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IN THE SUPREME COURT OF IOWA

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NO. 18-1229

(Grievance Commission Docket No. 848)

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IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD,

Complainant-Appellee,

vs.

MATTHEW L. NOEL,

Respondent-Appellant.

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APPEAL FROM THE GRIEVANCE COMMISSION, 539th DIVISION,

MIKKIE R. SCHULTZ, PRESIDENT

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**RESPONDENT-APPELLANT'S AMENDED FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT**

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## TABLE OF CONTENTS

Table of Authorities.....................................................................................5

Statement of the Issues Presented for Review...............................................7

Routing Statement.........................................................................................9

Statement of the Case....................................................................................9

Statement of the Facts.................................................................................10

Scope and Standard of Review....................................................................11

Argument

I. THE GRIEVANCE COMMISSION ERRED IN RELYING UPON THE DOCTRINE OF ISSUE PRECLUSION……………………………………………………11

II. THE GRIEVANCE COMMISSION ERRED IN ADMITTING MINUTES OF TESTIMONY IN A CRIMINAL CASE AS EVIDENCE IN THIS PROCEEDING……………………………...16

III. RESPONDENT-APPELLANT DID NOT KNOWINGLY VIOLATE IOWA RULE OF PROFESSIONAL RESPONSIBILITY 32:1.5……………………………………………………………...20

IV. THE GRIEVANCE COMMISSION ERRED IN FINDING THE ACTIONS OF RESPONDENT-APPELLANT REFLECTED ADVERSELY ON HIS FITNESS TO PRACTICE LAW………………………………………………………………23

V. THE GRIEVANCE COMMISSION ERRED WHEN IT FOUND RESPONDENT-APPELLANT DID NOT ATTEMPT TO PAY RESTITUTION UNTIL HE WAS ORDERED TO DO SO IN THE CRIMINAL CASE……………………………………………..26

VI. THE SACTION IMPOSED ON REPONDENT/APPELLANT IS INCONSISTENT WITH SACTIONS IMPOSED UPON OTHER INDIVIDUALS WHO HAVE EXHIBITED SIMILAR BEHAVIOR…………………………………………………………28

VII. A SUSPENSION OF 90 DAYS WOULD BE AN APPROPRIATE SANCTION IN THIS CASE……………………………………..30

Request for Oral Submission........................................................................35

Certificate of Cost.......................................................................................35

Certificate of Service...................................................................................36

Certificate of Compliance............................................................................36

## TABLE OF AUTHORITIES

Cases:

*Iowa Supreme Ct. Att'y Disciplinary Board v. Khowassah,*
890 N.W.2d 647, 650 (Iowa 2017)………………………………………… 11
*Iowa Supreme Ct. Att'y Disciplinary Board v. Kress,*
747 N.W.2d 530 (Iowa 2008)…………………………………………… 23
*Iowa Supreme Ct. Att'y Disciplinary Board v. Laing,*
832 N.W.2d 366 (Iowa 2013)…………………………………………… 21
*Iowa Supreme Ct. Att'y Disciplinary Board v. Pederson,*
887 N.W.2d 387, 391 (Iowa 2016)……………………………………… 11
*Iowa Supreme Ct. Att'y Disciplinary Board v. Richbaugh,*
728 N.W.2d 375 (Iowa 2007)…………………………………………… 32
*Iowa Supreme Ct. Att'y Disciplinary Board v. Said,*
869 N.W. 2d 185, 190 (Iowa 2015)……………………………………… 11
*Iowa Supreme Ct. Att'y Disciplinary Board v. Thompson,*
732 N.W.2d 865 (Iowa 2007)…………………………………………… 32
*Iowa Supreme Ct. Att'y Disciplinary Board v. Weaver,*
750 N.W.2d 71 (Iowa 2008)…………………………………………….. 23
*Iowa Supreme Ct. Att'y Disciplinary Board v. Wheeler,*
824 N.W.2d 505, 509 (Iowa 2012)……………………………………… 11
*State v. Beckett,*
383 N.W.2d 66 (Iowa Ct. App. 1985)……………………………….. …..18
*State v. Gonzalez*
582 N.W.2d 515 (Iowa 1998)…………………………………………… 18
*State v. Long,*
628 N.W.2d 440, 447 (Iowa 2001)……………………………………… 20
*State v. Menke,*
227 N.W.2d 184 (Iowa 1975)…………………………………………… 17

Iowa Code

Iowa Code §714.1(3)……………………………………………………12
Iowa Code §714.2(2)……………………………………………………12
Iowa Code §714(3)………………………………………………………12

Iowa Court Rules

Iowa Ct. R. 36.21(1)…………………………………………………..11

Iowa Rules of Evidence


Iowa R. Evid. 5.801(b)(2)……………………………………………………17
Iowa R. Evid. 5.801(d)(1)……………………………………………………16
Iowa R. Evid. 5.801(d)(2)……………………………………………………16


Iowa Rules of Professional Responsibility


Iowa R. of Prof'l Conduct 32:1.5……………………………………………..21
Iowa R. of Prof'l Conduct 32:1.5(a)…………………………………………...9
Iowa R. of Prof'l Conduct 32:8.1(b)………………………………………….32
Iowa R. of Prof'l Conduct 32:8.4(b)…………………………………………...9
Iowa R. of Prof'l Conduct 32:8.4(c)………………………………...9, 24, 32

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE GRIEVANCE COMMISSION ERRED IN RELYING UPON THE DOCTRINE OF ISSUE PRECLUSION

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

*State v. Beckett,* 383 N.W.2d 66 (Iowa Ct. App. 1985)
*State v. Gonzalez,* 582 N.W.2d 515 (Iowa 19980
*State v. Long,* 628 N.W.2d 440, 447 (Iowa 2001)
*State v. Menke,* 227 N.W.2d 184 (Iowa 1975)

III. RESPONDENT-APPELLANT DID NOT KNOWINGLY VIOLATE IOWA RULE OF PROFESSIONAL RESPONSIBILITY 32:1.5

*Iowa Supreme Ct. Att'y Disciplinary Board v. Laing,* 832 N.W.2d 366 (Iowa 2013)

IV. THE GRIEVANCE COMMISSION ERRED IN FINDING THE ACTIONS OF RESPONDENT-APPELLANT REFLECTED ADVERSELY ON HIS FITNESS TO PRACTICE LAW

*Iowa Supreme Ct. Att'y Disciplinary Board v. Kress,* 747 N.W.2d 530(Iowa 2008)
*Iowa Supreme Ct. Att'y Disciplinary Board v. Weaver,* 750 N.W.2d 71 (Iowa 2008)

V. THE GRIEVANCE COMMISSION ERRED WHEN IT FOUND RESPONDENT-APPELLANT DID NOT ATTEMPT TO PAY RESTITUTION UNTIL HE WAS ORDERED TO DO SO IN THE CRIMINAL CASE

VI. THE SACTION IMPOSED ON REPONDENT/APPELLANT IS INCONSISTENT WITH SACTIONS IMPOSED UPON OTHER INDIVIDUALS WHO HAVE EXHIBITED SIMILAR BEHAVIOR

## VII. A SUSPENSION OF 90 DAYS WOULD BE AN APPROPRIATE SANCTION IN THIS CASE

*Iowa Supreme Ct. Att'y Disciplinary Board v. Richbaugh*, 728 N.W.2d 375 (Iowa 2007)
*Iowa Supreme Ct. Att'y Disciplinary Board v. Thompson*, 732 N.W.2D 865 (Iowa 2007)

## ROUTING STATEMENT

Pursuant to Grievance Commission Rule 36.22(1) this appeal is taken directly to the Iowa Supreme Court.

## STATEMENT OF THE CASE

**Nature of the Case**

This is an attorney disciplinary case. The Iowa Supreme Court Disciplinary Board (Board) filed a Complaint alleging unprofessional conduct by Respondent-Appellant Matthew L. Noel on October 30, 2017. An Amended and Substituted Complaint was filed on February 7, 2018. The Respondent-Appellant generally denied the allegations made by the Board.

The matter came on for hearing before the 539$^{th}$ Division of the Grievance Commission (Division) of the Supreme Court of Iowa on March 27-28, 2018. On July 17, 2018, the Division found the Respondent-Appellant had violated Iowa R. Prof'l Conduct 32:1.5(a), charging an unreasonable fee or charging unreasonable expenses; Iowa R. Prof'l Conduct 32:8.4(b), committing a criminal act which reflects adversely on fitness to practice law; Iowa R. Prof'l Conduct 32:8.4(c), engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

It was the recommendation of the Division that Respondent-Appellant be suspended from the practice of law for an indefinite period with no

possibility of reinstatement for at least one year from the date the Iowa Supreme Court makes the ultimate decision in the matter. The Respondent-Appellant was also assessed costs in the total amount of $1,063.13.

Notice of Appeal was filed with the Clerk of the Grievance Commission of the Clerk of the Iowa Supreme Court on July 25, 2018.

## STATEMENT OF THE FACTS

The Findings of Fact of the Division are adopted by the Respondent-Appellant with the following exceptions as noted herein.

At paragraphs 34, 35, 36, 37 and 38 of the Division's Findings of Fact the Division in reality makes legal conclusions rather than findings of fact. These legal conclusions are directly related to the Respondent-Appellant's appeal point I, the Division erred in relying upon the doctrine of issue preclusion, and II, the Division erred in admitting Minutes of Testimony as evidence. Similarly, the Respondent-Appellant does not accept the Division's findings at paragraphs 43, 44, 45 and 46 in that those paragraphs do not contain findings of fact but rather conclusions of law. With the exceptions stated above, the Respondent-Appellant accepts the Findings of Fact of the Division for purposes of this appeal.

## SCOPE AND STANDARD OF REVIEW

The Iowa Supreme Court reviews attorney disciplinary cases de novo. *Iowa Supreme Ct. Att'y Disciplinary Board v. Pederson,* 887 N.W.2d 387, 391 (Iowa 2016); Iowa Ct. R. 36.21(1). The Board must prove attorney misconduct by a convincing preponderance of the evidence. *Iowa Supreme Ct. Att'y Disciplinary Board v. Khowassah,* 890 N.W.2d 647, 650 (Iowa 2017). The findings of the Grievance Commission are respected by the court but not binding. *Iowa Supreme Ct. Att'y Disciplinary Board v. Wheeler,* 824 N.W.2d 505, 509 (Iowa 2012). The Supreme Court may impose a greater or lesser sanction than recommended by the Grievance Commission. *Iowa Supreme Ct. Att'y Disciplinary Board v. Said,* 869 N.W. 2d 185, 190 (Iowa 2015).

## ARGUMENT

### I. THE GRIEVANCE COMMISSION ERRED IN RELYING UPON THE DOCTRINE OF ISSUE PRECLUSION

In its Amended and Substituted Complaint filed March 5, 2018, the Complainant relies upon a sequence of events commencing with the March 2016 Attorney General Trial Information, filed in the Iowa District Court for Polk County, Case No. FECR294112 charging Respondent-Appellant with the crime of Theft in the Second Degree, a Class D felony in violation of

Iowa Code §714.1(3), §714.2(2) and §714(3). (App. p. 75). This charge was amended by Trial Information filed June 19, 2017 which amends the felony charge to two serious misdemeanor charges in violation of §714.1(3), §714.2(4) and §714.3 of the Iowa Code. (App. p. 83). The Board also relies upon its Exhibit 6, Respondent-Appellant's Petition to Plead Guilty to a Serious Misdemeanor. (App. p. 87-89).

In the prosecution of Respondent-Appellant, the Board relied upon the concept of issue preclusion contending that the elements of Count I of the Board's Complaint against the Respondent-Appellant were satisfied by virtue of the fact that Respondent-Appellant had pled guilty to two serious misdemeanor charges. Additionally, the Board issued its Issue Preclusion Notice on March 5, 2018, stating that the Complainant intends to invoke issue preclusion with regard to all matters involved in the criminal case proceeding for Polk County, FECR294112. (App. p. 73).

At paragraphs 34, 35, 36, 37 and 38 of the Division's Findings of Fact, the Division finds that Respondent-Appellant's conduct with regard to the family team meetings as alleged in Count I of the Board's Complaint had been decided by Respondent-Appellant's plea of guilty in the criminal proceedings. This is classic use of issue preclusion. It is significant to note that the Division specifically finds that the allegations against Respondent-

Appellant concerning mileage reimbursement was not part of the criminal proceedings and was not subject to any arguments of issue preclusion. (App. p. 158).

The testimony in the case does not establish a factual basis for the application of issue preclusion in this matter. Respondent-Appellant admitted that on a handful of occasions he submitted bills to the State Public Defendant (SPD) for family team meetings with dates or descriptions that he later realized were false. He did not however submit those bills with the intent to procure more money than what was called for in the contract. The Respondent-Appellant testified his record keeping was not tracking his time sufficiently to provide the SPD with an appropriate record of the meetings that he attended.

In order to comply with the time limits of getting paid by the SPD, Respondent-Appellant would sometimes be as accurate as he could on his billing statements and would guess at dates or label events as family team meetings for the sake of brevity. In fact, the actual time spent on the client's case was correct. The description was inaccurate. (Tr. p. 196) . At the time, Respondent-Appellant testified he assumed that as long as he wasn't billing for more time than he expended on a case this was acceptable. He testified

at the hearing that he has since changed his billing practices and attempts to keep better records.

Respondent-Appellant was initially charged with a felony violation. He testified that he contemplated the plea offer made by the Attorney General's office in consultation with his criminal attorney Carter Stevens, and they discussed the factual basis for his guilty plea. In consultation with his criminal attorney, Respondent-Appellant came to the conclusion that by mislabeling events and dates a factual basis was created under the pertinent statute for support of the charge against him even if Respondent-Appellant did not knowingly submit any bills for reimbursement that he did not think he had properly earned. Respondent-Appellant took full responsibility for his actions by pleading guilty to the charge as shown by Exhibit 6 and reaffirmed to the Division he was not attempting to argue around this plea of guilt. The Respondent-Appellant submits that at best the actions in inaccurate billing of family team meetings constitutes sloppiness and negligence and is not evidence of a crime of intent. By relying upon issue preclusion, both the Board and the Division were allowed to take a significant shortcut in this case. Sloppy billing practices prevented the Respondent-Appellant from truly creating a record that would allow him to prove the meetings he attended. Also, the events at issue had occurred as

far back as 2011. (App. pp. 123-150). The SPD in effect stated that it did not have a record of his attendance at a certain family team meeting so therefore he must not have attended the meeting even though a billing had been submitted. At best, this factual scenario would allow the Board to submit proof that Respondent-Appellant needed to improve his book keeping practice and perhaps obtained fees without support and justification for those bills. In reality, the doctrine of issue preclusion allowed the Board and the Division to go far beyond this inferring into the disciplinary record an intent that should not have been present.

Rather than face a felony count with a factual basis that his inadequate records could not rebut, Respondent-Appellant pled guilty to two serious misdemeanors and paid a fine which in total is less than $1,000. Such a plea deal and the circumstances surrounding the plea deal do not constitute proof by convincing preponderance of the evidence that Respondent-Appellant violated Iowa Code §714.1(3)

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

Board Exhibit 2 is confidential minutes of testimony and Board Exhibit 5 is additional minutes of testimony filed in the case of *State of Iowa*

*v. Matthew Noel*, FECR294112 in the District Court of Iowa for Polk County. Respondent-Appellant had objected to the admission of those exhibits on the basis of hearsay. The objection was made before testimony was taken. (Tr. p. 5-6). At the conclusion of testimony, the division president admitted Exhibits 2 and 5. The Division president stated with regard to Exhibits 2 and 5: "I'm going to rule that those are allowed pursuant to the rules cited yesterday, Iowa Rule 5.801(b)(2)(b), I believe which is offered against a party opponent. I can read the rule, if necessary, but those are determined admitted." (Tr. p. 258-259).

There is no Iowa R. of Evid. 5.801(b)(2)(b). The division president explains that she believes the rule pertains to statements offered against a party opponent. The statements contained in the minutes of testimony are certainly not statements made by Respondent-Appellant Noel. Accordingly, these statements cannot be an exception to the hearsay rule under Iowa R. of Evid. 5.801(d)(1). The minutes of testimony do not come within the hearsay exception Iowa R. of Crim. P. 5.801(d)(2). The minutes of testimony are not statements made by Respondent-Appellant and cannot be offered against him as impeachment as to an opposing party's statement.

One of the reasons the Board submitted for admission of the minutes of testimony was that they were adoptive statements by the Respondent-

Appellant pursuant to Iowa R. of Evid. 5.801(b)(2). In analyzing the case law, the Respondent-Appellant believes that the reliance on this rule is misplaced. The Iowa appellate courts have held a stringent standard when it comes to adoptive statements, holding the statement needs to be unequivocally adopted by the party for it to be admissible under this rule. "It must be shown a person clearly and unambiguously assented to the statements of another before an adoptive admission comes into being." *State v. Menke,* 227 N.W.2d 184 (Iowa 1975). In *Menke,* the Court disallowed as hearsay portions of a conversation between three individuals where the defendant was one of the individuals in a conversation. At the end of the conversation there was an agreement between the three individuals. Although the defendant was part of the conversation and had responded to the statements made by the other individuals, the court said there could not be an unambiguous assent by Menke to the truth of any of the inculpatory statements. Admission of such testimony was hearsay.

In *State v. Beckett,* 383 N.W.2d 66 (Iowa Ct. App. 1985) the court gave further instruction on the meaning of an adoptive statement. "When hearsay accusations are sought to be introduced as evidence against the defendant in a criminal proceedings on the ground that hearsay was adopted by the defendant as an admission of guilt, the trial court must first determine

that the asserted adoptive admission be manifested by conduct or statement which are unequivocal, positive, and definite in nature, clearly showing that the defendant intended to adopt hearsay statements as his own." *State v. Beckett,* 383 N.W.2d 66 at 69 (Iowa Ct. App. 1985).

In *State v. Gonzalez,* 582 N.W.2d 515 (Iowa 1998) it was error for a trial court to use minutes of testimony that were not necessary to establish a factual basis for the plea and determining the sentence of the defendant. In doing so the Supreme Court said, "The sentencing court should only consider those facts contained in the minutes that are admitted or otherwise established true. Where portions of the minutes are not necessary to establish a factual basis for the plea, they are deemed denied by the defendant and are otherwise unproven and a sentencing court cannot consider or rely upon them." *Id.* at 517.

The minutes of testimony contained in Exhibit 2 pertained to the felony charges against the Respondent-Appellant. These minutes of testimony were filed on March 31, 2016. (App. p. 77). The amended trial information reducing the felony charge to a serious misdemeanor was filed on June 19, 2017. (App. p. 83). The amended minutes of testimony were filed on or about November 2, 2017. (App. p. 85). The Petition to Plead Guilty to a Serious Misdemeanor, Exhibit 6, was e-filed in the office of the

Clerk of the Polk County District Court on June 22, 2017. (App. p. 87). The additional minutes of testimony represented by Exhibit 5 states that it was e-filed with the Polk County Clerk of Court on June 19, 2017 but the exhibit also bears a certificate of service date of November 2, 2017.

No adequate explanation was made by the Board regarding the apparent discrepancy in these minutes of testimony. Nothing in the minutes of testimony, Exhibit 2 or Exhibit 5, can be seen as a statement which Respondent-Appellant somehow adopted as his own for purposes of a criminal plea. Quite to the contrary, these minutes of testimony are simply unsubstantiated and undocumented statements presented by the Attorney General's office and made part of the criminal file in the proceedings against Respondent-Appellant. They are not statements against interest by Respondent-Appellant and they are not adoptive statements by the Respondent-Appellant. Despite objection made to their admission, the division president admitted these statements which were clearly and substantially prejudicial to the Respondent-Appellant in these proceedings.

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 Division is in error in admitting Exhibits 2 and 5 which is prejudicial and which error now requires that the

Supreme Court set aside the Division's consideration of these minutes of testimony. This primarily pertains to Count I of the Complaint against the Respondent-Appellant which should be considered dismissed due to the receipt of prejudicial inadmissible testimony.

## III. RESPONDENT-APPELLANT DID NOT KNOWINGLY VIOLATE IOWA RULE OF PROFESSIONAL RESPONSIBILITY 32:1.5

The Board presented no evidence to substantiate its charge that Respondent-Appellant knew the fees and expenses he submitted to the SPD were unreasonable.

At the hearing, Respondent-Appellant admitted he had designated things as "Family Team Meetings" on his billing sheets to the SPD that either did not happen on that day or were not official family team meetings. (Tr. p. 172). Lacking records of his time spent on behalf of a client, Respondent-Appellant was unable to substantiate where he had been on certain dates giving rise the inference that he had improperly submitted billings to the SPD concerning the family team meetings. (Tr. p. 146). Often times, matters would be attended other than a family team meeting but the billing put down under family team meeting for ease of reference. (Tr. p. 172).

Typically the court finds a violation of Iowa R. Prof'l Conduct 32:1.5 for excessive billing when fees are clearly excessive as determined by the factor in the rule or when an attorney takes a fee before the time set by statute or when a fee is taken that is in excess of the statutory maximum. A situation analogous to Respondent-Appellant arose in the case of *Iowa Supreme Ct. Att'y Disciplinary Board v. Laing,* 832 N.W.2d 366 (Iowa 2013).

In the *Laing* case, two attorneys were suspended for eighteen months for consistently over a period of eighteen years charging excessive fees for work they were doing on a conservatorship case. The court also determined that their actions violated the Iowa ethics rules as it pertains to deception and criminal activity that reflects adversely on their membership to the bar. However in the *Laing* case it was determined that the attorneys were paid clearly excessive fees and were paid for work they had not performed. The facts of the case at issue here are more nuanced than *Laing*. First, Respondent-Appellant believes there is no evidence showing he used deception to defraud anyone out of money except for the $400 he agreed to plead guilty to in the criminal case. (App. pp. 87-89). The entire matter of record keeping for the family team meetings was often confusing. The auditor's notes, Exhibit O, show the difficulty faced by the auditor in tracing

back to the court officials in the various counties attended by Respondent-Appellant to confirm whether or not a family team meeting had even been held on that date or if it had been moved to a different day. Respondent-Appellant testified that in some instances he would attend a family team meeting and not make reference that he had done so. In other instances he strongly believed that he had attended a family team meeting but simply had not correctly submitted the billing information to confirm that. In other cases, he might have met with family members after a family team meeting was cancelled. (Tr. p. 172). Although an official family team meeting was not held or confirmed by Department of Human Services the time was nevertheless spent by Respondent-Appellant in service of a client.

All in all, aside from the $400 Respondent-Appellant admitted he obtained by deception as a result of the criminal plea, no evidence was presented by the Board that any of the Respondent-Appellant's bills for family team meetings were done with the intent to deceive. Respondent-Appellant maintains he never used deception to be paid more money than he was owed. (Tr. p. 185).

## IV. THE GRIEVANCE COMMISSION ERRED IN FINDING THE ACTIONS OF RESPONDENT-APPELLANT REFLECTED ADVERSELY ON HIS FITNESS TO PRACTICE LAW

Unquestionably, the Respondent-Appellant has made errors in his billing practices. These errors pertain both to the billings made to the SPD for family team meetings as well as the duplicate mileage issue. Respondent-Appellant has explained the circumstances under which he entered a plea of guilty to the two serious misdemeanors involving billings for family team meetings. Respondent-Appellant also has explained how the duplicate mileage issue came into being and how it was corrected in a prompt and effective manner after he was informed of his error by the SPD.

The Division finds intent to deceive on the part of Respondent-Appellant by reliance upon issue preclusion without regard to the circumstances surrounding the reduced plea to two serious misdemeanors. Citing *Iowa Supreme Ct. Att'y Disciplinary Board v. Kress,* 747 N.W.2d 530 (Iowa 2008) the Division correctly states that intent is required to satisfy an element of misrepresentation. Likewise, intent can be shown by a reckless disregard for the truth. *Iowa Supreme Ct. Att'y Disciplinary Board v. Weaver,* 750 N.W.2d 71 (Iowa 2008). In the present case however, the evidence produced by the Board at best establishes that Respondent-Appellant was negligent and haphazard in his billing practices. If his actions

with regard to duplicate mileage billing evidence the intent necessary for disciplinary action then one must question, what about the other individuals who were also cited with duplicate mileage paid? Respondent-Appellant's Exhibit P is a summary of a portion of the State Auditor's Report dated August 15, 2014.

Thirteen individuals are noted as having made billing charges for which duplicate mileage was paid. Did each of these individuals then evidence intent to misrepresent and deceive reflecting adversely on their fitness to practice law because of their billing practices and receipt of monies from the SPD? The answer is obviously no. If the mere fact of billing duplicate mileage evidences the intent to misrepresent and deceive the SPD then all of these individuals would have been charged.

To single out the Respondent-Appellant, the Division makes the following finding: "The Commission also concludes that Noel violated Iowa R. of Prof'l Conduct 32:8.4(c) for intentionally making dishonest statements. As cited above, Noel consistently and regularly submitted fraudulent mileage claims to the SPD, even after he admittedly learned the submission of the mileage claims was inappropriate. This conduct was dishonest." (App. p. 162). This conclusion is simply not supported by the evidence.

The record establishes that at a SPD conference in late June 2013, covering a variety of topics, one of the speakers, Sam Langholz, spoke on billing practices. It was the first time Respondent-Appellant learned that billing mileage in the manner in which he had done was incorrect. (Tr. pp. 144-145). While he was confused since this advice differed from the billing procedures he had learned at his previous law office, Respondent-Appellant put in place the new procedure to correct the mileage billing practices. The mileage was split between clients. (Tr. p. 146). In fact, there are only ten instances after June 2013 in which alleged duplicate billing occurred. (App. pp. 122). These duplicative billing issues persisted due to the billing software Respondent-Appellant was using which did not straighten out the billing as he had desired. (Tr. pp. 155-156).

After June 2013 Respondent-Appellant attempted to correct his billing practices but mistakes continued. The Division obviously takes these mistakes as evidence of intent to deceive and fraud reflecting adversely on Respondent-Appellant's fitness to practice law. The Division's conclusion is not supported by the records in the case and does not support the conclusion that Respondent-Appellant is unfit to practice law

## V. THE GRIEVANCE COMMISSION ERRED WHEN IT FOUND RESPONDENT-APPELLANT DID NOT ATTEMPT TO PAY RESTITUTION UNTIL HE WAS ORDERED TO DO SO IN THE CRIMINAL CASE

The Division is critical of what it sees as Respondent-Appellant's failure to repay the excess mileage claim until after his criminal plea of guilty in order to pay restitution. Respondent-Appellant did respond to the inquiry of the SPD by authoring Exhibit 16. In Exhibit 16, Respondent-Appellant clearly states his desire to discuss the issue of restitution in order to rectify the situation. (App. p. 100). Respondent-Appellant was not aware of the amount claimed for restitution until he received the SPD letter of January 29, 2014, claiming an overpayment of more than $11,000. Even in this letter, the SPD does not state a specific amount of restitution allegedly due from Respondent-Appellant. Respondent-Appellant was not aware of the amount of the alleged duplicative mileage payments until he received Exhibit 17. (Tr. pp. 159-160). At the same time the SPD was claiming restitution from Respondent-Appellant, the SPD owed Respondent-Appellant pending bills that he had submitted for services performed. Respondent-Appellant's attorneys were attempting to negotiate with the SPD to get payment to Respondent-Appellant of approximately $31,000 owed to him by the SPD as part of the payment of restitution to the SPD. Respondent-Appellant even went so far as filing a case against the SPD

which owed Respondent-Appellant more than the restitution amounted to. This was denied as premature. (Tr. pp. 164, 165).

It may be true that restitution was only paid once the plea agreement was entered into but that was not for lack of trying. Respondent-Appellant's efforts to make restitution commenced in a timely manner once he was aware of the amount claimed from him. Those efforts continued to offset the amount owed to Respondent-Appellant by the SPD, over $31,000 against the amount that he was to repay the SPD, in excess of $11,000. The mileage reimbursement claim against Respondent-Appellant of $14,697.45 was made part of the plea agreement, Exhibit 6. (App. p. 87).

The Division is correct when it states that Respondent-Appellant did not repay the excessive mileage until after his criminal plea of guilty in order to pay restitution. This is at best a half-truth however, ignoring the efforts made by Respondent-Appellant to right the record and make restitution as soon as he learned of the amount on January 29, 2014. (App. pp. 101-102). It seems totally unfair to require that the Respondent-Appellant knuckle under to the SPD and forego the amount of billings to which he was properly entitled at his peril of being held uncooperative in making restitution.

## VI. THE SACTION IMPOSED ON REPONDENT/APPELLANT IS INCONSISTENT WITH SACTIONS IMPOSED UPON OTHER INDIVIDUALS WHO HAVE EXHIBITED SIMILAR BEHAVIOR

In its Conclusions of Law, the Division improperly concludes that the Respondent-Appellant claimed "selective prosecution as a defense to his conduct." (App. p. 162). The Division improperly interprets the position taken by the Respondent-Appellant. Selective prosecution has its classic application in the complaint made by one motorist that they were picked up for speeding when other motorists in the flow of traffic were going the same speed. Needless to say, such a plea falls on deaf ears for the simple reason that law enforcement cannot arrest all parties at the same time. That is not the argument advanced by the Respondent-Appellant. Instead, the argument advanced is that the basic conduct of erroneously submitting duplicate mileage claims is itself not an ethical violation. The State Auditor's Report reveals that thirteen individuals were found to have submitted duplicate mileage claims and were paid $41,344.93. (App. p. 151). Respondent-Appellant was paid the most for these mileage claims but he also had the most trips at issue, 460 compared to the next individual who had 387 trips. Some of these individuals may have been investigated for ethical violations upon receipt by the SPD of the auditor's report. The testimony of Mr. Langholz in this regard is not clear. All of these individuals should have

been charged with an ethical violation with the same conduct as that alleged to have been committed by the Respondent-Appellant. The amount of the charges and the number of trips made by the attorneys should make no difference. If it is an ethical violation for one then it is an ethical violation for all.

If some attorneys are investigated for duplicate mileage claims and others are not the issue presented becomes, is such conduct really an ethical violation or in fact a civil matter that needs to be addressed by an appropriate claim for restitution? In this matter, Respondent-Appellant has made full restitution to the SPD for the duplicate mileage claims. This is clearly a civil matter which has been addressed by the restitution and is not the proper basis for an ethical complaint against the Respondent-Appellant.

Mr. Langholz during his testimony acknowledged that he found other members of Respondent-Appellant's former firm, Blair, Fitzsimmons, who had submitted duplicate mileage billings in a similar manner to that of the Respondent-Appellant. Les Blair had some instances of double-billing. (Tr. p. 95). No action was taken against Mr. Blair, who still works for the SPD. (Tr. p. 95). Stuart Hoover, another member of the Blair, Fitzsimmons firm, had double-billed mileage. At the time Mr. Langholz left the SPD, Mr. Hoover still had an indigent defense contract. (Tr. pp. 95-96). Mr. Chris

Welsch also had duplicate billing issues with the SPD and was allowed to repay for those overbillings. For a time Mr. Welsch worked in the Dubuque Public Defenders Office having been hired by Mr. Langholz. (Tr. p. 97). In fact, Mr. Langholz testified he learned of the mileage issues after he had hired Mr. Welsch but did not terminate his employment with the SPD. (Tr. p. 97-98).

Respondent-Appellant's Exhibit P is a summary of only a portion of the State Auditor's Report.

## VII. A SUSPENSION OF 90 DAYS WOULD BE AN APPROPRIATE SANCTION IN THIS CASE

The Division recommends a suspension of not less than one year the Supreme Court makes its final determination in this matter. (App. pp. 165-166). The Division further admonishes Respondent-Appellant that he has not taken responsibility for his actions or does not understand the significance of his misconduct. These conclusions are quite harsh and not supported by the facts in the record.

Respondent-Appellant cooperated with all investigating individuals immediately upon learning that his billings were under investigation. The State Auditor's Report listed thirteen attorneys, eight of which had duplicate mileage claims against them for thousands of dollars or more. As previously

argued, the SPD through Samuel Langholz reported only one person to the Grievance Commission, that being the Respondent-Appellant. Mr. Langholz testified that he felt the need to report Respondent-Appellant more "urgently than others" because he was a magistrate as well. That heightened the concerns for Mr. Langholz. (Tr. p. 105).

The Respondent-Appellant submits he should not have been singled out for ethical prosecution while others, having engaged in the same duplicate mileage acts, were not only allowed to simply make restitution but in the instance of Mr. Welsch were hired by the same public defender's office.

The Respondent-Appellant has the sufficient clerical staff and software to keep his billing practices and scheduling in proper order. (Tr. p. 176-177). During the approximate three and a half years since Mr. Langholz's letter to the Attorney Disciplinary Board, January 29, 2014, Respondent-Appellant has not had any billing issues or discrepancies brought to his attention. (Tr. p. 178). There is no danger or likelihood of billing discrepancies occurring again given the system that he now has. (Tr. p. 179).

In its conclusions of law and recommendation, the Division cites an aggravating factor that the conduct of Respondent-Appellant was dishonest. The two cases cited by the Division, *Att'y Disciplinary Board v. Richbaugh,* 728 N.W.2d 375 (Iowa 2007) and *Att'y Disciplinary Board v. Thompson,* 732 N.W.2d 865 (Iowa 2007). In both of those cases, the Supreme Court treated dishonesty as an aggravating factor. In both of those cases however the attorneys involved had forged judges' signatures on various documents and either filed them with the Clerk of Court or falsely presented the forged documents to clients. In *Thompson,* the court noted that such behavior of dishonesty was an aggravating factor. There is no case law in Iowa that supports the proposition of general dishonesty, particularly which arose as a result of poor book keeping, can be an aggravating factor when dealing with the violation of Iowa R. of Prof'l Conduct 32:8.1(b) and 32:8.4(c).

The Division also lists mitigating factors including the lack of a prior history of disciplinary action and the Respondent-Appellant's cooperation with the investigation by the Board, the SPD, and the court system. Additionally, the Division notes that Respondent-Appellant has respect in the legal community as evidenced by the affidavits from two local judges attesting to his skill and character.

The Respondent-Appellant asks the court to take into consideration the manner in which he was trained to submit billings to the SPD office, the lack of ethical prosecution against other members of the bar submitting exactly the same type of mileage claim as well as his cooperation in this matter. Lastly, the evidence in this case establishes that the billing procedures and guidance outlined by Mr. Langholz in his testimony were not all that clear in the first instance. Hindsight is wonderful and in hindsight the words of the administrative rules can be parsed and reviewed and seem to be obvious to anyone who examines them. Without the benefit of hindsight however, the matter is far less clear. The legal services defense contract signed by the Respondent-Appellant, Exhibit 9, provides no instruction to an attorney with regard to mileage billing. (App. pp. 94-95). Likewise, the renewal of legal services contract, Exhibit 10, provides no such guidance. (App. p. 96). It is only with reference to the Iowa administrative rules that Mr. Langholz comes up with his interpretation of the correct mileage billing procedures. Even Mr. Langholz acknowledged that the administrative rules in place at the time of Respondent-Appellant's billings have been changed to provide greater specificity than the administrative rules in place at the time of the Respondent-Appellant's conduct. As he testified: "You know if you were to go to the administrative

code now, the language would be slightly different, because we clarified in greater specificity that you could not bill for multiple clients – you couldn't bill multiple clients for the same trip for the full amount; that you were supposed to proportionally split it." (Tr. p. 92-93). At the time Mr. Langholz wrote his January 2014 letter to Respondent-Appellant the rules had not yet been amended and clarified. (Tr. p. 93).

This entire matter was not sufficiently clear given the error in this record not only in terms of the Division's use of issue preclusion but also its use of the minutes of testimony. Respondent-Appellant was accused of violating rules for billing of mileage which were not clear. These rules were not contained in his public defender contract or the guidelines given to him for billing. Further, it is only with the use of hindsight that the administrative rules Respondent-Appellant is accused of violating become clear. Mr. Langholz had to amend the administrative rules at issue and concedes that the rules in place at the time of the conduct of Respondent-Appellant were not even before the Division for their consideration. If the rule Respondent-Appellant violated was so clear then why did the administrative rules need to be clarified? Under the circumstances of this case, Respondent-Appellant's plea of guilty to two serious misdemeanor charges is not indicative of dishonest, deceitful conduct. It is indicative of a

young attorney whose sloppy billing practices got him into trouble while others having committed the same or very similar acts were allowed to make restitution only or even hired by the SPD office.

This court is certainly aware of its prior cases concerning punishment in the circumstances. It does little good at this point to recite cases to this court. The Respondent-Appellant asks however that the court take into consideration all of the circumstances and mitigating factors in reviewing the Division's recommendation of a one year suspension. The Respondent-Appellant respectfully submits that a 90 day suspension of the Respondent-Appellant is more in keeping with the goal of disciplinary proceedings and the facts in this case.

## REQUEST FOR ORAL SUBMISSION

Respondent-Appellant respectfully request this appeal be granted oral argument.

## CERTIFICATE OF COST

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

## CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I hereby certify that on November 26, 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 5,639 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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