In the Supreme Court of Iowa

Supreme Court No. 18-1229
Grievance Commission No. 848

Iowa Supreme Court
Attorney Disciplinary Board,

Appellee,

vs.

Matthew L. Noel,

Appellant

Appeal from the Report of the Iowa Supreme Court Grievance Commission

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Appellee's Final Brief

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Routing Statement

The Supreme Court should retain this case because under Iowa R. App. P. 6.1101 "[t]he Supreme Court shall ordinarily retain the following types of cases: … e. Cases involving lawyer discipline."

Statement of the Case

Nature of the Case

The Attorney Disciplinary Board (Board) brought this lawyer disciplinary action against Matthew L. Noel (Noel) alleging violations of the Iowa Rules of Professional Conduct (Rules).

Course of Proceedings and Disposition

On October 10, 2017, the Board filed its Complaint against Noel. App. pp. 8-23. On November 1, 2017, Noel filed his Answer. App. p. 24-31.

On January 26, 2018, the Board filed a Motion for Leave to Amend and Substitute its Complaint. On February 28, 2018, the Grievance Commission (Commission) granted the Board's Motion to Amend Complaint. On February 7, Noel filed an Answer to the Amended and Substituted Complaint. App. pp. 40-46. On March 5, 2018, the Board filed its Amended and Substituted Complaint and its Issue Preclusion Notice. App. pp. 47-71 and 72-73.

On March 27 and 28, the parties tried the case before the Commission.

On July 18, 2018, the 568th Division of the Commission filed its Findings of Fact, Conclusions of Law, and Recommendation. App. pp. 168-82.

Commission's Conclusion

The Commission concluded that Noel violated Rules 32:1.5(a), 32:8.4(b), and 32:8.4(c) in his billings to the SPD for fees and mileage expense reimbursement. App. pp. 176-78. The Commission rejected Noel's affirmative defense of selective prosecution, writing, in part: "Noel's conduct and ethical obligations are his alone." App. p. 178.

Commission's Aggravating Circumstances

The Commission concluded that Noel engaged in a pattern of misconduct over a long period of time. App. pp. 178-79. It concluded that Noel engaged in dishonesty. App. p. 179.

Commission's Mitigating Circumstances

The Commission concluded that Noel established these mitigating factors: 1. No disciplinary record; 2. Cooperation with the Board and its

investigation; 3. Reimbursement to the SPD of improper fees and mileage payments; and 4. Respect within the legal community. App. p. 179.

Commission's Recommendations

Although the Commission did not specifically identify it as an aggravating factor, it noted Noel's "failure to acknowledge his admissions and misconduct during the hearing and in his brief[]" as troubling. App. pp. 179-80. The Commission recommended that Noel "be suspended from the practice of law for an indefinite period with no possibility of reinstatement for at least one year". App. pp. 181-82.

Noel's Appeal

On July 30, 2018, Noel filed his notice of appeal with the Commission clerk. App. pp. 183-84.

Statement of the Facts

The Board is a Commission of the Iowa Supreme Court. App. p. 47 ¶ 1.

Noel obtained his law license in 2008. App. p. 47 ¶ 2.

In November 2008, Noel and the State Public Defender (SPD) executed a contract, under SPD's Master Contract Version 493-04; this

contract, which expired on January 1, 2011, authorized Noel to represent indigent litigants in district and juvenile court matters in five counties and appellate matters. App. p. 47 ¶ ¶ 4 and 5, Supp. App. p. 3, and App. pp. 93-94.

In December 2010, Noel and the SPD executed a contract, under SPD's Master Contract Version 493-04; this contract, which expired on January 1, 2014, authorized Noel to represent indigent litigants in district and juvenile court matters in five counties and appellate matters. App. pp. 47-48 ¶ ¶ 6 and 7, App. p. 93-94, and App. p. 95.

In February 2011, Noel and the SPD executed a contract, under SPD's Master Contract Version 493-10A; this contract, which expired on January 1, 2014, authorized Noel to represent indigent litigants in appellate matters. App. p. 48 ¶ ¶ 8 and 9 and Supp. App. pp. 4 and 5-7.

In February 2012, Noel and the SPD agreed to add five counties to his December 2010 contract for district court matters. App. p. 48 ¶ 10.

In December 2013, Noel and the SPD executed a contract, under SPD's Master Contracts Version 493-10 and 493-10A; this contract, which expired on February 1, 2014, authorized Noel to represent indigent litigants in district and juvenile court matters in four counties

and in appellate matters. App. p. 48 ¶ ¶ 11 and 12 and Supp. App. pp. 5-7, 8, and 9-11.

In January 2014, the SPD, Samuel Langholz (Langholz), advised Noel in writing that the SPD would not renew his contract beyond February 1, 2014. App. p. 49 ¶ 16 and App. pp. 100-01.

Count I

Noel Billings for Family Team Meetings

In March 2016, the State Attorney General (AG) filed a trial information in the Iowa District Court for Polk County, case FECR294112, charging Noel with the crime of theft in the second degree. App. pp. 74-75. In May 2017, the district court scheduled a change of plea hearing for June 23, 2017. App. p. 49 ¶ 22.

On June 19, 2017, the AG filed an amended trial information charging Noel with two counts of the crime of theft in the fourth degree, serious misdemeanors. App. p. 50 ¶ 23 App. pp. 82-83. On June 22, Noel filed a petition to plead guilty to the two counts of fourth degree theft alleged in the amended trial information. App. p. 50 ¶ 25 and App. pp. 86-88.

In this petition to plead guilty, Noel stated, in part:

> In order to establish a factual basis I ask the court to accept as true the minutes of testimony, the dated (sic) of the offense is July 2009 through August 2013 and I admit that I did the following: The Defendant admits that there is a factual basis for both Count I and Count II related to billings for Family Team Meetings. Defendant does not contest paying restitution for allegations of over billing mileage."

App. p. 50 ¶ 26 and App. pp. 86-88. The AG filed minutes of testimony with the trial information and with the amended trial information. App. pp. 76-81 and App. pp. 84-85.

On July 6, 2017, Noel pleaded guilty to two counts of theft in the fourth degree, the district court accepted his pleas of guilty and the district court adjudged Noel guilty and convicted him of two counts of theft in the fourth degree. App. p. 50 ¶¶ 28 and 29 and App. pp. 89-92. The district court ordered Noel incarcerated for one year on Count I and 30 days on Count II; the court ordered Noel to serve these sentences concurrently, and the court suspended these sentences. App. p. 51 ¶ 31 and App. pp. 89-92. The district court placed Noel on probation for a period of one year without supervision by the Department of Correctional Services. App. p. 51 ¶ 32 and App. pp. 89-92. The district court fined Noel $315 plus applicable surcharges on each Count. App. p.

51 ¶ 30 and App. pp. 89-92. The district court ordered Noel to make restitution of $14,697.45. Of this total, $12,333.45 represented Noel's repayment of his expense claims for miles that he did not travel and $2364 represented his repayment of his fee claims for Family Team Meetings in juvenile court cases that he did not attend. App. p. 51 ¶ 33 and App. pp. 89-92. The district court ordered Noel to pay all restitution, civil penalties, fines, surcharges, and court costs immediately. App. p. 51 ¶ 34 and App. pp. 89-92.

Noel did not appeal this judgment. App. p. 51 ¶ 35.

The conduct of Noel alleged in Count I of the Board's Amended Complaint as to his billings for Family Team Meetings violated Iowa Code § 714.1(3). App. p. 51. ¶ 36.

Count II

Noel Billings for Mileage

As part of his sentence in Polk County case FECR294112, Noel paid the State of Iowa $12,333.45 as reimbursement for his expense claims he submitted to the SPD for miles that he did not travel. App. p. 53 ¶ 46.

The SPD paid Noel 35 cents per mile. App. p. 53 ¶ 49.

Melissa Hill Testimony

Melissa Hill (Hill), a Board investigator, testified that she began her investigation of Noel's SPD billings by requesting information from the State Auditor and the SPD; from the SPD she received a spreadsheet of Noel's fee claims for the period April 2010 through September 2013. Transcript (Tr.) page (p.) 12, line (l.) 20 – p. 13 l. 16. Hill had asked the SPD to provide the data used in making the decision to not renew Noel's SPD contract. Tr. p. 59 ll. 1-8.

Because of discrepancies that Hill found in the auditor's data, she did not use it in analyzing Noel's mileage claims; she worked from the SPD data only. Tr. p. 49 ll. 5-16.

One of the forms provided is called a GAX; GAX is an abbreviation of General Accounting Expenditure. Tr. p. 13 ll. 17-22. The components of a GAX are cover page, the court's appointment order, and the lawyer's itemization of fees and expenses. Tr. p. 13 l. 23 – p. 14 l. 4.

Hill identified App. pp. 119-38 as a spreadsheet containing Noel's multiple mileage billings only; Hill and the Board's counsel distilled it from the larger spreadsheet received from the SPD. Tr. p. 14 ll. 5-18.

Hill explained that columns F and G contain the multiple entries for miles that Noel billed and the related dollar amount the SPD paid Noel for these miles. Tr. p. 15 ll. 18-25 and Tr. p. 16 ll. 4-9.

Hill identified the mistakes in Exhibit 18; the Board corrected these mistakes and substituted a revised Exhibit 18 at the end of the hearing[1]. Tr. p. 17 l. 2 – p. 19 l. 4, p. 262 ll. 12-22 and App. pp. 119-38.

Hill explained how to use Exhibit 18A by reviewing the components of the April 13, 2010, GAX 428B286110650. Tr. p. 20 l. 20 – p. 26 l. 21.

Hill testified that the 2010 folder in Exhibit 18A contains a series of folders listed by date that have one or more GAX numbers; the GAX numbers found on Exhibit 18 correspond with the GAX numbers found in dated folders found in Exhibit 18A. Tr. p. 32 l. 22 – p. 33 l. 3 and App. pp. 119-38.

Hill testified about Noel's mileage claims on June 9, 2010, and how the Board presented these claims in Exhibit 18 and 18A. Tr. p. 34 l. 5 – p. 41 l. 3 and App. pp. 119-38.

[1] The Board filed this revised Exhibit with the Commission Clerk on April 3, 2018.

Hill prepared Exhibit 18A. Tr. p. 32 ll. 8-9.

Samuel Langholz Testimony

Langholz served as the SPD for the period January 2011 through October 2014. Tr. p. 67 ll. 21-23 and p. 68 ll. 3-5.

Langholz testified about the creation and structure of the SPD system, including the fact that it receives most of its funds from an appropriation by the legislature from the general fund. Tr. p. 68 l. 21 – p. 70 l. 20.

When Langholz served as the SPD, the office had a written policy, in the lawyer's contract and in the SPD's regulations, to reimburse contract lawyers for their mileage expenses. Tr. p. 72 l. 21 – p. 73 l. 9.

Paragraph three in the SPD's Legal Services Contract No. 493-04 and No. 493-10, App. pp. 93-94 and Supp. App. pp. 9-11, addresses compensation, including mileage reimbursement. Tr. p. 77 l. 20 – p. 78 l. 5.

In 2013, Langholz began investigating Noel because of his billing practices. Tr. p. 71 ll. 1-21. As part of a process of reviewing the highest billing contract attorneys, the SPD compiled a list of attorney with high

mileage claims; for the period reviewed, Noel topped the list as the highest mileage biller. Tr. p. 78 l. 20 – p. 79 l. 23. Noel had multiple days on which he submitted multiple mileage claims on the same day for different clients; Langholz did not believe it likely that Noel had actually made all of these trips. Tr. p. 80 l. 22 – p. 81 l. 5.

On December 23, 2013, Langholz wrote to Noel about his concerns about his mileage billings. Tr. p. 81 ll. 6-17 and App. pp. 96-97. Langholz asked Noel to explain his mileage billings and asked for additional information. Tr. p. 81 ll. 9-14. On page 2 of Exhibit 13 Langholz listed four points that he wanted Noel to address. Tr. p. 84 ll. 17-23 and App. pp. 96-97.

On January 14, 2014, Noel wrote to Langholz. Tr. p. 85 ll. 15-18 and App. pp. 98-99.

Langholz did not consider Noel's explanation of electrician billing practices "particularly important" because the use of public funds was "distinguishable" from private funds. Tr. p. 86 l. 20 – p. 88 l. 2.

Langholz had concerns about Tara Baker's statements about her telephone call to the SPD; he concluded, however, that Baker misunderstood the answer she received. Tr. p. 88 l. 3 – p. 89 l. 3.

Langholz considered Noel's claim that he was naïve about billing practices, but he rejected this excuse given the number of Noel's clear billing violations. Tr. p. 89 l. 4 – p. 90 l. 6.

Langholz decided to not renew Noel's SPD contract, and he notified Noel of his decision and the reasons for it by a letter dated January 29, 2014. Tr. p. 90 ll. 7-19 and App. pp. 100-01.

Langholz testified that he cancelled other SPD contracts in addition to Noel's contract. Tr. p. 104 ll. 11-19.

Langholz testified that he had not filed complaints with the Board about other SPD contract attorneys; he had heightened concerns about Noel because he was also a magistrate. Tr. p. 105 l. 1 – p. 106 l. 9.

In answer to the question whether there was confusion about SPD billing, Langholz testified that the vast majority of contract attorneys did not have unusually high billing, but attorneys other than Noel billed the same way; Noel was not unique. Tr. p. 115 l. 18 – p. 116 l. 18.

Matthew Noel Testimony

Noel testified that he did all of his SPD contract work in Dubuque, Jackson, and Clinton Counties, except for one case he did in Delaware County. Tr. p. 129 l. 20 – p. 130 l. 6.

Noel testified that Stuart Hoover from the Blair & Fitzsimmons law firm told him that he could bill the SPD for mileage, but Hoover did not tell him he could bill multiple times for one trip. Tr. p. 132 l. 12 – p. 133 l. 7. Noel testified that he did not receive any instruction on how to bill the SPD. Tr. p. 133 ll. 8-11. The law firm's secretaries added the mileage to the draft bill. Tr. p. 133 ll. 16-19. He acknowledged, however, that he was ultimately responsible for the billing information on the claim form. Tr. p. 133 ll. 11-15.

Noel admitted that he did not know about the SPD's regulations until he received Langholz's January 2014 letter, App. pp. 100-01, in which he cited Iowa Administrative Code § 493-12.8(1)(a). Tr. p. 158 ll. 7-25. Noel testified, however, that he read the underlying contracts, App. pp. 93-94 and Supp. App. pp. 9-11, contemporaneously with signing the contract acceptances, App. pp. 119-38 and Supp. App. p. 4. Tr. p. 189 l. 12 – p. 190 l. 5.

Noel explained his guilty plea to two counts of theft; he had billed for four or five family team meetings for which the notes stated he had not attended the meeting; he had billed for seven or eight family team meetings for which the notes did not disclose whether he attended or not; and he had billed for 15 family team meetings on dates for which no notes existed for those dates. Tr. p. 168 l. 18 – p. 169 l. 13. Noel acknowledged that he had used deception in his SPD billings. Tr. p. 172 ll. 1-21, Tr. p. 198 ll. 14-21, and Tr. p. 202 l. 23 – p. 203 l. 1.

Noel testified that he had paid the restitution before he pleaded guilty. Tr. p. 169 ll. 14-18. Of the total restitution amount, $2364 represented the portion allocated to family team meetings. Tr. p. 186 l. 20 – p. 187 l. 5. Of the total restitution amount, $12,333.45 represented the portion allocated to mileage. Tr. p. 188 ll. 15-21.

Noel testified that he pleaded guilty to theft in relation to the family team meetings, but he did not plead guilty to any claims about his mileage billings. Tr. p. 170 l. 23 – p. 171 l. 8.

Noel acknowledged that his SPD billing problems were his fault. Tr. p. 184 l. 17 – p. 185 l. 4.

Noel acknowledged that he was "aware" he had not made the number of trips for which he billed the SPD. Tr. p. 194 ll. 7-9. He testified that only rarely did he make more than one trip to the same county on the same day; he estimated that he had not made two trips per day to the same county more than ten times in five years. Tr. p. 194 l. 12 – p. 195 l. 5.

Argument

Issue I – Whether the Grievance Commission Erred in Relying upon the Doctrine of Issue Preclusion

The Commission properly invoked the doctrine of issue preclusion in considering the effect of Noel's guilty plea to two counts of theft in the fourth degree, serious misdemeanors. The pleadings, the case law, and the court rules compel this conclusion.

Iowa Ct. R. 36.17(4) authorizes the use of issue preclusion in Count I of this case if these three conditions exist:

1. The issue has been resolved in a criminal proceeding that resulted in a finding of guilt.

2. The burden of proof in the prior proceeding was greater than a preponderance of the evidence.

3. The party seeking preclusive effect has given written notice to the opposing party, not less than 10 days prior to the hearing, of the party's intention to invoke issue preclusion.

Those conditions exist here.

In *Hunter v. City of Des Moines*, 300 N.W.2d 121 (Iowa 1981), the Court wrote: " '[O]ffensive use' or 'affirmative use' of the [issue preclusion] doctrine is used to mean that a stranger to the judgment, ordinarily the plaintiff in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an essential element of his cause of action or claim." *Id.* at 123.

In *Bd. of Prof'l Ethics & Conduct v. D.J.I.*, 545 N.W.2d 866 (Iowa 1996), the Court approved the Board's use of issue preclusion with regard to a judgment against D.J.I. for fraud, misrepresentation, breach of loyalty, and conflict of interest. *Id.* at 869, 877. The Board must establish:

(1) the issue [sought to be precluded in the subsequent action] must be identical [to the issue litigated in the prior action];

(2) the issue must have been raised and litigated in the prior action;

(3) the issue must have been material and relevant to the disposition of the prior action; and

(4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. (citations omitted).

Id. at 874-75. The Court recognized that D.J.I. would be "permitted to present evidence of mitigating facts and circumstances in the upcoming hearing concerning any sanction to be imposed." *Id.* at 877.

In *Dettmann v. Kruckenberg*, 613 N.W.2d 238 (Iowa 2000), the Court wrote: "The rule is well established in Iowa that a validly entered and accepted guilty plea precludes a criminal defendant from relitigating essential elements of the criminal offense in a later civil case arising out of the same transaction or incident. (citations omitted)." *Id.* at 244-45.

In *Fischer v. City of Sioux City*, 654 N.W.2d 544 (Iowa 2002), the Court reiterated two more requirements if "issue preclusion is to be used offensively …"; these additional requirements are:

a. the opposing party in the prior action must have been "afforded a full and fair opportunity to litigate the issues . . ."; and

b. no "other circumstances are present that would justify granting the party resisting issue preclusion occasion to relitigate the issues. (citation omitted)."

Id. at 547. In *Attorney Disciplinary Bd. v. Stowers,* 823 N.W.2d 1, 9 (Iowa 2012), the Court assumed, without deciding, that these additional requirements apply under what is now Rule 36.17(4). The *Fischer* Court also wrote: "[T]he general rule is that issue preclusion – whether offensive or defensive – must be pled and proved by the party asserting it. (footnote omitted)." *Id.* at 548.

In *Attorney Disciplinary Bd. v. Iverson,* 723 N.W.2d 806, (Iowa 2006), the Court reiterated that while issue preclusion barred the lawyer "from relitigating his criminal conduct", the lawyer was " 'permitted to present evidence of mitigating facts and circumstances … concerning any sanction to be imposed.' (citation omitted)." *Id.* at 810.

In this case, the Board pleaded the elements of issue preclusion in paragraphs 37 through 43 of its March 5, 2018, amended complaint. App. pp. 51-52.

While Noel denied amended complaint paragraph 37, he admitted these amended complaint paragraphs alleging that he pleaded guilty to

theft: 23, 25, 26, 28, and 29. App. pp. 41-42. Secondly, these Board exhibits corroborated Noel's guilty plea to two counts of theft: 4, 6 p. 2, and 7. Thirdly, Noel's testimony acknowledged his guilty plea to two counts of theft: Tr. p. 168 l. 18 – p. 169 l. 13, Tr. p. 172 ll. 1-21, Tr. p. 198 ll. 14-21, and Tr. p. 202 l. 23 – p. 203 l. 1. Noel's guilty plea proceeding in district court resolved the issue of his conduct as to his billings for Family Team Meetings - he committed theft.

While Noel denied amended complaint paragraph 39, the exhibits noted above clearly establish that the State prosecuted Noel in the district court in Polk County; the State raised the issue of Noel's theft of taxpayer money, the parties litigated that issue, and they resolved it by reaching a plea agreement. In his amended answer, Noel acknowledged "that the pleadings in the criminal case speak for themselves"; indeed they do – they establish that his conduct as to his billings for Family Team Meetings was raised and litigated in district court in a criminal case. App. p. 42 ¶ 39.

While Noel denied amended complaint paragraph 41, the amended trial information focused on his billings for Family Team Meetings. App. pp. 82-83. In his amended answer, Noel asks this Court to conclude that

following a guilty plea proceeding, the district court made "no determination of [his] conduct." App. p. 42 ¶ 41. Nothing could be farther from the truth. In accepting Noel's guilty pleas and convicting Noel of theft, the district court concluded that Noel's fee billings to the SPD for some family team meetings were criminal.

While Noel denied amended complaint paragraph 43, he acknowledged "[t]here are no circumstances to re-litigate the matter as a criminal proceeding." App. p. 43 ¶ 43**.** In keeping with the recognized approach to using issue preclusion in an attorney discipline case, the Commission "afforded [Noel] the right to present information" to it. *Id.*

Turning to Iowa case law, Noel's facts fit well within the mainstream of the cases that have considered the use of issue preclusion in attorney discipline. This Court's decision in *Attorney Disciplinary Bd. v. Iverson,* 723 N.W.2d 806 (Iowa 2006), summarizes the use of issue preclusion in Noel's case: issue preclusion bars Noel "from relitigating his criminal conduct", but he is " 'permitted to present evidence of mitigating facts and circumstances … concerning any sanction to be imposed.' (citation omitted)." *Id.* at 810. The Commission followed that prescription here.

Issue II – Whether the Grievance Commission Erred in Admitting Minutes of Testimony in a Criminal Case as Evidence in this Proceeding

At pages 258-59 of the hearing transcript, the Commission admitted into the record, relying on Iowa R. Evid. "5.801(b)(2)(b)", Board Exhibits 2 and 5, the Minutes of Testimony from Noel's criminal case. App. pp. 76-81 and 84-85. Noel correctly points out there is no such Rule. The Rule to which the Commission President referred is 5.801(d)(2)(B), and the Board attributes this apparent misstatement in the record to a scrivener's error by the court reporter trying to distinguish between the pronunciation of the letter "b" from the letter "d".

Rule 5.801(d)(2)(B) states:

> d. *Statements that are not hearsay*. A statement that meets the following conditions is not hearsay:
>
> (2) *An opposing party's statement*. The statement is offered against an opposing party and ... (B) Is one the party manifested that it adopted or believed to be true; ....

Noel's criticism of the Commission's ruling admitting Exhibits 2 and 5 fails to recognize the source of the problem he decries – himself.

App. pp. 76-81 and 84-85. In his petition to plead guilty to a serious misdemeanor, Exhibit 6, he "ask[ed] the court to accept as true the minutes of testimony …." App. pp. 86-88. This broad adoption by Noel of the State's Minutes converts all of Exhibits 2 and 5 into "not hearsay". App. pp. 76-81 and 84-85. The Board would have been guessing as to what Noel considered to be "true" if it attempted to offer only a portion of Exhibits 2 and 5 since Noel did not limit his adoption of the Minutes. App. pp. 76-81 and 84-85. There is no reason to limit the Board's offer of these Exhibits into evidence when Noel has not limited his adoption of them as "true".

In *State v. Menke,* 227 N.W.2d 184 (Iowa 1975), the Court, in a 5-4 decision, concluded that Gary Menke had not adopted the hearsay statement made by Vivian Palmer to an undercover police officer, Roger Timko, in Menke's presence that the drugs she had to sell to Timko were actually owned by Menke. *Id.* 186-88. The Court concluded that the prejudice to Menke by the district court's admission of this statement by Palmer through the testimony of Timko was not cured by other evidence presented at trial; the Court reversed Menke's conviction. *Id.* at 189-90.

The Court noted that Menke's silence during this conversation would not make Palmer's statement admissible. *Id.* at 187-88. The Court determined that the State had failed to prove that Menke "clearly and unambiguously assented to" Palmer's statement and therefore "an adoptive admission [had not] come[] into being. (citation omitted)." *Id.* at 188.

Menke's failure to "clearly and unambiguously assent[] to" Palmer's statement is a far cry from Noel's written request to the district court that it accept the State's Minutes of Testimony as true. In his petition to plead guilty Noel clearly and unambiguously adopted the Minutes as true, and the Commission properly admitted them into the record in this case.

In *State v. Black,* 324 N.W.2d 313 (Iowa 1982), the Court remanded Donald Black's case for resentencing because "the district court may have improperly based Black's sentence on allegations arising from the unprosecuted burglary charge that were neither admitted by the defendant nor proved independently." *Id.* at 314. Citing *State v. Messer,* 306 N.W.2d 731, 732-33 (Iowa 1981), the Court wrote: "We will set aside a sentence and remand a case to the district court for resentencing if the

sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved." *Id.* at 315.

In *Black*, the Court specifically addressed the use of minutes of testimony:

> Minutes of testimony attached to the information do not necessarily provide facts that may be relied upon and considered by a sentencing court. We have approved using the minutes to establish a factual basis for the charge to which the defendant pleads guilty. (citation omitted). However, where portions of the minutes are not necessary to establish a factual basis for the guilty plea, they are denied by the defendant, and they are otherwise unproved, we find no basis to allow the sentencing court to consider and rely on these portions. No evidence is before the court that shows the alleged facts contained in these portions of the minutes are valid. (citation omitted). The sentencing court should only consider those facts contained in the minutes that are admitted to or otherwise established as true.

Id. at 316. Black denied committing a burglary; he claimed that he gained entry to the residence by the voluntary action of the resident. *Id.* at 314.

The Court provided this instruction for resentencing Black: "The district court shall not consider the dismissed charge nor the facts arising from it unless these are admitted to by [Black] or independently proved." *Id.*

In this disciplinary proceeding, the Court must determine Noel's fitness as a lawyer, not what his punishment should be for committing a crime. As part of his plea proceeding, Noel admitted the Minutes of Testimony were true. In the *Black* case, the Court disapproved the district court's consideration of a dismissed burglary charge when sentencing Black for indecent exposure. *Id.* at 314. In Noel's case, he pleaded guilty to two counts of theft in the fourth degree in exchange for the dismissal of the one count of theft in the second degree.

The Commission received Noel's testimony about his criminal conduct and his decision to plead guilty to two counts of theft. The Commission received Noel's testimony about his mileage expense billing. The Commission received the Board's testimony and exhibits in support of Noel's theft convictions and his multiple mileage expense claims. In the context of this record, the Commission properly admitted these Minutes of Testimony into the record.

In *State v. Beckett,* 383 N.W.2d 66 (Iowa Ct. App. 1985), the Court of Appeals surveyed the Iowa case law on adoptive admissions before concluding that Gregory Beckett's post arrest head nod, after his codefendant, Mark Lawson, made a statement to him, did not

unambiguously indicate Beckett's assent to Lawson's statement that Beckett should tell the booking officer that they were under the influence of cocaine and alcohol. *Id.* at 69. The Court of Appeals concluded that the police officer's testimony about Beckett's head nod to Lawson's statement did not qualify as an adoptive admission. *Id.*

Noel's written request to the district court to accept the State's Minutes of Testimony as true is in a different league than Beckett's head nod. In the language of a Minnesota case, *Village of New Hope v. Duplessie,* 231 N.W.2d 548, 553 (Minn. 1975), cited by the Court of Appeals, Noel unequivocally, positively, definitely, and clearly adopted the statements in the Minutes of Testimony. *Id.*

In *State v. Gonzalez,* 582 N.W.2d 515 (Iowa 1998), the Court remanded Francisco Gonzalez's case for resentencing because "The sentencing court improperly considered the dismissed drug tax stamp charges." *Id.* at 517. Gonzalez never admitted the drug stamp offenses. *Id.* Citing *Black* and two other cases, the Court wrote: "A court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused

committed the offense, or (2) the defendant admits it. (citations omitted)." *Id.*

Noel admitted committing a theft of fees from the SPD and acknowledged that he billed mileage for every client that had a hearing on the same date even though he only made one trip. The Minutes of Testimony relate to Noel's admitted or acknowledged conduct. The Minutes are properly a part of this record.

Noel argues that the Board needs to explain the dates found on Exhibit 5. App. pp. 84-85. The Board offers this explanation: 1. The State filed Exhibit 5 on June 19, 2017, at 5:03 p.m. as shown at the top of both pages of the Exhibit. App. pp. 84-85. On November 2, 2017, a designee of the Clerk of the District Court signed a certificate that reads: "Comes now Clerk of the District Court of the State of Iowa, in and for Polk County and does hereby certify that this is a true and complete copy of the Original Instrument filed in this office." 3. The November 2, 2017, date refers to this certificate of authenticity and not to the date of filing the document or the date of serving the document.

Based on the other evidence in this record, including Noel's testimony, the Commission properly admitted Exhibits 2 and 5 into the record. App. pp. 76-81 and 84-85.

Issue III – Whether Noel Knowingly Violated Rule 32:1.5

Rule 32:1.5(a) lists eight factors to consider in determining the reasonableness of a fee or an expense. While this list is not offered as a complete list of the relevant factors, it is important to note that "knowingly" is not one of the identified factors.

The first enumerated factor is "the time and labor required". This straight forward phrase includes the concept of honesty. For a fee to be reasonable, it must be based on an honest assessment of the time and effort involved. From this premise flows the idea that a fee charged for a service not provided is not reasonable. The same concept guides what a reasonable expense is; it must be an honest request for reimbursement for real costs incurred.

Noel complains that he lacked records about time spent on behalf of a client, including family team meetings. While the Trial Informations, Exhibits 1 and 4, App. pp. 74-75 and 82-83, identified Noel committing a theft during a period from July 2009 through August 2013, the March

2016 Minutes of Testimony, Exhibit 2, App. pp. 76-81, identified several specific dates of concern:

- Witness C. P. – November 2011 and January 2013 (App. p. 77)
- Witness J. B. – July 2011 (App. pp. 77-78)
- Witness D. G. – January 2013 (App. p. 78)
- Witness D. S. – August 2011 and January 2013 (App. p. 78)
- Witness P. S. – January 2013 (App. p. 79)

All of these dates occurred within the five year records retention window provided in paragraph 14 of Exhibits 9 and 15, the SPD legal services contracts. App. pp. 93-94 and Supp. App. pp. 9-11. Based on the March 31, 2016, filing of the original Trial Information, Noel had an obligation to retain documents related to his SPD services from March 31, 2011, forward.

Noel cites *Attorney Disciplinary Bd. v. Laing,* 832 N.W.2d 366 (Iowa 2013), in support of his argument that he did not violate Rule 32:1.5 or that he only violated it in the amount of $400. Noel never mentions his unreasonable billing for mileage expenses.

Donald Laing served as the conservator for John Klein, a disabled veteran. *Id.* at 368. The Court concluded that Laing and his partner, D. Scott Railsback, violated DR 2-106(A) and (B) prior to July 1, 2005, and Rule 32:1.5(a) after July 1, 2005. *Id.* at 373. The Court wrote that Laing and Railsback

> charged and submitted claims for clearly excessive fees in the Klein conservatorship. The excessiveness of the fees arose from [their] claims of unreasonable time expended for management of Klein's assets, drafting annual conservator's reports, and preparing tax returns. .... [They] charged excessive hourly rates for performing a wide array of services not requiring legal training or other professional skills and commonly performed at a much lower cost by guardians.

Id.

While Laing and Railsback's problems arose from a conservatorship and Noel's problems arose from criminal and juvenile matters, the three lawyers share one commonality – they all engaged in misrepresentations in making their fee and expense claims. The Court found "incredible the amount of time [Laing and Railsback] consistently claimed for preparation of annual reports and tax returns in the twelfth through the thirty-third years of the conservatorship ...." *Id.* This Court should conclude that Noel's fee billings for services that he did not

provide were, at a minimum, "incredible". Likewise, this Court should conclude that the amount of Noel's mileage expenses submitted to the SPD for payment, including thousands of miles he did not travel, is "incredible".

The Board disagrees with Noel's claim that his violations of Rule 32:1.5 are more nuanced than Laing and Railsback. The district court's restitution order for fees totaling $2364 is clear evidence to support the view that Noel's fee violations exceed $400. The Board submitted comprehensive and detailed exhibits, Exhibit 18, App. pp. 119-38 and 18A, along with supporting testimony, to establish a regular and longstanding pattern of overbilling mileage expenses excessively. Noel over billed mileage expenses deliberately. The 20 pages of Exhibit 18 amply demonstrate that Noel over billed mileage expenses frequently and regularly. App. pp. 119-38.

If Noel's billing records were confusing, he made them so. By incorrectly describing on his billings the activities he attended, he created difficulties in reconciling his records with the records of others.

The Board disputes Noel's claim that, aside from his guilty plea to two serious misdemeanors, he never used deception to be paid more

money than he was owed. He used deception regularly in submitting bills to the SPD that contained false mileage expense claims. Notwithstanding the knowledge that he gleaned from reading paragraph 3 of his SPD contract, Exhibit 9, that the SPD would reimburse him for his "out-of-pocket" mileage expenses, he regularly deceived the SPD by billing for and receiving payment for mileage expenses that he did not incur. App. pp. 93-94.

The following cases support the Board's argument that Noel's fee and expense billings were unreasonable.

In *Comm. on Prof'l Ethics & Conduct v. Coddington,* 360 N.W.2d 823 (Iowa 1985), the Court suspended James Coddington's law license for at least two years for his willful violations of DR 2-106(A) and other ethics rules. *Id.* at 825-26. While serving as a conservator for about three and one-half years, Coddington paid himself a total of $33,600 from conservatorship funds; he paid himself before receiving district court approval of these fees. *Id.* at 824. In four separate orders, the district court approved a total of $18,600 in fees; according to Coddington, he overpaid himself $15,000 as "a result of 'extreme carelessness' in his handling of the matter." *Id.*

Noel's "haphazard" billing in which he does not accurately describe the services provided is comparable to Coddington's "extreme carelessness".

In *Comm. on Prof'l Ethics & Conduct v. Zimmerman,* 465 N.W.2d 288 (Iowa 1991), the Court suspended Carl Zimmerman's law license for at least six months for violating DR 2-106(A) and other ethics rules. *Id.* at 292-93. Zimmerman's wife served as the conservator for Earl White, one of Zimmerman's longtime clients, and Zimmerman served as the attorney for the conservator. *Id.* at 288-89.

The district judge who presided over the hearing on the conservator's and Zimmerman's fee applications brought the White conservatorship to the Committee's attention. *Id.* at 290. In part, the Committee brought its case against Zimmerman on these undisputed facts:

> (1) his original application for legal fees duplicated nonlegal administrative fees he simultaneously sought on behalf of the conservator; and (2) his original statement requested fees for 89.75 hours of legal service billed at $90 per hour when, in fact, he devoted only 19.5 hours to legal matters while his legal assistant devoted 39.85 hours to bookkeeping and report preparation.

Id. at 291. The Court concluded these inaccuracies occurred because "Zimmerman deliberately set out to fleece his elderly client in an ex parte proceeding and would have done so but for the intervention of an alert and inquiring judge." *Id.* at 292.

The Court rejected Zimmerman's argument that he overcharged for his legal assistant's time initially due to confusion and misunderstanding; the Court wrote: "we are not persuaded that the initial application was the product of misunderstanding. Even if it were, such conduct is inexcusable. (citation omitted)." *Id.*

Noel deliberately set out to fleece the SPD by submitting fee bills for services he did not provide and by submitting expense bills for miles he did not travel. Submitting bills to the SPD is analogous to an ex parte proceeding to set fees in a conservatorship. The Court and the SPD have to rely on the honesty of the attorney presenting the bill. Both Zimmerman and Noel failed to live up to this expectation.

In *Bd. of Prof'l Ethics & Conduct v. Hoffman,* 572 N.W.2d 904 (Iowa 1997), the Court suspended Thomas Hoffman's law license for at least six months for charging an excessive fee when it concluded that he had attempted to collect a contingent fee in a workers' compensation case in

which the employer admitted liability and started paying statutory benefits without any action on Hoffman's part. *Id.* at 905-07 and 909-10.

Noel collected fees and expenses from the SPD "without any action" on his part when the billed for work he did not do and for miles he did not travel.

In *Bd. of Prof'l Ethics & Conduct v. Lane,* 642 N.W.2d 296 (Iowa 2002), the Court suspended William Lane's law license for at least six months for violating DR 2-106(A) and other ethics rules. *Id.* at 301-02. Lane had submitted a plagiarized post-trial brief to a federal district court in an American with Disabilities Act lawsuit, and subsequently, he requested attorney fees for 80 hours to prepare this brief. *Id.* at 297-98. Concluding that Lane did not spend 80 hours writing this brief, the Court wrote: "When Lane requested compensation for time he did not spend working on the case, he violated the professional rule forbidding a lawyer from entering into an agreement for, charging, or collecting an illegal or clearly excessive fee. (citations omitted)." *Id.* at 301.

Noel's conduct closely parallels Lane's conduct in billing for fees not earned and mileage expenses not incurred.

In *Bd. of Prof'l Ethics & Conduct v. Tofflemire,* 689 N.W.2d 83 (Iowa 2004), the Court suspended Cynthia Tofflemire's law license for at least two years for violating DR 2-106(A) and other ethics rules. *Id.* at 92, 95. Tofflemire worked fulltime for Iowa Workforce Development, and she had a contract for indigent defense representation with the SPD. *Id.* at 86. A coordinated investigation by Workforce Development and the SPD for an eight and one-half month period in 2000 revealed, in part, "On some days the amount of hours Tofflemire claimed from IWD employment and SPD contract work exceeded twenty-four hours for a given date." *Id.* at 87. Tofflemire responded to this claimed level of productivity "by saying that there had to be some sort of mistake in her SPD billings." *Id.*

The SPD, Thomas Becker, "terminated Tofflemire's contract with the SPD because of his concerns that she had submitted inaccurate billing itemizations and fee claims to the SPD." *Id.* at 88. The Court wrote that when he testified at the Grievance Commission hearing, however, "Becker would not conclude that Tofflemire had not performed the services. Of course, that is not surprising because the record reflects that the SPD has no accurate way to determine whether the services were or

were not performed. The SPD has to rely on attorneys being truthful in submitting claims." *Id.*

The Court concluded that Tofflemire "over-billed" the SPD; it wrote:

> Concerning the Board's charge of "over-billing," the Commission had concerns that Tofflemire had repeatedly over-billed the SPD. However, because of the haphazard way that she kept time records, the Commission felt there was no way to prove this. However, the Commission did find that Tofflemire had overcharged for six letters. Four of those letters were brief identical letters to witnesses concerning their review and signing of proposed affidavits. Tofflemire billed .5 hours for each of the six letters. Because the Commission simply did not believe that Tofflemire expended three full hours preparing the letters, it concluded that the billing constituted conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5) and collection of an excessive fee in violation of DR 2-106(A). Although we agree with and adopt these findings and conclusions, we go one step further. We think there is ample evidence from this record to reasonably infer that Tofflemire repeatedly over-billed the SPD.

Id. at 92.

The *Tofflemire* case introduced the idea of unreasonable and dishonest billing to the SPD; Noel has written another chapter in that saga.

In *Attorney Disciplinary Bd. v. Carty,* 738 N.W.2d 622 (Iowa 2007), the Court suspended John Carty's law license for 60 days for violating DR 2-106(A) and other ethics rules. *Id.* at 624-25. Carty violated DR 2-106(A) when he collected an illegal fee. *Id.* at 624.

Carty collected an illegal fee in the ordinary fees component of a decedent's estate. *Id.* After the district court set Carty's ordinary fees, Carty amended the estate inventory value downward by $90,000; the Court wrote that Carter

> failed to amend his ordinary fee claim once the gross value of the estate was reduced to reflect the correct amount. An attorney may not be compensated for ordinary services in a probate proceeding in an amount greater than the fee schedule under Iowa Code section 633.197 (2001). This fee schedule caps the maximum fee at two percent of the amount of the gross estate over $5000, as disclosed in the probate inventory, plus $220. The collection of a probate fee in excess of the amount permitted by statute is illegal.

Id. Two percent of $90,000 equaled $1800.

Carty collected a phantom fee on $90,000 that was not in the estate; similarly, Noel collected a fee of $60 per hour for a number of hours that was nonexistent.

Carty collected an illegal fee in the extraordinary fees component of a decedent's estate too. *Id.* The Court wrote: "he charged and collected duplicative fees for extraordinary services. Carty submitted a claim for extraordinary services that included ordinary services for which he had previously been compensated. He charged and collected an illegal fee." *Id.* The Court acknowledged, "The inclusion of these services was likely due to miscommunication between Carty and his [new] secretary during a time when Carty was working from his home after recuperating from heart surgery." *Id.* at 623. The Court concluded, however, "this circumstance does not excuse Carty from his violations. (citation omitted)." *Id.* at 624.

Noel's billings for mileage expenses were similarly duplicative; the SPD paid him more than once for making one trip.

As to both fees and mileage expenses billed to the SPD, Noel violated Rule 32:1.5(a).

Issue IV – Whether the Grievance Commission Erred in Finding that Noel's Actions Reflected Adversely on His Fitness to Practice Law

The Board disagrees with Noel's characterization that at best the evidence presented to the Commission establishes him as having

negligent and haphazard billing practices. In making this argument, Noel asks the Court to take its collective eyes off of his conduct and to ruminate about what other lawyers have done or not done in billing the SPD. Noel's refusal to acknowledge the wrongfulness of his conduct should be viewed as an aggravating factor in considering the appropriate sanction.

Rule 32:8.4(b) provides: "It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

Comment [2] to this Rule states: "Illegal conduct can reflect adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation."

The following Iowa cases have addressed what conduct reflects adversely on a lawyer's fitness to practice law and therefor violates Rule 32:8.4(b).

In *Attorney Disciplinary Bd. v. Templeton*, 784 N.W.2d 761 (Iowa 2010), the Court suspended Mark Templeton's law license for at least three months for violating Rule 32:8.4(b) following his conviction for six

counts of invasion of privacy-nudity, a serious misdemeanor. *Id.* at 765-66, 768, 771. The Court explored the contours of Rule 32:8.4(b), writing:

> The mere commission of a criminal act does not necessarily reflect adversely on the fitness of an attorney to practice law. (citation omitted). The nature and circumstances of the act are relevant to determine if the commission of the criminal act reflects adversely on the attorney's fitness to practice law. (citation omitted).

Id. at 767. The Court adopted the approach taken by the Oregon Supreme Court in *In re Conduct of White,* 815 P.2d 1257 (Or. 1991), in its analysis of a disciplinary rule similar to Iowa's Rule 32:8.4(b); the Court quoted from the Oregon *White* decision:

> To some extent, every criminal act shows lack of support for our laws and diminishes public confidence in lawyers, thereby reflecting adversely on a lawyer's fitness to practice. [The Oregon Rule] does not sweep so broadly, however. For example, a misdemeanor assault arising from a private dispute would not, in and of itself, violate that rule. Each case must be decided on its own facts. There must be some rational connection other than the criminality of the act between the conduct and the actor's fitness to practice law. Pertinent considerations include the lawyer's mental state; the extent to which the act demonstrates disrespect for the law or law enforcement; the presence or absence of a victim; the extent of actual or potential injury to a victim; and the presence or absence of a pattern of criminal conduct.

> (citation omitted). Oregon's analysis as to when a criminal act reflects adversely on a lawyer's fitness to practice law is reasonable and is the analysis we now adopt to apply in our own disciplinary cases.

Id. at 767.

In *Attorney Disciplinary Bd. v. Polsley,* 796 N.W.2d 881 (Iowa 2011), the Court revoked David and Kathryn Polsley's law licenses following their conviction for theft of government property, Social Security checks. *Id.* at 883, 886. The Court concluded that they were not fit to practice law:

> We now turn to the question of whether the board has established the Polsleys violated our disciplinary rule prohibiting conduct reflecting adversely on the Polsleys' fitness to practice law. In *Templeton,* we noted that "the mere commission of a criminal act does not necessarily reflect adversely on the fitness of an attorney to practice law." (citation omitted). Ordinarily, our determination of whether an attorney's conduct reflects adversely upon his or her fitness to practice law turns not on whether the conduct is illegal, but rather upon whether there is some rational connection between the specific conduct and the actor's fitness to practice law. (citation omitted).
>
> As we have noted, the Supreme Court of Kansas found by clear and convincing evidence that the Polsleys were "convicted of theft of government property, a crime that reflects adversely on [their] honesty and trustworthiness." (citations omitted). The Kansas court's finding was made in civil proceedings imposing a burden of proof greater than a preponderance of the evidence. (citations omitted). Upon

> our review, we conclude the principles of issue preclusion also control our determination of this issue. (citation omitted). Accordingly, we conclude the Polsleys' conduct reflected adversely on their fitness to practice, and therefore violated DR 1–102(A)(6)[2].

Id. at 885-86.

In *Attorney Disciplinary Bd. v. Wheeler,* 824 N.W.2d 505 (Iowa 2012), the Court suspended Ronald Wheeler's law license for at least six months. *Id.* at 513. The Court found the necessary *Templeton* connection between Wheeler's conviction in federal court for making a false statement to a financial institution and his fitness to practice law, writing:

> Here, the criminal act is connected to fitness to practice law. The actions by Wheeler were dishonest, and they victimized the bank in a substantial manner. We find Wheeler violated rule 32:8.4(b) by knowingly making a false statement on a mortgage application for the benefit of a client, which adversely reflected on his fitness as a lawyer.

Id. at 511.

In *Attorney Disciplinary Bd. v. Khowassah,* 837 N.W.2d 649 (Iowa 2013), the Court noted that a criminal conviction was not a condition precedent to imposing discipline under Rule 32:8.4(b) and the fact that

[2] DR 1-102(A)(6) provided, "[a] lawyer shall not engage in any other conduct that adversely reflects on the fitness to practice law."

Tarek Khowassah had not been charged with theft was immaterial to its analysis:

> We first note that while Khowassah was not criminally charged with theft, that fact does not color our analysis. (citation omitted). Rather, in attorney disciplinary cases involving allegations of crime, "[t]he charges against [the attorney] must be proved by a convincing preponderance of the evidence." (citation omitted). We also note that "a criminal law defense is not a defense in a disciplinary proceeding since the purpose of a disciplinary hearing is not primarily intended to punish the lawyer but rather to protect the public." (citation omitted).

Id. at 654-55.

In *Attorney Disciplinary Bd. v. Taylor,* 887 N.W.2d 369 (Iowa 2016), the Court put this focus on Rule 32:8.4(b):

> It is the commission of a criminal act reflecting adversely on a lawyer's fitness to practice law, not the act of getting caught committing a crime, which constitutes a violation of this rule. (citation omitted). Thus, an attorney who commits a criminal act reflecting adversely on his or her fitness as a lawyer may be found to have violated rule 32:8.4(b) even if the authorities never charged the attorney with a crime. (citation omitted).

Id. at 378.

In *Attorney Disciplinary Bd. v. Khowassah,* 890 N.W.2d 647 (Iowa 2017), the Court wrote: " "[C]onduct that diminishes 'public confidence

in the legal profession' " reflects adversely on a lawyer's fitness to practice law. (citations omitted)." *Id.* at 651.

In *Attorney Disciplinary Bd. v. Springer,* 904 N.W.2d 589 (Iowa 2017), the Court, noting that not all criminal convictions establish a violation of this Rule, wrote:

> [t]here must be some rational connection other than the criminality of the act between the conduct and the actor's fitness to practice law. Pertinent considerations include the lawyer's mental state; the extent to which the act demonstrates disrespect for the law or law enforcement; the presence or absence of a victim; the extent of actual or potential injury to a victim; and the presence or absence of a pattern of criminal conduct.
>
> (citations omitted).

Id. at 594-95.

In *Attorney Disciplinary Bd. v. Mathahs,* No. 18-0535, 2018 WL 4514008, (Iowa Sept. 21, 2018), the Court suspended Dennis Mathahs' law license for 60 days for violating Rules 32:1.5(a) and 32:5.3(b). *Id.* at 5, 6, and 10. The Court described the Board's three "frames of reference" in demonstrating Mathahs improper billing of the SPD: 1. Double billing 25.4 hours in representing five clients; 2. Claiming duplicate mileage

totaling 20,206 miles during fiscal year 2010; and 3. Billing 3103.65 hours during fiscal year 2010. *Id.* at 4.

With regard to the excessive mileage, Mathahs "explained that beginning in 2009, he made single trips for several clients and erroneously billed each client for the total mileage." *Id.* at 3.

With regard to the mileage billing, the Court wrote: "Mathahs had a reasonable claim to receive compensation for the expenses incurred to make a work-related trip; however, he did not have a reasonable claim to receive compensation multiple times for the expenses incurred for the same trip." *Id.*

With regard to the excessive fees, Mathahs offered two explanations: 1. His secretary's "inattentiveness" and haphazard entry of dates of service on his billings that "often did not correspond to the dates Mathahs had done the actual work." and 2. He received "compensation for time that he had logged in previous years when the cases lasted more than one year but had not been billed until the case was finished." *Id.* at 2 and 5.

With regard to Mathahs' fee billing, the Court, describing it as "excessive", wrote: "we agree with the commission that although the

Board presented no evidence by which the commission could determine the validity of the hours claimed, the total number of hours that Mathahs claimed to have worked on SPD work alone during FY 2010 is unusually high." *Id.* at 5.

Turning to the issue of the appropriate sanction for Mathahs, the Court noted, "Sanctions for charging and collecting unreasonable fees generally range from sixty days to two years. (citations omitted)." *Id.* at 6. The Court cited these Iowa disciplinary cases to support this statement: *Laing* – 18 months (2013), *Carty* – 60 days (2007), *Lane* – six months (2002), *Hoffman* – six months (1997), *Zimmerman* – six months (1991), and *Coddington* – two years (1985). *Id.*

In *Mathahs*, the Court carefully described the facts from its earlier SPD billing case, *Bd. of Prof'l Ethics & Conduct v. Tofflemire,* 689 N.W.2d 83 (Iowa 2004). *Id.* at 7. The court suspended Tofflemire's law license for at least two years. *Id.* Several similarities between Tofflemire and Noel exist: 1. Both gave evasive testimony at the Commission hearing; 2. Both failed to appreciate the wrongfulness of their actions; and 3. Both attempted to shift blame from themselves to others. *Id.*

In this case, Noel engaged in misrepresentation and deception. The Commission's recommendation that the Court suspend Noel's license for one year fits well within the range of sanctions the Court described in *Mathahs.*

The Board brought this case against Noel after it learned that he had pleaded guilty to two counts of theft with regard to his fee billings to the SPD and after its analysis established an abusive, calculated practice of fleecing the taxpayer-funded SPD budget with numerous bogus mileage claims.

While Noel asks the Court to look askance at the Commission's conclusion that his actions reflect adversely on his fitness to practice law, the Board suggests that the Court should embrace this conclusion and make it its own.

Issue V – Whether the Grievance Commission Erred in Finding that Noel did not Attempt to Pay Restitution until the Criminal Court Ordered Him to Do So

While the Commission stated that it was "troubled" by the timing of the Noel's payment of restitution, it concluded that his payment of restitution was a mitigating factor. App. p. 179.

Issue VI – Whether the Grievance Commission's Sanction Recommendation is Consistent with Sanctions the Court has imposed on other Lawyers Who Have Engaged in Similar Misconduct

Noel asks the Court to conclude "that the basic conduct of erroneously submitting duplicate mileage claims is itself not an ethical violation." The cases cited by the Board in this Brief establish that Noel's contention is not the law of Iowa. Facts are important in assessing whether an attorney has violated a Rule of Professional Conduct. The facts in this record establish that after reading his contract with the SPD that it would reimburse him for out-of-pocket mileage expenses, Noel intentionally and deliberately billed the SPD for 35,224 miles he did not travel. App. p. 138. On these facts, the Court should conclude that Noel committed an "ethical violation."

Noel asks the Court to conclude that if the Board does not prove that all of the attorneys named in a State Auditor's report regarding the SPD have been "investigated" then he has not "really" committed an ethical violation. This all or nothing approach to professional regulation would do nothing to promote the public's confidence in the profession. The Board is not surprised that Noel fails to cite any authority to support

his position. What action, if any, the Board has taken with regard to other lawyers is not an element that the Board has to prove in this case. In a system framed in confidentiality under Court Rules 35.4(3) and 34.4, this is an element that the Board could not prove. The Court should reaffirm its approach that it determines an attorney's compliance with the Rules of Professional Conduct based on the evidence presented about the lawyer's conduct rather than what action the Board or the Grievance Commission has taken, or not taken, with regard to another attorney.

Noel asks the Court to conclude that the Board cannot "properly" pursue a Grievance Commission complaint against him after he has paid the restitution judgment imposed by the district court in a criminal case. Noel misapprehends the purpose of this proceeding; the purpose is not to punish him but instead to determine his fitness as a lawyer. The criminal court did not address that issue at all. This Court's regulation of the legal profession is not circumscribed by what sentence a district court imposes in a criminal case or the response of the attorney/defendant to the sentence.

In parsing the conduct of Langholz in his handling of the SPD's contractual relationship with other attorneys, Noel implies that the

Board and the Grievance Commission have no "proper" role to play in his case. The Court should reaffirm the value of the system it has created that obligates the Board and the Commission to investigate, prosecute, and adjudicate attorneys' conduct and their compliance with the Rules of Professional Conduct.

Issue VII – Whether a 90 Day Suspension is an Appropriate Sanction for Noel

Noel argues that the Court should conclude that his conviction of two counts of theft in the fourth degree "is not indicative of dishonest, deceitful conduct." In *Comm. on Prof'l Ethics & Conduct v. Rabe*, 284 N.W.2d 234 (Iowa 1979), the Court suspended Richard's Rabe's law license following his conviction of theft in the fourth degree. *Id*. at 236.

Noel argues that the SPD contract and renewal, Exhibits 9 and 10, "provides no instruction to an attorney with regard to mileage billing." App. pp. 93-94 and 95. Noel grumbles that to learn more about how to submit bills to the SPD he would need to read the SPD regulations, which he testified that he did not read.

Noel argues that the SPD's change to its administrative regulations means that they were not clear enough to support a conclusion that he

violated any Rules of Professional Conduct. This is a difficult argument to accept since Noel testified that he had never read the regulations. Further, the Grievance Commission and the Court are evaluating Noel's conduct against the Rules of Professional Conduct, not the administrative regulations of the SPD.

The SPD regulation related to billing mileage expenses in effect from July 2008 through July 29, 2014 was Iowa Administrative Code § 493-12.8(1)(a); it read:

> The state public defender shall reimburse the attorney for the following out-of-pocket expenses incurred by the attorney in the case to the extent that the expenses are reasonable and necessary: a. Mileage for automobile travel at the rate of 35 cents per mile. ….

Merriam-Webster's Collegiate Dictionary (11th ed. 2003), offers these definitions of "reimburse": 1. To pay back to someone, as in "reimburse travel expenses" and 2. To make restoration or payment of an equivalent to, as in "reimburse him for his traveling expenses". *Id*. at 1049.

Merriam-Webster's Collegiate Dictionary (11th ed. 2003), offers this definition of "out-of-pocket": requiring an outlay of cash, as in "out-of-pocket expenses". *Id*. at 881.

Notwithstanding Noel's argument to the contrary, this SPD administrative rule is not so complex or vague that it would flummox an Iowa attorney. Hindsight is not needed to understand this rule.

The Court should accept the Commission's recommended sanction of a suspension of at least one year. Noel's sanction should require him to have to apply for readmission. His conduct is more egregious than that of Mathahs; his conduct is more analogous to that of Tofflemire.

Noel's billing problems began shortly after obtaining his license, but the Board urges the Court to discount his inexperience as a mitigating factor. Basic honesty in billing in not an aspect of lawyering that requires years of experience to achieve.

Aggravating Factors

The Board urges the Court to find these aggravating factors: 1. Noel's dishonesty and selfish motive; 2. His pattern of misconduct; 3. His refusal to acknowledge the wrongful nature of his conduct; 4. His illegal conduct; 5. The nature and extent of the amount of funds that Noel improperly collected. *Mathahs* at page 10; and 6. The "numerous hours" the SPD and the Board spent "attempting to analyze and account for the discrepancies" in the GAX forms. *Id*. On this last aggravating factor, the

Mathahs Court wrote: "The SPD's limited accounting system, however, does not excuse Mathahs from his ethical duties." *Id.*

Conclusion

The Court should accept the Commission's recommendation to suspend Noel's license for at least one year. He pleaded guilty to two counts of theft related to his fee billings to the SPD, a tax-payer funded program established to represent the indigent charged with crimes or brought into the juvenile court system as a child or parent. While Noel contends that his theft of fees is de minimis, it is a small comfort to the public, or to an attorney's clients, that the attorney is only a little bit dishonest or dishonest only about small things. And by way of contrast, Noel's exorbitant mileage expense billing is breathtaking. When presented with the opportunity to cheat the State out of fees he did not earn and mileage expenses he did not incur, Noel took it. The Court needs to communicate clearly to all that this is not acceptable conduct.

Noel's moral compass failed him here. The reasons behind professional regulation, to protect the public, to deter other lawyers from similar misconduct, and to maintain the integrity of the profession, should lead the Court to conclude that it must impose a significant suspension of Noel's license.

Iowa Supreme Court
Attorney Disciplinary Board

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Request for Nonoral Submission

The Board requests submission of the case without oral argument.

_____
Wendell J. Harms

Certificate of Compliance with Typeface Requirements and Type – Volume Limitation

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Cambria in 14 point and contains 10,810 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Wendell J. Harms — October 30, 2018

Wendell J. Harms — Date