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 Final Reply Brief and Oral Argument Request

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CERTIFICATE OF FILING AND SERVICE

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

/s/ Stephanie Sutherland
Stephanie Sutherland

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REPLY ISSUES

I. Grievance Commission Correctly Concluded Text Messages to Assistant County Attorney Did Not Violate Rule 32:8.4(d)

The Board argues the Grievance Commission erred in finding text messages Andrew sent to Assistant Marion County Attorney Matthias Robinson regarding his OWI 1st arrest did not violate Iowa R. Prof Cond. 32:8.4(d). The Board did not seek permission to appeal from the Grievance Commission's ruling. *See* Iowa Ct. R. 36.22(2) ("The complainant may apply to the supreme court for permission to appeal from a determination, ruling, report, or recommendation of the Grievance Commission."). Instead, the Board relies on the Court's de novo review authority as permitting argument on this issue. (Appellee Br. 14-15.)

This Court has the power of de novo review of Rule violations absent an appeal or request for permission. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Tindal*, 949 N.W.2d 637, 643 (Iowa 2020). This Court "has the inherent constitutional power to license lawyers" with "the concomitant duty" to discipline attorneys for misconduct. *Comm. on Pro. Ethics & Conduct of Iowa State Bar Ass'n v.*

Bromwell, 221 N.W.2d 777, 780 (Iowa 1974). Having sole authority over final disposition, this Court may set aside error preservation principles if "raising the legal issue before the Commission would not have changed the record made there, nor the course of the proceeding before that body[.]" *Comm. on Pro. Ethics & Conduct of Iowa State Bar Ass'n v. Behnke*, 276 N.W.2d 838, 841 (Iowa 1979).

This inherent power to regulate the practice of law is implemented through Rules this Court establishes. *Comm. on Pro. Ethics & Conduct of Iowa State Bar Ass'n v. Wilson*, 290 N.W.2d 17, 22 (Iowa 1980). *See also* Iowa Code §602.4201(1) ("The supreme court may prescribe all rules…for all proceedings in all courts of this state, for the purposes of simplifying the proceedings and promoting the speedy determination of litigation upon its merits.") These Rules guide the determination of "whether an attorney's conduct violates our ethical rules" and "the proper sanction for the violation." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Gailey*, 790 N.W.2d 801, 804 (Iowa 2010). The Rules ensure the due process which an attorney "is guaranteed…in disciplinary proceedings" is received "since the rules specifically set out the procedure and the

penalty that may be exacted as a consequence of that procedure." *Comm. on Pro. Ethics & Conduct of Iowa State Bar Ass'n v. Michelson*, 345 N.W.2d 112, 115-16 (Iowa 1984).

Permitting the Board to argue for reversal of the Grievance Commission's ruling as to a violation without permission to appeal conflates Rule 36.21 and Rule 36.22 to such a degree "we have rendered the entirety of both rules superfluous." *Tindal*, 949 N.W.2d at 647-48 (McDonald, J., dissenting). Absent an appeal or permission, "[u]pon de no review the supreme court may impose a lesser or greater sanction than the discipline the Grievance Commission recommends." Iowa Ct. R. 36.21(1). The Court "will proceed to review de novo the record" the parties are limited to "statements…in support of or in opposition to the discipline the Grievance Commission recommends." *Id*

With an appeal or permission, "[r]eview is de novo" with "proceed[ings] pursuant to the Iowa Rules of Appellate Procedure[,]" unless dismissed, at which point the matter becomes subject to Rule 36.21. Iowa Ct. R. 36.22(4). Under the Rules of Appellate Procedure, only rulings adverse to the appealing party

are subject to review. *Tindal*, 949 N.W.2d at 646-47 (McDonald, J., dissenting) (collecting cases).

De novo review "means we will decide anew the issues properly preserved for appellate review." *Struve v. Struve*, 930 N.W.2d 368, 371 (Iowa 2019). Such review "does not mean we review all issues anew; it means we review anew those issues properly preserved and presented for appellate review." *Tindal*, 949 N.W.2d at 647 (McDonald, J., dissenting). It does not permit the non-appealing party to "obtain greater relief than that afforded in the decision being reviewed." *Id.*

The Board's arguing for reversal of a ruling adverse to it without having obtained this Court's permission to do so violates Rule 36.21 and Rule 36.22. To allow this would release the Board from its obligations to obtain permission to challenge an adverse ruling. Iowa Ct. R. 36.22(2). This undermines the process which this Court's Rules has established and which once established "have the force and effect of law, as applied to the rights of parties…." *David v. Aetna Ins. Co.*, 9 Iowa 45, 46 (Iowa 1859).

It unduly burdens the attorney's right to appeal by subjecting it to the Board's challenge of rulings in the attorney's favor. Iowa Ct. R. 36.22(1). It forces an attorney to weigh his right to protect his professional standing through appeal of erroneous rulings against the risk of the Board riding his coattails to undermine any ruling in his favor. This is a trap which the "rules were not intended to create…but [which] were established for the purpose of facilitating the review of cases in this court[.]" *Homes Ins. Co., N.Y. v. Fidelity-Phenix Fire Ins. Co.*, 279 N.W. 425, 429 (Iowa 1938).

Prohibiting the Board from arguing for reversal of adverse ruling without permission does *not* interfere with the Court's ability to review disciplinary matters per its inherent and Rule implemented power. Should the Court desire briefing on an issue not raised by the attorney's appeal, it can may "file an order prescribing the issue or issues to be addressed, the length of such brief, and the schedule for filing them." Iowa R. App. P. 6.901. But what the Court is empowered to do and what the Board is *permitted* to do are separate matters. Under the Rules, the Board is not permitted to piggyback off the attorney's appeal or the Court's

authority to challenge adverse rulings absent prior permission. To the extent the Board does so on this appeal, its arguments should be disregarded.

As to the Grievance Commission's finding, it correctly determined no violation of Rule 32:8.4(d) occurred from Andrew's text messages to Assistant Marion County Attorney Matthias Robinson. "It is professional misconduct for a lawyer to…engage in conduct prejudicial to the administration of justice." Iowa R. Prof. Cond. 32:8.4(d). To violate this Rule, conduct "must hamper 'the efficient and proper operation of the courts or of ancillary systems upon which the courts rely'[.]" *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Silich*, 872 N.W.2d 181, 192 (Iowa 2015) (*quoting Iowa Supreme Ct. Att'y Disciplinary Bd. v. Netti*, 797 N.W.2d 591, 605 (Iowa 2011)). Examples of such conduct include: "paying an adverse expert witness for information regarding an opponent's case preparation, demanding a release in a civil action as a condition of dismissing criminal charges, and knowingly making false or reckless charges against a judicial officer." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Templeton*, 784 N.W.2d 761, 768 (Iowa 2010).

While there is no typical form of conduct for this violation, the through line is conduct wasting judicial resources. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Turner*, 918 N.W.2d 130, 151 (Iowa 2018). For a violation, there must be "an undesirable effect - some interference with the operation of the court system." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Weiland*, 885 N.W.2d 198, 212 (Iowa 2016). The Board presents no evidence showing how Andrew's text messages interfered with the court or wasted judicial resources. These messages were functionally no different than those Andrew had sent the same county attorney before. (App.19 ¶18, ¶¶21-23.) Contemporaneous to the first two messages, Andrew provided a breath sample, freely providing the only evidence necessary to prove an OWI offense. (App.19 ¶19.) There is no evidence Andrew's messages hampered any investigation or delayed his charges. Any impact on his case would have been subsumed in the pre-existing social relationship between the two. (App.20 ¶24.) There is no evidence these text messages were the basis for bringing charges in Wayne County, nor caused a greater consumption of resources than otherwise would have been used. (App.20 ¶26.)

While the judgment behind contacting a prosecutor during booking is questionable, Andrew did not seek preferential treatment or an improper intervention. Finding otherwise is where the Grievance Commission erred on this issue. (App.267.) He complied with law enforcement following his arrest. (App.19 ¶20.) Andrew was timely charged. (App.32.) He pled guilty to OWI 1st Offense as charged. (App.36.) At an in-person hearing, the court granted his request for a deferred judgment. (App.34 ¶¶3-4; 39.) Nothing in the record suggests this process required any extra resources from the court, the prosecutor, or the police greater than in any similar case. Absent evidence of actual prejudice due to the text message, there is no violation. *See Templeton*, 784 N.W.2d at 769 (no violation where attorney "complied with every order and time deadline[,]…did nothing to impede the progress of his criminal proceeding and did not make any statements falsely impugning the integrity of the judicial system.")

Equating Andrew's text messages with offering an officer $5,000.00 to let him go is ridiculous. *Comm. on Pro. Ethics & Conduct of Iowa State Bar Ass'n v. Williams,* 473 N.W.2d 203, 206

(Iowa 1991) (attorney "offering $1000 to $5000 to be turned loose"). These two acts are not comparative. While exemplifying poor judgment, even when viewed in the most damning light Andrew's middle of the night texts to a non-present prosecutor is not equivalent to offering a deputy money in exchange for being released uncharged.

Andrew's text messages and compliance with law enforcement assumed he would be charged. Andrew's intent was not to circumvent being charged, but rather to resolve charges quickly and quietly. Expressing a desire for a quick and quiet resolution to a client's misdemeanor charge is hardly unheard of. That it was done on his own behalf, and by text message rather than at a pretrial conference, does not make it an ethical violation, let alone raise it to the level of bribery.

The Board ties *Williams* into its argument as to an attempted violation, ignoring the fact the offered bribe violated Rule 32:8.4(d) because it, along with other conduct, *did* interfere with administering justice:

> Williams' conduct in regard to officers of the court which *impeded* the carrying out of their

> responsibilities violated this standard. Even with his disability…he had no right to elevate his desires above the duties of those administering the judicial system, and his duty as a lawyer to cooperate with them.

Williams, 473 N.W.2d at 207. As the Grievance Commission determined, Andrew's text messages did not prejudice the course of his legal proceedings. (App.267.) *Williams* is inapposite.

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

Much of what the Board argues to support the Grievance Commission's finding a Rule 32:8.4(c) violation is addressed in Andrew's initial briefing. A few of the Board's assertions, however, require additional exploration.

Again, as he has previously admitted, Andrew understated his criminal experience. (App.22 ¶¶34-35.) This is not in dispute. What is in dispute is the nefarious intent the Board contends must be read into Andrew's misstatements. As the *Sobel* case demonstrates, suspicion and inference does not carry the Board's burden "to prove by a convincing preponderance of evidence that the inaccurate statements…were made with an intent to deceive or to be dishonest." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Sobel*,

779 N.W.2d 782, 787 (Iowa 2010). The stipulated evidence does not remove "substantial doubt about the correctness of the conclusion" the Grievance Commission drew from the evidence. *Id*. at 788.

The Board's attempts to distinguish *Sobel* rely entirely on speculation, not just into Andrew's intent, but into *Sobel* as well, assuming "that some of [Sobel's] clients and cases could blend together" from his long career. (Appellee Br. 28.) At the same time, it openly speculates about Andrew, asserting "Surely an attorney would not" and "One would think[.]" (Appellee Br. 28.) Conjecture as to what "an attorney" would "surely" do and what "one would think" is not the convincing preponderance of evidence the Board is required to present. *Sobel*, 779 N.W.2d at 788 (convincing preponderance of evidence standard is "between a preponderance of evidence and evidence beyond a reasonable doubt."); *Sweeny v. City of Bettendorf*, 726 N.W.2d 873, 884 (Iowa 2009) (preponderance of evidence requires "something beyond mere conjecture and speculation."); *Slack v. C.L. Percival Co.*, 199 N.W. 323, 326 (Iowa 1924) (preponderance of evidence "cannot be left wholly to surmise

or conjecture. A legal right is involved. It must be established in a legal way and not by guess or speculation.").

The Board takes issue with the stipulation being characterized as "Andrew had never handled a complex criminal matter or even a misdemeanor trial." (Appellee Br. 29.) The Board contends the two felony cases Andrew had shows otherwise. (Appellee Br. 29.) Primary reliance is on the charges he got dismissed for violating Iowa R. Crim. P. 2.33(2)(a). (Appellee Br. 29.) Obtaining this resolution was as complex as reading the criminal complaint followed by reading Iowa R. Crim. P. 2.33(2)(a). It was as simple a resolution of a criminal charge as there can be.

As for the other criminal matter, the Board conflates a felony with complexity. Not every felony charge is complex. That the case was resolved in approximately three months cuts against it having a high degree of factual or legal complexity. (App.198, 201.)

The Grievance Commission found Andrew' intentionally lied about his criminal experience "which the Court relied upon for his sentencing." (App.265.) It is against this finding that Andrew asserts the lack of any evidence. (Appellant Br. 29-30.) While the

Board contends such reliance was irrelevant, the Grievance Commission felt otherwise in finding the violation. (App.267.)

Having a lapse in recall during your own sentencing allocution when responding to a prosecutor's own mischaracterization of your practice is not an ethical violation. It is unintentional error. The record does not prove otherwise. Andrew's statements to the sentencing court did not violate Rule 32:8.4(c).

III. A Six-Month Suspension from Practice is Excessive

In discussing the application of *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wheeler*, 824 N.W.2d 505 (Iowa 2012), to Andrew's case the Board discusses the motives behind each attorney's violative conduct to assert Andrew's was worse. (Appellee Br. 39.) In *Wheeler*, the attorney intentionally filed false financial documents with a bank with the intent "to obtain a loan for the bank, not for the bank to suffer a loss." *Id*. at 512. The Board asserts Andrew's false statements to police show he "intended Cornelison to suffer." (Appellee Br. 39.) There is no evidence of this, as the Board knows, having stipulated to Andrew's motivation as his "main concern was obtaining a no contact order." (App.17 ¶7.)

The Board also expresses confusion as to why Andrew would have any reason to feel threatened by Cornelison. (Appellee Br. 54.) These reasons are set out in detail in the record. (App. 70 [6:8-21], 71 [7:6-16], 72 [8:18-22], 73-75 [9:21-11:20].) To the extent the recorded conversation "speaks for itself," it speaks to Andrew *not* being concerned about a complaint from Cornelison about a refund to which he was not entitled. (Appellee Br. 54; App.63 [3:25-3:27].)

The Board is also incorrect in arguing Andrew's conduct was more egregious than *Wheeler* because Andrew had additional violations. (Appellee Br. 38.) *Wheeler* involved multiple violations as well. *Id*. at 511 (conduct violating Rule 32:8.4(b), (c), and (d)).

That Andrew's actions put Cornelison at risk of criminal charges and incarceration is true. It is also true obtaining a loan from a bank on fraudulent grounds puts the bank at a known risk of financial loss, regardless of motive. While an attorney may believe "his client would eventually refinance…and pay off the loan" or that "the bank was protected from loss[,]" such belief doesn't change the reality. *Id*. at 512 (attorney did not "anticipate the bank would lose funds, which is what occurred"). If *Wheeler*

stands for the motives and beliefs behind an attorney's violation mitigating the sanction, Andrew is entitled to the same benefit afforded in *Wheeler*. As Andrew's conduct was less egregious than the bank fraud in *Wheeler*, his sanction should be less then the six-months imposed there.

The attorney in *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Caghan* engaged in an active and ongoing conspiracy with his clients to deceive the court for approximately two years. 927 N.W.2d 591, 600-01 (Iowa 2019). The attorney had engaged in similar conduct across multiple jurisdictions previously, "refused to acknowledge even the possibility of wrongful conduct[,]" and "did not intend to pay the sanctions that had been levied against him" in the underlying action. *Id*. Andrew's conduct, though bad and unjustified, is not equivalent to this.

Andrew agrees the one case found by the Board involving malicious prosecution involves conduct significantly beyond Andrew's. (Appellee Br. 43.) In fact, *Iowa Supreme Ct. Bd. of Pro. Ethics & Conduct v. Postma*, 555 N.W.2d 680 (Iowa 1996) is so

beyond the pale in its conduct and disregard of the disciplinary process as to have no application here.

Throughout its brief, the Board argues the risk to Cornelison from Andrew's malicious prosecution justifies a six-month suspension. This concern about the risk of unjust incarceration makes the Board's contention Andrew's conduct was more egregious than that of the prosecutor in *Comm. on Pro. Ethics & Conduct of Iowa State Bar Ass'n v. Ramey*, 512 N.W.2d 569 (Iowa 1994) surprising. Andrew made a false report to police about being threatened with assault. The prosecutor in *Ramey*, during a *trial* on controlled substance charges, made false statements as part of laying a foundation for inculpatory evidence while knowingly withholding other exculpatory evidence. *Id.* at 571-72. *Ramey* was suspended three months for conduct far more egregious than Andrew's. *Id.* at 572.

In the end, prior cases are at best guideposts for achieving consistency in sanctions. *Templeton*, 784 N.W.2d at 769. The primary purpose of a sanction is not punishment of the violator, but protection of the public. *Iowa Supreme Ct. Att'y Disciplinary Bd. v.*

Hier, 937 N.W.2d 309, 317 (Iowa 2020). The Board wants Andrew punished for his actions against Cornelison. He has been, criminally, just as with the OWI 1st. (Ex. 1 at 9-10; Ex. 7 at 14-15.) There is nothing in the record to suggest Andrew's conduct will be repeated. *Wheeler*, 824 N.W.2d at 513 (that "incident appears to be an aberration" mitigated sanction).

The question is, given Andrew's violations, what sanction is necessary to protect the public and the integrity of the profession. *Templeton*, 784 N.W.2d at 769-70. A suspension is warranted, but not of the length recommended by the Grievance Commission and Board. As Andrew has previously requested, a one-month suspension should be imposed.

CONCLUSION

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 renews the request to be heard in oral argument.

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TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 7,000 words) because this brief contains 3,128 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: February 21, 2022
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