IN THE SUPREME COURT OF IOWA

NO. 21-0214
Grievance Commission No. 889

IOWA SUPREME COURT
ATTORNEY DISCIPLINARY BOARD,

Complainant-Appellee,

v.

BRUCE A. WILLEY,

Respondent-Appellant.

APPEAL FROM THE IOWA SUPREME COURT GRIEVANCE COMMISSION PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS DATED FEBRUARY 16, 2021
Thomas D. Hobart, President of Panel 889

APPELLANT'S BRIEF

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ROUTING STATEMENT

As this is a matter regarding attorney discipline, it must be retained by the Iowa Supreme Court. Iowa Ct. R. 35.10.

STATEMENT OF THE CASE

Nature of the Case. This primary matters in this case involved the complaint of a former client who filed an ethics complaint on the hells of having his meritless civil action against attorney dismissed. These matters, a vast majority at issue in the case, were all decided in Respondent's favor.

However, although the complaining former client's assertions were proven to be without merit in the disciplinary matter, the Commission did make findings relative to a separate client. This client did ***not*** file a complaint. This client did ***not*** appear and testify at the hearing. This client did ***not*** waive his attorney-client privilege.

The circumstances presented in this case should not allow for speculative and unsubstantiated findings that support a violation by Respondent. In forcing attorney to meet his burden, without an express waiver of the attorney-client privilege, attorney is effectively barred from defending himself. Contrary to law, the attorney-client privilege was effectively used as both a sword and a shield against the defenseless attorney.

Relevant Events of Prior Proceedings. In February of 2017, the Supreme Court of Iowa entered opinion in Case No. 16-1228 against Respondent (see *Iowa Supreme Court Attorney Disciplinary Board v. Willey*, 889 N.W.2d 647 (Iowa 2017). Therein, the Respondent's licensed was suspended for violating the Rules of Professional Conduct governing conflicts of interest. *Id.* (App. p. 244)

In 2017, former client, David Wild, filed a civil lawsuit against Respondent seeking monetary damages. (App. p. 434) The civil lawsuit was dismissed shortly thereafter. (App p. 434) In 2018, following the dismissal of the civil lawsuit against Respondent, Mr. Wild filed a Complaint with the Attorney Disciplinary Board. (App. p. 433) That Complaint came for hearing with the Grievance Commission on November 9-10, 2020. (App. p. 327)

On December 14, 2020, Respondent submitted his Post-Hearing Brief. (App. p. 35)

Disposition of the Case Before the Grievance Commission. Pursuant to hearing, the Grievance Commission entered its Findings of Fact, Conclusions of Law, and Recommendations (App. p. 58). Relevant to this appeal, the Commission's Order contained the following:

1. Finding that Respondent violated multiple Rules in his conduct with client Midwest SN Investors, LLC ("Midwest"). (App. pp. 67-70)

2. Neither Midwest, nor any of its representatives appeared and testified at the hearing. (App. p. 62)

3. The attorney-client privilege barred Respondent from offering evidence/testimony as to any matters involving Midwest and its representatives. (App. p. 62)

4. As a result of the attorney-client privilege bar, and fact no one testified on behalf of Midwest, Exhibit 43 was the only evidence considered with regard to Respondent and any purported conflict of interest with Midwest (or its representatives). (App. p. 67)

5. Finding the Supreme Court of Iowa would not have increased Respondent's existing suspension (aforementioned Case No 16-1228) another sixty (60) days if this case would have been presented together with that prior matter. (App. p. 70)

6. Recommending that Respondent's license be suspended for thirty (30) days. (App. p. 70)

Summarily, Respondent now appeals from these elements of the Commission's Order. (App. p. 71)

STATEMENT OF THE FACTS

This case presents a unique and challenging issue insofar as essentially none of the operative facts or evidence were presented in analyzing Respondent's conduct in relation to a purported conflict of interest with Midwest. As the Commission concedes:

> *[Midwest] did **not appear** at the hearing, and [Respondent] was **prevented** from any further testimony by the **attorney/client privilege**.*

(App. p. 62)(emphasis added)

At the time of hearing, the tangible evidence regarding Respondent's conduct was limited to the introduction of Exhibit 43-a Consent and Waiver between Midwest and Respondent. (App. p. 300; p. 67) The testimony about Respondent's related conduct was even more limited. (App. pp. 367-368)

Notably, however, as it pertained to a basic understanding of his responsibilities under the Rules, Respondent testified as follows:

> *My understanding was that I had to disclose what the transaction was, what my interest in the transaction was, tell the client to seek other counsel, to advise them in getting into the transaction and to obtain written consent and waiver after the* ***conversations*** *with them.*

(App. pp. 368-369)(emphasis added). As a result of Respondent's inability to disregard the attorney-client privilege with Midwest, he was never able to detail any "conversations" he had with Midwest and its representatives. (App. p. 67)("[Respondent] was severely limited by the attorney/client privilege…")

For his part, Complainant, Mr. Wild, admitted that he did not have any communications or involvement with Midwest and its representatives. (App. p. 449)

The record was effectively ***void*** of any information concerning the communications and interactions between Respondent and Midwest (or its representatives).

APPELLANT'S ARGUMENTS

I. THE GRIEVANCE COMMISSION ERRED IN FINDING RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT PERTAINING TO HIS REPRESETATION OF MIDWEST.

PRESERVATION OF ERROR/ SCOPE OF REVIEW

Error Preservation: This matter is fully preserved in the docket filings, hearing Exhibits, Grievance Commission hearing transcript, and the Commission's Findings of Fact, Conclusions of Law and Recommended Sanction.

Scope and Standard of Appellate Review: The Court reviews attorney disciplinary proceedings de novo. *Iowa Supreme Court Attorney Disciplinary Board v. Parrish*, 801 N.W.2d 580, 583 (Iowa 2011). The appropriate discipline in a particular case turns on the nature of the alleged violations, 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. *Iowa Supreme Court Board of Prof'l Ethics & Conduct v. Freeman*, 603 N.W.2d 600, 603 (Iowa 1999).

There is no standard discipline for a particular type of attorney misconduct. *Iowa Supreme Court Board of Prof'l Ethics & Conduct v.*

Hohenadel, 634 N.W.2d 652, 655 (Iowa 2001). The form and extent of any sanction must be tailored to the specific facts and circumstances of each individual case. *Iowa Supreme Court Attorney Disciplinary Board v. Marks*, 759 N.W.2d 328, 332 (Iowa 2009). The Court is, however, concerned with maintaining some degree of consistency throughout disciplinary cases. *Iowa Supreme Court Attorney Disciplinary Board v. Clauss*, 711 N.W.2d 1, 4 (Iowa 2006).

ARGUMENT

Despite the admitted dearth of evidence regarding the communications and interactions between Respondent and Midwest, the Commission made an unsupportable expanse of findings that relied on unfair inference and speculation-effectively using the attorney-client privilege as a sword against the Respondent! This no-win situation for the Respondent left him unable to defend himself. In evaluating the lone piece of purported evidence, Exhibit 43, (App. p. 300) the Commission impermissibly concluded that the lack of any additional evidence-that which was not permitted by the attorney-client privilege-was tantamount to there being no additional evidence upon which Respondent's conduct should have been evaluated.

In its Order, the Commission identified the Respondent's burden in addressing allegations regarding his conduct in representing Midwest: "[T]he burden shifts to the attorney to demonstrate that he acted in good faith and made a full disclosure." (App. p. 67) (internal citation omitted).

In analyzing an attorney's conduct under such allegations, the Supreme Court expressly contemplates "**discussions**" between the client and attorney as part of the requisite disclosure. *Iowa Sup. Ct. Atty Disciplinary Bd. v. Hamer*, 915 N.W.2d 302, 322-323 (Iowa 2018)(The disclosure must include a detailed, situation-specific ***discussion*** …)(emphasis added); *Iowa Sup. Ct. Atty Disciplinary Bd. v. Wintroub*, 745 N.W.2d 469, 474 (Iowa 2008)(Court's analysis contemplated detailed advice, indicating the disclosure requirements could be met with "oral summaries."); *Iowa Sup. Ct. Bd. of Pof'l Ethics and Conduct v. Wagner*, 599 N.W.2d 721, 727-728 (Iowa 1999)(Lawyer's obligation contemplates a duty to ***explain*** and see that a client understands the issues.)(emphasis added).

It is clear that the Rules do ***not*** require the entirety of the disclosure to be commemorated in writing-truly such satisfaction would be impossible.

Contrary to the Supreme Court's direction, the Commission set an improper expansive duty to memorialize all details in writing: "There were

clearly significant portions of the transaction by which Midwest loaned Catalyst $200,00, but were clearly not disclosed in writing by [Respondent] to Midwest." (App. p. 68)

In relying solely on the Consent and Waiver in Exhibit 43, the Respondent was robbed of an analysis that would contemplate all the circumstances as he stood in judgment. Worse, the Commission ultimately made findings contrary to the Respondent as a result of his inability to present evidence.

In finding violations, the Commission made the following far-reaching conclusions:

1. Respondent did not accurately convey his status as an owner of Catalyst in his communications with Midwest. (App. pp. 67-68)
2. Respondent did not provide Midwest any financial information or details concerning the transaction. (App. p. 67)
3. Respondent did not inform Midwest that the money it was loaning was going to be invested in a high-risk venture or would not be secured and was in a foreign market. (App. p. 68)
4. Respondent did not inform Midwest that he would receive monies from the loan directly. (App. p. 68)

5. Midwest lost $200,000 in the transaction. (App. p. 69) The Commission makes these affirmative findings based solely on the conclusion that: if they are not expressly documented in the Consent and Waiver, then they did not happen. As to Midwest's loss, and its amount (#5 above), that is pure speculation.

In the attorney-disciplinary process, a client's Complaint serves as a waiver of the attorney client privilege. This reality is set out on the Board's website for clients to appreciate from the outset:

> Waiver of Attorney-Client Privilege
>
> In signing the complaint form, you waive the attorney-client privilege, if any, to allow the lawyer to make a complete response to the Board free of any obligation of client confidentiality.

(https://www.iowacourts.gov/opr/attorneys/attorney-discipline); See also Iowa R. Prof'l Conduct 32:1.6. And of course, ***based on principles of fairness***, this should be the case! (see, *Brandon v. W. Bend Mut. Ins. Co.*, 681 N.W.2d 633, 642 (Iowa 2004)(providing that waiver may be implied by "conduct making it unfair for a client to invoke the privilege"); *Miller*, 392 N.W.2d at 505 (same); *Kantaris v. Kantaris*, 169 N.W.2d 824, 830 (Iowa 1969)(Any other rule would subject the lawyer to any kind of scurrilous and unjust attack, and convert the statute from being a mere shield into a weapon of offense.)

However, that waiver is not applicable in this case, as the client, Midwest, has not put any attorney-client privileged communications at issue. The present matter contemplates what a recent Iowa Ethics Opinion (Op. 15-03) characterized as "Self-Defense Waiver in Relation to Claims by Third Parties." *Iowa Ethics Opinion* 15-03 (July 15, 2015)(pp. 7-8). Therein, it was definitively established that Respondent does not have the ability to "work around" or waive Midwest's privilege:

> *There are situations,* ***usually in the attorney-disciplinary case****…In these and similar situations* ***the client has taken no adverse action against the lawyer and, has not triggered the loss of the legal professional privilege and/or confidentiality****. Absent a previous expressed written agreement by the client, it* ***cannot be waived by a non-client third party or the lawyer who must honor it****. In these cases the legal professional privilege and/or rule of confidentiality remains* ***intact*** *and* ***must be honored*** *absent express waiver from the client or court adjudication of the issue after notice to the client.*
>
> *…*
>
> *4. A lawyer* ***must*** *honor the client's legal professional privilege and confidentiality and cannot invoke the implied waiver of self-defense regarding claims made against the lawyer by third parties absent the client's express written consent or order of the court after notice to the client.*

Id. (at pp. 7-8)(emphasis added)

Fairness should still rule the day. In using the attorney-client privilege against Respondent in this case, the third parties in this matter (Grievance Commission through Complainant Wild and the Board) effectively forced

Respondent into an ethics violation. One the one hand, Respondent was unable to defend himself in this ethics matter, or, if he chose to do so, he would be guilty of a subsequent violation to former client Midwest! This is contrary to the spirit and letter of the law.

As the record developed, there was not enough evidence to permit a fair and accurate analysis of the Respondent's conduct as it pertains to his representation of and interactions with Midwest. To find violations, the Commission was forced to move well beyond the record-making factual findings that are not supported anywhere beyond speculation and the mistaken belief that disclosure details cannot be conveyed in discussion and consultation with the client. This effectively held Respondent's attorney-client privilege obligation against him in finding the absence of his ability to present this evidence to be proof of a violation.

There are two other Iowa Appellate Court cases that are instructive in noting that sole reliance on hearsay and/or incomplete inferences/evidence does not qualify as the substantial evidence required to support violation. One, in *State v. Mulatillo*, the Court was tasked with evaluating whether or not legal counsel should have been disqualified-the primary analysis contemplated the very Rules at issue in this case. *State v. Mulatillo*, 907 N.W.2d 511 (Iowa

2018). In *Mulatillo*, the "only evidence the State provided with hearsay statements." *Id.* at 521. The Court specifically found that such hearsay statements did not rise to the level of "substantial evidence."

In the same way, two Court of Appeals of Iowa cases on the same matter are instructive. In Butt (one), the Court of Appeals cited to its prior decision and ratified the longstanding proposition that if substantial evidence is composed solely of hearsay, it should be scrutinized closely. *Butt v. Iowa Bd. of Med.*, 836 N.W.2d 152 (Iowa App. 2013)("However, if an administrative record is composed solely of hearsay evidence, a reviewing court will examine the evidence closely in light of the entire record to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by reasonably prudent persons in the conduct of their serious affairs.")(citing, *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 607–08 (Iowa App. 1990).

Later, in Butt (two), the Court of Appeals discussed the interplay between inferences and the evidence required. Butt v. Iowa Bd. of Med., 872 N.W.2d 410 (Iowa Ct. App. 2015)(But inferences, whether obvious or not, must amount to more than speculation and must be subject to reasonable deduction from the record.)(citing *See Lewis v. State ex. rel. Miller*, 646

N.W.2d 121, 124 (Iowa 2002) ("An inference is not legitimate if it is based upon speculation or conjecture.").

Here, it was simply unfair to use the law to take away Respondent's ability to defend against the charges, while at the same time use it against him. The record developed does not allow a meaningful analysis of the Respondent's conduct, does not support the inferences needed to support violations, and is otherwise unfair and unjust under the circumstances.

The Commission erred in finding violations of the Rules.

II. THE GRIEVANCE COMMISSION ERRED IN RECOMMENDING A SUSPENSION.

PRESERVATION OF ERROR/ SCOPE OF REVIEW

Please reference the preservation of error and scope of review for Section I, above. The same applies equally to this Section.

ARGUMENT

Although its calculations are certainly confusing, it appears that the Commission simply felt that the violations it found support a suspension that they reduced by half to account for the prior suspension Respondent received for similar conduct during the same time period. Respondent disagrees. This is not consistent with the way the Supreme Court has applied sanctions for overlapping conduct.

The Supreme Court has consistently evaluated "tag along" complaints as if they had been brought concurrently. Like the attorney-client waiver issue above, this is based on fundamental fairness. The question in this case is whether or not the Respondent's suspension would have been increased had this case been presented at/around the same time[1]?

In the *Noel* case, the Court analyzed the timing-relation issue in the context of the *Moorman* case:

> *In Iowa Supreme Court Attorney Disciplinary Board v. Moorman, we found the attorney had committed various ethical violations between 2001 and 2004, including neglect in handling client matters. We also noted that we had previously suspended the attorney's license for two years following his neglect of a client matter in 2002. We imposed a public reprimand for the 2001–2004 conduct that was the basis of the present disciplinary proceeding even though the attorney's conduct would usually generate a suspension up to two years. We reasoned,*
>
> *Had we been aware of the conduct that is the subject of this disciplinary proceeding at the time of our previous decision, it is unlikely this conduct would have caused us to suspend Moorman's license for longer than two years. Because Moorman's license is presently under suspension, we see no purpose served by ordering another suspension insofar as a deterrence or protection of the public is concerned.*
>
> *Likewise, even if we had been aware of Noel's conduct that gave rise to the present case when we issued our decision in February of 2019,*

[1] This argument assumes that the Court does not agree with Respondent on Issue No. 1, above. Nothing herein should be construed as Respondent's concession that a violation occurred or has been proven by the evidence. This is an "in the alternative" argument.

> *"it is unlikely this conduct would have caused us to suspend [Noel's] license for longer than [one] year[ ]." Therefore, we see no reason to enhance Noel's sanction in the present case or extend the suspension we imposed in Noel I. A public reprimand is the proper sanction. However, we remind Noel that future misconduct will result in harsher sanctions.*

Noel, 933 N.W.2d at 206. (Court elected to impose a public reprimand, rather than the suspension recommended by the commission)(internal citations omitted)

The Respondent believes the same logic should apply here, and that the alleged conflict of interest violations are essentially the product of the same corpus of conduct and should result in a no further sanction (or private admonition). The Commission cites no legal authority for the logic it applies in findings.

The *D'Angelo* case is particularly in opposition to the Commission's conclusion here. In that case, the Court found that the violations at issue were part of the same pattern and occurred at approximately the same as that which led to suspension and *declined* to enhance the suspension:

> *[T]he violations in question were **part of the same pattern of conduct** that led to respondent's November 16, 2000, suspension and occurred at approximately the same time as the violations that led to that suspension. **Had these additional matters been brought to our attention at that time, we seriously doubt that respondent's prior suspension, which was for a minimum of three years, would have been enlarged**. Although we recognize that the failure to comply with our suspension*

> *order on turning over files, failing to abide the implicit requirement that unearned fees be returned, and his failure to cooperate with the ethics board are new matters occurring since the prior suspension, we do not deem it necessary to increase the quite lengthy suspension that is currently in force. We accept the Grievance Commission's recommendation that the sanction for the current violations be a suspension for a minimum of one year, which shall run concurrently with the prior suspension.*

D'Angelo, 652 N.W.2d at 215. More to the point, Respondent does not have the "new matters" occurring since the suspension that confronted the Court in *D'Angelo*!

In summary, the Court in *D'Angelo* considered the violations to not support enhanced or additional sanction due to the fact that the violations were part of the same pattern of conduct and occurred at approximately the same time as conduct supporting prior sanction. Similarly, Respondent's alleged violations presented in this case were undeniably part of the same pattern of conduct and occurred approximately at the same time as the violations that led to the suspension.

More recently, the Court evaluated this issue in the *Tindal* case. As stated bluntly in that case "Sequence matters." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Tindal*, 949 N.W.2d 637, 644 (Iowa 2020)("In *Iowa Supreme Court Attorney Disciplinary Board v. Noel*, we imposed a public

reprimand instead of the suspension recommended by the board and commission because the conduct at issue preceded the discipline imposed for earlier misconduct. *Id.* at 205–06. We concluded the prior sanction, a public reprimand, would have remained the same had we been aware then of the additional misconduct, and we therefore declined "to enhance Noel's sanction in the present case." *Id.* at 206. We reach the same conclusion here.")

The conduct giving rise to the prior suspension in this matter, the *Willey* case, happened after the conduct alleged in this case. More to the point, the conduct that formed the basis for the suspension in the prior case is considerably more egregious than the "thin" case alleged here. *Iowa Supreme Court Atty Disciplinary Bd. V. Willey*, 889 N.W.2d 647, 658 (Iowa 2017). The conduct that previously warranted a sixty (60) day suspension contemplated similar conflict of interest violations but included several aggravating factors that are not present in this case. For one, there is no evidence of harm to the client. In *Willey I*, the client investor was out $100,000. *Id.* That client was not "in a position to lose his and his wife's money." *Id.* The client expressly told Respondent he could not be out the money any more than forty-five days. *Id.* Despite this Respondent assured him the investment was safe. *Id.*

In the present matter, there is absolutely no credible or admissible evidence to support that Midwest is out any money, let alone that which is speculated. Midwest never sued Respondent, nor did it testify at the hearing. Instead of inferring the more probable reason for that, that it was not upset or out an investment, the Commission speculated otherwise.

The client in *Willey I* was not a sophisticated investor. *Id.* Here, while the record remains void of specific evidence, the client is a corporate entity that was incorporated for investment purposes. Moreover, the principal member is a famous Iowan who is known to have had a very successful career as a professional athlete. There is no record evidence of this aggravating factor.

Finally, in *Willey I* the Court found that Respondent persisted in perpetuating a falsehood. *Id.* The Court found this to be an aggravating factor.

Finally, and most importantly, the entire backdrop of the Rule violation is different. In *Willey I*, the Court detailed the lack of any attempt to meet the mandates of the rule:

> *Willey did not disclose his relationship with Wild or Synergy to Wieniewitz until much later. Willey never obtained informed consent from Wieniewitz, nor confirmed in writing any potential conflict of interest with Wild and Synergy. Willey did not recommend Wieniewitz consult with independent counsel regarding the concurrent conflict of interest.*

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Willey, 889 N.W.2d 647, 651 (Iowa 2017). The violation facts are clearly not present in this matter. The Commission nit-picks the Consent and Waiver in this case, but it is a multiple-page document that expressly satisfies the mandates of the Rule. This is a major distinction.

As the Court concluded in *Willey I*, Respondent violated the rules governing conflicts of interest. However, the Court has consistently determined that reprimands are appropriate if the attorney has already served a time of suspension for the underlying conduct. *Iowa Sup. Ct. Atty Disciplinary Bd. v. Powell*, 901 N.W.2d 513, 516 (Iowa 2017)(citing to *Marks*, 814 N.W.2d at 542; *Wintroub*, 745N.W.2d at 477).

Assuming the Court were to agree a separate, albeit prior, violation occurred (something the Respondent disagrees with under section #1 above), this case decidedly qualifies under the "***we have typically only used reprimands in this context if the attorney has already served a time of suspension for the underlying conduct***" framework. *Powell, supra.*

If the Court is of the belief that the limited and incomplete evidence presented at hearing is sufficient to support rule violation, the sanction for the same should not be more than a private admonition or public reprimand, as the

Court would not have enhanced the sanction based on the scant record presented in this case.

CONCLUSION

The Supreme Court of Iowa should determine that the Midwest client alleged violations complained of in this lack sufficient evidence, and that the Respondent was unfairly hamstrung by the attorney-client privileged. The case should be DISMISSED. In the alternative, and should the Court agree a violation occurred, the Midwest matter, that which predated his prior founded violation was part of the same conduct for which he previously received a suspension. In this alternative theory, a private admonition or public reprimand should warrant.

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 6.908(1).

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

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DAVID L. BROWN

7/15/2021

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