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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 REPLY BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DID THE GRIEVANCE COMMISSION ERR IN FINDING RESPONDENT VIOLATED RULES OF PROFESSIONAL CONDUCT IN HIS REPRESENTATION OF MIDWEST?

In re Disciplinary Action Against Dyer, 817 N.W.2d 351, 359 (N.D. 2012)

II. DID THE GRIEVANCE COMMISSION ERR IN FINDING RESPONDENT'S PRIOR SUSPENSION WOULD HAVE BEEN MORE SEVERE?

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Clauss, 711 N.W.2d 1, 4 (Iowa 2006)

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Tindal, 949 N.W.2d 637, 644 (Iowa 2020)

Iowa Supreme Court Attorney Disciplinary Bd. v. Noel, 933 N.W.2d 190 (Iowa 2019)

APPELLANTS' ARGUMENTS

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

REPLY ARGUMENT

The parties' respective positions on this issue center on what is required by the "in writing" waiver of conflict in the Rules of Professional Conduct. *Iowa R. Prof'l Conduct* 32:1.8. According to the Board's interpretation of this requirement, nothing could ever be enough.

The Rule specifically states the following:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives 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.

Iowa R. Prof'l Conduct 32:1.8.

Despite the Rule's very general requirements for what needs to be writing, the Board spends a majority of its Brief arguing that the Consent and Waiver provided to Midwest was deficient. The truth is, such an expansive, impossible-to-attain standard is not required. The Commission, in its Order, identified the Respondent's more general burden: "[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). This standard does not require that every single potential scenario, pitfall, interest, or other aspect of the possible conflict be memorialized in writing. Truly this undertaking would be impossible.

In addressing the Respondent's argument that the more generalized requirement contemplates considerable oral discussions (and naturally it must), the Board cited to Comment 18 of an altogether different Rule! (Board's Proof Brief, p. 26) This Comment, assuming it has an applicability to the "inwriting" requirement of the Rule in question, states:

> *Informed Consent*
>
> [18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that

> client. *See* rule 32:1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. 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. *See* comments [30] and [31] (effect of common representation on confidentiality).

Iowa R. Prof'l Conduct 32:1.7 (cmt. 18)

While this Rule does contemplate an "in writing" requirement, the contained "information" of that written memorialization fluctuates and decidedly contemplates attendant discussions. Respondent believes the "in writing" requirement contemplates a memorialization that the required information has been communicated, not that every single potential facet be reduced to writing-again, this would be impossible.

Second, the Board admits it is required to speculate to support a finding of a violation against Respondent. For example, the Board argues that the first prong of the Rule is not satisfied because the transaction was not fair and reasonable to Midwest. (Board's Proof Brief, p. 32) However, in supporting this contention, the Board cites only to Wild's testimony. Whether or not this transaction was fair and reasonable to Midwest involves a much more involved analysis. This obviously contemplates subjective information and analysis from Midwest-something wholly missing from the record. In stating

that there is a "great deal of unassessed risk," the Board is forced to speculate as to what assessment was or was not conducted by Midwest. Again, no one from Midwest testified. The record is void of any evidence to support the Board's claim.

Next the Board claims that Respondent's reliance on the attorney-client privilege as a bar to presenting evidence contrary to the speculation and conjecture necessary to support the finding of a violation is improper. (Board's Proof Brief, pp. 37-39) In support thereof, the Board appears to argue that Respondent could simply abandon the attorney client privilege as he saw fit and cited a North Dakota case in support of this contention. This is all wrong and misplaced thinking: under Iowa law, North Dakota law, and presumably all law, a lawyer must make a preliminary series of determinations. Most of these focus on the necessity and depth of what to disclose. Frankly, in addition to the authority cited by Respondent, the North Dakota Court cited by the Board[1] stated it properly:

> *Although Dyer and Summers were permitted to disclose information under Rule 1.6(c)(4), they were* ***only permitted to reveal*** *information relating to the representation of a client* ***to the extent they reasonably believed was necessary to respond to the allegations****. See N.D.R. Prof. Conduct 1.6(c). Official comment 14 to Rule 1.6 provides:*

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[1] Not surprisingly this portion of the North Dakota case was absent from the Board's Brief.

> *[P]aragraph (c) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest* ***should be no greater than the lawyer reasonably believes necessary to accomplish the purpose****. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.*

In re Disciplinary Action Against Dyer, 817 N.W.2d 351, 359 (N.D. 2012).

Here, Wild, an illegitimate and discredited former client, made complaints to the Board. Midwest and its principals were contacted by the Board as part of their investigation and apparently did not offer any "allegations" independent of what Wild made. The summary claims put forth by the Board originally contemplated alleged complaints from Midwest. As the record reflects, Midwest had no such "complaints." Respondent was not only correct in his determination not to abandon Midwest's privilege, but a complaint from a competing geographical investor should not serve as grounds for such an abandonment.

Finally, the Board's many legal authority citations ***ALL*** contemplate the scenario of a complaining client. Although the Board argues that the Rules

contemplate situations where the complainant is not the client[2], not once does the Board cite any legal authority for a case where a conflict waiver was insufficient without evidence from a client (complaining or otherwise). This is for good reason, as the Rules specifically evaluate what was disclosed to the client (written and oral) and what the client understood. Absent evidence from the client, the Board cannot carry its burden on these matters without speculation and conjecture.

The Commission erred in finding violations of the Rules.

II. THE GRIEVANCE COMMISSION ERRED IN RECOMMENDING A SUSPENSION.

ARGUMENT

The Board's argument can be summarized as follows: "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." (Board's Proof Brief, p. 42) The Board's general argument, and legal authority in support there of are not persuasive.

First the Board claims that a longer suspension is warranted under the *Clauss* case (*Iowa Sup. Ct. Atty Disciplinary Bd. V. Clauss*, 711 N.W.2d 1

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[2] See Board Proof Brief, pp. 40-41.

(Iowa 2006). However, this case is clearly distinguishable. As the Court determined in that egregious matter:

> We also consider prior discipline. In 1989 Clauss was suspended for six months for income tax violations, making false statements to our client security commission, failing to properly monitor a client's trust account, and commingling his clients' money with his office account. In 1991 he was reprimanded for obtaining a default judgment, based on a material misrepresentation of fact, against a collection debtor who had already paid the account. In 1995 he was suspended for a minimum of three years for falsely signing his wife's name to a return of service, falsely notarizing it, and for withdrawing a client's trust funds to pay his own fees, even though the fee was disputed. In that case, we expressed this concern about the future of the respondent's law practice:
>
> If and when Clauss applies for readmission he should be prepared to convince us he will pose no threat to the public or to the reputation of the legal profession.

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Clauss, 711 N.W.2d 1, 4 (Iowa 2006)(internal citations omitted). At the risk of sounding flippant, the *Clauss* case bears no resemblance to this matter and actually supports the Respondent's view. The Board ***admits*** the conduct at issue in this case occurred after the conduct Respondent was previously suspended for. (See Board's Proof Brief, p. 45) Had Respondent's current conduct come after his significant suspension, the analysis may be different; it did not. *Clauss* is by no means instructive in this case.

Moreover, the Board's minimization of the Court's recent *Tindal* case is telling. There, the Court stated:

> ***Sequence matters***. *See id.* ("We believe the timing of the present violations has bearing on the sanction."). 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.

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Tindal, 949 N.W.2d 637, 644 (Iowa 2020)(emphasis added). Sequence does matter! In this case, again assuming there is a supportable violation here, the issue pales in comparison to that which he was suspended for.

Finally, it is important to address the Board's contention that anything "short of a suspension in this matter as [Respondent] urges would undermine the disciplinary system as a whole." (Board's Proof Brief, p. 55) This is simply not true. In this segment of the Brief, the Board suggests that the Court apparently do away with the firmly established (and fair) rule that "sequence matters." The *Tindal* case is barely nine (9) months old and the Board would have the Court do away with that analysis-a commonsense analysis that has decades of roots with the Supreme Court. Respondent, of course, disagrees.

A further suspension for Respondent here is not needed to protect the public. The Complaint in this case, and vast majority of the evidence presented, was based on a debunked client complaint. Respondent has made clear that he has corrected his conflict practices, avoided client business entanglements, and we do not have a complaining client in this instance. No further suspension is necessary.

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 6.093(2)(i).

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

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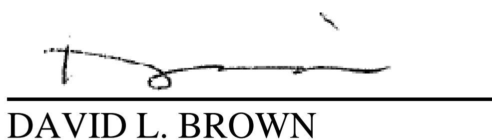

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July 15, 2021
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