In the Supreme Court of Iowa

Supreme Court No. 21–0214
Grievance Commission No. 889

Iowa Supreme Court
Attorney Disciplinary Board,

Complainant–Appellee,

vs.

Bruce A. Willey,

Respondent–Appellant

Appeal from the Report of the Iowa Supreme Court Grievance Commission

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Appellee's Final Brief

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Routing Statement

The Supreme Court should retain this case because under Iowa Rule of Appellate Procedure 6.1101(2) "[t]he Supreme Court shall ordinarily retain the following types of cases: . . . . e. Cases involving lawyer discipline."

Statement of the Case

Nature of the Case

The Iowa Supreme Court Attorney Disciplinary Board ("Board") brought this lawyer disciplinary action against Bruce A. Willey ("Willey") alleging violations of the Iowa Rules of Professional Conduct. This matter arises out of a complaint David Wild ("Wild") filed with the Board in January of 2018 and primarily concerns allegations of conflicts of interest arising in 2007 and 2008 related to Catalyst Resource Group, LLC ("Catalyst")—a company established to hold an investment opportunity intended to fund projects and which was indirectly owned by Willey and Willey's longtime client Wild—and Midwest S.N. Investors, LLC ("Midwest")—another of Willey's clients.

Course of Proceedings and Disposition

On March 28, 2019, the Board filed its Complaint against Willey with the Grievance Commission ("Commission"). On April 23, Willey filed his Answer. On January 13, 2020, the Commission granted the Board's

Motion for Leave to Amend its Complaint. On February 3, Willey filed his Amended Answer. On March 13, the Board filed a Motion to Amend and Substitute Complaint, which the Commission granted on March 20. The Board filed its Amended and Substituted Complaint on March 26. On April 15, Willey filed his Answer to the Amended and Substituted Complaint. On July 28, the Board filed a Third Motion to Amend Complaint, which the Commission granted on August 3. On August 7, the Board filed its Third Amended Complaint. In accordance with the August 3 Ruling on the Board's Third Motion to Amend Complaint, the new paragraphs set forth in the Third Amended Complaint were deemed denied by Willey without further pleading.

On November 9 and 10, 2020, the Commission heard and received the parties' evidence.

On February 16, 2021, the 609th Division of the Commission filed its Findings of Fact, Conclusions of Law, and Recommendation

Commission's Conclusion and Recommendations

The Commission concluded Willey violated Iowa Rules of Professional Conduct 32:1.7, 32:1.8(a), and 32:8.4(c) in his representation of client Midwest, and found no rule violations in his representation of client Wild and related entity Catalyst. (App. 67–68).

The Commission recommended that the Court suspend Willey's law license for a period of thirty days. (App. 70).

Willey's Appeal

On February 18, 2021, Willey filed his notice of appeal with the Commission clerk. (App. 71–72).

Statement of the Facts

Willey has a license to practice law in the state of Iowa; he obtained his Iowa license in 1993. (App. 8, 14). Before his admission to practice law in Iowa, Willey was admitted in Missouri and Kansas; he practiced law in Kansas City from 1990 to 1993. (App. 411–12 (Tr. 143:8–144:12)). During the period relevant to the Board's Complaint, Willey resided and maintained his law practice in Linn County, Iowa. (App. 8, 14). Willey's practice focused on tax and business law. (App. 240, 329–30 (Tr. 30:22–31:10), 335 (Tr. 49:2–7), 412–13 (Tr. 144:25–145:3)). Willey also worked as a CPA. (App. 335 (Tr. 49:8–14)).

Between approximately 2005 and 2014, Willey and Wild maintained an attorney–client relationship, and during this time period, the two also became business partners. (App. 336–38 (Tr. 50:15–52:2), 418 (Tr. 169:16–19), 431–32 (Tr. 191:25–192:21)). Willey represented Wild personally and with regard to a number of his business entities and

interests. (App. 8, 15, 336–37 (Tr. 50:20–51:5)). Willey estimated that he created between twenty and thirty companies for Wild over the course of their business relationship. (App. 340 (Tr. 54:24–25)). In March of 2007, Wild signed a Consent and Waiver of conflicts of interest, which Willey drafted. (App. 73–75). This was the only written waiver regarding conflicts of interest or business transactions with a client that Willey wrote for Wild or Wild executed. (App. 338–39 (Tr. 52:25–53:4)).

Willey generated bills for the legal work he did for Wild but did not receive any payment from Wild for the work. (App. 419–20 (Tr. 170:23–171:16)). Willey estimated that the bills exceeded $20,000. (App. 420–21 (Tr. 171:17–172:8)). Willey testified he believed he would be paid for his legal work when Wild completed a successful venture yet could not recall a single successful business venture that he completed with Wild during the course of their nearly ten-year relationship. (App. 430 (Tr. 188:3–24), 432 (Tr. 192:22–24)).

In the summer of 2007, Willey organized Catalyst along with multiple related entities. (App. 76–81, 138–41, 145–47). Willey also served as the attorney for Catalyst. (App. 350 (Tr. 65:4–6)). Catalyst, which Willey organized on August 24, 2007, was made up of two holding companies with equal ownership interests: Orion's Pride, LLC ("Orion's

Pride"), and Braveheart Equity Holdings, LLC ("Braveheart"). (App. 9, 17, 145–75, 348–49 (Tr. 63:7–64:7)). A third holding company, R.O.F. Management, Inc. ("R.O.F."), managed Catalyst. (App. 9, 17, 435 (Tr. 200:17–21)). R.O.F. stood for "reversal of fortune." (App. 345 (Tr. 60:8–10)). Willey explained that Wild had "suffered a setback, as he called it, a reversal of fortune, and he was, you know, getting back on his feet and looking for help to do that." (App. 414 (Tr. 149:7–10)).

Willey organized Orion's Pride on June 19, 2007; Willey was the sole member. (App. 9, 17, 76–78, 341 (Tr. 56:1–19)). Willey organized Braveheart on July 30, 2007. (App. 79–81, 341–42 (Tr. 56:25–57:12)). Although Wild believed he was the sole member of Braveheart, the operating agreement originally drafted by Willey reflected that Willey and Wild had equal ownership interests.[1] (App. 108–09, 343 (Tr. 58:2–9), 435–37 (Tr. 200:22–202:16)). Willey incorporated R.O.F. on July 30, 2007. (App. 9, 17, 138–41). Both Willey and Wild were directors and officers of R.O.F., and each owned equal shares of voting stock. (App. 190,

[1] Willey testified that Wild and his assistant contacted Willey approximately three years later in 2010 and asked him to change the operating agreement to indicate Wild was the sole owner of Braveheart. Willey stated that he did so and sent the revised operating agreement, Exhibit 5, to Wild. (App. 136–37, 343–45 (Tr. 58:16–60:7)).

192, 345–47 (Tr. 60:24–62:10)). Willey, for Orion's Pride, and Wild, for Braveheart, certified an operating agreement for Catalyst with an effective date of August 24, 2007. Willey and Wild each indicated their signatures were "for R.O.F. Management, Inc. Manager." (App. 9, 17, 148, 174–75). Through his ownership interest in the entities he created, Willey indirectly owned at least half of Catalyst. Willey testified that his interest in Catalyst was for the benefit of Wild because Wild "was really struggling to raise any capital, and he needed help, and - - I mean, you know, most of the time when things were in [Wild's] name, he wanted some cover . . . so I filled that role as kind of a block." (App. 423 (Tr. 176:5–12)).

In early 2008, Catalyst located two businesses—Ramis Limited ("Ramis"), based out of England, and Civis Group ("Civis")—to help it generate seed funding for projects. (App. 438–39 (Tr. 206:6–207:9)). Wild believed that in exchange for $300,000, Ramis and Civis could provide discounted standby letters of credit for the benefit of Catalyst and sell them to generate funding for Catalyst, which would lead to funding of $100 million over the course of two years or less. (App. 442–46 (Tr. 210:5–214:1)). The Commission found that neither Wild nor Willey was able to explain satisfactorily this investment strategy. (App.

60). Wild had not previously obtained seed funding as the result of this type of transaction. (App. 445 (Tr. 213:5–8)). Wild had first encountered Rodney Dalton ("Dalton") of Ramis in 2006 or 2007; neither Wild nor Willey had met Dalton in person or previously completed a transaction with Dalton or Ramis. (App. 351 (Tr. 66:2–21), 439–40 (Tr. 207:10–208:9)).

On or about February 18, 2008, Catalyst and Ramis signed a Joint Services Agreement ("JSA"). (App. 9, 18, 183, 189, 353 (Tr. 68:12–17), 441 (Tr. 209:8–12)). Willey acted as Catalyst's legal counsel for the anticipated transaction with Ramis. (App. 176–82, 353–54 (Tr. 68:12–69:13), 441–42 (Tr. 209:13–210:4)).

Catalyst was unable to raise the $300,000 required for the transaction with Ramis in February 2008; however, Catalyst still executed the JSA. (App. 359 (Tr. 76:15–25), 441 (Tr. 209:8–12), 446 (Tr. 214:2–4)). Shortly thereafter, a different opportunity with Ramis arose. Civis was no longer involved, the required amount of funds to be sent to Ramis increased to $500,000, and the amount of funding to be generated increased. (App. 446 (Tr. 214:5–18), 462–64 (Tr. 253:10–255:3)). Catalyst did not sign a new agreement with Ramis reflecting those changes. (App. 446 (Tr. 214:19–21)).

Willey and Wild discussed avenues to obtain funding for this new transaction, and Willey agreed to approach two of his contacts—a representative of Laurus Technologies, Inc. ("Laurus"), and a representative of Midwest—about providing funding to Catalyst. (App. 446–47 (Tr. 214:22–215:14), 448 (Tr. 222:5–8)).

Willey approached the Chief Executive Officer of Laurus, who had been a friend and business partner to Willey, and presented the opportunity. (App. 360 (Tr. 77:5–23), 373–76 (Tr. 91:5–94:23)). Laurus agreed to loan $500,000 to Catalyst for the Ramis transaction. (App. 194–95, 377–79 (Tr. 96:7–98:4)). Laurus wired a total of $500,000 to Willey's client trust account ("CTA") on May 5 and 6, 2008. (App. 212, 331–32 (Tr. 42:2–43:2), 378–79 (Tr. 97:23–98:4)). Wild, as an agent of Catalyst, signed a promissory note for $500,000 that promised to pay Laurus the sum of $625,000 within 90 days. (App. 202–04). Wild also signed a personal guaranty to Laurus. (App. 202–04).

Willey also approached Midwest. (App. 360 (Tr. 77:5–23)). Willey was in an attorney–client relationship with Midwest at this time. (App. 10, 20, 300–02, 366 (Tr. 84:5–8)). Willey had organized Midwest in August of 2007. (App. 142–44, 347–48 (Tr. 62:20–63:6)). Wild did not have any relationship with Midwest at this time and did not communicate

with Midwest about the loan. (App. 449 (Tr. 223:3–21)). Willey arranged a loan in the amount of $200,000 for Catalyst from Midwest. (App. 448 (Tr. 222:5–8), 449 (Tr. 223:12–18)). Midwest wrote a check to Willey's CTA for $200,000 on May 5, 2008; it was deposited into Willey's CTA that same day. (App. 198, 211–15, 366–67 (Tr. 84:9–85:1)).

Wild, as an agent of Catalyst, signed a promissory note for $200,000 that promised to pay Midwest $250,000 within 90 days. (App. 199–201, 369–70 (Tr. 87:21–88:5)). Willey discussed the terms of this note with Midwest and drafted the Midwest promissory note and personal guaranty. (App. 10, 21, 318, 369–70 (Tr. 87:21–88:5), 450–51 (Tr. 225:23–226:12)). Willey did not sign the promissory note. (App. 199–201). Both this note and the Laurus note were "secured by so much of member units owned by [Wild] in WL Partners, LLC holder of a 2.62% equity interest in The IDEA Group, LLC, a bio-fuels company, as required to secure this obligation." (App. 10, 20–21, 199, 202). No documentation of the value of The IDEA Group was presented at the hearing. Willey, who also had an ownership interest in The IDEA Group, was unable to provide specifics about the value of The IDEA Group at the hearing. (App. 371–72 (Tr. 89:8–90:19), 427–28 (Tr. 184:9–185:16)). Wild did not believe a formal valuation of The IDEA Group was done; he relied on Willey's

representations that the interest in the entity was sufficient to secure the notes. (App. 459–60 (Tr. 244:23–245:4), 461 (Tr. 252:3–20)).

Contemporaneously, Wild signed a personal guaranty to Midwest; Wild guaranteed "full, complete and timely performance by [Catalyst] of all obligations of [Catalyst] under the foregoing Promissory Note." (App. 10, 21, 201). Willey did not sign a personal guaranty to Midwest. (App. 199–201). Midwest did not request a financial statement from Wild about his income, assets, and liabilities, and Wild did not provide one. (App. 452–53 (Tr. 227:21–228:2)).

Willey prepared a Consent and Waiver for Midwest at or around the time of the transaction. (App. 10, 21, 300–02, 367 (Tr. 85:11–20)). This was the only document Willey provided to Midwest relating to informed consent with regard to the May 2008 loan. (App. 322–26, 367 (Tr. 85:21–25)). The Consent and Waiver falsely characterized Willey as having only a potential future interest in Catalyst. Neither the Consent and Waiver nor the promissory note between Catalyst and Midwest disclosed that Willey would be a direct beneficiary of cash from the loan.

On May 7, 2008, Willey wired $500,000 to Ramis's account at HSBC Bank in London from his CTA. (App. 11, 27, 207–08, 219–20,[2] 241–43, 332 (Tr. 43:14–19), 381–82 (Tr. 100:14–101:4)). Willey did not know how to collateralize a European transaction; he sent the money without receiving any collateral from Ramis and without retaining counsel overseas to assist with the transaction. (App. 209–10, 357–58 (Tr. 73:24–74:9), 383–84 (Tr. 103:19–104:12), 429 (Tr. 186:1–22)). Catalyst retained $200,000 of the funds received from Laurus and Midwest for operating costs and project development. (App. 453–54 (Tr. 228:9–229:17)).

On or about May 7, 2008, Willey issued a check to himself for $100,000 from the Catalyst subaccount of his CTA. (App. 11, 27, 214, 216, 241, 332 (Tr. 43:3–13), 384–85 (Tr. 104:17–105:8)). He disbursed $50,000 of this sum to Wild and retained $50,000 for himself. (App. 271 (6:20–7:10), 386–87 (Tr. 106:3–107:17), 454 (Tr. 229:6–12)). Willey considered the $50,000 he retained as a loan, but he did not sign a promissory note payable to Catalyst for that amount. (App. 279 (40:2–

[2] Other transactions appearing in the Catalyst subaccount were mistakenly categorized and did not involve Catalyst. (App. 379–80 (Tr. 98:5–99:19)).

18), 388–89 (Tr. 108:8–109:15)). Willey never fully repaid the funds he received from Catalyst.[3] (App. 390–91 (Tr. 110:2–111:8), 455 (Tr. 230:3–19)). Willey testified that he used the $50,000 he retained to pay off his credit card to finance a weeklong trip by Willey, Wild, and Wild's wife to London to meet with Ramis in the summer of 2008. (App. 385–86 (Tr. 105:9–106:2), 401–03 (Tr. 123:19–125:7)). Willey testified he and Wild met with Ramis "for due-diligence purposes" although the meeting occurred well after Catalyst had wired the funds to Ramis. (App. 402 (Tr. 124:6–7)). Neither Willey nor Wild was able to provide additional substantive details about the disposition of the $200,000 Catalyst retained; however, Willey acknowledged his signature on a May 2008 promissory note in favor of Catalyst in the amount of approximately $67,000. (App. 394–97 (Tr. 114:8–117:2), 454–56 (Tr. 229:6–231:1)). At around the same time Willey signed that promissory note, also in May of 2008, Willey paid off a judgment related to credit-card debt totaling $65,000 "plus interest from and after August 15, 2007 at the rate of 5 percent per annum." (App. 311, 313, 355–56 (Tr. 71:14–72:13), 424–25

[3] Willey testified that at some point, several years later, he paid $14,000 back "in several tranches . . . in the form of checks to Dave Wild" but was unsure whether those funds were transferred to Catalyst. (App. 391 (Tr. 111:4–8)).

(Tr. 177:23–178:7)). Willey denied any memory of having borrowed the additional $67,000 from Catalyst. (App. 423–24 (Tr. 176:22–177:3)).

On or about May 12, 2008, Ramis signed a promissory note, which promised to pay Catalyst "[t]he entire amount [$500,000] . . . on or before thirty banking (30) days from the date of receipt by Ramis of [sic] from [Catalyst] or such other date as otherwise agreed between the Parties" with an interest rate of 5.25% per annum. (App. 209–10, 399–400 (Tr. 121:12–122:4)). Pursuant to an addendum to the JSA signed by Dalton, the first pay out from the "investment instrument" would be 14 days after receipt and pay outs would continue on a weekly basis. (App. 206). Ramis did not provide any collateral to secure the promissory note. (App. 11, 28, 210).

On or about May 14, 2008, Willey transferred the remaining $99,965 by check from the Catalyst subaccount of his CTA to Catalyst's account *** 6748 at Banker's Trust; Willey controlled this account. (App. 214, 217, 305–06, 392–94 (Tr. 112:9–114:7), 453–54 (Tr. 228:17–229:5)). This transfer zeroed out the Catalyst subaccount of Willey's CTA. (App. 218–20, 333 (Tr. 45:9–14), 334 (Tr. 46:5–13)). Willey closed the Banker's Trust account on January 11, 2012. (App. 306, 398 (Tr. 118:4–11)). The closing balance was $152.19. (App. 306). Willey was unable to

give an accounting of the proceeds from that account. (App. 394 (Tr. 114:8–10)).

Ramis did not repay Catalyst in accordance with the promissory note, and the $100 million in funding contemplated by the JSA between Ramis and Catalyst never materialized. (App. 400 (Tr. 122:5–18), 457 (Tr. 232:14–18)). Over the next year and a half, Willey sent demand letters on behalf of Catalyst but pursued no other remedies against Ramis. (App. 231–36, 404–05 (Tr. 126:22–127:12), 407–10 (Tr. 134:2–137:13), 457–58 (Tr. 232:24–233:11)). As a result of Ramis's failure to repay Catalyst, Catalyst was unable to repay the loan from Midwest in accordance with the promissory note. (App. 12, 28, 458 (Tr. 233:12–24)).

Argument

I. The Commission Correctly Found Respondent Violated the Rules of Professional Conduct Related to His Representation of Midwest.

A. *Error Preservation and Scope and Standard of Appellate Review*

The Board agrees that Willey preserved this issue for appellate review. The Board agrees with Willey that the scope and standard of appellate review is de novo.

B. Argument

The Commission correctly found that Willey violated the Iowa Rules of Professional Conduct in his representation of client Midwest. On appeal, Willey does not contest the existence of a concurrent conflict of interest in the loan transaction between his clients Catalyst and Midwest, *see* Iowa R. Prof'l Conduct 32:1.7(a)(1)–(2), and he does not argue that the Board failed to prove that he entered into a business transaction with a client, *see id.* r. 32:1.8(a). Rather, Willey focuses on the sufficiency of the evidence concerning informed consent and written disclosures. *See id.* rs. 32:1.7(b)(4), 32:1.8(a)(1)–(3). Because Willey's written disclosures to Midwest were substantively deficient and contained a material misrepresentation, the Court should find Willey violated Iowa Rules of Professional Conduct 32:1.7, 32:1.8(a), and 32:8.4(c).

If a concurrent conflict of interest arises, the attorney can cure the conflict and continue the representation through compliance with Iowa Rule of Professional Conduct 32:1.7(b), which requires the attorney to obtain "informed consent, confirmed in writing" from "each affected client." *Id.* r. 32:1.7(b)(4); *see also id.* r. 32:1.0 cmt. 6 (discussing informed consent and noting: "The lawyer must make reasonable efforts to ensure that the client . . . possesses information reasonably adequate to make an

informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's . . . options and alternatives").

An attorney who enters into a business transaction with a client must comply with the requirements of both rule 32:1.7 and rule 32:1.8(a). *See id.* r. 32:1.8 cmt. 3. Rule 32:1.8(a) requires all of the following written disclosures: (1) "the transaction and terms on which the lawyer acquires the interest" must be "fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;" (2) the client must be "advised in writing of the desirability of seeking . . . the advice of independent legal counsel;" and (3) the client must give "informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction." *Id.* r. 32:1.8(a). The requirements for a waiver of conflict of interest in business transactions with a client are stringent:

> A client simply cannot waive the conflict as a matter of informal routine. The disclosure must include a detailed, situation-specific discussion of the ways that are reasonably foreseeable in which the attorney's conflict could potentially impact that particular client with that particular conflict, along with all of the other required disclosures including how confidential information will be handled.

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Hamer, 915 N.W.2d 302, 322–23 (Iowa 2018). "Commentators have observed that attorneys combining 'the distinct roles of loyal counselor and business participant' in transactions with their clients '[skate] on thin ice and will receive little sympathy in Iowa if the ice should break.'" *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wright*, 840 N.W.2d 295, 301 (Iowa 2013) (alteration in original) (quoting 16 Gregory C. Sisk & Mark S. Cady, *Iowa Practice Series: Lawyer and Judicial Ethics* § 5.8(c), at 373 (2013)).

Willey presented Midwest with a written conflict-of-interest waiver. (App. 300–02). The Midwest Consent and Waiver was deficient for several reasons. Although it mentioned the fact that Willey represented both Midwest and Catalyst, the Midwest Consent and Waiver did not specifically discuss the pitfalls related to representation of both borrower and lender in the transaction. *See* Iowa R. Prof'l Conduct 32:1.8(a)(2)–(3). It did not discuss how the multiple representation could affect Willey's duty of loyalty or explain how confidential

information would be handled between Catalyst and Midwest. *See Hamer*, 915 N.W.2d at 322–23; *see also* Iowa R. Prof'l Conduct r. 32:1.7 cmt. 18 ("When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney–client privilege and the advantages and risks involved."). And it did not fully and accurately disclose the extent of Willey's interest in the transaction. *See* Iowa R. Prof'l Conduct 32:1.8(a)(1), (3) (requiring the transaction and lawyer's interest to be fully disclosed in writing); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Qualley*, 828 N.W.2d 282, 287–89 (Iowa 2013) (finding violations of rules 32:1.7 and 32:1.8 when attorneys claimed to have disclosed to seller that they represented both buyer and seller in transaction but did not obtain informed consent, confirmed in writing to document the disclosure to either party and did not advise either party to seek advice of independent counsel); *see also Wright*, 840 N.W.2d at 297, 301–02 (finding a violation of rule 32:1.8(a) when attorney failed to obtain clients' "written informed consent to the proposition that he held a contingent fee interest" in a supposed Nigerian inheritance claim and was therefore not representing

those clients in the loans he solicited from them to pay taxes owed on the inheritance).

Willey's mischaracterization in his written disclosure to Midwest is particularly concerning because it minimizes his conflict of interest. Willey did not disclose in writing to Midwest the extent of his business relationships with Wild, nor did Willey disclose in writing to Midwest that Willey himself, through ownership of Orion's Pride, held a present—rather than "potential" as disclosed in the Consent and Waiver—ownership interest in Catalyst. (App. 199–201, 300, 322). *See* Iowa R. Prof'l Conduct 32:1.8(a)(1), (3). Willey did not disclose in writing to Midwest that Willey would personally be receiving a significant amount of money from the May 2008 loans to Catalyst. (App. 199–201, 300–02). *See id.* These representations and omissions violate rules 32:1.7 and 32:1.8(a) as well as rule 32:8.4(c). *See id.* r. 32:8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."); *see also Wright*, 840 N.W.2d at 301–02 (finding attorney's failure to disclose his pecuniary interest in a loan transaction violated both rule 32:1.8(a) and rule 32:8.4(c)).

The Midwest Consent and Waiver is similar to a "multiple-client representation letter and consent form" that the Court found insufficient

in *Iowa Supreme Court Attorney Disciplinary Board v. Hamer*. 915 N.W.2d at 307–08, 320. In that case, Hamer represented Paul, who was acting as a private lender, and other clients, who were the borrowers, in several separate transactions. *Id.* at 307–08. Paul signed a multiple-client representation letter for one of the transactions, which the Court described as "lengthy and contain[ing] mostly generalizations," and Hamer prepared a similar letter for one other transaction, although he never obtained Paul's signature on that document. *Id.* The Court found: "Even if Paul had signed this consent form . . . this letter was insufficient to serve as full disclosure because, at the very least, it lacked a specific discussion of the potential pitfalls involved in the transactions at hand." *Id.* at 320; *see also Iowa Supreme Ct. Att'y Disciplinary Bd. v. Clauss*, 711 N.W.2d 1, 2–3 (Iowa 2006) (noting that under the Iowa Code of Professional Responsibility rules related to conflicts of interest, the attorney is required to do more than simply warn clients of a potential conflict and ask for a waiver); *In re Disciplinary Proceeding Against Hall*, 329 P.3d 870, 875 (Wash. 2014) (en banc) (finding waiver provisions in an attorney's engagement letter and a will and trust to be insufficient when the provisions did not explain the lawyer's role in the transaction). Willey asserts that the Board is "nit-pick[ing]" a "multiple-page document

that expressly satisfies the mandates" of the conflict-of-interest rules. (Willey Brief, p. 25). But while the Midwest Consent and Waiver may have been multiple pages, like the *Hamer* disclosures, it did not comply with the rules. Not only did the Midwest Consent and Waiver fail to discuss specifically the pitfalls related to the transaction, but it also affirmatively misrepresented Willey's personal interest in the transaction.

Willey's undisclosed business entanglements with Catalyst were significant and heightened his conflict. As a member of Catalyst, Willey was developing projects with Wild to be funded by the transaction. (App. 229, 406 (Tr. 132:6–22)). If the venture with Ramis was successful, Catalyst anticipated earning up to $100 million over the course of two years. *See Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Wagner*, 599 N.W.2d 721, 727 (Iowa 1999) (finding attorney's financial stake in transaction brought interests into conflict with client who was a party to the transaction and noting: "Given the uncertainty of the value of the restaurant and the lack of offers from other interested parties, the purchase of the restaurant was a risky proposition. In these circumstances [the client] had a right to expect competent, disinterested advice that would allow him to make an informed decision on whether to proceed with the purchase at all. Wagner's own interest, on the other

hand, was to make sure that the sale went through so he could earn his commission."). Willey also personally benefitted from the Midwest and Laurus loans. It appears that Willey received at least $117,552.47 ($50,000 + $67,552.47).[4] And Willey needed money at the time. In May of 2008, Willey had considerable financial liabilities—more than $65,000 in credit card debt, which he was able to pay off just days after receiving money from Laurus and Midwest. (App. 311, 313). Further, Willey knew Wild had financial difficulties, was not employed, and had not completed a successful venture since their relationship began in 2005. (App. 414–16 (Tr. 149:19–151:3), 417 (Tr. 166:7–21), 422–23 (Tr. 175:11–176:12), 430 (Tr. 188:20–24), 432 (Tr. 192:22–24)). Willey's own witness, Matt Novak, the attorney who represented him in the lawsuit initiated by Wild, testified that he knew after a single deposition that although Wild "had a lot of grandiose ideas . . . there wasn't anything of substance behind that." (App. 465 (Tr. 271:1–7), 466–67 (Tr. 273:18–274:2)). Even if Wild was enthusiastic and insistent about completing the Ramis transaction, that

[4] In his testimony, Willey failed to recollect that he had borrowed more than $50,000 from Catalyst until he was reminded of that fact on the witness stand. (App. 396–97 (Tr. 116:7–117:2), 424–25 (Tr. 177:23–178:1), 455 (Tr. 230:20–23)). Similarly, he failed to recollect borrowing any money from clients in his interviews with auditor McGarvey. (App. 238, 240, 328 (Tr. 27:17–24), 329 (Tr. 30:16–21)).

does not mean Willey could abandon his professional responsibilities to Midwest. *See Hamer*, 915 N.W.2d at 320 ("[A]n unconflicted attorney representing the lender in a loan transaction would carefully examine available collateral, advise the client of potential remedies in the event of default, and ensure any security interests supporting the loan were properly perfected."); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Willey ("Willey I")*, 889 N.W.2d 647, 654 (Iowa 2017) ("[O]ur own rules require that a lawyer fulfill certain duties to clients: competence, diligence, and communication. In determining whether an attorney's representation was materially limited, we ask whether the attorney was able to fully perform all of these duties to each of his or her clients." (citation omitted)).

In addition to the insufficiency and inaccuracy of Willey's written disclosures to Midwest, the first requirement of rule 32:1.8(a) was not satisfied because these transactions were not fair and reasonable to Midwest. *See* Iowa R. Prof'l Conduct 32:1.8(a)(1); *see also, e.g.*, *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Lynch*, 901 N.W.2d 501, 507 (Iowa 2017) (finding violation of 32:1.8(a)(1) when attorney in need of money sought and obtained a personal loan from clients and "[t]he interest rates were low for the risk involved, as subsequent events . . . proved"). While

the terms of the promissory note between Catalyst and Midwest were facially reasonable to Midwest, the substance of the transactions themselves were highly questionable. For instance, in the loan between Catalyst and Midwest, only Wild would be liable to Midwest in the event of a default on the promissory note because only Wild signed a personal guaranty to Midwest. Yet Willey failed to obtain a financial statement from Wild to provide to Midwest, despite Willey's knowledge Wild had significant financial liabilities. At the hearing, Willey was also unable to provide accurate details about the value of Wild's interest in The IDEA Group, and according to Wild, Willey never assessed the value. (App. 371–72 (Tr. 89:8–90:19), 427–28 (Tr. 184:9–185:16), 459–60 (Tr. 244:23–245:4), 461 (Tr. 252:3–20)).

In addition, there was a great deal of unassessed risk associated with the related transaction between Catalyst and Ramis. Ramis, a European organization that had never previously consummated a deal with either Willey or Wild, promised an outrageous return on Catalyst's $500,000 investment: a return of the principal within 10 days and a credit line to draw up to $100 million dollars over the course of two years. (App. 196, 205, 361–63 (Tr. 78:11–80:11), 442–46 (Tr. 210:5–214:1)). According to Willey, this type of transaction is subject to "significant

restrictions" in the United States. (App. 426 (Tr. 180:4–15)). Dalton wrote to Willey in May of 2008: "Worst case scenario is that nothing happens but you get your principal returned, in my opinion the odds of nothing happening are zero unless we have another world war." (App. 197). Willey recalled that Ramis was "being fairly high pressure about getting the money moving forward." (App. 364–65 (Tr. 81:21–82:2)). Willey had not met Dalton in person or previously completed a transaction with Dalton and testified he was not sure whether Wild had transacted with Dalton previously; he further stated that he did not have enough information to form any independent opinion of Ramis. (App. 351–53 (Tr. 66:19–68:8), 384 (Tr. 104:4–16)). Wild himself testified he had never obtained project funding as the result of a transaction resembling the Ramis transaction. (App. 445 (Tr. 213:5–8)). Regardless of these glaring red flags, Willey still solicited funding from Midwest on behalf of Catalyst. Even more concerning, Willey almost immediately borrowed a significant amount of the money Catalyst obtained, a fact that was not disclosed in writing to Midwest. *See Att'y Grievance Comm'n v. McLaughlin*, 813 A.2d 1145, 1168 (Md. 2002) (noting that "to sustain a transaction of advantage to himself with his client, the attorney has the burden of showing, not only that he used no undue influence, but that he gave his client all the

information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger" (quoting *Att'y Grievance Comm'n v. Snyder*, 793 A.2d 515, 529 (Md. 2002))).

Willey has placed the blame for moving forward with the Ramis-related transactions on Wild, characterizing himself as a naïve attorney who relied upon the representations of his client, an experienced businessman. (App. 350 (Tr. 65:9–12), 414 (Tr. 149:3–10), 430 (Tr. 188:8–10)). But Willey was the participant with experience. He had been practicing law for nearly twenty years and specialized in business law. (App. 8, 14, 240, 329–30 (Tr. 30:22–31:10), 335 (Tr. 49:2–14), 411–12 (Tr. 143:8–144:12)).

Willey emphasizes that "the lone piece of purported evidence" presented by the Board in support of its violations concerning Midwest is Exhibit 43, the Midwest Consent and Waiver. (Willey Brief, p. 12). This is not accurate. Nonetheless, the Midwest Consent and Waiver, which Willey testified was his attempt to comply with the requirements of the conflict-of-interest rules, (App. 368–69 (Tr. 86:20–87:9)), as well as the

promissory note between Catalyst and Midwest, Exhibit 20, are central pieces of evidence in this matter. (App. 199–201, 300–02).

Willey argues that the disclosures required by the conflict-of-interest rules need not be entirely in writing. This is incorrect. As noted in *Hamer*, oral disclosures are insufficient under the current Rules of Professional Conduct. *See* 915 N.W.2d at 319–20. In that matter, some of the conflict-of-interest violations occurred after Iowa's transition to the Rules of Professional Conduct and some occurred before. *Id.* At the hearing, Hamer and his client disagreed about the oral disclosures made, and the Court noted that unlike rule 32:1.7, the predecessor conflict-of-interest rules, DR 5–105(B)–(D), did not require informed consent to be confirmed in writing.[5] *Id.* at 319. With respect to the transactions occurring after the change to the current rules, the Court looked to Hamer's written disclosure and found it was insufficient because it failed to include the "required specific, in-context assessment of the pitfalls that

[5] Both of the other cases cited by Willey in support of his assertion that the conflict-of-interest requirements may be satisfied by oral discussions—*Iowa Supreme Court Attorney Disciplinary Board v. Wintroub*, 745 N.W.2d 469, 474 (Iowa 2008), and *Iowa Supreme Court Board of Professional Ethics & Conduct v. Wagner*, 599 N.W.2d at 727–28—similarly involve the predecessor rules that lack the "in writing" requirement.

might arise in the course of the loan" that would make the advice of independent counsel desirable. *Id.* at 320. Willey emphasizes that the *Hamer* case uses the term "discussion" in analyzing the informed consent requirement and argues that discussion is oral. (Willey Brief, p. 13). But *Hamer* clearly contemplates a full written disclosure and uses the term "discussion" in reference to the written informed-consent letter:

> With respect to the transaction that occurred after July 2005, it is undisputed that Hamer did not obtain informed consent from Paul confirmed *in writing* as required by rule 32:1.7(b). We note that Hamer prepared a multiple-client representation letter and consent form for this transaction, but this letter was not signed by Paul. . . . Even if Paul had signed this consent form, as we explained above with respect to the prior, similar informed-consent letter, this letter was insufficient to serve as full disclosure because, at the very least, it lacked a specific *discussion* of the potential pitfalls involved in the transactions at hand.

Id. (second emphasis added); *see also id.* at 322 ("While the code and the rules allow a client to waive the conflict of interest, the onerous burden of ensuring documentary evidence of good faith and full disclosure should make such business transactions the exception rather than the rule."); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Powell*, 901 N.W.2d 513, 516 (Iowa 2017) ("In short, the rule requires (1) fair terms that are fully disclosed, (2) advice on independent counsel and the opportunity to obtain it, and (3) informed consent. These requirements must each be

evidenced in writing."). Because of the writing requirement in the conflict-of-interest rules, speculation beyond the record is not required to find a rule violation pertaining to Midwest as Willey suggests. Not only is the Midwest Consent and Waiver insufficient because it fails to include a "specific, in-context assessment of the pitfalls that might arise" but also because it mischaracterizes Willey's interest in the loan transaction.

Willey carries the burden of demonstrating that he acted in good faith and made full disclosures in his business transactions with clients. *See* 915 N.W.2d at 322. He has not carried that burden. Willey states that he could not defend himself because he could not testify further about his discussions with Midwest. In support of his contention that he could not provide additional information about his required conflict-of-interest disclosures to Midwest, for the first time on appeal, Willey cites Iowa Ethics Opinion 15-03, which concluded an attorney may not rely upon the implied waiver of self-defense related to the attorney–client privilege or rule of confidentiality regarding claims made against the lawyer by third parties absent the client's expressed written consent or order of the court. *See* Iowa Ethics Op. 15-03, at 8 (July 15, 2015). But because written, rather than oral, disclosures are what are required to satisfy the conflict-

of-interest rules, Willey was not hampered by his choice not to testify about his discussions with Midwest as he now insists.

Moreover, Willey was permitted to defend himself by the plain language of Iowa Rule of Professional Conduct 32:1.6(b)(5), which provides:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . .
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Iowa R. Prof'l Conduct 32:1.6(b)(5); *see also In re Dyer*, 817 N.W.2d 351, 358 (N.D. 2012) ("Dyer and Summers claim this exception only applies in cases or controversies between an attorney and his or her client, and therefore it does not apply in this case because none of their clients filed a disciplinary complaint. Under the plain language of the rule, however, we conclude the exception is not limited to controversies between the lawyer and his or her client."). Comment 10 to rule 32:1.6 clarifies that the right to reveal information extends to the disciplinary process:

> Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the

> client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client.

Iowa R. Prof'l Conduct 32:1.6 cmt. 10; *see also Iowa Supreme Ct. Att'y Disciplinary Bd. v. Marzen*, 779 N.W.2d 757, 766 (Iowa 2010) (noting that comment 10 "makes clear that the ability to defend arises in criminal and civil proceedings, including disciplinary actions").

The Board relies on the language of rule 32:1.6(b)(5) rather than Ethics Opinion 15-03, which is not binding.[6] Sisk and Cady offer a succinct critique of Ethics Opinion 15-03, noting:

> Iowa Ethics Opinion 15-03 goes awry by suggesting that lawyers who are facing civil claims, criminal charges, or professional discipline must engage in an implied waiver analysis before using confidential information in self-defense. Rather, subparagraph (b)(5) is an *exception* to confidentiality. . . . In the genuine self-defense situation, the lawyer may use confidential information as reasonably necessary to protect herself, even if the client expressly objects.

16 Gregory C. Sisk & Mark S. Cady, *Iowa Practice Series: Lawyer and Judicial Ethics* § 5:6(j) (June 2021 Update). As noted in North Dakota

[6] Pursuant to an April 21, 2005, Resolution of the Iowa Supreme Court, ethics opinions issued by the Iowa State Bar Association Committee on Ethics and Practice Guidelines are advisory and non-binding.

disciplinary proceeding *In re Disciplinary Action Against Dyer*, other authorities have similarly interpreted parallel language from the Model Rules of Professional Conduct to permit disclosure of information related to the representation of a client in all proceedings concerning the lawyer's representation of the client, "including proceedings where the controversy is not between the attorney and his or her client." 817 N.W.2d at 358 (collecting authorities).

Willey likewise recognized the rule 32:1.6(b)(5) exception to confidentiality when he used the Midwest Consent and Waiver in his defense as evidence of his required disclosures. (App. 319; Exh. E). After relying on the Consent and Waiver, Willey cannot now credibly claim that he was unable to defend himself.

The Board's cases almost always involve matters relating to a lawyer's misconduct in representing a client, but those complaints come from a variety of sources, including not only the attorney's client but opposing parties, other attorneys, judges, and the Board itself. In fact, lawyers have an ethical obligation to report professional misconduct. *See* Iowa R. Prof'l Conduct 32:8.3; *see also id.* r. 32:8.3 cmt. 1 ("Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Iowa

Rules of Professional Conduct. . . . An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense."). Here, the complaint came from one of two clients that participated in a business transaction with Willey. On its face, the Midwest Consent and Waiver is inadequate and contains a misrepresentation. It would run contrary to the Board's public-protection function to ignore apparent rule violations simply because the attorney's client has not complained.

Because the record as a whole demonstrates that Willey's written disclosures to Midwest were insufficient and contained a material misrepresentation, the Court should find Willey violated Iowa Rules of Professional Conduct 32:1.7, 32:1.8(a), and 32:8.4(c).

II. The Commission Properly Considered Willey's Prior Discipline in Its Sanction Recommendation of a 30-Day Suspension.

A. Error Preservation and Scope and Standard of Appellate Review

The Board agrees that Willey preserved this issue for appellate review. The Board agrees with Willey that the scope and standard of appellate review is de novo.

B. Argument

After careful consideration of aggravating and mitigating factors, discipline orders in similar cases, and a previous disciplinary matter concerning Willey, the Commission recommended that the Court suspend Willey's license for thirty days. (App. 69–70). *See* Iowa Ct. R. 36.19(1). In coming to this recommendation, the Commission properly determined that Willey's previous discipline was not an aggravating factor because the events that formed the basis for the previous discipline occurred after the events in the underlying matter. (App. 69). Because Willey's previous disciplinary suspension would have been greater than sixty days if the two disciplinary matters were brought together, a suspension of at least thirty days is warranted here.

The Court does not impose a standard sanction for each type of misconduct in attorney disciplinary cases. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Clarity*, 838 N.W.2d 648, 660 (Iowa 2013). Rather, the Court considers the totality of the facts in a particular case, including "the nature of the violations, the need for deterrence, protection of the public, maintenance of the reputation of the bar as a whole, and the attorney's fitness to continue practicing law, as well as any aggravating or mitigating circumstances." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Bartley*, 860

N.W.2d 331, 337 (Iowa 2015). Although the Court considers every case individually, it is guided by prior cases involving similar circumstances in determining the appropriate sanction. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Jacobsma*, 920 N.W.2d 813, 822 (Iowa 2018).

The Court suspended Willey's license for sixty days on January 27, 2017, related to a 2010 transaction involving a concurrent conflict of interest. (App. 244–66). *See also Willey I*, 889 N.W.2d 647. That matter involved a transaction between a business owned by Wild—Synergy: Projects, Inc. ("Synergy")—and another of Willey's clients—Henry J. Wieniewitz, III ("Wieniewitz"). (App. 247–48). *Id.* at 650. Unlike Catalyst, it does not appear that Willey had any ownership interest in Synergy, and Wild's 2007 Consent and Waiver explicitly included Synergy as an entity of Wild's. (App. 73–75, 247–249). *Id.* at 650–51. The disciplinary proceedings arose out of Wieniewitz's complaint to the Board and focused on the concurrent conflict of interest related to Willey's representation of Synergy and Wieniewitz and Willey's failure to obtain Wieniewitz's informed consent. (App. 247–52). *Id.* at 649–52. The Court found Willey had violated Iowa Rules of Professional Conduct 32:1.7(a)(2) and 32:1.7(b)(4). (App. 247). *Id.* at 649.

"Willey told Wieniewitz that other clients of his had been involved with the same or similar investment opportunities and that it was a safe and common investment." (App. 248). *Id.* at 650. The transaction itself bears many similarities to the investment opportunity in the underlying proceeding. Wieniewitz loaned Synergy $100,000; pursuant to the promissory note terms, the original investment would be returned within forty-five days with additional $100,000 payments every forty-five days until he had received $400,000. (App. 248–49). *Id.*

According to Wieniewitz, Willey never told him that Wild and Synergy were Willey's clients. (App. 248–49). *Id.* Willey did not obtain informed consent from Wieniewitz, he did not confirm in writing any potential conflict of interest with Wild and Synergy, and he did not recommend Wieniewitz consult with independent counsel. (App. 248–49). *Id.* at 651. Despite Willey's repeated assurances to Wieniewitz over the course of the next year and a half, Wieniewitz never received any repayment from Synergy. (App. 250–51). *Id.* at 651–52.

As recognized by the Commission, although *Willey I* resulted in public discipline before the present proceedings, it is not prior discipline that would qualify as an aggravating factor here. To constitute prior discipline, the Court must have found Willey's prior misconduct violated

the Rules of Professional Conduct and sanctioned him before he committed the conduct giving rise to the current proceeding. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Noel*, 933 N.W.2d 190, 205 (Iowa 2019). Here, both the misconduct giving rise to *Willey I* and the sanction issued by the Court occurred after the conduct at issue in the current proceeding.

Regardless, *Willey I* must be considered in the sanction determination. The Court described the appropriate analysis at length in *Iowa Supreme Court Attorney Disciplinary Board v. Moorman*, 729 N.W.2d 801 (Iowa 2007). In that matter, the Court imposed a public reprimand for various ethical violations between 2001 and 2004 when Moorman had already been suspended for two years following neglect of a client matter in 2002 and remained suspended at the time of the second proceeding. 729 N.W.2d at 803–06; *see also Iowa Supreme Ct. Att'y Disciplinary Bd. v. Tindal*, 949 N.W.2d 637, 644–45 (Iowa 2020) (issuing a second public reprimand when attorney received thirteen default notices, when four defaults occurred after prior reprimand for the same misconduct); *Noel*, 933 N.W.2d at 13, 205–06 (issuing a public reprimand for various ethical violations, primarily related to neglect of a client matter, when attorney had already been suspended for one year related

to submitting fees for services he did not perform and mileage he did not incur as a contract attorney for the state public defender's office). The Court reasoned that a suspension was not warranted under the circumstances, concluding:

> 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.

729 N.W.2d at 806.

The Board agrees with Willey that the Court must undergo this same analysis and determine whether a suspension greater than sixty days would have been warranted if it had been aware of the conduct that is the subject of this proceeding at the time of *Willey I*. (Willey Brief, p. 20). Willey's previous discipline and the underlying proceedings reflect a troubling practice by Willey over the course of multiple years. Willey took advantage of his role in his attorney–client relationships by presenting clients with dubious investment opportunities, failing to disclose his interest in the transactions, and failing to obtain informed consent. Considering the *Moorman* inquiry in conjunction with a review of prior

disciplinary matters involving conflicts of interest, as well as aggravating and mitigating factors, the Court should now suspend Willey's license.

Past disciplinary cases in Iowa involving conflicts of interest support a suspension in this case. Generally, matters involving conflicts of interest have resulted in license suspensions ranging from sixty days to four months. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Stoller*, 879 N.W.2d 199, 219 (Iowa 2016) (collecting cases). However, longer suspensions have been issued for "more severe violations and in cases where multiple violations have occurred." *Id.*; *see Hamer*, 915 N.W.2d at 325 (collecting cases and noting that the Court had imposed a sixty-day suspension in *Willey I* for a single conflict-of-interest violation and that aggravating factors or multiple conflicted transactions warranted lengthier suspensions); *see also, e.g.*, *Wright*, 840 N.W.2d at 299, 303 (suspending an attorney for twelve months after he convinced several clients to lend money to another client for a loan scam when attorney also had a financial interest in the transaction and failed to make competent analysis of the transaction).

For instance, in *Iowa Supreme Court Board of Professional Ethics & Conduct v. Wagner*, the Court imposed a three-month suspension when Wagner violated conflict-of-interest rules in a single real estate

transaction. 599 N.W.2d at 723; *see also Qualley*, 828 N.W.2d at 285–89, 294 (suspending two attorneys for sixty days when they claimed to have disclosed to seller that they represented both buyer and seller in transaction but did not obtain informed consent, confirmed in writing, to document the disclosure to either party and did not advise either party to seek advice of independent counsel). Wagner represented both the buyer and seller in the real estate transaction. 599 N.W.2d at 723–24. Wagner additionally had a financial interest; the seller agreed to pay him a commission of the sale price. *Id.* Wagner informed the buyer and seller that he represented them both and he informed one party about a possibility of a conflict, but he did not advise his clients what possible conflicts could arise and why independent counsel was advisable. *Id.* at 729. Wagner also failed to disclose his financial interest in the transaction to the buyer. *Id.* at 728. In determining the appropriate sanction, the Court emphasized Wagner's failure to reveal his personal interest in the transaction, noting:

> Every client has the right to expect that his attorney is . . . not someone with a secret personal interest in the outcome of the client's case. Clients do not pay legal counsel for advice and representation which is or may be affected by counsel's own interests in the matter, and clients have a right to know not only whether an attorney has any interest in the subject matter of the representation, but also, if he has an

> interest, exactly what that interest is and how it may affect his judgment in their case.

Id. at 730 (alteration in original) (quoting *Office of Disciplinary Counsel v. Wittmaack*, 522 A.2d 522, 528 (Pa. 1987)). The Court also found client harm, even though speculative, and Wagner's experience supported the imposed sanction. *Id.* ("Had Childers known the true facts and received the independent legal advice he was entitled to, he might never have purchased the restaurant and suffered the financial loss that he did. Although this may be speculative, the fact remains that Wagner's dual representation and cover-up denied Childers the opportunity to make an informed choice.").

The Court imposed a longer six-month suspension in *Iowa Supreme Court Attorney Disciplinary Board v. Clauss*, a matter that also involved a single conflict-of-interest violation,[7] when an attorney represented both parties in a loan without obtaining informed consent. 711 N.W.2d at 2–4. Clauss did write a letter to both parties asking them "to waive any conflict I may have" related to the dual representation, but this was not sufficient to constitute informed consent. *Id.* at 2. The Court found aggravating

[7] The conflict-of-interest rules at issue, DR 5–101(A), DR 5–105(C), and DR 5–105(D), were in effect before the current Iowa Rules of Professional Conduct. *See Clauss*, 711 N.W.2d at 4.

factors—Clauss's prior discipline and the fact that Clauss "benefited financially from his representation of a second client at the expense of the first"—warranted the lengthier sanction. *Id.* at 4–5.

Similarly, in *Hamer*, the Court imposed a six-month suspension when Hamer violated conflict-of-interest rules related to several loan transactions occurring between multiple clients of Hamer without adequate conflict-of-interest disclosures and informed consent. 915 N.W.2d at 305–06. Hamer also engaged in deceit in connection with a bonus payment he received for legal work. *Id.* at 306. In its decision to impose a six-month suspension, the Court found significant that the matter involved multiple conflict-of-interest violations over the course of several years and that the bonus payment violation involved deceit. *Id.* at 325–26.

These past disciplinary cases support a finding that a suspension should be imposed in this matter because they demonstrate that factors such as multiple conflict-of-interest violations, deceit, and harm to clients have generally resulted in suspensions of greater than the sixty days imposed by the Court in *Willey I*. Had the Court been aware of the underlying matter at the time of *Willey I*, its decision would have

considered these factors, and accordingly, the Court would have imposed a sanction of greater than sixty days.

Willey cites *Moorman*, *Noel*, *D'Angelo*, and *Tindal* in support of his argument that the Court should impose either a public reprimand or private admonition in this matter. However, a more serious sanction is appropriate here.

The nature of the violation matters. While neglect violations such as those in *Noel*, *Moorman*, and *Tindal* typically require a pattern of consistently failing to perform professional obligations, even a single conflict-of-interest violation often results in a suspension. *Compare Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Moorman*, 683 N.W.2d 549, 551 (Iowa 2004) (noting that neglect involves "a *consistent* failure to perform those obligations that a lawyer has assumed, or a conscious disregard for the responsibilities a lawyer owes to a client" (emphasis added)); *with Hamer*, 915 N.W.2d at 325 (listing cases involving license suspensions for conflict-of-interest violations arising out of a single transaction). Notably, in *Tindal*, the Court additionally relied upon the lack of precedent for a license suspension based upon the type of misconduct at issue in the case—"default notices cured without dismissal of the appeal"—in its decision to impose a public reprimand. *See* 949

N.W.2d at 645; *see also id.* at 644 ("In our view, given Tindal's nearly unblemished disciplinary history in 2018 . . . he still would have received a public reprimand for the series of default notices with no client harm, whether in sixteen or twenty-five appeals."). Unlike *Tindal*, the case law supports a suspension here.

In addition, the character of the initial sanction is significant. In *Moorman*, *Noel*, and *D'Angelo*, the Court emphasized that the respondent attorney had previously received a substantial suspension that remained in effect at the time of the second proceeding. *See, e.g.*, *Noel*, 933 N.W.2d at 206 (previously suspended for at least one year); *Moorman*, 729 N.W.2d at 806 (previously suspended for two years); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. D'Angelo*, 652 N.W.2d 213, 215 (Iowa 2002) (previously suspended for three years; imposed suspension of one year to run concurrently with previous suspension). All of these respondent attorneys had to apply for reinstatement and satisfy conditions in order to return to the practice of law. *See generally* Iowa Ct. Rs. 34.23 (suspension), 34.25 (reinstatement). In fact, at the time of the second disciplinary proceedings, it was not clear that the respondent attorneys would ever take the necessary steps to return to practice. Conversely, Willey's initial sixty-day suspension was relatively short, his

reinstatement from that suspension was automatic, and his license is currently active. Unlike *Moorman*, *Noel*, and *D'Angelo*, a suspension in this matter would serve as a deterrent, protect the public, and maintain the reputation of the bar.

A review of aggravating and mitigating factors similarly supports a suspension. *See, e.g.*, *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Earley*, 774 N.W.2d 301, 309 (Iowa 2009) (revoking attorney's license although misappropriation occurred in the same time frame as misconduct, including trust account violations, for which he was previously disciplined); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Ireland*, 748 N.W.2d 498, 503 (Iowa 2008) (suspending attorney's license because of aggravating circumstances although attorney had previously been suspended because of neglect and similar violations in the subsequent proceeding occurred before the earlier suspension). At the time of the relevant underlying events, Willey was an experienced attorney and CPA, who specialized in tax and business law and who had been practicing law for eighteen years. (App. 411–13 (Tr. 143:11–145:8)). *See Willey I*, 889 N.W.2d at 658 ("Willey was also an experienced attorney and CPA who had been practicing for many years. We consider the experience of an attorney to be an aggravating factor."); *see also Wagner*, 599 N.W.2d at

730 (finding sixteen years' experience with heavy emphasis in real estate to be aggravating factor in case involving conflicts of interest in real estate transaction). Although Willey was cooperative with the Board's investigation, *see Qualley*, 828 N.W.2d at 294 (finding cooperation with the Board to be mitigating), the Commission also noted that Willey was "somewhat vague in his testimony before the panel" and had several credibility issues. (App. 64–65, 69). *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Nine*, 920 N.W.2d 825, 829 (Iowa 2018) ("[I]t is an aggravating circumstance that Nine was initially evasive about her misconduct and did not admit regret.").

In addition, this matter involves client harm. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Weiland*, 885 N.W.2d 198, 215 (Iowa 2016). Although Willey himself received a significant amount of money from the transactions, Midwest lost $200,000. Willey asserts there was no credible admissible evidence to support that Midwest lost any money. (Willey Brief, p. 24). But Willey himself admitted that Catalyst did not repay Midwest, and Wild testified that Catalyst did not pay its promissory note to Midwest and that he had not paid Midwest under the terms of his personal guaranty. (App. 12, 28, 458 (Tr. 233:12–24)).

Issuing a sanction short of a suspension in this matter as Willey urges would undermine the disciplinary system as a whole. Allowing serious misconduct to be sanctioned with a public warning undermines public confidence in the profession. It is also unfair to other attorneys because it treats similar misconduct differently based upon the timing of the Board's receipt of complaints. If the underlying matter was brought at the same time as *Willey I*, a suspension of greater than sixty days would have been warranted. But the Board did not receive the underlying complaint until January of 2018, approximately one year after the Court issued its suspension order in *Willey I*. (App. 433–34 (Tr. 193:21–194:18)). Our disciplinary system is complaint-driven and confidential until very late in the process. An attorney should not receive a different sanction just because two people happened to file complaints at approximately the same time rather than spaced apart. Not only is such a result unfair to other attorneys and to the public, but it punishes expediency in the disciplinary process by the Board, whose goal is to try cases in a timely manner rather than gather all possible complaints against an attorney before proceeding, and incentivizes delays by the respondent attorney, who may seek to delay responding to newer complaints when another is pending.

In consideration of all of these factors, the Court should impose a suspension of at least thirty days.

Conclusion

Based on the record as a whole, the Court should conclude that Willey violated Iowa Rules of Professional Conduct 32:1.7, 32:1.8(a), and 32:8.4(c) and suspend his law license for at least thirty days.

Request for Nonoral Submission

The Board requests submission of the case without oral argument.

Iowa Supreme Court
Attorney Disciplinary Board

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July 15, 2021 /s/ Allison A. Schmidt