". (Tx. 104). CA. 80. Her care of elderly male patients likely included cancer patients and survivors and perhaps even individuals with sexual devices. A CNA would not be shocked to see a rectangular device she claims she saw above Mr. Newport's beltline. There is no rectangular device implanted in Mr. Newport's abdomen. The Boards attempt to explain away her lies and inconsistencies and the contrary evidence needs to be considered in light of JD1's real life experiences and not hide behind some claimed shock or trauma.

JD1 DELETED INFORMATION FROM HER PHONE

JD1 deleted texts and calling information, likely after being told by Officer

Payton, that he wanted to examine her phone. She testified as follows at Tx. 92

(CA. 72):

Q. Did you delete those text messages prior to any police office looking at your cell phone?

A. I don't recall deleting anything from my phone.

Q. You don't recall previously testifying that you deleted messages to make additional space?

Continuing at Tx. 93 (CA. 73), she admitted:

Q. Do you recall telling an office that you deleted the text messages to have additional - -

A. To open space? Yes, yes.

EXITING MR. NEWPORT'S OFFICE

JD1 also claimed Mr. Newport rushed to the door and got there before her.

(Tx. 64). CA. 57. Mr. Newport has obvious gait and balance issues. JD1 admits at

Tx. 151 (CA. 108) as follows:

Q. Did you notice that he wobbled and had some balance difficulties during the time approaching the trial?

A. Some.

THE CLAIMS BY JD1 TO KNOW PERSONAL INFORMATION

The prosecutor argues JD1 knows private details about Mr. Newport that she would not otherwise know unless the assault occurred. Mr. Newport represented JD1 for 17 years. No assault, inappropriate sexual contact or sexual comments alleged. Now JD1 claims, on the day after her dreams of financial

wellbeing were destroyed, that Mr. Newport sexually assaulted her before any settlement demand or offer was accepted at about 3:00 P.M. The prosecution ignores the substantial evidence contradicting virtually everything JD1 has claimed about the assault and claims that the complaint is true because she “knew” some personal information allegedly observed during the assault. The Board ignores the incorrectly stated “personal details” about Mr. Newport’s anatomy. To speculate how she might know this information:

A) *CANCER*

JD1 states she knows Mr. Newport had cancer. Given Mr. Newport’s Parkinson’s disease, this brief must argue hypothetically Steve is not able to eloquently defend himself as a healthy lawyer might. Might an attorney representing a client (a CNA at that) in a personal injury matter share with the client some of his own health issues? Did Mr. Newport share with JD1 that he survived cancer at some earlier time? Mr. Newport was asked how she would know he had prostate cancer, he answered: “I have no idea”. (Tx. 317). CA. 202. JD1 claims she was told by Mr. Newport on the 19th. It is not likely they discussed Steve’s cancer on the 19th. The focus was attempting settlement. JD1 seemed confused whether it was pancreatic cancer or prostate cancer. Both may leave a scar on your abdomen. She also claimed to see a rectangular medical

device in Mr. Newport's abdomen that does not exist. She claimed to see hoses coming from his stomach. Those do not exist. Her modified claim is she could "feel", not see the tubes. An evolving story necessary to try and keep the facts determined later similar to the original lie. Her timid description that there might be a scar is not the impression left by observing the photograph. There is a substantial and very noticeable scar. JD1 is not some young child or teen. This is a mother and CNA. If she saw medical implants, tubes or scars there would be no uncertainty or contradictions.

B) SEXUAL DEVICE or URINARY FUNCTION VALVE

JD1 claims Mr. Newport had a sexual device implanted for the purpose of penile erection or impotence issues. JD1 may have learned at some time that Mr. Newport was a survivor of prostate cancer. (Tx. 59-60). CA. 52-53. Perhaps at some earlier time Mr. Newport described an implant to JD1. JD1 is a CNA likely to know that a prostate cancer survivor may have an implanted device. JD1 claimed it was a sexual device. Mr. Newport does not have a sexual assistance device, nor has he ever had any such device. Mr. Newport does not think he ever told JD1 he had a medical device implanted in his scrotum. (Tx. 338). CA. 219. It would be easy to lie and say that he told her if he were a liar. But, urinary incontinence is not a subject people are anxious to talk about. The prosecutor

argues that Mr. Newport was being deceptive when he failed inform the Board that he had a urinary device, not a sexual device. He denied the claim made concerning a sexual device. Does denial require correction? Why would he want to volunteer this personal condition?

When confronted with her prior deposition testimony JD1 admitted at Tx.

139 (CA. 97):

Q. Have you had an opportunity to review your testimony?

A. Yes.

Q. Did you describe seeing something that looked like a hose at the time of your deposition?

A. Yes.

Q. And then something that looked like a pump that you put in the scrotum or something?

A. Yes.

In her sworn testimony before the commission, she claimed she did not see any device or hose. Only that she felt a device in the scrotum.

C) TUBES COMING OUT OF HIS STOMACH AND A SQUARE IMPLANT

JD1 also stated, when trying to trap Mr. Newport with the assistance of Payton, that in the recorded 2-7-18 call she described that Mr. Newport had “tubing sticking out of his stomach”. She later admitted this statement was not true at Tx. 74 (CA. 66):

Q. Is that true? Does he have tubing sticking out of his stomach?

A. No.

She also reported to law enforcement at Tx. 136 (CA. 95) as follows:

When he lifted his shirt, there was like a box, a square, a weird shaped square box that was protruding underneath the skin.

There is no square or rectangular box in his stomach. No tubing or implants were observed by police. (Tx. 179). CA. 127. JD1 also told law enforcement there was a “hose”, “something flopping” in his abdomen. (Tx. 135-36). CA. 94-95. This was a lie.

D) THE SCAR

When a person has surgery, a scar results. It is an easy to say you “may” have seen a scar. The scar shown in the photograph is obvious. JD1 did not describe either the scar or its location to Detective Payton. When Detective Payton first asked her if she saw a scar, she answered she “may” have seen a scar. (Tx. 137). CA. 96. Only after many months and two trials with the photos being published is JD1 able to describe a scar. If one has prostate surgery, there is likely a scar. There is no claim by Detective Payton that JD1 described the size, orientation or other facts about the scar. Detective Payton does not claim the location of a scar was described to him by JD1 beyond that it is on the abdomen. Probably a large percentage of elderly persons have some scar. This scar is

prominent and not something you would forget.

E) REDISH PUBIC HAIR

It is easy to infer that someone's pubic hair and head hair are the same color. JD1's testimony that Mr. Newport has red pubic hair is no surprise. She need not see his pubic hair to make this inference. JD1 testified she had been to Mr. Newport's office many times. Steve's office has many photographs of his grandchildren with red hair. Was there any conversation about red hair? Did she ask Mr. Newport in one of their many years of representation about a grandchild with red hair? Is it a guess after seeing Steve's head hair and family photos? She claims she learned that after the assault he explained how his pubic hairs were red and that's where his granddaughter had gotten her red hair from. (Tx. 63). CA. 56. If there was just an assault, why would he "explain?"

F) BOXERS OR BRIEFS OR BOXER BRIEFS?

JD1 originally claimed she observed boxer underwear. Mr. Newport testified he has never owned boxer underwear. (Tx. 340). CA. 220. This may be simply a terminology or generational difference in what "boxers" mean. Boxers to older generations mean underwear that appear to be loose fitting cotton shorts. Briefs are tight fitting underwear that older generations are more familiar with.

Mrs. Newport testified Mr. Newport has not worn boxer underwear in the sense of loose-fitting shorts. He wears the more traditional tight-fitting underwear. The prosecutor argues he was not honest on the type of his underwear. But in her brief to the commission the prosecutor acknowledges the issue of verbiage when she first claims Mr. Newport denied owning boxers or boxer underwear, then says JD1 claims he was wearing boxers and then finally noting Detective Payton testified he was wearing boxer briefs. If Payton is claiming it was boxer briefs and not boxers, those two types of under garments are different. Which is it? JD1 claims boxers and Payton identifies boxer briefs. No photo of the strip-search of Mr. Newport by the prosecution was offered into evidence.

G) RECTANGULAR DEVICE ON RIGHT ABDOMEN THAT COULD BE SEEN AND FELT

JD1 claimed she saw a visible rectangular device on Mr. Newport's abdomen. (Tx. 99-100). CA. 76-77. She told police officers she could see a device in his stomach and felt the device. (Tx. 101). CA. 78. An invasive strip search was done by three police officers and photographs were taken. Three police officers examined his abdomen and genitalia carefully and saw no device and felt no device. There is no device shown in any of the photographs or that photograph would obviously be placed into evidence. Payton testified at Tx. 219 (CA. 147) as

follows:

Q. Did you see any sort of device implanted in Mr. Newport's lower right abdomen?

A. No.

Q. Did you see any device that was implanted in Mr. Newport's scrotum?

A. No.

Q. Did you see any tubing in Mr. Newport's abdomen, scrotum, or I believe it's the perineum area?

A. No.

Q. Mr. Newport was cooperative with you during this?

A. Correct?

Q. And moments after - - and how many other officers were involved?

A. Two others.

Q. Moments after three officers are asking Mr. Newport to expose himself and to allow pictures to be taken, he went to your station to talk to you?

A. Correct.

Q. Voluntarily?

A. Correct.

H) 2-7-18 PHONE CALL AND 2-15 IN PERSON RECORDED MEETING

Mr. Newport had no idea he was being recorded on 2-7 or 2-15 as admitted by JD1 at Tx. 147 (CA. 105) as follows:

Q. Mr. Newport was not aware that you were recording audio or video of either the February 7th or the February 15th events, was he?

A. No, he was not.

During this recorded phone call JD1 is the only person bringing up the subject of sexual favors. Mr. Newport does not bring this subject up and all his comments are in response to her statements. The "transcript" provided by the

prosecutor is not by a court reporter. (Exb. 8). CA. 294. It is a transcript from an unknown person who listened to the transcript apparently in preparation for the criminal trial. Respondent asks this Court to carefully listen to the recording and not to rely on the transcript. The wording on page three (CA. 296) should read as follows:

SN: Sexual favors, what do you mean?
In the transcript the prosecutor provided from the unknown source adds the words “you mean” behind this sentence. Those words are not there.

DD: Well what you were talking about.

SN: What do you mean?

You mean give me a blow job you mean?

In the transcript from the unknown source, the transcript is: “You’d give me a blow job you mean?” (Id).

Mr. Newport is asking two questions, not recalling a prior conversation. Mr. Newport is discussing JD1’s injury case and trying to complete the settlement thereof before she asks about sexual favors out of the blue. The prosecutor argues that because Mr. Newport first used the word “blow job” that means somehow there was a prior discussion. First, he used that language after JD1 continued to make leading and inappropriate comments about sexual favors. His comments were questions responsive to her comments. Nothing more. JD1 testified she believed Mr. Newport was joking as shown at Tx. 74 (CA. 66):

Q. Did you also state on the recording that you thought that Mr. Newport was joking when discussing the sexual favors?

A. Yes, I did say that.

At Tx. 146-47 (CA. 104-5) JD1 admits this comment is an out of the blue question, not comment to her in that recording as follows:

Q. So that's an out-of-the blue question by Mr. Newport to you?

A. Yes.

The prosecutor's office is relying on a small part of a recorded phone call in isolation. If there was some arrangement concerning sexual favors this would likely be discussed in more detail and again at some point during the 72-minute audio and video recording meeting when the police and JD1 were trying to get some statement or admission from Mr. Newport. Both JD1 and Detective Payton agree there was nothing improper and no admission during the 72-minute in person meeting one week later. The prosecutor claims Mr. Newport was wary of some trap because he looked at his cell phone and ignores that the land lines were out at this time. An excuse for everything. JD1 tried but did not get a single incriminating word.

I) "IN LIEU OF PAYMENT"

Please listen to the recording. The words "in lieu of payment" are not in the call. Those words are Detective Payton's spin in a report. Those words are not

even contained in the unknown source transcript. Yet the prosecutor urged the commission to find those words when they do not exist, and she urges you to connect dots that are not there.

The prosecutor claims the following at page 11: “Newport never disputed that he and Jane Doe #1 had previously discussed sexual favors in lieu of payment”. It is hard to dispute something that is not contained in the record and is not found in the transcript. The prosecutor conveniently leaves out Mr. Newport’s response:

JD1: Well what about, what about payment options? I mean like what you previously mentioned?

Mr. Newport: Payment option, what do you mean payment options? (Exb. 8, p. 3) (CA. 296)

Mr. Newport again has responded with a question. This indicates he does not know what JD1 is talking about.

Detective Payton has continued his spin of a story that never existed. At Tx. 175 (CA. 123), after reviewing his police reports, he testified, contrary to the actual record, as follows:

Q. What comments did Mr. Newport make during that recorded telephone call that you felt pertinent to your investigation?

A. JD1 broached the topic of sexual favors in lieu of payment; that according to her, they had discussed this before.

J) FINAL SETTLEMENT NEGOTIATION CALL ON 1-19-18

JD1 said that Mr. Newport stated that in the 2-19-18 settlement call to Mr. Newport that she could take her clothes off and give him a blow job. (Tx. 168-69). CA. 119-20. However, at Tx. 69 (CA. 62), JD1 testified that Mr. Newport stated as follows:

A. Then he made a comment about how I can now take my clothes off. He made sexual comments about some orientation, and I said whatever, and I hung up.

JD1 makes no mention of a blowjob but only that Mr. Newport said she could take her clothes off. Further inconsistency in JD1's testimony is shown at Tx. 146 (CA. 104) as follows:

Q. Well that's what I'm asking you. The details were you first described this as you were to take your clothes off and masturbate, and that's what you told the officers?

A. Yes.

Q. You didn't tell the officers anything about giving somebody a blow job, did you?

A. Not that I recall, not that I remember that far back.

JD1 admits that she does not recall telling police that Mr. Newport used the term "blowjob". On three separate occasions JD1 provides two different contradictory stories and in only one claims that Mr. Newport used the term "blowjob".

K) NO ONE WAS AT THE OFFICE

JD1 testified at one point that Mr. Newport told her no one was in the

office. However, when asked if she knew if that was true or not, she answered: “I would not be aware if anybody was in the office or not”. (Tx. 62-63). CA. 55-56. She did know there were people in the office because she was greeted by the receptionist and further claimed Mr. Buzzell was present in the office. JD1 admitted there was a receptionist who greeted her upon her arrival to the office on 1-19-18. (Tx. 95 and 216). CA. 74 and 146, respectively. The record shows she had contact with the receptionist when she signed the Release as witnessed by Rosalie Bergert. She testified Arthur Buzzell was in the office. At Tx. 100 (CA. 77) she admits people were in the office as follows:

Q. When you came out, there was a secretary there at the desk outside in the office?

A. She was standing, facing the door.

L) JDI WAS INSTRUCTED BY POLICE NOT TO CONTACT MR. NEWPORT

Detective Payton instructed JD1 not to call Mr. Newport unless he was present. However, JD1 made multiple subsequent calls to Mr. Newport’s office as shown at Tx. 271 (CA. 181):

Q. When you were reviewing the report, the Cellebrite report, when you got it in March, did you notice that there were continuing phone calls to Mr. Newport, other than the calls that you were supervising?

A. I think I recall seeing some more phone calls to the office.

Q. And had you instructed her not to call Mr. Newport unless you were present?

A. That was my recommendation to her, was to not have any further contact.

She was allegedly in fear of Mr. Newport. She was advised not to call him without Payton's presence. Instead, she called multiple times. Was it her efforts to cancel the settlement agreement? To get her files? Payton eventually learned about these calls after the cell phone dump. There is no reason she could not call for these purposes with Detective Payton listening, anxious to try and trap Mr. Newport.

M) RIGHT HAND – LEFT HAND

JD1 has claimed her right hand was grabbed and also that her left hand was grabbed to force her to touch his scrotum. She admitted she swore under oath in her deposition it was her right hand. (Tx. 139). CA. 97. According to her testimony to the commission only one hand was allegedly grabbed. At Tx. 134 (CA. 93) she testified as follows:

Q. Do you recall describing both your left and right hands being grabbed at different times in your deposition testimony?

A. No, I don't recall which hand I said.

Q. So now you don't have a recollection whether it was left or right?

A. The way I was sitting, I had my phone in my right hand, so it could have been my left hand the way that I was facing towards him.

THE FAILURES OF DETECTIVE PAYTON

The duty to investigate and preserve evidence is important because Mr. Newport was not aware of the complaint until long after the allegation was made. It is difficult to defend because of the failure of law enforcement to collect and

preserve evidence. Mr. Newport is further hindered because of his Parkinson's Disease. The Detective only attempted to "confirm" the allegations of JD1. The failure to reasonably investigate, preserve and present evidence in litigation may allow the finder of fact to assume such evidence would be harmful to the party failing to do so.

Years ago, the jury was instructed that rape was an easy crime to allege and difficult to defend. That circumstance is still true. But a jury is no longer instructed in that fashion. It is not politically correct to doubt the claims by a person invariably described as the "victim" by the prosecution as in this case. But false allegations by adults of crimes are more common than inexperienced persons believe. See Federal Bureau of Investigation report entitled False Allegations of Adult Crimes, FBI Law Enforcement Bulletin, September 2012, available at <https://leb.fbi.gov/archives>. JD1 shares many of the characteristics of a person making a false allegation.

The shortcomings and failings of Detective Payton include:

1. NO TRAINING FOR SEXUAL ABUSE ALLEGATION CASE

Detective Payton has no specialized training how to investigate a sexual abuse allegation case. (Tx. 213). CA. 145.

2. BIASED AND PREDETERMINED OUTCOME

Within minutes of meeting JD1, Payton told JD1 at Tx. 206 (CA. 141) he wanted to get Mr. Newport disbarred and criminal charges filed. Payton encouraged JD1 to report Mr. Newport to the bar in the “hope” he would get sanctioned. At Tx. 208 and 209 (CA. 142-43) he testified:

Q. And did you encourage her that day to report the case to the bar and hopefully that will get him some sanctions from the bar?

A. I believe I told her something along those lines.

Q. And did you tell her, you know, he’s a dirt bag, and he needs to get in trouble?

A. It sounds vaguely familiar.

Q. Did you allege that she was not the first person he’s done this to and that I’m hoping we can get him in some trouble in some way?

A. I believe I said something along those lines, just with regard to my past experience with cases like this.

3. FAILURE TO INTERVIEW WITNESSES

Detective Payton was well aware of numerous witnesses identified who might have knowledge to support or refute the claims by JD1.

a. ROSALIE BERGERT

He deliberately or negligently failed to interview Rosalie Bergert. No interview was conducted of Rosalie to get her statement concerning the signing of the release, the time JD1 was at the office or how long she was there or whether Mr. Newport was there. Rosalie is no longer available as a witness. (Tx. 364). CA.

234.

See Detective Payton's testimony at Tx. 242 and 245 (CA. 167 and 168, respectively) about the knowledge Rosalie Bergert might have to the disputed issues in this case.

b. ARTHUR BUZZELL

At the 2-20-20 hearing JD1 testified Arthur Buzzell was also present in the office. Detective Payton conducted no interview of Mr. Buzzell. Detective Payton later learned of video surveillance at the building of the law offices a few months into his investigation, due to a burglary that occurred in the Newport/Buzzell law office. Payton interviewed Mr. Buzzell for that incident, but it did not occur to him to ask about this incident.

c. KELSIE SLAY

Detective Payton never thought to interview Kelsie Slay. Mr. Newport and his defense team located her in the fall of 2018 and took her deposition statement.

At Tx. 221 (CA. 149) he testified as follows:

Q. Why wouldn't be it relevant to talk to the first person that Deb JD1 sees after being sexually assaulted?

A. She never indicated that she told Ms. Slay anything.

Q. Wouldn't that by itself be interesting to know.

A. Sure.

Q. Don't you usually follow up on leads - -

A. Ms. Slay wasn't in the office when the alleged assault occurred. She said that when she was at Ms. Slay's house, receiving and making phone calls with Mr. Newport, that she was in a separate room; that Ms. Slay would have no knowledge of that.

Q. If someone were traumatized by some incident and the first person they see is a long-time friend, within minutes after some traumatic incident, is it your experience as a law enforcement officer for 15 or 20 years that they share that?

A. I don't think it was within minutes of this incident. I think it was a couple of hours, I believe.

d. JD1'S MOTHER

Detective Payton didn't think to interview JD1's mother about any phone conversation or text messages that occurred and regarding settlement negotiations or any assault and never took a statement about what JD1 told her mother. On 2-7-18 when Detective Payton first met JD1, her mother accompanied her. No questions, no interview, no statement taken. His testimony is found at Tx. 247 (CA. 169):

Did you ever interview JD1's mother?

A. I did not.

Q. Did you ever ask for JD1's mothers cell phone records?

A. I did not.

4. NO RECORDED INTERVIEWS WITH JD1

Detective Payton did not record any of the many interviews with JD1 (except when she was recorded incidental to the efforts to "trap" Mr. Newport).

This deprives the defense the opportunity to review and verify the statements allegedly made to law enforcement in real time and deprives the defense potentially valuable impeachment information when the accuser contradicts prior statements and the story continues to evolve. (Tx. 227). CA. 153. Payton testified there is no policy that requires him to record the accuser. See his testimony at Tx. 229. CA. 155.

5. DID NOT INVESTIGATE CHILD ABUSE, NEGLECT OR OTHER ALLEGATIONS OF SEXUAL ASSAULT TO JD1 OR HER FAMILY

At Tx. 230 (CA. 156), Payton admitted:

Q. Have you at any time inquired of her concerning child abuse or neglect charges?

A. No.

Q. Have you at any time inquired of her concerning any close experience with sexual assault to herself or to her family?

A. No.

Detective Payton conceded that after receiving her alleged claim, he did no background check on her and was not aware whether JD1 was involved in making prior sexual allegations in the past. (Tx. 212). CA. 144.

6. PAYTON'S GOAL WAS TO "CONFIRM" JD1'S STORY RATHER THAN INVESTIGATE THE FACTS

At Tx. 230 (CA. 156), his testimony is as follows:

Q. So is it fair to assume that you accepted what Deb JD1 told you about this incident uncritically?

A. What's fair to say is that Deb JD1 provided her complaint to us, and **we set about CONFIRMING** as much as possible in her complaint. (Emphasis added)

It should never be the goal of an investigating officer to “confirm” the accuser’s story. An investigation is to investigate all the facts wherever they may lead and to negate or confirm all facts. Detective Payton admitted he sought to confirm JD1’s account, but did nothing to confirm Mr. Newport’s account as shown at (Tx. 232). CA. 158.

Detective Payton had experienced a complaining witness in a sexual assault matter in another case that he later discovered gave him false information as shown at Tx. 279 (CA. 184):

Q. Have you ever encountered a complaining witness in a sexual assault case that you later determined was giving you false information?

A. Yes.

Yet, in this case with many opportunities and even compelling reason to do so, he did not investigate, just try and trap Mr. Newport into confirming JD1’s story.

When Payton finally got around to collecting the evidence that might be available in JD1’s cell phone call logs and text messages he testified at Tx. 231 (CA. 157):

“...We got phone records which confirmed her story”. He testified he completed no other neutral open-minded investigation. (Tx. 232). CA. 158.

7. ANY MEETING OR CONTACT ON JANUARY 18

Detective Payton testified that he looked at the phone records during his investigation and found no contacts on the 18th to confirm Mr. Newport's claim of phone contact. (Tx. 235-37). CA. 160-62. Clearly, he did not look at the records as it is obvious there was contact on the 18th or Detective lied that he had looked.

8. EXCULPATORY EVIDENCE

Detective Payton testified at Tx. 239 (CA. 164) as follows:

Q. Do you think that there is any obligation by law enforcement to collect exculpatory evidence, evidence that is inconsistent with guilt, when you're investigating a case?

A. Sure, if we can find it.

Continuing at Tx. 240 (CA. 165):

Q. What about exculpatory evidence about Mr. Newport's phone records, his calendar or fax records or emails between Mr. Von Kampen and himself concerning this?

A. Well, he have provided some of those e-mails between, I think, Von Kampen.

Q. And you had a suspect that was attempting to cooperate with you; correct?

A. Correct.

Q. He offered to come back, and he came to you after you do an invasive strip search, so if you wanted to gain exculpatory evidence you certainly could have done that?

A. Well, **WE COULD HAVE ATTEMPTED.** (Emphasis added)

9. PRESERVATION LETTER

Issuing a preservation letter to a cell phone carrier or internet carrier service can only be issued by law enforcement described at Tx. 240 (CA. 165) as follows:

Q. When you have cell phone and internet information, doesn't law enforcement have the ability to write what's called a preservation letter to the carrier or the internet provider and say, You preserve all records on this account?

A. Yes.

10. FAILURE TO REQUEST REVIEW OF MR. NEWPORT'S COMPUTER, TELEPHONE OR CALENDAR

Detective Payton thought it appropriate to conduct a strip search and photograph Mr. Newport to "confirm" JD1's statements. However, at the same time he made no request or effort to inspect Mr. Newport's computer, calendar or cell or telephone records (or the telephone of the complaining witness for that matter) to confirm Mr. Newport's account as shown by his testimony at Tx. 249 (CA. 170):

Q. If you examined Mr. Newport's computer forensically, you could determine when programs were opened, when documents were created, when e-mails were prepared and sent, when there is activity on a computer, correct?

A. Potentially, yes.

Q. And if that were done sometime within the few days of the incident, would that provide potentially useful evidence?

A. Potentially.

Q. But we don't know, do we, because you never made any effort to do

that?

A. Correct.

11. TELEPHONE DUMP OF JD1'S PHONE

Law enforcement has sophisticated software that allows them to copy all the data from a person's cell phone. The software can recover deleted data even when the user has purposely deleted it. In this case, Payton secured a release for a full dump, with no restrictions, of JD1's cell phone. Payton gave JD1 at least one day's notice prior to meeting with her to dump the cell phone data as shown at Tx.

272 (CA. 182):

Q. When you requested permission to search her phone, you told her your plan to search the phone before she brought the phone to the station; correct?

A. Correct.

Q. So she had an opportunity to review her phone and review text messages and delete whatever she wanted to delete?

A. She had that opportunity.

A few days before the first criminal trial began, he recalled the cell phone dump. His testimony was as follows at Tx. 250 (CA. 171):

Q. You did a limited download of the - - I don't know if it's a download or an extraction. What's the Cellebrite?

A. They're used interchangeably.

Q. You can, basically, download or extract the entire contents of the phone or just ask it to search for things like contacts and calendar entries?

A. Correct.

Q. And what was the nature of the search that you performed on JD1's phone in March of 2018? A. I don't specifically - - my intent doing the

download was to get her call log, so I could get - - could show the calls that she reported on January 19th from Mr. Newport's cell phone.

Q. And you did not download text messages?

A. I don't recall specifically if I did nor not.

Q. When somebody is sending 10 or 20 or 50 or 100 text messages on the date of a supposed sexual assault, would it be interesting as a law enforcement officer to see what the content of those text messages was?

A. Sure. Once again, I don't recall if I download text messages with that or not. I would have to look at the extraction again.

....

Continuing at Tx. 253 (CA. 174):

..Q. Officer, you had a chance to review the Cellebrite report during the break?

A. Correct.

Q. And does that appear to be the report that you conducted in March concerning JD1' cell phone?

A. Yes.

Q. And this one is kind of marked up and has some circles and annotations, but is the original printing still evident to you?

A. Yes, it appears to be.

Q. And can you tell the scope of inquiry that you made of JD1' cell phone? Did you request text messages, for example?

A. No, I did not.

Q. Your consent would allow that, wouldn't it?

A. It would.

Q. Did you do a visual inspection of her cell phone?

A. I don't recall.

Q. So you didn't visually look through text messages down around the 18th and 19th of January?

A. I don't specifically recall.

Continuing at Tx. 255 (CA. 176) he testified:

Q. ...What was it that you were asking Cellebrite to extract or download from her cell phone when you performed that?

A. Primarily, I was looking for the call log information to try and locate

those phone calls she recorded on January 19th in the afternoon from Steve's cell phone.

Q. And are those calls apparently extracted?

A. They were not in the extraction that I found.

Q. So the January phone calls are gone from the Cellebrite report?

A. Correct.

...

And at Tx. 256 (CA. 177):

Q. Now, the Cellebrite machine is capable of doing an extraction of I believe they are called parsed files or files that have been deleted and can be reconstructed?

A. Correct.

Q. And even if a phone call or a text message is deleted, is the Cellebrite often capable of recovering those texts?

A. It is capable as long as that section of data hasn't been recorded over since then.

Q. I understand. Until actually you get a wiping program, nothing ever goes away from a computer, but the mere act of deleting it does not mean the file is not available?

A. Correct.

Q. And if the file space is not written over, it's relatively easy for even software I could buy at Best Buy to recover deleted files, isn't it?

A. I can't testify as to the software at Best Buy, but Cellebrite, yes."

JD1 had deleted information in January and mid-February as shown at Tx. 258

(CA. 179) as follows:

Q. What kind of information did she keep on her calendar?

A. I did not thoroughly inspect her calendar.

Q. Did you consider looking at the 18th and 19th of January?

A. I'm not sure if I did or not.

Q. If you did, that would be perhaps relevant to who was seeing who and when?

A. Sure

The information before and after that deletion was still intact showing it was a purposeful removal of that specific time period. Payton failed to ask JD1 about any of the calls or text message content as shown at Tx. 275 (CA. 183):

Q. Did you ever ask JD1 at any time the purpose or the identity of the persons that she was calling on the 19th?

A. At some point I did, and I have a different highlighted printout that I had all the names of all these numbers.

ARGUMENT II

THERE WAS NO SEXUAL HARASSMENT BY MR. NEWPORT PROVEN BY A CONVINCING PREPONDERANCE OF THE EVIDENCE

PRESERVATION OF ERROR AND STANDARD OF REVIEW

The preservation of error and standard of review are the same in Argument I and II. Mr. Newport did not engage in any inappropriate conversation with JD1 except as provoked by JD1. The claimed inappropriate statements with respect to JD2 are vague interpretations by JD2 concerning events that happened several years earlier or an inaccurate recollection. Alternatively, the complaints by JD2 should not be considered because she did not waive attorney

RELEVANT FACTS AND ANALYSIS

In October 2011 JD2 retained Mr. Newport to file a modification action. The record reflects the first scheduled hearing occurred on November 8, 2012 and was a Settlement Conference. On November 14, 2012, an order was granted to JD2 of custody and support. The record reflects there were child support hearings filed through The Child Support Recovery Unit from the time of the favorable order through 9-27-13 at which time Attorney Joel Walker entered an appearance and a motion to modify on behalf of the Respondent. A Settlement Conference was set

for 12-19-13 and non-jury trial for 1-15-14. This did not happen, and the settlement conference and trial continued to be moved. On October 7, 2014 a modified decree was entered. (Exb. 5). CA. 276.

According to JD2, Mr. Newport was referred to her by an Iowa Department of Human Services case manager who was assigned to her child abuse case. (Tx. 40-41). CA. 36-7. Mr. Newport represented JD2 for three years.

JD2 describes that, after two years of representing her, Mr. Newport was at the Scott County Courthouse for a court appearance on her behalf. At the Courthouse there is little ability to speak privately with your client. Her description follows:

A. We had a court date. It was a hearing. I don't know, I think it was maybe on the third floor. You walk in, and you go to the right, and there is a like a private room, like a counsel room with a large table. We were in that room. (Tx. 21-22) (CA. 21-22)

This description is that of one of the large jury rooms on the third floor. She claims Mr. Newport asked if she wanted the door closed during this time. Her "interpretation" of Mr. Newport's question follows:

Q. And what did you *interpret* Mr. Newport's comment to be?

A. To be paying him by shutting the door and paying him with something other than money.

Q. What?

A. I don't know, something that would be privately behind a closed door, maybe a sexual favor of some sort. (Tx. 23, emphasis added) (CA. 23)

Her interpretation of an innocent question to a client to determine if that client wanted privacy at an otherwise crowded busy and public place, was what in her own words were “I don’t know” and “maybe”. Nothing more.

Later, JD2 claims as they were walking out of the courthouse Mr. Newport asked if she desired to see a hernia as he laughed. She testified “I don’t remember the exact words” of this alleged comment. (Tx. 24). CA. 24. She next claims he was “insinuating” if she wanted to inspect a hernia in the groin. We have gone from her “interpretation”, “I don’t know”, “maybe” about a comment, to her interpretation of what she believed that Mr. Newport was “insinuating”.

JD2 continued Mr. Newport’s employment and next claims in 2014 at a meeting in Mr. Newport’s office, presumably during regular business hours when staff and clients and likely present, (with no claim that the door is shut):

A. So we were in the office, and I was sitting across the desk. We had discussed, you know, things regarding the divorce hearing, and Brad no longer having an attorney, and it was Brad who was going to be calling in on the telephone, and it was over just finishing up the custody.

The phone was starting to ring, and Brad was going to be ringing in, and I was with Mr. Newport. Mr. Newport kind of came around the desk and sat on the desk, kind of half sat on the desk, and he was getting ready to answer the phone, and he said, Would you like it if I – should I ask him if you can pay for this with sex? (Tx. 26) (CA. 26)

It was in those types of words... (Tx. 27) (CA. 27)

When asked why she didn't fire Mr. Newport and hire a new attorney, her answer is "Well, I had no money." (Tx. 30). CA. 30. When asked if she paid Mr. Newport, she answered, "No. The last bill I did not". (Tx. 34). CA. 32.

When asked why she didn't make a complaint against him at that time, she answered "I don't know". It's my word against his, you know. (Tx. 31). CA. 31. She "of course" understood she could make a complaint to the licensing authorities. (Tx. 35). CA. 33. She further testified she did not file any complaint with the Board. (Tx. 35-36). CA. 33-34.

JD2 may be a copycat coming forward after the publicity of Mr. Newport's arrest or perhaps some show of support for JD1. A person's state of mind, interpretation, conjecture, speculation or mental illness is relevant. Why would anyone ask one ex-spouse about having sex with the other? An attorney may request that the opposing party to pay the prevailing parties fees. The claimed statements are so vague or improbable that they are not proof by a convincing preponderance.

ARGUMENT III

EVEN IF JD2'S RECOLLECTIONS CONSTITUTE SEXUAL HARASSMENT, THEY ARE NOT A PATTERN OF CONDUCT AND THE COMMISSION'S RECOMMENDED SANCTION IS TOO SEVERE

If the Court finds that JD2's recollections are sexual harassment by a convincing preponderance of the evidence, those statements are not a pattern of conduct and the sanction recommended by the commission is too severe.

REQUESTED RELIEF

Mr. Newport first requests the Court find that the Board has failed to prove by a convincing preponderance of the evidence that he committed any criminal violation. JD1 is not credible. She has made multiple inconsistent and changing statements. The testimony from Kelsie Slay and Cheryl Newport is believable and consistent with Mr. Newport's testimony, the cell phone records, the execution of the release and the timing and circumstances of the settlement.

The allegations of JD2 are not in the form of a proper complaint. The allegations are old vague recollections and interpretations and not supported by any other evidence to satisfy the convincing preponderance of the evidence standard.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitations of Iowa Rules of Appellate Procedure 6.903(1)(g)(1) because this brief contains 13,381 (less than 14,000 words, excluding the table of contents, table of authorities and any addendums and certificates of counsel).

CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of this Appellant's Brief on the 30th day of October 2020, by emailing it to the attorney for the Board – Crystal.Rink@iowacourts.gov. and by edms.

/s/John O. Moeller