

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 AMENDED REPLY BRIEF

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ARGUMENT

THE COMMISSION MAJORITY'S RULING IS PROCEDURALLY AND SUBSTANTIVELY INCORRECT AND DOES NOT DESERVE DEFERENCE BY THIS COURT

INTRODUCTION

This reply brief will describe why the majority ruling of the commission should not be adopted by this court. Section I will describe the substantive flaw concerning the Commission majority's credibility findings and the improper burden of proof placed upon Mr. Newport in the Commission proceedings. Section II will describe the failure of the Commission majority to explain its conclusion that JD1 was credible in spite of her motivations to lie and the numerous contradictions and inconsistencies in her testimony. Section III will describe why the commission's majority stated reasons to conclude Mr. Newport was not credible are incorrect. Section IV will describe how the Commission majority ignored credible testimony and evidence that supported Mr. Newport and contradicted JD1. Section V will describe why the dissenting Commissioners' determination that JD1 is not credible is the correct decision.

I. THE COMMISSION MAJORITY'S CREDIBILITY FINDINGS ARE SUBSTANTIVELY FLAWED BY USE OF INCORRECT STANDARDS TO DETERMINE WITNESS CREDIBILITY AND IMPROPERLY PLACED THE BURDEN OF PROOF UPON MR. NEWPORT

The substantive error

The Commission majority expressly used an incorrect standard to determine witness credibility. The majority acknowledges that Mr. Newport was twice acquitted of criminal allegations but then concludes: “after balancing the aggravating and mitigating factors, and having heard the live testimony of the witnesses, and observing their demeanors, the commission finds JD1 and JD2 to be credible”. (Commission Findings of Fact, Conclusions of Law, and Recommendation (hereinafter: “Ruling”) p. 10). A. 19. The majority reports their findings and analysis of Mr. Newport’s credibility as an ‘aggravating factor’ within the section “Aggravating and Mitigating Factors”. (Ruling p. 7). A. 16. Aggravating and mitigating factors are used only to determine the sanction, not witness credibility. *Iowa Supreme Court Attorney Disciplinary Bd. v. McGinness*, 844 N.W.2d 456, 463 (Iowa 2014). The procedure to determine witness credibility is the same in both criminal and civil proceedings and does not change or depend upon the burden of proof. *See Uniform Civil Jury Instruction 100.9 and Uniform Criminal Jury Instruction 100.7.*

Deference is not appropriate

The Board requests this Court give deference to the Commission’s credibility determinations, citing *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Arzberger*, 88 N.W.2d 353, 367 (Iowa 2016) and *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Clarity*, 838 N.W.2d 648, 659 (Iowa 2013).

Respondent/Appelle's Brief p. 24. This Court is obviously not bound by these determinations during its *de novo* review. This Court is free to disagree with the Commission's determinations if it finds that the Commission failed to consider certain possibilities which might have undermined its ultimate determinations. *See Iowa Supreme Court Attorney Disciplinary Bd. v. Sobel*, 779 N.W.2d 782, 787 (Iowa 2010). In this case the Commission majority does not explain why they found JD1 to be credible despite her motivation to lie, inconsistencies and contradictions with other evidence and her history of lying to her treating physician and in her answers to interrogatories. The Board and the Commission majority impliedly placed the burden to prove credibility upon Mr. Newport who suffers from Parkinson's disease. The Commission majority fails to properly make and describe their credibility determinations. This Court should not accept the credibility determinations or the recommendations of the Commission majority.

Credibility determinations concerning JD1

Prior to these proceedings JD1 was interviewed by and assisted Detective Payton's efforts to convict Mr. Newport. Presumably she was prepared by the state's attorney for her deposition by criminal defense counsel. She was deposed by defense counsel. Presumably she was prepared for her trial testimony by the state's attorney on two occasions. She testified at two different criminal jury trials. She was again prepared for her testimony in these proceedings by reviewing/watching her deposition in the criminal proceeding and was prepared to

testify at this proceeding by the Board's attorney. (Tx. 96-97). All this preparation and practice helps JD1 conceal her credibility issues.

The Board argues the prior jury verdicts are irrelevant because of the lesser burden of proof in these proceedings. The Board implies that the credibility determination concerning JD1 is different in this proceeding. This is incorrect. Two juries did not find the testimony of JD1 credible. What difference in this third proceeding might properly allow the commission majority to determine that she is credible?

What differences are properly considered to distinguish the result in the criminal proceedings and these proceedings

The first is that the Board has also called JD2 to describe her recollections of inappropriate comments by Mr. Newport years prior to JD1's complaints. The circumstance that one person in the community shared her concerns about Mr. Newport with the police after the publicity of Mr. Newport's arrest implies that even a verbally inappropriate comment by Mr. Newport is unusual. After 40 years practicing law and representing thousands of clients there were thousands of opportunities and thousands of persons who might make a complaint about any inappropriate comments or behavior by Mr. Newport. Consider the number of persons that routinely appear to provide their complaints about high-profile persons after the publicity of another complaint. JD2 does not provide support for the criminal allegations by JD1. If JD2 is believed, she may support an allegation

of sexual harassment by a credible complainant.

The second difference is that the Board called Mr. Newport as a witness in these proceedings. The Board then presents this case as a choice between Mr. Newport's credibility and JD1's credibility – a 'he said, she said' controversy. This may be a prosecutor's favorite strategy when prosecuting a sexual abuse case when there are no witnesses and no forensic evidence, but the decision who is more credible does not decide the proper issue – did the Board prove the conduct alleged by a convincing preponderance of the evidence? Particularly in the circumstances where Mr. Newport is suffering from Parkinson's disease and is forced to rely upon records created and the testimony of other persons for his defense and is not able to defend himself by testifying concerning personal recollections of events.

The failure to explain the credibility determination concerning JD1

The Commission majority does not explain its decision concerning the credibility determination about JD1. Was that explanation deliberately avoided? The dissenting members of the board do consider JD1's credibility issues and they properly identify and explain their conclusion that JD1's complaints concerning criminal conduct are not proven by a convincing preponderance of "**credible**" evidence (emphasis appears in original). (John Miller's Dissent joined by Mikkie Schiltz in all parts except the recommended sanction (hereinafter: "Miller's Dissent") p. 12). A. 21.

Burden of proof

The Board faults Mr. Newport for not bringing Rosalie Bergert (confined to a nursing home) as a witness. Rosalie might testify concerning her practice when witnessing and dating documents. JD1 first denied signing anything. Then she reluctantly admitted that the receptionist was there. The testimony of Rosalie, even if she had any recollection of this day and JD1 being there, would do little to prove or disprove an alleged assault. But at the same time, the Board defends Detective Payton's failure to talk to JD1's mother and Kelsie Slay. The Board did not call either as witnesses. The defense called Kelsie Slay.

II. THE COMMISSION MAJORITY DOES NOT EXPLAIN WHY IT FOUND JD1 TO BE CREDIBLE

Despite contradictions and inconsistencies in her testimony and her obvious motivation to lie, three members of the Commission found JD1 credible. The remaining two members of the Commission argued that their colleagues erred in finding JD1 credible with respect to the criminal assault allegations. (Miller's Dissent). A. 21. The majority does not explain why they determined JD1 to be credible. There is no consideration of the numerous inconsistencies and contradictions of JD1's testimony and statements. The obvious motivations of JD1 to falsely accuse Mr. Newport are incorrectly mentioned only in passing as "a dispute with Newport regarding legal fees", making it seem as though this dispute

arose out of the sexual assault accusation. (Ruling p. 5). A. 14.

In considering whether to accept the Commission majority's credibility determination, the Court should consider the fact that the majority failed to address JD1's obvious financial motivations. These motivations were discussed in detail by the dissenters as evidence that the Commission majority should not have found JD1's criminal allegations credible. The dissent correctly point out that JD1 "has motivation to get back at [Mr. Newport]" because she is unhappy with the outcome of her settlement and engaged in an ongoing dispute with Mr. Newport over legal fees she agreed to pay as part of that settlement but which she has subsequently refused to pay. (Miller's Dissent p. 14-15). A. 23-24.

In addition to the financial motivations of JD1, the dissenters describe four reasons why they did not find JD1 credible. First, they note that, if Mr. Newport forewarned JD1 that he wanted her to feel the tubing in his scrotum and grabbed her hand as she claims, "[i]t seems highly unlikely [...] she would have been unable to prevent [Mr. Newport] from forcing her to do what she says he forced her to do". (Miller's Dissent p. 13). A. 22. Second, they point to "inconsistencies and contradictions" in JD1's testimony and between her testimony and "other clear and credible evidence" casting "serious doubt on her credibility concerning this alleged incident". *Id.* In support of this reason they offer two examples: that JD1 testified that Mr. Newport grabbed her right hand despite previously telling

Detective Payton he grabbed her left, and that JD1 claimed to have seen and felt a rectangular or square device in Mr. Newport's right abdomen which does not exist. Id. Third, the dissenters question why JD1 failed to tell her best friend Kelsie Slay about the alleged sexual assault despite going to her house on January 19, 2018. They correctly point out that while JD1 was upset at Kelsie's home, it was only about the settlement to which she had agreed and not about any sexual assault. Id. at 14. A. 23. Finally, they note that instead of going to the police on the 19th or 20th, JD1 waited several days before reporting the alleged assault to the police, only doing so after having discussions with her mother. Id.

III. THE MAJORITY'S CONCLUSION THAT MR. NEWPORT IS NOT CREDIBLE IS INCORRECT

The Commission accused Mr. Newport of expressing "inconsistencies in his testimony and pleadings". (Ruling p. 7). A. 16. They do not evaluate JD1, despite numerous examples of inconsistent and contradictory testimony and motivation to lie. The Commission faults Mr. Newport for forgetting that he once visited JD1's house 10 years ago. They do not comment on JD1's inability to remember and describe even basic facts about the events of January 19, 2018. The Board and the Commission majority excuse every inaccuracy and inconsistency in JD1's timeline and testimony supposedly because she was nervous or traumatized. The Commission majority and the Board criticize Mr. Newport for memory lapses that

might be expected of anyone and certainly are expected of someone suffering from Parkinson's. The disease has advanced to the point where Mr. Newport has trouble walking, talking, recalling short and long term memories. Expecting Mr. Newport to personally recall events and defend himself is not reasonable. The Commission majority states that they considered Mr. Newport's health to be a mitigating factor but did not consider its impact on his ability to recall.

According to JD1, Mr. Newport first pulled his shirt up and indicated to JD1 where the device was located underneath the skin in his abdomen area. The Board neglects to consider this claim by JD1 that she saw a device that does not exist.

Even if we assume that Steve Newport has no recollection of an in person meeting on the 19th or even if we assume that he is lying about a meeting on the 19th that does not make JD1 credible.

To support their conclusion that Mr. Newport was not credible, the Commission majority provide four reasons. First, they join the Board in criticizing Mr. Newport for supposedly contradicting himself by testifying that he did not meet with JD1 on January 19, 2018 despite admitting in his initial Answer to the Board's Complaint that this allegation was true. (Ruling p. 7). A. 16. This supposed contradiction is not borne by the evidence. Paragraph 6 of the Board's Complaint reads: "*On or about* January 19, 2018, Jane Doe #1 met with Respondent at his law office to discuss possible settlement of her case" (emphasis

added). (Complaint p. 2). A. 5. Mr. Newport initially admitted this. It appears on his calendar that he did meet with JD1 on or about January 19, specifically on the 18th. (See Exb. T-1 and T-2). CA. 457-458. However, when the Board began to twist his words and use them against him, he filed an Amended Answer specifying the following as to paragraph 6 of the Board's Complaint: "Conference by phone and/or in person to settle cases occurred primarily on January 18th". (Amended Answer p. 1). CA. 9. Around the time of the alleged assault, Mr. Newport and JD1 were in frequent communications concerning efforts to obtain authority for and reach a settlement.

Second, the majority criticizes Mr. Newport for testifying that he never closed his client door in his office despite video evidence showing that he did. (Ruling p. 7). A. 16. Again, this claimed inconsistency is simply not borne out by the evidence. The recorded meeting was in the conference room, not in his office. Mr. Newport testified that it is his standard practice not to shut this door "but if the client insists on it, then I do it". (Tx. 312). CA. 199. When pressed about whether he told Detective Payton that he had never shut that door in 40 years, he had trouble recalling precisely what he said but noted that he might have said it given that "it's very rare" that he closes that door. Id. Mr. Newport suffers from Parkinson's and has memory issues. At the time of JD1's personal injury case, Mr. Newport's health had degraded to the point that he had to ask attorney Arthur

Buzzell to assist him with the completion of JD1's case. Whether or not Mr. Newport has historically closed his client door or left it open is immaterial to the case at hand.

Third, the majority relies upon Mr. Newport's failure to remember, when asked by Detective Payton during his interview after being strip-searched, whether Mr. Newport was at the home of JD1 and he responded no. He did not recall the visit to her home more than ten years prior during a juvenile court proceeding home visit. The majority claims this means Mr. Newport should not be believed. This oversight was corrected during the opening statement to the Commission by Mr. Newport's attorney. (Tx. 14). Even an individual without Parkinson's would have difficulty remembering a single home visit 10 years earlier for a juvenile court proceeding.

Fourth, the majority states that "Newport further testified that it was possible he told Jane Doe #1 he had a medical device implanted in his scrotum and that it is probably not an appropriate topic to have a discussion about with a client [...] However, he expressed that Jane Doe #1 probably should not be offended by such a topic being discussed with her". (Ruling p. 7). A. 16. There is no contradiction or 'inconsistency' in Mr. Newport's testimony here. It is possible that he told JD1 about his medical device. He was representing her on a personal injury case. He reviewed her medical records. He knew she was a CNA. The current

litigation concerned her personal injuries. It is entirely plausible that at some point he described his health issues to her. This was the reason he needed the assistance of Mr. Buzzell to complete JD1's case.

Why would someone in the nursing field be offended or traumatized by a discussion of physical injuries or illnesses by the attorney? What is the significance that both JD1 and JD2 are in the nursing field if any?

These were the only explanations by the commission majority supporting their conclusion that Mr. Newport was not credible. Only two of these explanations, the client door and home visit, could even be somewhat construed as 'inconsistencies' and both are so trivial that anyone might be forgiven for making the same mistake – never mind someone with Parkinson's. The Commission majority's credibility determination for Mr. Newport does not deserve the deference of this Court, who upon review may come to its own conclusion. *Iowa Supreme Court Attorney Disciplinary Bd. v. Sobel*, 779 N.W.2d 782, 787 (Iowa 2010). For example, in *Sobel* the Court declined to follow the Commission's credibility determination arguing that "the commission failed to consider the possibility that Sobel could have, nevertheless, expressed a conflicting account of the proceeding without engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation". *Id.* Furthermore, the Court recognized "the existence of ample

research showing that a person's memory of events can be subject to error and distortion based on factors unrelated to intent or purpose to be untruthful". *Id.* Mr. Newport's failure to remember a home visit ten years prior or that he closed his client door on a particular day are not a proper basis to determine that he is not credible. Therefore, as in *Sobel*, this Court should reject the Commission majority's credibility determination for Mr. Newport and make its own determination upon closer review of his past statements and physical health.

IV. THE COMMISSION MAJORITY DOES NOT CONSIDER CREDIBLE TESTIMONY AND EVIDENCE SUPPORTING MR. NEWPORT AND CONTRADICTING JD1

Detective Payton aggressively set out to collect evidence to 'prove' that Mr. Newport was guilty as described by JD1. This effort starts within hours of his first contact with JD1 when he attempted to verify JD1's allegations in a secretly recorded phone call where he provided a script JD1 to try to get Mr. Newport to admit the allegations made by JD1. A second recorded meeting in person was later attempted without obtaining an incriminating statement. Detective Payton did not interview JD1's mother. Detective Payton did not inspect or download JD1's phone. Detective Payton apparently encouraged or directed the filing of the complaint to the Disciplinary Board.

Literally the day after Mr. Newport received a copy of JD1's complaint to the Board, Detective Payton executed a search warrant to take photographs of Mr.

Newport's office and to conduct a strip search and photograph Mr. Newport's naked body. After being strip-searched, Mr. Newport went to the police station to meet with Detective Payton and he shared his recollections and documents with Detective Payton and indicated his willingness to cooperate in Mr. Payton's investigation. This is not the conduct of a guilty person. JD1's allegations of criminal conduct against Mr. Newport were rejected by two juries and two dissenters and should be rejected on review by this Court.

Detective Payton was well aware that JD1 was very upset concerning the outcome of the personal injury case in which Mr. Newport was her attorney. Detective Payton was personally familiar with false allegations of sexual abuse. Detective Payton did not attempt to assess JD1's credibility. He did not collect objective evidence or obtain witness statements that might support or refute JD1's allegations. He pursued criminal charges of sexual abuse, indecent exposure and prostitution against Mr. Newport. Obviously the jury did not find that JD1 was credible. If her allegations were credible, Mr. Newport would have been convicted on some or all of the charges.

The Board and the Commission majority, in their effort to find JD1 credible, ignore the testimony and exhibits supporting Mr. Newport. We know that JD1 will lie or conceal from her doctor and from an opposing party prior physical injuries and incidents. She has lied under oath when she answered interrogatories on two

occasions that she did not have any prior accidents or injuries. (Exhibits A and B described and referred to but not admitted). The Board claims that it was Mr. Newport's duty to correct JD1's lies. Appellee's Brief p. 27.

Mr. Newport's Parkinson's disease harmed his ability to defend himself. Information obtained to assist the defense of the criminal matter such as phone records, court documents and emails, the testimony of JD1's close friend Kelsie Slay, and the testimony of Cheryl Newport were presented to assist the defense of Mr. Newport.

The Board argues that JD1 should be believed despite her motivation for revenge and despite her known history to lie and despite the obvious contradictions and even impossibilities of JD1's testimony. Instead the Board attacks Mr. Newport and his attorney and makes excuses for JD1. The Board suggests to this Court that the rectangular object that JD1 claims she observed implanted in Mr. Newport's abdomen above his waist line after he pulled his shirt up (and before he supposedly undid his pants) was some sort of swelling present when JD1 saw him but which was not present when Detective Payton inspected him two months later. (Appellee's brief p. 32). When at the same time when Mr. Newport's counsel suggest in his brief that it would not be unusual for an attorney representing a personal injury client to discuss medical issues. The testimony of JD2 to supports that Mr. Newport may discuss his medical issues with (and perhaps only with)

clients who are involved in nursing such as JD1 and JD2. JD1 acknowledged that Mr. Newport told her he was unable to present JD1's case because of his medical issues and that the assistance of another attorney was necessary.

JD1 described Mr. Newport "pulled his shirt up and showed the device, the mechanism, that was in his right abdomen area. And then it looked like it was just being pushed out, like being pushed out, forced out so you could see it, like it was just underneath his skin [...]" (Tx. 60-61) and "When he lifted up his shirt, there was like a box, a square, a weird-shaped square box that was protruding underneath the skin." (Tx. 136) and "He said it was like a pump that was to help him get an erection [...]" (Tx. 62). Imagine how surprised Detective Payton was when he conducted the strip search of Mr. Newport to learn that such a device did not exist. Nonetheless, the Board tries to explain away JD1's vividly described claim that a rectangular device in Mr. Newport's abdomen above his belt line that does not exist. The Board suggests that perhaps there was some rectangular swelling that might have been a device implanted. When Mr. Newport's counsel suggest that there may have been a conference concerning Mr. Newport's health or prostate cancer or a medical device implanted to a personal injury client particularly when Mr. Newport is requiring the assistance of Mr. Buzzell to complete the trial in this matter because of his physical and mental limitations it is obvious that there would be some discussion of Mr. Newport's health with JD1.

Cell phone evidence

The respondent has prepared a summary exhibit in his brief to help this court understand the cell phone forensic evidence. See Appellant's Brief p. 18-26. This summary was not available to the Commission and the Commission majority does not discuss or consider the cell phone records in its ruling.

The cell phone timeline, as presented in Appellant's brief page 18 – 26, is not contested by the Board. The only correction offered by the Board is on page 34 of the Appellee's brief, where it is pointed out that at 10:45 JD1's cell phone pinged off of tower 13461. This cell tower is accurately listed for the 10:45 entry on page 22 of the Appellant's brief, but was not listed in a section summary. In any event, this discrepancy is immaterial, as cell towers 13453, 13455, and 13461 are all in close proximity to one another, as testified to by Detective Payton, and explained in footnote 2 on page 18 of the Appellant's brief.

The phone records show inconsistencies in JD1's testimony and issues with the Board's timeline. They show JD1 is busy on her phone calling or texting, occasionally at locations and at times contrary to her testimony. They show Mr. Newport is busy from 11 to noon, the timeline of the assault. One of the more telling lies exposed is JD1's claim that after the assault she called Mr. Newport four times from the office parking lot but was unable to wait for an answer. When confronted with cell phone records containing tower locations the Board was

compelled to agree that the alleged assault did not occur in the afternoon just prior to the 2:30 phone calls by JD1.

The cell phone records show that JD1 lied about the time of the alleged assault and her actions following it. JD1 described four phone calls between 2:38 and 2:40 as having been made from the parking lot of Mr. Newport's office. However, the phone records show that these calls 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 so angry. However, at this time, there was a power outage in Bettendorf, and the phones at Mr. Newport's office were down. She did not hang up in anger, the calls simply did not go through because the office landline was down. This outage is pointed out by both Mrs. Newport and Commission member Mikkie Schiltz (Tx. 392 and 399), and is further confirmed by the fact that subsequent communications with Mr. Newport are to and from his cell phone. JD1's claim that these calls were made immediately after the assault is also a lie, as her phone records show her pinging off her home area tower, 13445, and subsequently off towers in west Davenport near Kelsie Slays.

Other exhibits

The billing records of Mr. Newport do show the guardianship established for JD1's children denied by the Board. (See Exb. J p. 4). CA. 432. The fact that

children are removed from the parent's care is consistent with a person prone to make false allegations. Consider the FBI report.

The Board's exhibit 10 purports to represent JD1's cell phone records, but conveniently does not include any cell tower data. Appellant's exhibit K, however, shows what cell towers calls ping off of in addition to call time, numbers, etc. that are included in exhibit 10.

The faxed release, Ex. Q, indicates the presence of JD1 at Mr. Newport's office on that date sometime prior to the fax record on the document.

Cell phone record Exhibit M clearly shows the three-way call waiting call between Mr. Newport, JD1 and after 2:51 PM between Mr. Newport, JD1, and attorney Chad Vonkampen to conclude the settlement. That JD1 does not remember being on call waiting, and that her phone records do not indicate call waiting is not an inconsistency on Mr. Newport's part. His records clearly and incontrovertibly show that this was indeed a call waiting call, as indicated by the "CW" mark on the phone records. The time of settlement is also confirmed by the court records filed to enforce the settlement, Exhibit E.

Ex. A and B, answers to interrogatories where JD1 answers "none" to an interrogatory whether she was ever involved in any other incident that resulted in any personal injury or property damage to you or anyone else involved. (Tx. 111 – 114). CA. 83-86. The Board's argument that Mr. Newport should have known

JD1's answers were incorrect does not diminish the fact that she herself knew her answers were incorrect. It is not Mr. Newport's job to correct the lies of his client. His only mistake was trusting that JD1 was being honest when making sworn statements.

Exb. E. JD1's agreement to settlement even though she frequently claimed at many different times that she did not agree to the settlement.

Ex. T-1 and T-2 – explains why Mr. Newport said he did not meet with JD1r on January 19, 2018. The calendar indicates a meeting with client on January 18, 2018. Mr. Newport is relying upon the calendar entry to deny meeting with the client on the 19th. After reviewing cell phone records it appears they probably only talked by phone and not in person.

Other witnesses

Kelsie Slay

The dissenters do consider the proper effect of the testimony of Kelsie Slay. (Miller's Dissent p. 14). A. 23. The majority doesn't. According to JD1, Mr. Newport told her to take her clothes off during a phone call while she was at Kelsie Slay's home. (Tx. 68-69, 168-169). CA. 61-62, 119-120. The dissenters thought it reasonable that JD1 would tell her best friend Kelsie Slay about an alleged sexual assault occurring minutes or hours before meeting Kelsie Slay. (Miller's Dissent p. 14). A. 23. The cell records indicate that Mr. Newport called JD1 while she was at Kelsie Slays when, according to JD1, Mr. Newport told her to take her clothes off

(Tx. 68-69, 168-169 (CA. 61-62, 119-120)). That JD1 would not describe or complain about this improper phone call with her best friend when she is already mad and complaining about the settlement of her case is not plausible. It is most reasonable to conclude that JD1 is lying again. If JD1 shares her anger with Kelsie about the settlement, why not tell Kelsie that Mr. Newport assaulted her earlier that day and is now telling her to take her clothes off at Kelsie's house.

Cheryl Newport

Cheryl and Mr. Newport met to have lunch at noon on the 19th. The phone records clearly show that JD1 was in the area of her home at that time. Cheryl's testimony also described when Mr. Newport left that morning (and his probable time of arrival at the office), explained office procedures, and described his memory issues. The Commission majority incorrectly stated that Mr. Newport only suffers from short-term memory problems. (Ruling p. 8). A. 17. Cheryl explained that Mr. Newport suffers from both short *and* long-term memory impairment.

V. THE DISSENTING COMMISSIONERS CONSIDER AND EXPLAIN WHY JD1'S ALLEGATIONS OF CRIMINAL CONDUCT ARE NOT CREDIBLE

JD1's allegations of criminal conduct against Mr. Newport were rejected by two juries and two dissenters on the commission and they should again be rejected by this Court. An experienced judge and an experienced courtroom attorney on the commission found that JD1's allegations of criminal conduct were not proven by a

convincing preponderance of the evidence. They did determine that Mr. Newport engaged in sexually inappropriate language with respect to JD1 and JD2. Perhaps Mr. Newport's use of the term "blow job" during the tape-recorded conversation and the testimony of JD2 concerning Mr. Newport's inappropriate statements was enough in their view to support a finding that Mr. Newport did violate Iowa Rules of Professional Conduct 32:8.4(g) sexually inappropriate language.

If the dissenting Commissioners did believe JD2 was credible then a finding that Mr. Newport violated 32:8.4(g) is understandable though not accepted by Mr. Newport, who has no recollection of any incidents as described by JD2. With respect to JD2's allegations, there is no objective or contemporaneous record to support either side other than the court and billing records showing a possible opportunity for the statements alleged by JD2.

CONCLUSION

For the reasons noted by the dissenting Commissioners, this reply brief and the Appellant's brief, this Court must find the Board has failed to prove by a convincing preponderance of the evidence that Mr. Newport is guilty of criminal conduct violating Iowa Rules of Professional Conduct 32:8.4(b). If this Court does find that Mr. Newport engaged in sexual inappropriate conduct, such conduct is not a pattern of conduct. At most there are two incidents years apart and the six-month suspension sanction recommended by dissenting Commission member

Miller is an adequate sanction.

CERTIFICATE OF SERVICE

I did serve a copy of this brief by filing on edms on 11-5-20.

Certificate of Compliance with Typeface Requirements and Type- Volume Limitation

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Cambria in 14 point and contains 5309 words, including some the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

_____/s/____ John Moeller

Date 11-5-20