IN THE SUPREME COURT OF IOWA

IOWA SUPREME COURT ATTORNEY DISPLINARY BOARD, Complainant-Appellee, v. REUBEN ANDREW NEFF, Respondent-Appellant.	SUPREME COURT NO. 23-0572

APPEAL FROM THE IOWA SUPREME COURT GRIEVANCE COMMISSION

APPELLANT'S BRIEF AND ARGUMENT

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ROUTING STATEMENT

Attorney disciplinary cases must be retained by the Iowa Supreme Court. Iowa Ct. R. 36.22

STATEMENT OF THE CASE

Nature of the Case

This is an appeal by Reuben Andrew Neff ("Neff") following a findings of fact, conclusions of law and recommendations filed by the Iowa Grievance Commission of the Supreme Court of Iowa on April 6, 2023. Following a partial stipulation pursuant to Iowa Ct. R. 36.16, the Commission entered a recommendation that Neff's license be suspended for a period of sixty (60) days for violations of Iowa Rule of Professional Conduct 32:8.4(g).

Course of Proceedings

On August 8, 2022, the Iowa Supreme Court Attorney Disciplinary Board ("the Board") filed a complaint against Neff alleging violations of Rule 32:8.4(g). (APP - 004 , Complaint). On September 6, 2022, Neff filed an answer to the complaint. (Con. APP - 004, Answer). On November 14, 2022, the parties entered into a joint partial distribution pursuant to Iowa Ct. R. 36.16. (Con. APP - 008, Partial Stipulation). On November

15, 2022, the Commission accepted the parties' partial stipulation. (APP - 010, Findings of Fact). Following post-trial briefing, the Commission entered its findings of facts, conclusions of law, and recommendations on April 6, 2023. (APP - 010, Findings of Fact). On April 14, 2023, Neff timely filed a notice of appeal. (APP - 021, Notice of Appeal).

Statements of the Facts

The Board and Neff stipulated to all facts in this matter. Iowa Ct. R. 36.16(2) states that when a stipulation is accepted by the commission, "the stipulation binds the parties, the grievance commission, and the supreme court." The parties stipulated as follows:

1. The Board is a commission of the Supreme Court of Iowa, vested with the authority to investigate alleged violations of the Iowa Rules of Professional Conduct and prosecute such violations before the Grievance Commission.

2. Respondent was admitted to practice law in Florida in 2011 and waived into the Iowa Bar in February of 2017.

3. Respondent's license to practice law in Iowa is currently active.

4. Respondent currently serves as the Wapello County Attorney, having been elected to that position in 2018.

5. While Respondent served as the Wapello County Attorney, the Wapello County Attorney's office employed Ms. Tanvi Yenna as a victim services coordinator and Ms. Carly Schoemaker as an Assistant Wapello County Attorney.

6. While discussing false accusations in a criminal case, Respondent discussed with Ms. Yenna and Ms. Schoemaker a false accusation of sexual assault lodged against Respondent while he was in college. Respondent explained he never met this accuser.

7. Respondent discussed with Ms. Yenna and Ms. Schoemaker the details of the accusation of sexual assault, which included statements of slapping and scratching the Respondent's stomach to the point of bleeding through his shirt.

8. In the Fall of 2019 or Spring of 2020, Respondent told Ms. Yenna and Ms. Schoemaker about a college memory in which another college student came to class in pajama pants and no shirt. Respondent recounted how the professor kicked the student out and, as the student was leaving, his penis came out of his pajama pants.

Respondent recounted how the professor yelled at the student that he "[did] not care how proud he was of his size, get out.

9. While prosecuting a criminal defendant, Respondent, while forming a circular shape with his hand, told Ms. Yenna that a criminal defendant's "asshole" would be "this big," indicating the circular shape, by the time the criminal defendant left prison.

10. After losing a sexual abuse criminal trial in September 2019, Respondent told Ms. Yenna and Ms. Schoemaker that he wished the defendant in the case would be "raped by antelopes and mauled by lions at the same time."

11. Respondent, while preparing for a sexual exploitation of a minor trial, told Ms. Yenna that a criminal defendant should "lube up" and "grab his ankles."

12. Respondent would occasionally refer to judges as "bitches" to members of the office staff, following an unfavorable ruling or decision.

13. Respondent, in October 2019, referred to the Hon. Judge Shawn Showers, while speaking to office staff, as a "limp dick" over frustrations with how Judge Showers presided over a criminal trial

involving a sexual assault charge in which the defendant was acquitted.

14. Respondent, in recounting a threatening phone call from a member of the public, stated the caller referred to the Wapello County Attorney who preceded him in office as a "faggot." After Ms. Tanvi Yenna, a member of his staff, objected to the use of the word, Respondent asserted his ability to say the word by repeating the epithet as it related to the former Wapello County Attorney. Later, Ms. Yenna noted she did not feel comfortable with Respondent's recitation or statement. Respondent did make these comments having previously learned that Ms. Yenna identified as part of the LGBTQ+ community.

15. Sometime in early 2020, Respondent came to the office late due to taking time to snow blow his driveway. Upon entering the office Respondent explained that he spent time snow blowing five inches, though he did not believe his wife minded. After seeing a staff member smirk at this comment, Respondent did state "that's what she said." This was a reference to the TV show "The Office" and was a quote Ms. Yenna and Carly Schoemaker used frequently in the office.

16. Respondent has been informed by Ms. Yenna that his comments are inappropriate.

17. Respondent has attempted, not always successfully, to redress this issue.

18. Current staff of the Wapello County Attorney's office believe that the office dynamics are the best that they have been in a number of years and prefer the Respondent's leadership over the leadership of the two prior county attorneys.

19. All of the preceding paragraphs took place while Respondent was Wapello County Attorney and engaged in the practice of law.

20. All of the statements in the preceding paragraphs were made to staff members who were Respondent's subordinates.

21. Ms. Yenna and Ms. Schoemaker left the Wapello County Attorney's Office, in part, due to Respondent's comments and conduct.

22. Wapello County Attorney's Office maintained a sexual harassment policy that prohibits sexual harassment and retaliation for reporting of sexual harassment. The policy provides that a person can file a complaint verbally or in writing with the County Auditor or the County Attorney. In practice, a person could also file a complaint

with the County Board of Supervisors. The policy further provides that violation of the policy will result in appropriate sanctions up to, and including, termination of employment.

23. Staff members, including Ms. Yenna, were aware of the policy and the option to file a complaint with the County Auditor. Ms. Yenna had previously filed a complaint with the office manager of the Wapello County Attorney's office when a female employee had struck her in the buttock with a file folder.

24. After hearing testimony from Ms. Yenna, an administrative law judge determined that Ms. Yenna did not "demonstrate[] that she notified the employer about the unacceptable conditions….The evidence as a whole, does not demonstrate that Ms. Yenna ever gave the employer clear notice that the conditions in the office were intolerable due to sexually charged comments or stories. Without notice the employer had no opportunity to take effective action to address or resolve the problem." The administrative law judge determined that "Ms. Yenna voluntarily left her employment without good cause attributable to the employer."

25. When Ms. Schoemaker and Ms. Yenna were employed with the Wapello County Attorney Office, the Wapello County Attorney's Office employed 10 individuals. Of which 5 were attorneys and 5 were administrative staff. Of the 10 employees, 9 were female.

26. Currently, the Wapello County Attorney's office employs 10 individuals, of which 4 are attorneys and 6 are administrative staff. Of these 10 employees, 9 are female. One of the employees identifies as pansexual and a member of the LGBTQIA+ community.

27. No employees have filed any complaints, verbally, or in writing, against the Respondent pursuant to the Office policies regarding sexual harassment.

(Con. APP - 008, Stipulation).

ARGUMENT

I. THE COMMISSION ERRED IN FINDING NEFF VIOLATED IOWA CT. R. 32:8.4(g).

Preservation of Error

Whether Neff violated Rule 32:8.4(g) was raised and decided by the Commission. As such, error was preserved on this issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised

and decided by the district court before we will decide them on appeal." (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review

Review in disciplinary proceedings is de novo. Iowa Ct. R. 36.22(4). "The Board must prove any alleged misconduct by a convincing preponderance of the evidence, which 'is less than proof beyond a reasonable doubt, but more than the preponderance standard required in a civil case.'" *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Watkins*, 944 N.W.2d 881, 887 (Iowa 2020) (quoting *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Stansberry*, 922 N.W.2d 591, 593 (Iowa 2019)). The Board's burden is to eliminate any substantial doubt about the correctness of the conclusion drawn from the evidence. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Sobel*, 779 N.W.2d 782, 787-88 (Iowa 2010).

Discussion

The sole complaint filed against Neff is an allegation of violating Iowa Rule of Professional Conduct 32:8.4(g), which states: "It is professional misconduct for a lawyer to…engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so."

"Sexual harassment is broadly defined and includes conduct that may not give rise to civil liability." *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Newport*, 955 N.W.2d 176, 182 (Iowa 2021) (citing *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Moothart*, 860 N.W.2d 598, 604 (Iowa 2015)). This rule "was adopted in response to a recommendation made by the Equality in the Courts Task Force." *Iowa Supreme Ct. Bd. Of Prof'l Ethics & Conduct v. Steffes*, 588 N.W.2d 121, 124 (Iowa 1999) (citing *Final Report of the Equality in the Courts Task Force, State of Iowa* 87 (1993)).

In defining sexual harassment, the Iowa Supreme Court has previously relied upon the Black's Law Dictionary definition which "defines the term 'sexual harassment' as including 'sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature.'" *Id.* (citing *Black's Law Dictionary* 1365 (6th ed. 1990). "Additionally, the rule itself is quite broad, referring to sexual harassment or discrimination 'in the practice of law.'" *Id.* The Court has interpreted sexual harassment under Rule 32:8.4(g) to also "encompass[ ] what could be considered 'put downs,' in the form of gender harassment that is aimed at degrading or demeaning women, often to maintain gender hierarchy." *Watkins*, 944 N.W.2d 881, 887-88 (Iowa 2020) (citing

Louise F. Fitzgerald & Lilia M. Cortina, *Sexual Harassment in Work Organizations: A View From the Twenty-First Century*, *in* 1 *APA Handbook of Psychology of Women* 6-7 (Cheryl B. Travis & Jacquelyn W. White, eds., 2018)). Under this definition of sexual harassment, the Court has provided further guidance:

> The "'garden variety' gender harassment…includes 'woman bashing' jokes, insults about [women's] incompetence, the irrelevance of sexual unattractiveness of older women, and comments that women have no place in certain kinds of jobs." Fitzgerald & Cortina at 7. In a "more pernicious form," it includes "referring to women by degraded names for body parts, pornographic images, [and] crude comments about female sexuality or sexual activity." *Id.* This discrimination does not require an individual woman to serve as its target or unwanted sexual overtures, nor does it need to be explicitly linked to any job or consideration. *Id.* at 7-8, 26.

Watkins, 944 N.W.2d at 888. The sexual harassment does not need to be "ongoing or pervasive." *Moothart*, 860 N.W.2d at 604.

Pursuant to the parties' stipulation, the comments that form the basis for the Board's complaint may be broken into three categories: (1) the retelling of stories/life experiences; (2) comments made about criminal defendants he was prosecuting; and (3) comments about judges

following adverse rulings. Each of these comments will be discussed in turn, however, in reviewing each of these statements it becomes apparent that Neff has not committed "sexual harassment" in violation of Iowa Rule of Professional Conduct 32:8.4(g).

A. Retelling of Stories/Life Experiences[1]

The first purported violation involves a story in which Neff described to members of the Wapello County Attorney's office a college memory in which another college student came to class in pajama pants

[1] The Commission's Findings of Fact, Conclusions of Law and Recommendations, are less than clear as to which of Neff's violations actually constituted a violation of Rule 32:8.4(g). For example, in the "VI. Violations" section, the Commission states that it is adopting the Board's arguments as it relates to their arguments with the headings of "Neff's Comments about Judges and Former County Attorney" and "Neff has Created a Culture of Harassment at the Wapello County Attorney's Office." Yet, the Commission then references stipulations regarding criminal defendants and the retelling of stories. In any event, it is clear that the Board (and as such the Commission) have acknowledged that certain stipulations are not in violation of Rule 32:9.4(g). In paragraphs 6 and 7 of the Stipulation, the parties agreed that Neff engaged in the retelling of a story of him being falsely accused of sexual assault while in college. In post stipulation briefing, the Board agreed that these comments did not serve as a basis for a Rule 32:8.4(g) violation. This is likely for good reason. Neff made these comments in the context of generally discussing false accusations in a pending criminal case. As such, Neff had a legitimate purpose to be discussing this issue and this particular story will not be discussed herein.

and no shirt. (Con. APP – 009-010, Stipulation ¶ 8). In describing that event, Neff stated that the student's "penis" had shown through the pajama pants and the professor told him that he "[did] not care how proud he was of his size, get out." (Con. APP – 009-010, Stipulation ¶ 8). The Board has asserted that merely uttering the word "penis" makes this comment "sexual in nature" in violation of Rule 32:8.4(g). It simply cannot be the case that uttering the anatomically correct word of an individual's body , without any sexual innuendo constitutes a violation of Rule 32:8.4(g). The record contains no evidence that this statement was made to further any "sexual advances, requests for sexual favors" or that this was in any way "sexual in nature." *Steffes*, 588 N.W.2d at 124.

In another instance, Neff described snow blowing at his house. (Con. APP – 011, Stipulation ¶ 15). After referencing the amount of snow that he removed, he noticed a staff member smirk, and added "that's what she said." (Con. APP – 011, Stipulation ¶ 15). This comment, in reference to the popular TV show "The Office." The stipulation states that the two employees taking issue with the Respondent (Ms. Yenna and Ms. Schomaker) were both continually referencing this quote from "The Office." (Con. APP – 011-012, Stipulation ¶ 15, ¶ 21). The position of the

Board is that because Neff did not sanction these two now complaining employees for sexual harassment, Neff created a toxic work environment. This logic is wholly circular. Ms. Yenna and Ms. Schomaker, as stipulated, enjoyed referencing a television show, and when Neff—on one occasion—attempted to engage in the same humor with them, the Board has now asserted that he has committed sexual harassment under Rule 32:8.4(g). This simply cannot be sexual harassment. Indeed, in the context of Title VII, while not dispositive but certainly informative, in order for the sexual harassment to be actionable, the purported harassment must be unwelcomed. *See generally Beard v. Flying J, Inc.*, 2626 F.3d 792, 798 (8th Cir. 2001) ("A plaintiff must indicate by her conduct that the harassment was unwelcome, and evidence that she "engaged in behavior similar to that which she claimed was unwelcome or offensive" is evidence that the behavior is not unwelcome.") (citing *Scusa v. Nestle U.S.A. Co.*, 181 F3d 958, 966 (8th Cir. 1999)). That is exactly what happened in this case. The individuals who engaged in the behavior first, are ironically the only two individuals who are now complaining of the behavior. This simply cannot constitute sexual harassment.

The final statement under this section was Neff's use of a gay slur. In this instance, Neff relayed that an individual who had called the Wapello County Attorneys' office referred to the prior county attorney as a gay slur. (Con. APP – 011, Stipulation ¶ 14). In discussion with Ms. Yenna, Neff repeated the gay slur to her knowing that she was a member of the LGBTQIA+ community. (Con. APP – 011, Stipulation ¶ 14). Neff is accused of saying the gay slur twice, once in relaying the story to Ms. Yenna and then "asserted his ability to say the word by repeating the epithet as it related to the former Wapello County Attorney." (Con. APP – 011, Stipulation ¶ 14). What this stipulation is clearly describing is Neff repeating what threatening information was relayed to him by a member of the community regarding his predecessor. He then repeated the threat, along with its language, and asserted he had the ability to repeat the word in this context. After the incident, Ms. Yenna informed Neff that she was uncomfortable with his use of the word in that context. (Con. APP – 011, Stipulation ¶ 14). Neff is not accused of ever using the word again and indeed, after Ms. Yenna's departure continues to employ at least one member of the LGBTQIA+ community. (Con. APP – 013-014,

Stipulation ¶ 26). This use of a gay slur cannot constitute discrimination in violation of Rule 32:8.4(g).

B. Comments Regarding Criminal Defendants

In this second category, Neff made comments about three criminal defendants he was prosecuting. In the first instance, he referenced that he hoped a certain defendant would experience prison rape during his period of incarceration. (Con. APP – 010, Stipulation ¶ 9). In the other instance, he wished that a criminal defendant that was acquitted of a sexual abuse charge would be "raped by antelopes and mauled by lions at the same time." (Con. APP – 010, Stipulation ¶ 10). Finally, Neff stated that a criminal defendant in a sexual exploitation of a minor case should "lube up" and "grab his ankles." (Con. APP – 010, Stipulation ¶ 11).

Again, to borrow language from the Title VII context, "context matters." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69, 126 S.Ct. 2405, 2415, 165 L.Ed. 22d, 345 (2006) ("Context matters."). Each of these comments involved the prosecution of sexual offenders. By wishing ill-will against these individuals, the Board attempts to assert that Neff is participating in enforcing chauvinist gender roles that show

women and gay men are unwelcome as equals within the legal profession or to further some deviant sexual desires of Neff. The stipulated facts show this claim is simply untrue. These comments were all hyperbolic statements illustrating a disdain for individuals charged with heinous sex crimes, in which Neff was prosecuting, that Neff believed were sexual abusers. These comments were made to express Neff's opinion as to what bad things he wishes would happen to individuals he believes committed sexual assaults. Each of these instances should not be considered "sexual harassment" as that term is recognized under Rule 32:8.4(g).

C. Comments about Judges Following Adverse Rulings

The final category of statements involves comments made by Neff regarding judicial officers. The parties stipulated that Neff "would occasionally refer to judges as 'bitches' to members of the office staff, following an unfavorable ruling or decision." (Con. APP – 010, Stipulation ¶ 12). Additionally, it is stipulated on one occasion Neff referred to a judge as a "limp dick" following the acquittal of a criminal defendant in a sexual assault charge. (Con. APP – 010-011, Stipulation ¶ 13).

Similar to the statements above, the Board focuses on identifying instances where Neff utters a vulgarity and then takes the position that such words, by their utterance in a law office, are sexual harassment as they hold no legitimate purpose within the legitimate practice of law. The central issue with this approach is that the Board fails to even attempt to establish a sexual in nature context and no attempt is made in differentiating sexual harassment from general office vulgarity.

In asserting that these statements are a violation, the Board relies upon *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 813 (11th Cir. 2010). However, in relying upon *Reeves*, the Board ignores several important aspects. First, in the context of Title VII, the *Reeves* court recognized that "the evidence of harassment is considered both cumulatively and in the totality of the circumstances." *Id.* at 808. Further, "where both gender-specific and general, indiscriminate vulgarity allegedly pervaded the workplace, we reaffirm the bedrock principle that not all objectionable conduct or language amounts to discrimination under Title VII. Although gender-specific language that imposes a change in the terms or conditions of employment based on sex will violate Title VII, general vulgarity or references to sex that are

indiscriminate in nature will not, standing alone, generally be actionable. Title VII is not a 'general civility code.'" *Id.* at 809 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)). "Title VII does not prohibit profanity alone, however profane. It does not prohibit harassment alone, however severe and pervasive." *Id.* (quoting *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1301-02 (11th Cir. 2007)). Further, "sexual language and discussions that truly are indiscriminate do not themselves establish sexual harassment under Title VII." *Id.* "Equally important to our inquiry here is the common-sense rule that the context of offending words or conduct is essential to the Title VII analysis." *Id.* at 810.

There is no evidence in this case that establishes that the statements by Neff are sexual in nature. Instead, the Board is pursuing these statements under the broader definition of sexual harassment as outlined in *Watkins* to include gender harassment. 944 N.W.2d at 887-88. Gender harassment includes "put downs" and "is aimed at degrading or demeaning women, often to maintain gender hierarchy." *Id.* (citations omitted). However, that is simply not the case here. There is no evidence in the stipulation that any of the comments made by Neff were a

reflection on his treatment towards women as a whole or seeking to affirm his personal views of gender hierarchy. Neff is not accused of asserting that only female judge are "bitches" or that all female judges or "bitches." Indeed, Neff also made at least one comment directed specifically to a male judge. Instead, Neff only made the statements "occasionally" and only in the context of an "unfavorable ruling or decision." (Con. APP – 011, Stipulation ¶ 12). These comments are not gender based, but instead are expressions of Neff's opinions regarding the rulings he receive on particular cases in the confines of his office and not in the public. They are not expressions about an individual's gender or capabilities of being a judge because of their gender, nor are they pervasive. Instead, these comments are more akin to general vulgarity than any sort of nefarious sexual harassment and/or gender harassment. In situations such as this, courts have recognized that it does not constitute sexual harassment under Title VII. For example, in *Reeves*, the court recognized that if the environment at issue "had just involved a generally vulgar workplace whose indiscriminate insults and sexually laden conversation did not focus on the gender of the victim, we would face a very different case." *Id.* at 810. *See also Faragher,* 524 U.S., at

788, 118 S.Ct. 2275 ("Properly applied, [the standards for judging workplace hostility] will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.") (quoting B. Lindemann & D. Kaude, Sexual Harassment in Employment Law 175 (1992)). Given the few instances that are alleged against Neff, the context of the statements, and the period of years which it covers, it is difficult to state that the facts even establish a "generally vulgar workplace" and instead almost always appear to be one-off statements made in response to high-stress situations. These statements should not be considered violations of Rule 32:8.4(g).

D. Neff has Not Created a Culture of Harassment.

Finally, the Board and the Commission assert that Neff has created a culture of harassment to the point that the Commission recommended that "Neff and his staff attend training approved by the Iowa Civil Rights Commission or other similar entities regarding topics of sexual harassment in the workplace and hostile work environment. (APP – 020, Conclusions of Law P. 11). First, as outlined at length above, none of these actions by Neff should be considered a violation of Rule 32:8.4(g)

and it is almost certain that none of these actions would constitute an actionable claim against Neff or the Wapello County Attorney's Office under Title VII. Indeed, relying upon the case law previously stated, it is apparent that no individual in the Wapello County Attorney's Office would have a cognizable claim. Likewise, there is no evidence in this case that anyone has pursued a claim based upon Title VII against Neff or the Wapello County Attorney's Office. In fact, the stipulated evidence establishes the exact opposite of hostile work environment.

First, as it relates to the employment of Ms. Yenna, Ms. Yenna attempted to obtain unemployment benefits by asserting unacceptable working conditions related to "sexually charged comments or stories." (Con. APP – 013, Stipulation ¶ 24). Ultimately, the "administrative law judge determined that 'Ms. Yenna voluntarily left her employment without good cause attributable to the employer." (Con. APP – 013, Stipulation ¶ 24).

Second, the Wapello County Attorney's Office has appropriate sexual harassment policies that prohibit sexual harassment and retaliation. (Con. APP – 012, Stipulation ¶ 22). The policy provides that individuals can report unwanted sexual advances to multiple

individuals, including individuals outside of the Wapello County Attorney's Office. (Con. APP – 012, Stipulation ¶ 22). The stipulation does not provide any instances in which an individual has reported any inappropriate behavior by Neff. (Con. APP – 014, Stipulation ¶ 27). This is despite the office having 9 of its 10 employees being female and one of the employees being a member of the LGTBQIA+ community. (Con. APP – 013-014, Stipulation ¶ 25, 26). In response to this, the Board and the Commission assert that this must mean that individuals are too fearful to assert a claim in fear of retaliation. There is absolutely no evidence to support any such contention. In fact, to have such an opinion runs entirely contrary to the stipulation where it was agreed that "[c]urrent staff of the Wapello County Attorney's office believe that the office dynamics are the best that they have been in a number of years and prefer [Neff's] leadership over the leadership of the two prior county attorneys." (Con. APP – 012, Stipulation ¶ 18). To assert that Neff has somehow created a hostile work environment, runs completely afoul to the stipulation and should be disregarded.

Based upon all of the foregoing, Neff respectfully requests that this Court find that there has been no Rule 32:8.4(g) violation and that the complaint against Neff should be dismissed.

II. ALTERNATIVELY, IF RULE 32:8.4(g) IS IN VIOLATION OF THE FIRST AMMENDMENT OF THE UNITED STATES CONSTITUTION

Preservation of Error

Whether Neff's speech was protected under the First Amendment of the United States Constitution was raised before the Commission below. In response to this argument, the Commission took the position that it lacked authority to address Neff's constitutional arguments but agreed that error was preserved. The Board has also agreed that error is preserved. As such, error was preserved on this issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)). Even if error was not preserved for some technical reasons, this Court has previously held that it may consider constitutional arguments that may have been waived "because such an inquiry is necessary to properly

interpret the rule." *Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Visser*, 629 N.W.2d 376, 380 (Iowa 2001).

Standard of Review

Review in disciplinary proceedings is de novo. Iowa Ct. R. 36.22(4). "The Board must prove any alleged misconduct by a convincing preponderance of the evidence, which 'is less than proof beyond a reasonable doubt, but more than the preponderance standard required in a civil case.'" *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Watkins*, 944 N.W.2d 881, 887 (Iowa 2020) (quoting *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Stansberry*, 922 N.W.2d 591, 593 (Iowa 2019)).

Discussion

At the outset, Neff asserts that this Court does not need to address these constitutional claims should it properly interpret and apply Rule 32:8.4(g). Under the doctrine of constitutional avoidance:

> When possible, statutory provisions should be construed in such a way as to avoid unconstitutionality rather than simply void them on the basis of an interpretation which renders them constitutionally infirm. If the law is reasonably open to two constructions, one that renders it unconstitutional and one that does not, the court must adopt the interpretation that upholds the law's constitutionality. It would also be preferable to construe the statute to support

> constitutionality rather than to rewrite or try to improve the statute in some other way.

Visser, 629 N.W.2d at 380 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 45.11, at 70-71 (2000 rev.)(footnotes omitted). However, should the Court determine that Neff's statements are in violation of Rule 32:8.4(g), this Court must perform a constitutional analysis as to whether his speech is protected free speech.

"Disciplinary rules restricting communications by lawyers are 'necessarily constrained by the First Amendment." *Visser*, 629 N.W.2d at 380 (quoting *Peel v. Attorney Disciplinary Comm'n*, 496 U.S. 91, 108, 110 S.Ct. 2281, 2292, 110 L.Ed.2d 83, 99 (1990)). The Court "must also be aware of the 'constitutional limits on the *type* of speech' that may be the subject of discipline." *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Weaver*, 750 N.W.2d 71, 82 (Iowa 2008) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S.1, 16, 110 S.Ct. 2695, 111 L.Ed. 2d 1, 16 (1990)). "Speech is not unprotected merely because it is uttered by 'professionals.' [The U.S. Supreme Court] has 'been reluctant to mark off new categories of speech for diminished constitutional protection.'" *Nat'l Inst. Of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (hereinafter *NIFLA*)

(quoting *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996)).

This Court has recognized that "there are limitations on the type of speech which we may discipline." *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Attorney Doe No. 792*, 878 N.W.2d 189, 194 (Iowa 2016). "While all statements of opinion are not automatically given First Amendment protection, 'a statement of opinion relating to matters of public concern which does not contain a probably false factual connotation will receive full constitutional protection." *Id.* (quoting *Weaver*, 750 N.W.2d at 82). "In addition, 'statements that cannot reasonably be interpreted as stating actual facts about an individual, such as rhetorical hyperbole, will also be protected by the First Amendment." *Weaver*, 750 N.W.2d at 82. (quoting *Milkovich*, 497 U.S. at 20, 110 S.Ct. at 2706, 111 L.Ed2d at 19).

The U.S. Supreme Court has recognized lesser protections for "professional speech in two circumstances—neither of which turned on the fact that professionals were speaking." *NIFLA*, 138 S.Ct. at 2372. The first instance was when there are "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* (citations omitted). "Second, under our precedents, States

may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* (citations omitted). However, if the professional conduct "alters the content" of the speech, it actually affects speech and not merely conduct. *Id.* at 2371, 2374; *see also In re Idaho State Bar Resolution 21-01* at 5 (Idaho Supreme Court decided January 20, 2023) (located at https://isc.idaho.gov/opinions/50356.pdf) (last visited June 12, 2023)(recognizing same).

In applying these same principals, at least two courts have, on their face, struck down similar rules to Rule 32:8.4(g). Recently, there has been much scholarly discussion and even a finding that a recent ABA Model Rule that somewhat mirrors Iowa Rule of Professional Conduct 32:8.4(g) is unconstitutional. ABA Model Rule 8.4(g) "makes it professional misconduct for a lawyer to 'engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.'" § 12:4(d)(3) Conduct prejudicial to the administration of justice and biased manifestations or conduct as professional misconduct—Sexual

harassment and illegal discrimination, 16 Ia. Prac., Lawyer and Judicial Ethics § 12:4(d)(3). Further, the comments to the ABA rule state that this rule "goes further by extending to professional activities (such as continuing legal education programs and bar dinners)…" *Id.* This proposed rule has not been adopted by many States due to fears of it being unconstitutional. *Id.*

In one State where it has been adopted, it has been deemed unconstitutional and a violation of the First Amendment of the United States Constitution. In *Greenberg v. Haggerty*, 491 F.Supp.3d 12 (E.D. Penn. 2020), a Pennsylvania federal district court struck down Pennsylvania's adoption of ABA Model Rule 8.4(g). The Court in *Greenberg* specifically found that the "plain language of Rule 8.4(g) explicitly prohibits "words" that manifest bias or prejudice" and the speech was entitled to "full protection of the First Amendment." *Id.* at 27. Additionally, the court went on to find that Rule 8.4(g) constituted "view-point discrimination in violation of the First Amendment." *Id.* "Viewpoint discrimination is 'when the government targets not subject matter, but particular views taken by speakers on a subject.'" *Id.* (quoting *Startzell v. City of Philadelphia, Pennsylvania*, 533 F.3d 183,

193 (3d Cir. 2008)). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* The court also quoted the United States Supreme Court: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed. 2d 342 (1989)).

Likewise, the Idaho Supreme Court engaged in an in-depth analysis regarding the Idaho State Bar Commissioners request to adopt a resolution to change Idaho's Rule 8.4(g) to be somewhat similar to the ABA's requested version. *In re Idaho State Bar Resolution 21-01* at 1-2 (Idaho Supreme Court decided January 20, 2023) (located at https://isc.idaho.gov/opinions/50356.pdf) (last visited June 12, 2023). In an attempt to address many of the critiques observed by legal scholars and likely the opinion in *Greenberg*, the Idaho State Bar Commissioners made many significant changes to make it more in line with Title VII and hopefully pass constitutional muster. *In re Idaho State Bar Resolution 21-01* at 1-3 (Idaho Supreme Court decided January 20, 2023) (located at

https://isc.idaho.gov/opinions/50356.pdf) (last visited June 12, 2023). However, after a thorough analysis, the Idaho Supreme Court determined that the requested language must be subjected to strict scrutiny and in applying strict scrutiny, is in violation of the First Amendment. *Id.* at 13. The Idaho Supreme Court also determined that the proposed rule was overly broad and unconstitutionally vague. *Id.* at 13-15. This Court should follow the logic of the Idaho Supreme Court and find that Rule 32:8.4(g) invokes fundamental constitutional rights, must be subjected to strict scrutiny and is in violation of the First Amendment of the U.S. Constitution.

First, the Idaho Supreme Court, after reviewing applicable U.S. Supreme Court precedent, in particular *NIFLA*, recognizes "that a category of speech that is subject to regulation can still violate the First Amendment if it singles out sub-categories of that speech based on its content…While the resolution deals with unlawful employment practices, it extends beyond the unlawful employment practices to regulate conduct based on the content of speech and the messages expressed—derogatory and demeaning comments based upon race, sex,

religion, identity, marital status, or socioeconomic status." *Id.* at 6. Accordingly, strict scrutiny should apply.

The Idaho Supreme Court then relied upon *NIFLA* which states as follows:

> The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. [155, 162] (2015). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.* This stringent standard reflects the fundamental principle that governments have "'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Ibid.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 [](1972)).

Id. at 6-7 (quoting *NIFLA*, 138 S.Ct. at 2371). In applying these principles, the Idaho Supreme Court determined that even though their version of 8.4(g) was merely directed at conduct, it in fact served as both content and viewpoint-based regulation. It is a "content-based restriction on speech because it 'applies to particular speech because of the topic discussed or the idea or message expressed.' Resolution 21-01 favors one

viewpoint over another (tolerance for a protected class of persons versus intolerance for a protected class of persons); therefore, it is also a viewpoint-based restriction." *Id.* at 10. Importantly, the "resolution is not limited to speech directed at a person based on *that person's* protected status, but instead prohibits speech because the speech is derogatory or demeaning and the speech is based on a specified protected status." *Id.* (emphasis in original).

Importantly, the Idaho Supreme Court recognized as follows:

> Title VII specifically prohibits unlawful employment practices taken "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). However, Resolution 21-01 does not specifically limit its application to individuals who are members of a protected status. Further, it is unclear from the proposed version of Rule 8.4(g) whether the P&E Section intended to limit the reach of the rule to those situations that involve members of a protected class. In other words, it is not clear whether the P&E Section intended to limit harassment and discrimination against someone based on that person's protected status, or if it intended to say any harassment based on a protected status is unlawful—i.e., if one person does not fall into a protected class as defined by Title VII, but he may be offended by another's comments against a protected class.
>
> The distinction is important. Title VII limits harassment against individuals because of their

> protected status. However, the Bar's proposed rule does not attempt to define a nexus between protected classes and harmful speech, rendering the Bar's suggested analysis under Title VII inapt.

Id. at 11. Iowa's Rule 32:8.4(g) has the same problem as the Idaho rule.

Idaho's Resolution 21-01 stated:

> It is professional misconduct for a lawyer to:
> …
>
> (g) engage in discrimination or harassment, as follows:
>
> (1) in representing a client or operating or managing a law practice or in the course and scope of employment in a law practice, engage in conduct that the lawyer knows or reasonably should know is unlawful discrimination. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules; and
>
> (2) in representing a client or operating or managing a law practice or in the course and scope of employment in a law practice, engage in conduct that the lawyer knows or reasonably should know is harassment. Harassment is derogatory or demeaning verbal, written, or physical conduct toward a person based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. To constitute a violation of this subsection, the harassment must be severe or pervasive enough to create an environment that is

> intimidating or hostile to a reasonable person. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules.

Id. at 1-2. The comments accompanying this rule further state that "substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." *Id.* at 2. Accordingly, this rule is a clear attempt to comply with Title VII prohibitions.

As interpreted by this Court, Iowa Rule 32:8.4(g) is actually broader than this Idaho proposal. This Court has recognized that Rule 32:8.4(g) is broad and encompasses actions greater than Title VII's employment context. *See Watkins*, 944 N.W.2d at 887; *Moothart*, 860 N.W.2d at 604; *Steffes*, 588 N.W.2d at 124. Rule 32:8.4(g) clearly prohibits not only conduct, but the content of speech. As such, this Court should follow the precedent of the Idaho Supreme Court and find that strict scrutiny applies and should strike Rule 32:8.4(g) for violation of the First Amendment of the U.S. Constitution. *In re Idaho State Bar Resolution 21-01* at 11 (Idaho Supreme Court decided January 20, 2023) (located at https://isc.idaho.gov/opinions/50356.pdf) ("We conclude that Resolution 21-01 is not narrowly tailored to achieve a compelling state interest.").

Like Idaho, and all states, Iowa "has an interest in regulating the legal profession to protect the public and uphold the integrity of the judicial system…[and] in insuring the legal profession is free from unlawful discrimination and harassment." *Id.* However, when that legitimate interest covers speech that is potentially constitutional, as is the case here, it cannot survive strict scrutiny. *Id.* at 12.

The Idaho Supreme Court determined that its version of Rule 32:8.4(g) was unconstitutionally overbroad and vague. *Id.* at 12. In particular, the Idaho Supreme Court found that the proposed rule only listed "vague exceptions of participation in bar association, business, or social activities outside of the employment context does not narrowly define the situations where the rule applies, and therefore clearly implicates a substantial amount of protected speech." *Id.* at 13. Similarly, the Court found that undefined language such as "intimidating" or "hostile" did not create "a sufficient framework to define harassment." *Id.* at 14. Additionally, the Idaho Supreme Court stated that the proposed rule "leaves a reasonably prudent attorney with doubt about exactly what type of conduct or speech constitutes misconduct" and is therefore unconstitutionally vague. *Id.* at 14.

It is worth noting that the Colorado Supreme Court has held that one of its disciplinary rules (Colorado Rule of Professional Conduct 8.4(g)) did not violate the First Amendment of the U.S. Constitution. *Matter of Abrams*, 488 P.3d 1043 (Colo. 2021). However, any such reliance upon *Abrams* is misplaced.

The Idaho Supreme Court compared the Colorado Supreme Court's holding in *Abrams* and the Pennsylvania federal district court opinion in *Greenberg* and summed it up the two positions as follows:

> The Pennsylvania and Colorado rules differ substantively. On one end of the spectrum, Pennsylvania's rule explicitly covered "words and conduct," and applied to "participation in…continuing legal education seminars, bench bar conferences, and bar association activities where legal education credits are offered." *Greenberg*, 491 F. Supp 3d at 16. The Pennsylvania rule included two comments to assist with interpretation and application of its restrictions. On the opposite end of the spectrum, Colorado's rule is much narrower. It limits the rule's scope to "conduct, in the representation of a client," that engenders bias on account of a protected status. The rule did not include any comments. *Abrams*, 488 P. 3d at 1052. On this spectrum, Resolution 21-01 falls closer to the Pennsylvania rule that was struck down because it contains several flaws that call its constitutionality into doubt.

In re Idaho State Bar Resolution 21-01 at 10 (Idaho Supreme Court decided January 20, 2023) (located at https://isc.idaho.gov/opinions/50356.pdf). For the same reasons as the Idaho Supreme Court, this Court should find that Rule 32:8.4(g) is more similar to the Pennsylvania and Idaho rules than the Colorado Rule.

Iowa's Rule 32:8.4(g) faces the same fatal flaws as the Idaho proposed rule and as such should be deemed to be both unconstitutionally overbroad and vague. First, there is virtually no definition as to what "in the practice of law" means under Rule 32:8.4(g). Does this mean attending bar functions or continuing legal education functions? Does this mean client functions outside of the traditional business setting? Similarly, this Court has already determined that sexual harassment is a broad term under 32:8.4(g), and as will be described below in the as applied section of this argument, apparently may apply to one off comments.

Likewise, the rule, as currently being interpreted by the Board, is unconstitutionally vague. As evidenced by this case, it will be difficult for practitioners to know what will be permissible under Rule 32:8.4(g) versus what could lead to a sanction and possible license suspension. For

example, if after dealing with a particularly difficult opposing counsel and an attorney uses a particular vulgarity to describe that attorney, will they have a fear of being suspended? There are many vulgar words that have their root in describing anatomy or a sex act but would hardly be considered sexual harassment if spoken in this context. (i.e., "d*ck", "a**hole," "motherf***er," etc.). The Boards interpretation of Rule 32:8.4(g) is simply so vague that it cannot survive this constitutional challenge.

Additionally, this Court should find that Rule 32:8.4(g) is unconstitutional as applied to the stipulated facts in this case. The majority of the statements in this case are constitutionally protected statements "of opinion relating to matters of public concern" and/or "statements that cannot reasonably be interpreted as stating actual facts about an individual, such as rhetorical hyperbole." *Weaver*, 750 N.W.2d at 82 (citations and quotations omitted).

For example, when Neff wished ill-will upon individuals, he was criminally prosecuting he was simply expressing an opinion regarding his belief as to what should happen to individuals accused of sexual assault crimes. This is certainly a matter of public concern. Similarly,

these statements could not be viewed as anything other than rhetorical hyperbole that is explicitly protected under the First Amendment. The same is true regarding his statements about certain judges that gave his office occasional unfavorable rulings. His comments are "the sort of loose, figurative, or hyperbolic language which would negate the impression that [he] was seriously maintaining" the asserted facts. *Id.* (quoting *Milkovich*, 497 U.S. at 21, 110 S.Ct. at 2707, 111 L.Ed. 2d at 19). These statements of Neff are clearly protected free speech under the First Amendment.

III. ALTERNATIVELY, IF NEFF IS NOT ENTITLED TO CONSTITUTIONAL PROTECTION FOR ANY COMMENTS, THE SANCTION PROVIDED BY THE COMMISSION IS TOO SEVERE

Preservation of Error

What sanction Neff should receive was raised and decided by the Commission. As such, error was preserved on this issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review

Review in disciplinary proceedings is de novo. Iowa Ct. R. 36.22(4). "The Board must prove any alleged misconduct by a convincing preponderance of the evidence, which 'is less than proof beyond a reasonable doubt, but more than the preponderance standard required in a civil case.'" *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Watkins*, 944 N.W.2d 881, 887 (Iowa 2020) (quoting *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Stansberry*, 922 N.W.2d 591, 593 (Iowa 2019)).

Discussion

Neff maintains that his actions should not be deemed to be in violation of Rule 32:8.4(g) and that his speech is protected under the First Amendment of the United States Constitution. However, should the Court find that any of Neff's statements violate Rule 32:8.4(g), then Neff proposes a sanction of a private admonition[2].

> When crafting a sanction, we consider the nature of the violations, the attorney's fitness to continue

[2] Neff recognizes that "while a private reprimand is not discipline, it serves as a warning and puts the attorney on notice that his or her behavior violates certain ethical requirements. Likewise, in imposing only a private admonition, we are in no way minimizing or condoning the unwarranted and unprofessional [actions]." *Iowa Supreme Court Attorney Disciplinary Bd. v. Attorney Doe No. 792*, 878 N.W.2d 189, 202 (Iowa 2016).

> in the practice of law, the protection of society from those unfit to practice law, the need to uphold public confidence in the justice system, deterrence, maintenance of the reputation of the bar as a whole, and any aggravating or mitigating circumstances.

Iowa Supreme Court Disciplinary Bd. v. Attorney Doe No. 792, 878 N.W.2d 189, 201 (Iowa 2016) (quoting *Iowa Supreme Court Disciplinary Bd. v. Blessum*, 861 N.W.2d 575, 591 (Iowa 2015)). "There is no standard sanction for any particular type of misconduct. Rather, we 'determine an appropriate sanction based on the particular circumstances of each case.'" *Id.* (quoting *Blessum*, 861 N.W.2d at 591; *Iowa Supreme Court Attorney Disciplinary Bd. v. Morris*, 847 N.W.2d 428, 435 (Iowa 2014)). In this case, each of these factors points towards a private admonition.

In considering the nature of these violations, it is worth noting that in the spectrum of violations of Iowa Rule of Professional Conduct 32:8.4(g), this is undoubtedly on the lowest end of the spectrum. None of Neff's actions involve persistent sexual advances or sexual favors. Instead, the majority of his comments are one off statements that express his displeasure regarding particular criminal defendants or unfavorable rulings. Furthermore, none of statements call into Neff's question to

practice law or a need to protect society from Neff's actions. None of the statements were made in a public setting or involve his duties as a county attorney.

The parties have previously stipulated to the mitigation factors of cooperation with the Board, lack of prior discipline, and community service and volunteer work. Additionally, given the nature of these violations, it is worth noting that Neff maintains an office that employs primarily women at both the administrative level and at the attorney level. (Con. APP – 013, Stipulation¶ 24, 25). His office maintains a sexual harassment policy and no one from his office has ever used the policy against him. (Con. APP – 014, Stipulation¶ 27). This is despite the policy allowing the reporter to assert claims outside of his office to the County Auditor. (Con. APP – 013, Stipulation¶23). It is also worth noting that an administrative law judge found that one of the employees that purported left employment due to Neff's actions, gave Neff "no opportunity to take effective action to address or resolve the problem" and that she "voluntarily left her employment without good cause attributable to [Neff]." (Con. APP – 013, Stipulation ¶ 24).

The parties have stipulated that "[c]urrent staff of the Wapello County Attorney's office believe that the office dynamics are the best that they have been in a number of years and prefer [Neff's] leadership over the leadership of the two prior county attorneys." (Con. APP – 012, Stipulation¶18). This is echoed by two employees who have provided character affidavits that praise Neff's leadership and actions as the elected County Attorney.

The sanctions in other cases provide little value in this case, other than to establish that Neff's conduct is on the lowest end of the spectrum for violations of Iowa Rule of Professional Conduct 32:8.4(g). In *Watkins*, the Iowa Supreme Court reviewed a litany of cases from other jurisdictions which all discussed significantly more egregious behavior than what is alleged in this case. *See*, 944 N.W.2d at 889-90 (collecting cases from Ohio, Colorado, and Kansas). *Watkins*, recognized that it was the first "sexual harassment" disciplinary case. *Id.* at 889. In *Watkins*, the county attorney engaged in significant, severe, and prolonged sexual harassment directed to members of his staff. *Id.* at 884-86. When his employee resigned, Watkins received a list of fifty-five complaints regarding his actions, several of which involved sexual harassment. *Id.*

at 885. These complaints included direct comments about his sex-life, former girlfriends, sexually driven jokes, appearing only wearing boxers in front of female staff, sexual comments about females, and comments directly about the employee's breasts in a sexual context. *Id.* Further, he subjected the County to litigation. *Id.* at 886. As a result of his actions, the attorney received a suspension of six months. *Id.* at 884.

In this case, there are simply no actions on Neff's part that come close to the actions in *Watkins*. None of the comments made in this case involve sexual gratification or sought to explore sexual gratification. None of the comments involved the type of gender harassment, gender discrimination, or the maintenance of a gender hierarchy that Rule 32:8.4(g) was implemented to prohibit. Based upon the foregoing, should this Commission find that there is a violation, the level of sanction should be a private admonition.

In a footnote, the Commission stated that because the actions regarding *Watkins* were located in close proximity to Wapello County, Neff should have been on notice of the improprieties of his actions. (APP - 018 , Conclusions of Law P. 9). However, *Watkins* was not published by this Court until *after* almost all of the actions in the stipulation occurred.

Indeed, one of the leading authorities for legal ethics in Iowa, the Iowa Practice Series on Lawyer and Judicial Ethics has recognized that "the court has shown no propensity for applying the rule to expressions of opinion or to ordinary social interactions. Prudential bar authorities will avoid pursuing charges for dubious objections to protected expressions of opinion on matters of public concern." § 12:4(d)(3) Conduct prejudicial to the administration of justice and biased manifestations or conduct as professional misconduct—Sexual harassment and illegal discrimination, 16 Ia. Prac., Lawyer and Judicial Ethics § 12:4(d)(3).

Considering all of the stipulated facts, the context of each of the statements, and the mitigation factors, this Court, if it finds Neff violated Rule 32:8.4(g), should find that a private admonishment is the appropriate sanction.

CONCLUSION

In conclusion, Neff respectfully requests that this Court should find that Neff did not violate Rule 32:8.4(g). Alternatively, this Court should find that the enforcement of Rule 32:8.4(g) is in violation of the First Amendment of the U.S. Constitution. Finally, should the Court find that Neff violated Rule 32:8.4(g) and it is not in violation of the First

Amendment of the U.S. Constitution, this Court should issue a private admonition.

REQUEST FOR ORAL SUBMISSION

Neff respectfully requests this Court grant oral argument in this matter.

Respectfully Submitted,

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I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Proof Brief and Argument was $0.00, as it was electronically filed.

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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Dated: August 3, 2023

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CERTIFICATE OF SERVICE AND CERTIFICATE OF FILING

I certify on August 3, 2023, I will serve this document on the Appellee's Attorney Robert Howard by electronically filing it.

I further certify that on August 3, 2023, I will electronically file this document with the Clerk of the Iowa Supreme Court.

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