

IN THE SUPREME COURT OF IOWA

NO. 18-1229

(Grievance Commission Docket No. 848)

IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD,

Complainant-Appellee,

vs.

MATTHEW L. NOEL,

Respondent-Appellant.

APPEAL FROM THE GRIEVANCE COMMISSION, 539th DIVISION,

MIKKIE R. SCHULTZ, PRESIDENT

RESPONDENT-APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- II. WHETHER THE GRIEVANCE COMMISSION ERRED IN ADMITTING MINUTES OF TESTIMONY IN A CRIMINAL CASE AS EVIDENCE IN THIS PROCEEDING.

Iowa R. Evid. 5.801(d)(2)(b)

State v. Gonzalez, 582 N.W.2d 515 (Iowa 1998)

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State v. Menke, 227 N.W.2d 184 (Iowa 1975)

- VI. WHETHER THE GRIEVANCE COMMISSION SANCTION RECOMMENDATION IS CONSISTENT WITH SANCTIONS THE COURT HAS IMPOSED ON OTHER LAWYERS WHO HAVE ENGAGED IN SIMILAR MISCONDUCT

Iowa Supreme Ct. Att’y Disciplinary Bd. v. Mathahs, 218 W.L. 4514008 at *6 (Iowa 2018)

ARGUMENT

II. THE GRIEVANCE COMMISSION ERRED IN ADMITTING MINUTES OF TESTIMONY IN A CRIMINAL CASE AS EVIDENCE IN THIS PROCEEDING

The receipt of Exhibits 2 and 5 in evidence is based upon Iowa R. of Evid. 5.801(d)(2)(b) as an opposing party's statement which the party has "adopted or believed to be true." Noel's plea of guilty to two counts of Theft in the 4th Degree does not make all of the minutes of testimony contained in Exhibits 2 and 5 "adoptive statements" so as to be admissible in this proceeding.

The additional minutes of testimony, Exhibit 5, address billings for mileage submitted by Noel in connection with his work for the State Public Defender's Office. In Exhibit 5, the Board was able to present the testimony of four added witnesses, Langholz, Campbell, Thielen, and Dietzel, all of whom address the mileage claims initially made against Noel. Of significance, those minutes of testimony were not necessary or relevant to the charge of Count I, Theft in the 4th Degree and Count II, Theft in the 4th Degree to which Noel entered his plea of guilty. See Exhibit 6. (App. pp. 86-88)

Where portions of minutes of testimony are not necessary to establish a factual basis for a plea they are deemed denied by the defendant and are

otherwise unproved and the sentencing court cannot consider or rely upon it. *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998). In the present case, there is no plea of guilty to the matter of alleged overbilling of mileage. Accordingly, the minutes of testimony contained in Exhibit 5 are irrelevant and immaterial to that charge and were not admitted as “true” by Respondent Noel. He cannot be held to have “adopted” those minutes since they address a mileage issue which was not the subject matter of his plea of guilt. For the Board to put these minutes before the Grievance Commission tainted the record against Respondent Noel by allowing the Commission to consider objectionable hearsay testimony.

The Iowa appellate courts have held a stringent standard when it comes to adoptive statements, holding the statement needs to be unequivocally adopted by a party for it to be admissible under this rule. *See State v. Menke*, 227 N.W.2d 184 (Iowa 1975).

The receipt of inadmissible hearsay is considered to be prejudicial to the non-offering party unless otherwise established. *See State v. Long*, 628 N.W.2d 440, 447 (Iowa 2001). The error of the Commission in admitting Exhibit 5 having nothing to do with the plea entered by Respondent Noel in this matter is prejudicial. The admission of Exhibit 5 allowed the Commission to consider extraneous and non-adoptive statements by

Respondent Noel which is presumed prejudicial in this case. Count I of the Complaint against Respondent Noel should be dismissed due to the receipt of this prejudicial inadmissible hearsay testimony.

VI. WHETHER THE GRIEVANCE COMMISSION SANCTION RECOMMENDATION IS CONSISTENT WITH SANCTIONS THE COURT HAS IMPOSED ON OTHER LAWYERS WHO HAVE ENGAGED IN SIMILAR MISCONDUCT

The Commission handed down its decision in this matter on July 17, 2018. On September 21, 2018, little more than 60 days after the Commission's decision, the Iowa Supreme Court filed its decision in *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Mathahs*, 218 WL 4514008 (Iowa 2018). The *Mathahs* case deals with issues that are strikingly similar to those presented in the Noel matter. In *Mathahs*, the respondent double-billed for his representation of clients in three separate fiscal years. The third fiscal year, 2010, Respondent Mathahs claimed \$186,219 in fees which would be 3,103.65 hours in one year. In that same year, he also charged \$15,788.85 for mileage expenses which would be 45,111 miles at the applicable mileage rate. Sam Langholz of the State Public Defender's Office found that Respondent Mathahs has billed multiple clients for the full mileage to the same location on the same day. On some days, Respondent Mathahs had also billed mileage to multiple locations as well, often billing for the full trip to each location even if he only took a single trip. Mr.

Langholz found that on two days the respondent had billed for more than 1,000 miles and on 26 days had claimed mileage expenses for three or more trips to the same county courthouse. On four occasions, the respondent had billed the same client twice for the same trip to the same courthouse in different cases. *Id.* at *4.

In *Mathahs*, the respondent accepted responsibility for the billing errors and went on to explain how those errors had occurred. The explanation was a combination of inattentiveness on the part of his legal secretary, mistakes by his legal secretary as well as his busy schedule. *Id.* at *2. The respondent did acknowledge the erroneous claims as well as his personal and professional responsibility for the billing errors. *Id.* at *9. The Supreme Court also noted that it was unable to conclude if Respondent Mathahs had made full restitution to the SPD or had overpaid the SPD. In the record before it, the Iowa Supreme Court suspended Respondent Mathahs's license to practice law in Iowa for 60 days with automatic reinstatement on the 61st day unless the Board objected. *Id.* at *10.

Respondent Noel was also juggling a high-volume of cases without adequate support staff or billing software. In Respondent Noel's case however this is taken as whining and an effort to avoid responsibility. In the

Mathahs case, it appears to be a mitigating factor cutting against Mathahs's deception.

The record seems to indicate that the amount of money Mathahs obtained by deception, both in terms of billing for client services he did not perform and in mileage he did not drive, is far in excess of that of Respondent Noel. In Respondent Noel's case, the total financial claim for overbilling of family team meetings was \$2,364 over a 21-month period of time. This amount pales in comparison to the amounts involved in the *Mathahs* case.

Unlike Mathahs, the attorney general did file charges against Respondent Noel to which he entered a plea of guilty to two counts of Theft in the 4th Degree, a serious misdemeanor involving amounts between \$200 and \$500 for each count. The minimum financial amount for these two counts would be \$400, or \$200 for each count. The attorney general did not file charges against Respondent Noel concerning the mileage claims that he had submitted. Respondent Noel accepted responsibility for the erroneous billings for the family team meetings and pled guilty to the reduced charges.

In considering an appropriate sanction, the Supreme Court considers, "the nature of the alleged violations, the need for deterrence, protection of the public, maintenance of the reputation of the bar as a whole, and [the

attorney's] fitness to continue in the practice of law. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Mathahs*, 218 WL 4514008 at *6 (Iowa 2018).

Respondent Noel cooperated with the investigation, changed his billing practices and has taken responsibility for his actions. He acknowledges, as did Respondent Mathahs, that he relied upon others to train him in the billing practices but ultimately the responsibility rests with him. As evidenced by the affidavits submitted by two district court judges, Respondent Noel is committed to the practice of law. He is a zealous and effective advocate for his clients. He has truly learned his lesson and an extensive suspension will serve none of the avowed goals sought by imposition of sanctions.

Respondent Mathahs was overpaid approximately \$48,000.

Respondent Noel's violations are approximately one-quarter of that.

Respondent Noel has made full restitution of the disputed amounts even though the State Public Defender's Office has failed to act on over \$30,000 of billing claims that Respondent Noel has submitted to that agency. A suspension of one year is harsh and arbitrary. Respondent Noel respectfully requests that the Court reduce the recommended sanction and impose upon him a sanction more in line with that imposed upon Respondent Mathahs.

Respondent Noel respectfully requests a sanction of no more than 60 days suspension of his license to practice law in the state of Iowa.

CERTIFICATE OF COST

I hereby certify that the actual cost of printing the foregoing Respondent-Appellant's Reply Brief was \$0.

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I hereby certify that on November 5, 2018 I, Max E. Kirk, the undersigned, did electronically file the foregoing instrument with the Clerk of the Supreme Court, Case No. 18-1229, using the Court ECF System, which will send a notice of electronic filing to the following registered parties per Iowa Ct. R. 16.317(1); whom I understand to be Attorneys and Pro-Se parties of record on the EDMS Service List at the time and date of this filing:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 1,340 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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