IN THE SUPREME COURT FOR THE STATE OF IOWA
No. 21-1799
Grievance Commission No. 923

IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD,
Complainant/Appellee,

vs.

ANDREW GATTON AEILTS,
Respondent/Appellant.

Appeal from the Iowa Supreme Court Grievance Commission
Julie Bussanamas, President, 643rd Division

Appellant's Page Proof Brief and Oral Argument Request

Matthew M. Boles
Adam C. Witosky
GRIBBLE BOLES STEWART & WITOSKY LAW
2015 Grand Avenue, Suite 200
Des Moines, Iowa 50312
Telephone: (515) 235-0551
Facsimile: (515) 243-3696
mboles@gbswlaw.com
awitosky@gbswlaw.com
ATTORNEYS FOR COMPLAINANT/APPELLANT

CERTIFICATE OF FILING AND SERVICE

I hereby certify e-filing of Appellant's Fianl Brief via EDMS on February 21, 2022, with the following counsel served by EDMS:

Tara Van Brederode
Crystal W. Rink
Attorney Disciplinary Board
1111 East Court Ave
Des Moines, IA 50319
ATTORNEYS FOR COMPLAINANT/APPELLEE

I hereby certify on February 21, 2022, the Appellant's Final Brief was served on Appellant.

/s/ Stephanie Sutherland
Stephanie Sutherland

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ROUTING STATEMENT

Matters of attorney discipline must be retained by the Iowa Supreme Court. Iowa Ct. R. 35.10.

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal by Andrew Aeilts pursuant to Iowa Ct. R. 35.11(1), seeking review of the November 30, 2021 Findings of Fact, Conclusions of Law, and Recommendation entered by the 643rd Division of the Iowa Supreme Court Grievance Commission.

II. Procedural History

On April 27, 2021, the Iowa Supreme Court Disciplinary Board filed a Complaint alleging Andrew had violated Rules 32:8.4(b), (c), and (d). (App.5-6.) On May 20, 2021, Andrew filed his Answer, admitting all the acts alleged, denying only that he had made a false statement intentionally and that these acts violated the Rules asserted. (App.14-15.)

On August 2, 2021, the parties filed a Partial Stipulation, in which Andrew again made multiple factual admissions, as well as admitting violating Rules 32:8.4(b) and (d). (App.16-30.) This

stipulation, including Exhibits 1 – 11, was accepted by the Grievance Commission on August 3, 2021, with the record being deemed closed. (App.260.) In this Order, the parties were instructed to submit simultaneous briefs on the contested violation of Rule 32:8.4(c) and the appropriate sanction. (App.260.)

On November 30, 2021, the Grievance Commission issued its Findings of Fact, Conclusions of Flaw, and Recommendation. (App.262.) It determined Andrew violated Rules 32:8.4(b), (c), and (d). (App.266-67.) Relying heavily on its finding that Andrew had been dishonest before a district court and to law enforcement, a six-month suspension from practice was recommended. (App.269.)

FACTUAL BACKGROUND

I. Andrew Aeilts

Andrew grew up in New York. (App.66 [2:16-18].) He was in seventh grade on September 11, 2001. (App.66 [2:18-19].) On that day, Andrew decided on a life of service. (App.66 [2:19-20].) At 19, he enlisted in the Army, serving for eight years as a combat medic. (App.66 [2:21-25].) After completing college, he was commissioned as an officer, with four years of service in that capacity. (App.67

[3:1-3].) He resigned his military commission while in law school. (App.67 [3:5-6].)

In August and September 2018, Andrew was 30 years old. (App.39.) He had been a practicing in Pella, Iowa attorney for a little over three years. (App.16 ¶¶2-4, 18 ¶13.) He started at the Kreykes Law Office, working primarily in the areas of real estate, wills, trusts, and transactional law. (App.67 [3:20-22], 68 [4:2-3].) The firm did little criminal work and Andrew received little mentorship as that he did perform. (App.67-68 [3:22-4:5].) Between June and September 2018, he was transitioning from Kreykes to a firm started with his wife. (App.68 [4:5-7], 69 [5:1-2], 75 [11:12-17].)

Between April 23, 2015 and August 21, 2018, Andrew worked on twenty-two criminal cases. (App.22 ¶35, 80-259.) Eight of these were simple misdemeanors. (App.22 ¶35, 87-135, 212-218, 226-231.) Four of those eight cases related to the same factual circumstances, had three family members as the defendants, and involved the search for a lost cat. (App.23 ¶36, 87-118.) Two of those four cases were against the same defendant for the same incident. (App.96-102, 112-118.) Another ten of his cases were misdemeanor

OWI cases. (App.22 ¶35, 80-86, 143-151, 168-191, 219-225, 232-259.) One of these OWI cases he withdrew from because the client wanted to proceed pro se. (App.225.) Nineteen of his twenty-two cases were resolved on written guilty pleas. (App.24 ¶39.) One of his two felony cases was dismissed because the state failed to timely file a trial information. (App.23 ¶38.) The one aggravated misdemeanor he had was dismissed based on a plea agreement in a separate case. (App.23 ¶37.) His longest representation of any criminal client lasted seven months. (App.24 ¶40.) Andrew did not bring any of these cases to trial. (App.84, 93, 101, 109, 116, 125, 133, 141, 148, 157, 164, 173, 182, 189, 201, 208, 217, 225, 229, 237, 243, 252.)

II. Randy Cornelison

On August 21, 2018, Andrew received a threatening phone call from Randy Cornelison, the father of child custody client. (App.16 ¶¶4-5, 63.) Randy was seeking the return of a $400.00 retainer which had already been earned. (App.63, 70 [6:3-7].) Randy was secretly recording the phone call. (App.17 ¶10, 63.) Randy threatened to file a complaint against Andrew. (App.63 [3:25].)

Andrew tells Randy to go for it and Randy responds, "Fuck you, clown." (App.63 [3:27].)

Andrew contacted Pella Police Officer Timothy Donelson and reported that Randy had threatened to physically assault Andrew. (App.17 ¶6.) No threats of physical assault were made during the phone call. (App.18 ¶12, 64.) Andrew, seeking a no-contact order against Randy, requested a harassment charge against him. (App.17 ¶7.)

Based on these acts, Andrew was criminally charged with Malicious Prosecution and False Report of an Indictable Offense. (App.20 ¶25.) Andrew entered an Alford Plea to Malicious Prosecution. (App.21 ¶29.) He was sentenced to three days in jail and a $315.00 fine. (App.24 ¶41.) At his sentencing, Andrew discussed not being aware of the various elements and degrees of a harassment charge and his limited criminal experience at the time. (App.67 [3:10-19].)

III. OWI 1st Offense

On September 16, 2018, an intoxicated Andrew drove his vehicle through a cornfield and then six miles with a broken

windshield. (App.18 ¶¶13-15.) Andrew had been drinking due to the recent death of a close friend. This poor judgment led to charges of OWI 1st Offense and Failure to Maintain Control. (App.18 ¶¶15-16.)

Prior to being booked at the jail, Andrew contacted Assistant Marion County Attorney Matthias Robinson about being in trouble. (App.19 ¶18.) Though he had never used the specific language of "need help" and "911" in communicating with Matthias before, it was not uncommon for Andrew to text Matthias about Marion County OWI cases. (App.19 ¶23.) Matthias did not respond until several hours later and asked, "What's up?" (App.19 ¶21.) Andrew explained he had made a mistake he expected come across Matthias desk and hoped they could get it resolved quickly and quietly. (App.19 ¶22.)

Andrew consented to a breath test at the jail, which came back as .122. (App.19 ¶19.) During this process, Andrew asked the officer whether they could just drop the matter. (App.19 ¶20.) The officer was unswayed. (App.18 ¶¶15-16.) A trial information was filed several days later. (App.32.) Nine months later, Andrew entered a guilty plea to OWI 1st Offense. (App.20 ¶27.) Prior to his guilty plea,

Andrew had completed a substance abuse evaluation, with no treatment recommended, and the Drinking Driver's Course. (App.37.) He received a deferred judgment with supervised probation, probation fee of $300.00, $650.00 civil penalty, and fifteen hours of community service. (App.20 ¶28.) Andrew successfully discharged probation, satisfied the terms of his deferred judgment, and the case was expunged. (App.31.)

ISSUES

I. Grievance Commission Erred in Finding a Violation of Iowa Ct. R. 32:8.4(c)

A. Error Preservation

Whether a violation of Iowa Ct. R. 32:8.4(c) had occurred was disputed before the Grievance Commission, which concluded a violation occurred. (App.267.)

B. Standard of Review

The Iowa Supreme Court reviews recommendations by the grievance commission de novo. Iowa Ct. R. 35.11(4). The Board must prove an ethical violation by a "convincing preponderance of the evidence" which is "'less than proof beyond a reasonable doubt, but more than the preponderance standard required in the usual

civil case.'" *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Lickiss*, 786 N.W.2d 860, 864 (Iowa 2010) (*quoting Iowa Supreme Ct. Att'y Disciplinary Bd. v. Conrad,* 723 N.W.2d 791, 792 (Iowa 2006)). This makes the Board's burden greater than in civil cases, but lower than in criminal matters. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Nelson*, 838 N.W.2d 528, 532 (Iowa 2013).

Admissions made in Andrew's Answer are established as fact. *Id.* Fact stipulations are binding and read "with reference to their subject matter and in light of the surrounding circumstances and the whole record, including the state of the pleadings and issues involved." *Id.* (*quoting Iowa Supreme Ct. Att'y Disciplinary Bd. v. Knopf*, 793 N.W.2d 525, 528 (Iowa 2011)).

C. Argument

"It is professional misconduct for a lawyer to…engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Iowa R. Prof. Cond. 32:8.4(c). For conduct to violate Rule 32:8.4(c), there must be "'a level of scienter that is more than negligent behavior or incompetence.'" *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Suarez-Quilty*, 912 N.W.2d 150, 158 (Iowa 2018) (*quoting*

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Barry, 908 N.W.2d 217, 226 (Iowa 2018)). An attorney must act "knowingly, intentionally, or with the aim to mislead." *Suarez-Quilty*, 912 N.W.2d at 158 (*quoting Iowa Supreme Ct. Att'y Disciplinary Bd. v. Guthrie*, 901 N.W.2d 493, 498 (Iowa 2017)). The dispositive question is if the effect of the conduct misled rather than informed. *Suarez-Quilty*, 912 N.W.2d at 158 (*quoting Barry*, 908 N.W.2d at 226).

Andrew's conduct toward Randy was an overreaction based on fear and inexperience. (App.72 [8:18-22], 73 [9:21-22].) He received little mentorship from the partners at his firm. (App.67 [3:20-4:5].) Without experience or guidance, Andrew overreacted and contacted the police to obtain a no-contact order. (App.17 ¶7.)

His professional experience with harassment to that point was handling two simple misdemeanor charges, one resolved by written guilty plea and the other dismissed by the State. (App.23 ¶35(7), ¶35(16), 133, 217.) He knew Harassment 3rd, a simple misdemeanor, was grounds for a no-contact order. *See* Iowa Code §664A.2. (App.214.) Andrew wanted a no-contact order and knew harassing phone calls were grounds to obtain one. (App.17 ¶7, 214.)

Because of his inexperience, however, he was unaware alleging a threat of bodily harm rose to the level of an indictable offense. Iowa Code §708.7(3). While Andrew's allegations amounted to an indictable charge, Andrew did not intend an indictable charge against Randy. This is "negligent behavior or incompetence" insufficient for a violation.

Andrew is alleged to have made false statements to the court in his allocution during sentencing for malicious prosecution. (App.9 ¶18.) Andrew admits making the statements. (App.15 ¶18.) He admits his off-the-cuff allocution understated his experience with criminal law. (App.22 ¶¶34-35.)

This is like the case of an attorney alleged to have falsely testified in a postconviction relief action that former clients in a criminal matter had personally appeared for a plea and sentencing. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Sobel*, 779 N.W.2d 782, 786 (Iowa 2010). This was factually wrong, as the district court had waived their appearance after an in-chambers meeting. *Id*. The Court acknowledged "a person's memory of events can be subject to error and distortion based on factors unrelated to intent or purpose

to be untruthful." *Id.* at 787. Inaccuracy in recall "does not necessarily lead to the conclusion that the person's inaccurate recollection is an expression of dishonesty or deceit." *Id.*

The attorney in *Sobel* was wrong when he stated his clients were personally present during the plea and sentencing. *Id.* at 786. The plea and sentencing occurred two years before the attorney's postconviction hearing testimony. *Id.* at 787. While the testimony may have been an intentional misrepresentation "it is just as likely his recollection was inaccurate[.]" *Id.* at 788. While Andrew's allocution did not concern a specific years-old event, it did regard a small number of cases over three years of legal practice. "Considering the passage of time and the number of court appearances made by busy attorneys, [Andrew] could have simply inaccurately recalled the event or otherwise formulated an inaccurate, yet honest, account of the event." *Id.*

Andrew's honest inaccuracy is no less likely than *Sobel*'s. While the particulars are different, the *Sobel* attorney presumably had advanced warning he was going to testify and an opportunity to refresh his memory as to what occurred in the specific proceeding

at issue. Andrew had no such opportunity in making his extemporaneous statement in response to arguments by the prosecutor seeking a greater sentence than expected. (App.67 [3:10-11].) Andrew spoke in the heat of the moment under heavy stress. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Barnhill*, 847 N.W.2d 466 (Iowa 2014) (*Barnhill I*) (misstatements resulting from oversight or haste do not constitute misrepresentation).

His allocution was negligent or incompetent. It was not knowingly or intentionally false. This is seen by comparison to *Comm. on Pro. Ethics & Conduct v. Ramey*, 512 N.W.2d 569 (Iowa 1994), where an attorney's statements in the heat of a contested proceeding was found to have been dishonest. *Ramey* involved a prosecutor who stated he had personally compared the serial numbers of specific bills to a list of serial numbers and could guarantee the numbers matched. *Ramey*, 512 N.W.2d at 571. Both statements were false. *Id*. The Court did not believe the prosecutor "was attempting to deceive" in stating he had personally checked the bills and likely "began as a 'white' lie concerning what Ramey may have thought to be a mere detail." *Id*. at 572. It was likely that

"[i]n the press of an exceedingly difficult trial, perhaps without really thinking" asserted having done the review himself as he honestly "believed the numbers would match." *Id.* These circumstances, though "somewhat ameliorating," did not forgive an intentional false statement to the court. *Id.*

The difference between *Ramey* and Andrew's statements is the prosecutor volunteered an affirmative claim to have performed an act *knowing* it had never happened. Andrew misremembered and misstated his unremarkable and limited experience in criminal law. These are not equivalent.

Andrew did not consider himself a criminal defense attorney at the time of the conduct, and even considering his full case list, Andrew's opinion was legitimate. As the Board stipulated, Andrew had never handled a complex criminal matter or even a misdemeanor trial. (App.22-24 ¶¶35-40.) There was no intent to mislead the sentencing court, as required to violate Rule 32:8.4(c). *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Stoller*, 879 N.W.2d 199, 214 (Iowa 2016).

Nor does the record establish the sentencing court relied on Andrew's experience in criminal cases in imposing sentence. (App.265.) The sentencing order is silent on the basis for the sentence. (App.60.) The court's reasoning at sentencing is not in the record. This finding is nothing more than unsupported speculation which this Court should disregard. *Cf. State v. Thacker*, 862 N.W.2d 402, 410 (Iowa 2015) ("While terse reasoning can be adequate when we know the statement in the context of the record demonstrates what motivated the district court…we cannot guess or simply calculate the rough probabilities.")

The Board has tacitly acknowledged Andrew's statement was an unintentional error by the violations it has alleged. Not alleged is a violation of Rule 32:3.3 which provides: "A lawyer shall not knowingly…make a false statement of fact or law to a tribunal…[or] offer evidence that the lawyer knows to be false." Iowa R. Prof. Cond. 32:3.3(a)(1), (3). If the Board believed Andrew had knowingly deceived the court, this is the violation it would have alleged. *Cf. Iowa Supreme Ct. Att'y Disciplinary Bd. v. Barnhill*, 885 N.W.2d 408, 422 (Iowa 2016) (*Barnhill II*) (court will not find general

violation under Rule 32:8.4(c) when conduct found to violate another specific provision).

Unlike other cases where Rule 32:8.4(c) was violated, Andrews actions were not in furtherance of an underlying fraud. *See Noel*, 923 N.W.2d at 588 (attorney billing for unattended family team meetings resulting in guilty plea to two counts of fourth degree theft); *Suarez-Quilty*, 912 N.W.2d at 159 (unauthorized use of a credit card to obtain property or services); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wheeler*, 824 N.W.2d 505, 511 (Iowa 2012) (attorney pled guilty to making false statements to a financial institution). The crime of malicious prosecution is not equivalent to such offenses. *Cf. Schnathorst v. Williams*, 36 N.W.2d 739, 748 (Iowa 1949) ("The important question was not his belief, but whether all of the facts, as he knew them or should have known, were such as to justify the ordinary, reasonably prudent, careful and conscientious person in reaching such a conclusion.") Rule 32:8.4(c) was not violated.

II. A Six-Month Suspension from Practice is Excessive

A. Error Preservation

The sanction to be imposed was at issue before the Grievance Commission. (App.29 ¶55, 260.) A six-month suspension was recommended. (App.269.)

B. Standard of Review

The appropriate sanction must be based on the particular facts and circumstances of this case, considering not just "the nature of the violations, but also the need for deterrence, protection of the public, maintenance of the reputation of the bar as a whole, and the respondent's fitness to continue to practice law." *Iowa Supreme Ct. Bd. of Pro. Ethics & Conduct v. Lemanski*, 606 N.W.2d 11, 14 (Iowa 2000). These proceedings:

> …are not designed to punish, but rather to determine the fitness of an officer of [the] court to continue in that capacity, to insulate the courts and the public from those persons unfit to practice law, to protect the integrity of and the public confidence in our system of justice, and to deter other lawyers from engaging in similar acts or practices.

Comm. on Pro. Ethics & Conduct v. Vesole, 400 N.W.2d 591, 593 (Iowa 1987).

While there is no standard sanction for misconduct, the Iowa Supreme Court has sought consistency in discipline for violations of the Rules of Professional Conduct. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Khowassah*, 837 N.W.2d 649, 657 (Iowa 2013) *(Khowassah I)*. Though sanctions must be based on each cases' circumstances, prior cases are instructive. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Cannon*, 821 N.W.2d 873, 880 (Iowa 2012).

C. Argument

Andrew agrees with the Grievance Commission both his criminal convictions violated Rule 32:8.4(b), as his acts underlying each "reflects adversely on [his] honesty, trustworthiness, or fitness as a lawyer in other respects." (App.26 ¶47.) Andrew also agrees the Grievance Commission correctly found his allegations against Randy violated Rule 32:8.4(d). (App.28 ¶51.) He admits the specific underlying acts which must be considered in assessing the appropriate sanction. (App.27 ¶¶48-49.)

For the reasons set forth above, Andrew believes violation of Rule 32:8.4(c) was erroneously found. For the sake of discussion,

however, even if this finding is upheld, a six-month suspension is excessive and unnecessary to serve the goals of attorney discipline.

1. *Aggravating Factors*

Andrew harmed Randy. This is beyond dispute. This harm is an aggravating factor. (App.25 ¶43). *See also Iowa Supreme Ct. Att'y Disciplinary Bd. v. Box*, 715 N.W.2d 758, 766 (Iowa 2006) (harm to third party is an aggravating factor). Andrew's actions toward Randy were wrong, legally and ethically.

Andrew admits two distinct ethical violations. (App.26 ¶47, 27 ¶51.) Multiple violations are an aggravating factor. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Baldwin*, 857 N.W.2d 195, 213 (Iowa 2014).

Without question, attorney honesty is essential to a functioning legal system:

> At its most basic level a court must rely, not alone on the honesty of lawyers, but also on the reliability of factual representations submitted to the court. A misrepresentation cannot be explained away, and certainly not justified, on the basis of disorganization and confusion. Disorganized confusion becomes itself culpable when left unaddressed.

Iowa Supreme Ct. Bd. of Pro. Ethics & Conduct v. Ackerman, 611 N.W.2d 473, 474 (Iowa 2000). While Andrew disputes having violated Rule 32:8.4(c), should this Court determine he committed a violation through dishonesty, the circumstances are ameliorative. *Ramey*, 512 N.W.2d at 572. *See also Ackerman,* 611 N.W.2d at 474 (recognizing distinction between deliberate deceit, lack of care, and pattern of misstatement); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Beauvais*, 948 N.W.2d 505, 515 (Iowa 2020) ("[W]e must view all of these statements in the context of the litigation.").

2. *Mitigating Factors*

a. Acknowledgment of wrong

An important mitigating factor is the lawyer's recognition of wrongdoing and acceptance of responsibility. *Iowa Supreme Ct. Bd of Pro. Ethics & Conduct v. Tofflemire*, 689 N.W.2d 83, 93 (Iowa 2004). Andrew accepts responsibility for his actions, as shown though his admissions here and his pleas in the criminal cases. He admits his criminal and unethical actions. These actions show, at a minimum, poor judgment on his part. In reflection, he understands the harm his conduct posed to both Randy and the general public.

b. Military and public service

Andrew's prior military and current public service are mitigating factors. (App.25-26 ¶44(a), (b), (d).) Andrew's military service is discussed above. He also serves as President of Work of Our Hands, a Pella-based fair trade federation store promoting living wages for families in developing countries; on the family selection committee for the local Habitat for Humanity Chapter; and on the executive counsel for the Iowa Bar Association Young Lawyers Division. Such service is a mitigating factor. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Jacobsma*, 920 N.W.2d 813, 820 (Iowa 2018).

c. Practice in underserved community

"[P]roviding legal representation to an underserved part of the community is a significant mitigating factor." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Taylor*, 814 N.W.2d 259, 268 (Iowa 2012). Andrew has intentionally based his firm in Pella, Iowa, seeking to practice in a small community. (App.16 ¶3.) He has also focused on representing indigent and low-income clients, regularly on a sliding scale. (App.68 4:9-19.) This is a mitigating factor. (App.26 ¶44(e).)

d. Pro bono work

Providing pro bono legal services weighs in favor of a lesser sanction. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Taylor*, 887 N.W.2d 369, 382 (Iowa 2016). In a time where people have needed a heightened level of legal assistance, Andrew provided dozens with assistance through working with Iowa Legal Aid to address issues arising from Covid-19 and the derecho. (App.26 ¶44(c).)

e. Inexperience

Inexperience has long been a recognized mitigating factor. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Turner*, 918 N.W.2d 130, 155 (Iowa 2018) (*citing In re Disbarment of De Caro*, 262 N.W. 132 (Iowa 1935)). This is true even in cases involving misrepresentation. *Beauvais*, 948 N.W.2d at 517.

Andrew was just in his third year of practice when these violations occurred. His professional experience is primarily in transactional matters, with little civil litigation experience and even less criminal. Andrew does acknowledge this factor's weight is minimized given the nature of his conduct. *See Id.* at 518 (while inexperience is a significant mitigating factor, neglect compounded

by misrepresentation warrant a more severe sanction due to importance of honesty to profession.); *Turner*, 918 N.W.2d at 155 ("Lawyers of *any* level of experience would understand" misrepresenting matters to court "are deplorable.")

f. Small firm

Andrew practices in a firm consisting of himself and his wife, who has been in practice only as long as him. Before that, he worked as an associate to a firm with two partners, neither of whom provided him much in mentorship. This is a factor which should be considered in mitigation. *See Iowa Supreme Ct. Att'y Discipline Bd. v. Muhammad*, 935 N.W.2d 24, 29 (Iowa 2019) (inexperienced attorney who opened a solo practice without a mentor).

g. Overlap in time

The conduct at issue all occurred within three weeks. This temporal overlap is a mitigating factor. *Cf. Iowa Supreme Ct. Att'y Disciplinary Bd. v. Cunningham*, 812 N.W.2d 541, 552 (Iowa 2012) (declining to view prior admonishment as aggravating factor when it occurred in same timeframe as current violation before court).

h. Lack of client harm

Lack of harm to clients is a mitigating factor. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Van Ginkel*, 809 N.W.2d 96, 110 (Iowa 2012). There is no evidence Andrew's conduct caused harm to any client. Doug Cornelison was Andrew's client, not Randy, and Andrew performed as much work on Doug's case as could be expected prior to the end of his representation. (App.70 [6:3-16].) As the conduct giving rise to the violations are not directly related to a client matter, Andrew recognizes this factor is minimized.

i. Personal issues

Personal issues do not excuse ethical violations, but can be mitigating. *Id.* at 110. The OWI occurred from drinking while mourning a friend's death. This is the circumstances of the conduct, not an excuse. Andrew was also preparing to leave the only firm he had worked for to hang out a shingle with his wife without a formal office. (App.75 [11:12-17].) These personal stressors should be considered. *See Barry*, 908 N.W.2d at 233 (stress of law office transition a mitigating factor).

j. Lack of prior violations and criminal history

Andrew's lack of prior discipline and criminal history are mitigating factors. (App.26 ¶44(f)-(g).) That Andrew has never been before the Board prior to this present matter is a circumstance to be considered in mitigation, though its weight is limited due to the brevity of his practice. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Sears,* 933 N.W.2d 214, 225 (Iowa 2019).

k. Remedial efforts

Andrew has pursued mentorship through the Iowa Bar Association's Mentorship Program. (App.76 [12:22-13:4].) Had Andrew had an experienced attorney willing to listen in these circumstances, there is a real probability these violations could have been avoided. That he has sought out to improve himself in this manner should be considered. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Humphrey*, 812 N.W.2d 659, 668 (Iowa 2012) (voluntary remedial efforts constitute a mitigating circumstances). His service of his criminal sentences including the substance abuse evaluation, attending the Drinking Driver's course, and successful

discharge of probation are also to be considered. *Khowassah I*, 837 N.W.2d at 657.

l. Full cooperation

Finally, an attorney's full cooperation with the disciplinary investigation is an important mitigating factor. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wengert*, 790 N.W.2d 94, 103 (Iowa 2010). Andrew timely and fully responded to the Complaint, admitted his actions in his Answer and the stipulation, and sought to provide all the relevant information at his disposal. (App.26 ¶44(h).)

3. *Relevant Prior Cases*

a. Rule 32:8.4(b)

For violations of Rule 32:8.4(b) involving an OWI and additional criminal conduct, sanctions have fallen generally within a thirty day to two-year range of suspension. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Khowassah*, 890 N.W.2d 647, 651 (Iowa 2017) (*Khowassah II*). Private admonition or public reprimand are common sanctions for OWI 1st Offense on its own. *Khowassah I*, 837 N.W.2d at 658; *Cannon*, 821 N.W.2d at 882; *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Weaver*, 750 N.W.2d 71, 75 (Iowa 2008).

A public reprimand was approved for a recently divorced solo practitioner with thirty years of experience who pled guilty to OWI 1st Offense (cocaine) and possession of drug paraphernalia after completing a deferred judgment and voluntary treatment. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Keele*, 795 N.W.2d 507, 509-10 (Iowa 2011).

At the next step up, a thirty-day suspension was imposed for two OWI's, one while boating and one while driving, and possession of cocaine, all three occurring within a little over a year. *Cannon*, 821 N.W.2d at 883. This case involved a solo practitioner with twenty years-experience, a prior private admonishment for a prior OWI and three public reprimands, who accepted responsibility and made demonstrable strides in treating addiction and fully cooperated with discipline proceedings. *Id*. at 881-82.

A sixth-month suspension has been imposed for an OWI 3rd Offense on its own. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Johnson*, 774 N.W.2d 496, 500 (Iowa 2009). The attorney had practiced for about 24-years, which he had ceased about two years prior to his arrest. *Id*. at 498. He otherwise admitted all allegations

and established his involvement in extensive alcohol abuse treatment. *Id.* He also fully cooperated with the Board in his disciplinary proceedings, as well as with his ongoing parole and work release conditions. *Id.* at 500. He had a prior private admonition for attending a court hearing while intoxicated. *Id.* These factors supported a sanction under the nine-month suspension the Commission recommended. *Id.*

At the extreme end an attorney convicted of OWI 3rd Offense and Harassment 3rd Degree was suspended for two years. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Weaver*, 812 N.W.2d 4, 16 (Iowa 2012). The attorney, a former judge, had previously been suspended three months for an OWI 2nd Offense and accusing his sentencing judge of dishonesty in sentencing. *Id.* at 7. This suspension was extended sixty days for failing to notify all his clients of the suspension. *Id.* Nine months after reinstatement, the attorney was convicted of OWI 3rd Offense. *Id.* at 8. Three days after being released from work release, he was arrest for Harassment 3rd Degree for calling his estranged wife twenty-six times in a few hours. *Id.* He pled guilty to this charge. *Id.* In imposing the two-

year suspension from these most recent convictions, the Iowa Supreme Court detailed the attorney's prior discipline, criminal history, and demonstrated unwillingness to comply with supervisory authority. *Id*. at 14-15.

Andrew is unaware of any cases involving discipline from malicious prosecution. Perhaps most comparable, though, are cases regarding filing of frivolous actions. Recently, a 90-day suspension was imposed for filing of frivolous small claims actions combined with making misrepresentations to witnesses in the attorney's personal divorce proceedings with the intent to intimidate, a months-long smear campaign against the presiding judge, and administrative issues with the client trust account. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Widdison*, 960 N.W.2d 79, 98 (Iowa 2021). Mitigating factors included a lack of discipline for twenty years of practice, marginal acceptance of responsibility, and subsequent counseling. *Id*. at 97.

Also instructive is the escalating sanctions imposed in the *Barnhill* cases. In *Barnhill I*, an attorney committed violations involving:

- pursuit of a frivolous lawsuit, *Barnhill I*, 847 N.W.2d at 485;
- repeated false statements and misrepresentations, *Id.* at 474;
- conduct adversely reflecting on fitness to practice, *Id.* at 476;
- conflict of interest in representation, *Id.* at 477;
- actions serving merely to harass or injure another, *Id.* at 478;
- advancing unwarranted claims, *Id.*;
- conduct prejudicial to justice, *Id.*;
- failure to safekeep property, *Id.* at 480;
- failure to reasonably supervise employees, *Id.* at 482;
- misconduct involving fraud, *Id.*;
- lack of diligence in client matter, *Id.* at 483;
- knowingly violating a court order, *Id.* at 484;
- conduct prejudicial to justice, *Id.*; and,
- incompetent representation, *Id.* at 485.

All violations were deemed serious. *Id.* at 487. Aggravating factors included extensive legal experience, financial harm to another, multiple violations, and two prior admonitions. *Id.* at 486. Mitigating factors were pro bono and volunteer work in the community, stipulation to multiple violations, corrective measures, and prior punitive sanctions for the conduct in civil proceedings. *Id.* at 486-87. In weighing all considerations, a suspension of sixty-days was imposed. *Id.* at 488.

Two years later, this Court addressed subsequent conduct by this attorney, again involving frivolous claims, false statements towards both third parties and the courts, conduct prejudicial to justice, violating court orders, and not complying with discovery.

Barnhill II, 885 N.W.2d at 420-23. The aggravating and mitigating factors were generally the same, though intent to retire replaced acceptance of responsibility. *Id.* at 424-25. So was the conduct, supporting increased sanctions. *Id.* Given the repeated nature of the conduct, a six-month suspension was warranted. *Id.* at 426.

b. Rule 32:8.4(d)

Rule 32:8.4(d) violations involving dishonesty or false statements have generally warranted "sanctions from three months to a year." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Caghan*, 927 N.W.2d 591, 607 (Iowa 2019). A lower sanction of sixty days was imposed on an attorney with 45-years' experience who assisted his son in violating a no-contact order protecting the son's estranged wife and attempting to bribe the wife to give certain testimony in the son's criminal case. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Gailey*, 790 N.W.2d 801, 803-05 (Iowa 2010). The attorney was representing his son in the dissolution case at the time he contacted the wife. *Id.* at 804-05. This attorney was previously publicly reprimanded for false statements during a deposition and privately admonished for extrajudicial statements about a pending criminal

case. *Id.* at 808. The attorney had stipulated to the facts of the violations. *Id.* at 803.

In another instance, an attorney was suspended for ninety days for attempting to extort his wife's former employer through threatening emails containing confidential information he included in clear violation of a protective order, resulting in his being held in contempt. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Stowers*, 823 N.W.2d 1, 14-15 (Iowa 2012). Mitigating factors like indigent criminal representation and service on court commission were considered against the attorney's open refusal to accept he had done anything wrong. *Id.* at 17.

A three-month suspension was given an attorney who neglected a client's personal injury case, misrepresented facts concerning an estate in probate, and prematurely took probate fees. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Casey*, 761 N.W.2d 53, 59-60 (Iowa 2009). The attorney had 34-years' experience, practiced in a small town, and had a prior private admonition for neglect. *Id.* at 55. The three-month suspension was based predominantly upon "his misrepresentations and premature taking of probate fees[,]"

and a failure to timely cooperate with the Board, as the neglect itself warranted only public reprimand. *Id.* at 62-63.

Similarly, an attorney "misleading the district court and opposing counsel as to the facts of an automobile accident case" received a three-month suspension. *Iowa Supreme Ct. Bd. of Pro. Ethics & Conduct v. Hohnbaum*, 554 N.W.2d 550, 550 (Iowa 1996). The attorney affirmatively made multiple false statements in the civil proceeding and the disciplinary proceeding, and actively pursued a frivolous defense strategy of covering up the true facts of the accident. *Id.* at 551-52.

An attorney who had been practicing for six years was suspended for a year for repeatedly misleading a client in a dissolution matter, failed to file or serve the petition, and forged an "order" he represented to the client as the divorce decree. *Barry*, 908 N.W.2d at 222-23. He pushed these lies for fourteen months despite the harm to the client. *Id.* at 234. The attorney had a prior private admonition. *Id.* The attorney ultimately expressed remorse for his actions which occurred during a substantial transition in his practice, cooperated with the Board after self-reporting the conduct

(though in a way minimizing his actions), was seeking treatment for depression, and had a history of community service. *Id.* at 231-233. He had also placed his practice on inactive status. *Id.* at 233.

c. Rule 32:8.4(c)

Should the Court find Andrew violated Rule 32:8.4(c), a six-month suspension would still not be warranted. Even if Andrew's conduct is deemed to be dishonest, the circumstances of this case do not reach the level for which that length of suspension is appropriate.

Cases previously discussed are instructive. The prosecutor in *Ramey* paired his dishonesty with a failure to produce material exculpatory evidence. *Ramey*, 512 N.W.2d at 572. The prosecutor had previously been suspended for six-months for income tax violation and false certification, indicating repeated dishonest conduct. *Id.* No mitigating factors were mentioned. *Id.* Despite this absence, a suspension of three months was ordered. *Id.*

Beauvais involved an attorney with limited experience and little support in his practice. *Beauvais*, 948 N.W.2d at 518. His violations involved falsely claiming to the court and opposing

counsel that his client had accepted a settlement and misrepresenting to his client that she would be punished by the court if she did not sign the settlement agreement. *Id.* at 515. This conduct came after being extremely neglectful in litigation, including failing to obtain experts in the toxic tort case, failing to discuss the settlement with the client, failing to respond to discovery, and prejudicing the administration of justice. *Id.* at 512-16. Aggravating the conduct were the multiple violations and harm to client. *Id.* at 517. Mitigating factors were inexperience, remorse, mental health considerations, work with underserved communities, and pro bono work. *Id.* at 517-18. A three-month suspension was imposed. *Id.* at 518.

A review of other cases involving violations of Rule 32:8.4(c) further demonstrate the excessiveness of a six-month suspension in these circumstances.

Taylor involved a failure to notify a client of a dismissed appeal while misrepresenting its real status. 814 N.W.2d at 259. She was publicly reprimanded. *Id.* at 269.

An attorney had a witness sign a will outside the testator and other witness' presence, knowing this made the will invalid. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Haskovec*, 869 N.W.2d 554, 561 (Iowa 2015). He gave the invalid will to the executor knowing it was going to be probated. *Id.* A public reprimand was found appropriate. *Id.* at 562.

In *Ackerman*, an attorney made three separate misrepresentations of fact to the court in three separate cases. 611 N.W.2d at 474. He had previously been public reprimanded for obtaining a payment from the family of a court appointed client. *Id.* at 475. He was suspended for one month. *Id.*

An attorney made false statements on her annual client security questionnaires, did not deposit retainers into trust, kept basically no accounting records, and prematurely took probate funds. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kersenbrock*, 821 N.W.2d 415, 419-21 (Iowa 2012). She was suspended for one month. *Id.* at 422.

Another attorney hid a pre-existing business relationship with one client when obtaining a consent and waiver from another.

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Willey, 965 N.W.2d 599, 613 (Iowa 2021). This and other related violations called for a one-month suspension as it occurred prior to similar dishonest conduct which had incurred a sixty-day suspension. *Id.* at 616 (*citing Iowa Supreme Ct. Att'y Disciplinary Bd. v. Willey*, 889 N.W.2d 647, 658 (Iowa 2017)).

An attorney filed tax returns with the IRS on the behalf of clients knowing those returns were inaccurate. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Marzen*, 949 N.W.2d 229, 239 (Iowa 2020). He also gave those same returns to a bank as part of a loan application. *Id.* at 239-40. This along with multiple other violations, including another misrepresentation to a client, resulted in a one-month suspension. *Id.* at 245.

Over the course of his own divorce proceeding, an attorney fraudulently hid information on two contingency cases despite being required to disclose such information in discovery. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Rhinehart*, 827 N.W.2d 169, 172 (Iowa 2013). This misconduct prejudiced the divorce proceeding. *Id.* at 180-81. He collected unreasonable fees and

disbursed fees which were disputed. *Id*. at 181-82. He was suspended sixty days. *Id*. at 183.

Another attorney perpetrated a sham transaction, making multiple factual misrepresentations to third parties and his own clients. *Stoller*, 879 N.W.2d at 214. He also engaged in multiple representations of clients with conflicting interests. *Id*. at 211 & 216. He was suspended sixty days. *Id*. at 221.

An attorney falsely told a client a divorce petition had been filed and was in process of being served. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Weiland*, 882 N.W.2d 198, 212 (Iowa 2016). He repeated this multiple times to the client knowing the petition had been rejected. *Id*. No attempt to refile was made for four months, with the attorney not informing the client. *Id*. at 208. He did not attend a hearing without informing of the client of the hearing. *Id*. at 209. He held client funds which he needed to return despite knowing the client was in financial distress. *Id*. at 210. This conduct all followed "a series of private admonitions, public reprimands, and suspensions." *Id*. at 215. A sixty-day suspension was called for. *Id*. at 216.

In *Iowa Supreme Ct. Att'y Disciplinary Bd. v. McGinness*, 844 N.W.2d 456 (Iowa 2014), used old certificates of service to deceive opposing counsel into believing discovery requests had been served. *McGinness*, 844 N.W.2d at 462. He falsely told his client these certificates were legitimate. *Id*. at 460. He falsely told the court the certificates were real. *Id*. This warranted a six-month suspension. *Id*. *McGinness* engaged in a thorough discussion of additional cases resulting in six-month suspensions. *Id*. at 464-65. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wagner*, 768 N.W.2d 279 (Iowa 2009) (six-month suspension for numerous misrepresentations to the district court, neglect of client matter, premature taking of probate fees, failure to deposit unearned fees in trust, failed to promptly return unearned fees, and failed to cooperate with the disciplinary board); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Isaacson*, 750 N.W.2d 104 (Iowa 2008) (misrepresentations to partner and to the disciplinary board in addition to trust account violations); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Powell*, 726 N.W.2d 397 (Iowa 2007) (harm to clients in addition to misrepresentations to clients for purpose of

obtaining payment of fees); *Comm. on Pro. Ethics & Conduct v. Bauerle*, 460 N.W.2d 452 (Iowa 1990) (attorney altered and backdated documents for a client and falsely notarized them); *Iowa Supreme Ct. Bd. of Pro. Ethics & Conduct v. Rylaarsdam*, 636 N.W.2d 90 (Iowa 2001) (forging multiple documents, including unauthorized use of clerk's seal, and falsely misrepresented sale of property to client).

4. *Thirty Day Suspension is Appropriate*

A thirty-day suspension of Andrew's licenses would be sufficient to protect the public, ensure his fitness to practice, and maintain the reputation of the bar. On its own, the OWI 1st Offense warrants no more than a public reprimand. It is Andrew's actions towards Randy Cornelison that are central to any sanction imposed.

Andrew's attempt to have Randy charged with harassment with no reasonable basis to do so is conduct tarnishing not only his professional reputation, but also risks that of the whole profession. This conduct is well below the "'absolute reliability and an impeccable reputation for honesty'" the system requires warranting a greater sanction then may otherwise be imposed. *Casey*, 761

N.W.2d at 62 (*quoting Iowa Supreme Ct. Att'y Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812, 818 (Iowa 2007)).

That said the sanction needed here is well below that imposed in *Weaver, Barry, Casey, Stowers*, and *Gailey*. The violating conduct in each of those cases was more extreme than Andrew's actions here. Each of these cases, excluding *Barry*, involved attorneys with decades more experience than Andrew had and involved progressive discipline due to prior sanctions having been ineffective. Even *Barry* involved an attorney with greater experience and a prior reprimand.

Andrew accepts responsibility for his actions. He understands his conduct was unwarranted by the circumstances, despite any subjective fear he had. He has worked to improve himself as a professional to better serve the community he chooses to represent. He has cooperated throughout this process. While Andrew's actions are do not reflect what is expected from an attorney, this conduct all occurred in a period of weeks and is not representative of the greater character Andrew has displayed throughout his life.

A thirty-day suspension is warranted. Lesser discipline would be insufficient given the nature of the violations. Greater discipline would only be for punitive purposes. For all the reasons set forth above, Andrew requests a thirty-day suspension.

CONCLUSION

Andrew has admitted conduct which violates Iowa Rules of Professional Conduct 32:8.4(b) and (d). The stipulated violations are the only violations arising from his conduct. Andrew further acknowledges a brief suspension of his license is appropriate discipline for this conduct. For all the reasons set forth above, Andrew prays the Court find violations of Rules of Professional Conduct 32:8.4(b) and (d) only and impose a thirty-day suspension.

ORAL ARGUMENT REQUEST

Counsel requests to be heard in oral argument.

GRIBBLE, BOLES, STEWART & WITOSKY LAW

BY: */s/ Matthew M. Boles*

Matthew M. Boles AT0001037
Adam C. Witosky AT0010436
2015 Grand Avenue, Suite 200
Des Moines, Iowa 50312
Telephone: (515) 235-0551
Fax: (515) 243-3696

Email: mboles@gbswlaw.com
awitosky@gbswlaw.com
ATTORNEYS FOR APPELLANT

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This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words) because this brief contains 7,141 words, excluding those parts exempted.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO in font size 14, Century Schoolbook.

/s/ *Adam Witosky* Date: January 14, 2022
Adam Witosky