

IN THE SUPREME COURT OF IOWA

---

NO. 17- 1599  
GRIEVANCE COMMISSION NO. 819

---

IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD,  
Complainant-Appellee,

vs.

MARK T. HAMER,  
Respondent-Appellant.

---

APPEAL FROM THE GRIEVANCE COMMISSION  
OF THE SUPREME COURT OF IOWA

---

APPELLANT'S REPLY BRIEF

---

DAVID L. BROWN  
Hansen, McClintock & Riley  
Fifth Floor, U.S. Bank Building  
520 Walnut St.  
Des Moines, Iowa 50309  
Telephone: (515) 244-2141  
Facsimile: (515) 244-2931  
E-mail: [dlbrown@hmrlawfirm.com](mailto:dlbrown@hmrlawfirm.com)

ATTORNEY FOR RESPONDENT-APPELLANT,  
MARK HAMER

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... 3

STATEMENT OF THE ISSUES ..... 4

ARGUMENT ..... 5

**I. A FINDING OF ETHICAL VIOLATIONS IS NOT SUPPORTED  
    BY THE EVIDENCE ON RECORD** ..... 5

CONCLUSION ..... 11

APPELLANT’S STATEMENT OF DESIRE TO BE HEARD IN ORAL  
ARGUMENT ..... 11

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE  
REQUIREMENTS ..... 12

**TABLE OF AUTHORITIES**

**Cases**

*Comm. on Prof'l Ethics & Conduct v. Coddington*, 360 N.W.2d 823 (Iowa 1985)  
..... 10

*Comm. on Prof'l Ethics & Conduct v. Zimmerman*, 465 N.W.2d 288 (Iowa 1991)  
..... 10

*Iowa Supreme Court Attorney Disciplinary Bd. v. Cannon*, 789 N.W.2d 756 (Iowa  
2010)..... 10

*Iowa Supreme Court Attorney Disciplinary Bd. v. Carty*, 738 N.W.2d 622 (Iowa  
2007)..... 10

*Iowa Supreme Court Attorney Disciplinary Board v. Nelson*, 838 N.W.2d 528 (Iowa  
2013) . . . . . 5

**STATEMENT OF THE ISSUES**

**I. Did Mark Hamer violate the Iowa Rules of Professional Conduct?**

*Iowa Supreme Court Attorney Disciplinary Bd. v. Cannon*, 789 N.W.2d 756  
(Iowa 2010)

## ARGUMENT

### **I. A FINDING OF ETHICAL VIOLATIONS IS NOT SUPPORTED BY THE EVIDENCE ON RECORD**

#### **A. The Board did not carry their burden of proof on proving the allegations against Mark Hamer.**

The Board's allegations against Mark Hamer ("Hamer") are not supported by sufficient evidence. The Board's evidence presented at the Grievance Commission hearing was limited to testimony that the Commission found to be inconsistent and not credible. The Petitioner-Appellee's most recent brief merely recites the allegations that have never been supported by credible evidence. Given the complete absence of any credible evidence presented by the Board, the Commission's findings of ethical violations should be reversed.

The Board must prove all allegations by a convincing preponderance of the evidence. The Board unequivocally did not meet their burden of proof. Namely, the Board's evidence was supported only by the testimony of a witness the Commission deemed not credible. The Board's complaint should be dismissed in its entirety as no credible evidence was presented at the Commission hearing.

The Board must prove all allegations by a convincing preponderance of the evidence. *Iowa Supreme Court Attorney Disciplinary Board v. Nelson*, 838 N.W.2d 528, 532 (Iowa 2013). This burden is less than a reasonable

doubt, yet greater than a mere preponderance of the evidence. *Id.* In short, the burden is higher than a traditional civil matter yet not as high as a criminal case. *Id.*

Over the past five years Hamer has responded to the allegations of the Board and their sole witness Doug Paul (“Paul”) related to events that occurred between 2004 and 2006. The allegations have been presented in numerous forms; Paul’s initial complaint in 2013, the Board’s formal complaint in 2015, and the numerous briefs on behalf of the Board. These allegations, while often contradictory and inconsistent, argue that Hamer inappropriately engaged in private transactions involving Paul. Over the five years, the Board has never presented any credible evidence supporting any of their allegations.

The Board’s evidence presented before the Commission was limited solely to the testimony of Paul. No other clients of Hamer’s or other persons involved in the transactions were called as witnesses. As discussed thoroughly throughout Hamer’s appeal brief, Paul’s testimony was inconsistent and unsupported by other evidence. The Commission accordingly found Paul’s testimony was not consistent. (App. Vol. 4 pp. 240-241).

Despite finding Paul was not a credible witness, the Commission relies solely on the incredible testimony to conclude Hamer violated the Rules of

Professional Conduct. The conclusion of the Commission obviates the Board's burden of proving the allegations by a convincing preponderance of the evidence. The finding of ethical violations cannot be sustained by the total absence of credible evidence presented by the Board. The finding should accordingly be reversed on appeal.

**B. The Commission erroneously found Hamer collected an excessive fee.**

The fee Hamer collected his legal services in helping Paul sell his Buckle Down business for \$27,500,000.00 was reasonable. The Commission erroneously found that Hamer violated DR 2-106 for collecting a clearly excessive fee. The Commission's finding misapplies the Code of Professional Responsibility and Iowa law regarding attorney fees. Further, the finding was based on the highly inconsistent and incredible testimony of Doug Paul.

The Board alleged Hamer violated the Code of Professional Responsibility DR 2-106 by collecting an excessive fee. The rule states:

A lawyer shall not enter into an agreement for, charge, or collect an Illegal or clearly excessive fee. . . . A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a **definite and firm conviction** that the fee is in excess of a reasonable fee.” (emphasis added).

The rule also contains a host of factors that are used to determine whether a fee is clearly excessive. Those factors include:

(1) **The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.**

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) **The amount involved and the results obtained.**

(5) The time limitations imposed by the client or by the circumstances.

(6) **The nature and length of the professional relationship with the client.**

(7) **The experience, reputation, and ability of the lawyer or lawyers performing the services.**

(8) Whether the fee is fixed or contingent.

DR 2-106(B) (emphasis added).

Under the factors outlined in DR 2-106, it cannot be said that any fee collected by Hamer would be considered excessive. As a preliminary note, Paul's testimony regarding the fee as it related to the sale of Buckle Down was highly inconsistent as discussed in Hamer's appeal brief. As inconsistent as Paul's testimony was, it is possible to garner several uncontroverted facts related to the sale of Buckle Down.



First, Paul's business sold for approximately \$27,500,000.00. The sale was highly technical and required the advance legal expertise that Hamer was positioned to provide. (App. Vol. 4 p. 433). Hamer worked on the sale of Buckle Down for a period of six years. (App. Vol. 4 pp. 433-434).

Further, the sale can only be considered a success for Paul. In fact, Paul was so thrilled with the sale of Buckle Down that he himself suggested a bonus! (App. Vol. 4 p. 315). Regardless of which version of Paul's testimony is accepted the bonus suggested by Paul would amount to less than 1% of the total proceeds from the sale of the business. (Paul's oscillating testimony states the bonus goes from non-existent in the complaint to the Board, to \$110,000 in the Complaint against Hamer, to \$110,000 in his deposition, to \$250,000 in a clarification in his deposition, and finally to \$150,000 in his sworn testimony at trial of this matter).

The factors in DR 2-106 clearly illustrate that the fee collected by Hamer is not excessive. The time, labor, and expertise required to navigate the legal complexities of the sale were astounding. The same can be stated for the amount involved and the results obtained for Paul. The bonus suggested by Paul was clearly reasonable by the standards established in DR 2-106.

Further, the Commission's finding is not supported by Iowa law. This Court has traditionally addressed potential excessive fees in a limited

category. The majority of excessive fee matters concern an attorney collecting a fee that is prohibited by statute. This includes collection of attorney's fees without an appropriate court order in probate or conservatorship matters. *See e.g., Iowa Supreme Court Attorney Disciplinary Bd. v. Carty*, 738 N.W.2d 622, 625 (Iowa 2007); *Comm. on Prof'l Ethics & Conduct v. Zimmerman*, 465 N.W.2d 288, 291–93 (Iowa 1991); *Comm. on Prof'l Ethics & Conduct v. Coddington*, 360 N.W.2d 823, 826 (Iowa 1985).

However, the Supreme Court has also ruled that the Board must carry its burden proving the attorney collected an unreasonable fee. *Iowa Supreme Court Attorney Disciplinary Bd. v. Cannon*, 789 N.W.2d 756 (Iowa 2010). In *Cannon*, there was uncontroverted evidence that the attorney put in the time he billed his client, despite submitting plagiarized work. The Court held that the Board failed to carry their burden on the unreasonable fee allegation because the evidence demonstrated the attorney was compensated for the work he performed.

The bonus collected by Hamer was not in violation of any Iowa statute. Additionally, the fee was collected for the outstanding services and exceptional results he obtained for his client. It can only be considered a reasonable fee under the circumstances. There was never any connection made by the Commission or the Board illustrating how the fee collected by

Hamer on the highly complex sale of a business for \$27.5 million in proceeds was clearly excessive.

The Commission fails to address any of the factors of DR 2-106. In fact, their analysis does not provide any analysis related to how the collection of a fee suggested by the client would be considered excessive. The finding should be reversed upon *de novo* review.

### **CONCLUSION**

The Board's allegations in this matter were never supported by credible evidence. The Commission's findings of ethical violations were based solely on the testimony of Doug Paul – a witness the Commission found to be not credible. Give the absence of credible evidence, the Board has not carried their burden of proof. The complaint against Hamer should accordingly be dismissed.

### **APPELLANT'S STATEMENT OF DESIRE TO BE HEARD IN ORAL ARGUMENT**

Appellant hereby states his desire to be heard in oral argument pursuant to Iowa Rule of Appellate Procedure 6.21(1).

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE  
REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

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

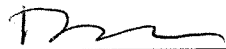
**[ X ] this brief contains [1432 ] words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or**

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

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

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

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

  
\_\_\_\_\_  
DAVID L. BROWN

2/26/018  
\_\_\_\_\_  
DATE