IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 21-0348

POLK COUNTY JUVENILE No. JGJV248693

IN THE GUARDIANSHIP OF

J.W.

Minor Child

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY

HONORABLE WILLIAM PRICE
SENIOR JUDGE, FIFTH JUDICIAL DISTRICT

FINAL BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Iowa Rule of Appellate Procedure 6.903(3) states "the brief shall conform to the requirements of rule 6.903(2), except that a statement of the case or a statement of the facts need not be included unless the appellee is dissatisfied with the appellant's statements." The Appellee finds material differences in the versions of the "Statement of the Case" and thus opts to include one.

Nature of the case: This is an appeal of the district court dismissing a petition for guardianship in response to the Petitioner/Appellant's filing a "Notice to Court of Alleged Ethical Issue and Request for Enumeration of the same." That filing ultimately lead to the Court's further review of the circumstances via briefs and a hearing. The Court then decided that the only appropriate remedy was dismissal of the petition in its entirety.

Procedural/Factual Background: The Petitioner/Appellant filed a Petition for Involuntary Guardianship of a minor child on December 8th, 2020. This petition lists the Petitioner and his office manager, Ms. Wildt as co-petitioners and is said to be filed by the Petitioner *pro se*, despite being signed with the Petitioner's law firm signature. App. p. 8-18. The Petitioner simultaneously filed a Civil Original Notice, a Motion for emergency appointment of temporary co-guardians, and four attachments labeled as follow: 1. Child Serve Recommendations Concerning ADHD, 2. Child Serve Evaluation for ADHD, 3. Letter from School Guidance Counselor, 4. Email from therapist showing we had access. App. p. 19-31.

On December 18, 2020 Attorney Dahlhauser was appointed for Mother, Attorney Reimer was appointed for the child, and an Order by the Court set a Status Hearing for January 5, 2021 and denying emergency temporary guardianship. App. p. 32-36. Prior to that Status Hearing Attorney Reimer withdrew due to a conflict and was ultimately replaced by Attorney Bahls. App. p. 38, 45.

On January 4, 2020 The Petitioner filed a Motion for Alternative Service along with an Attachment - Affidavit of Wildt Regarding Service. App. p. 41-44. A Status Hearing was held on January 5, as scheduled, and another hearing was scheduled for January 28, 2021, at 10:30am. App. p. 49. Approximately 12 hours before that hearing, the Petitioner filed a "Notice to Court of Alleged Ethical Issues and Request for Enumeration of the Same" asking Mother's Attorney to "provide the list of ethical issues she believes to be posed by Co-Petitioner's involvement in this action, as well as the remedies, if any, sought by Mother or Mother's Counsel in association with said issues." App. p. 53-54. Mother's Counsel filed the requested Enumeration, listing the Iowa Rules of Professional Conduct believed to be violated and proposed remedies. App. p 55-56.

At the Hearing on January 28, 2021, the presiding Judge, Honorable Judge Rachel Seymour, declined to hear full arguments or positions on the alleged violations and instead ordered Attorney Dahlhauser and Attorney van Cleaf to brief their positions. Attorney and Court Visitor roles were bifurcated at the request of Attorney Bahls, who remained on as the minor child' attorney. Attorney Allison was appointed as Court Visitor. A hearing just on the alleged ethical concerns and proposed remedies has been scheduled for February 25, 2021, at 9am. App. p 57-64.

At the Court's direction, all parties filed briefs. App. p 65-110. The Petitioner attached nine affidavits (exhibits "A" through "I") to his brief from people such as clients, his partner at the Petitioner's law firm, the Petitioner's paramour, etc. The Petitioner also attached a copy of "Petitioner's Exhibit 112" that was originally filed in a prior case that the Petitioner had represented Mother/Appellee in. App. p. 111-211.

The matter was brought before the Court for hearing on February 25, 2021, as planned, and the Honorable Senior Judge William A. Price presided. After a full day of argument, exhibits, and testimony by the Petitioner, the Court closed the record. On March 2, 2021, the Court entered an order dismissing the Petition for guardianship, ordering the Court Visitor to request the Iowa Department of Human Services conduct a Child in Need of Assistance Assessment to ensure well-being, and ordering the Clerk of Court send a copy of the order to the Iowa Supreme Court Commission on Professional Regulation. App. p. 212-227.

ROUTING STATEMENT

Under Iowa Rule of Appellate Procedure 6.1101(3)(a), this case should be transferred to the Iowa Court of Appeals. Oral argument is not requested.

ARGUMENT

The Appellant uses an exorbitant amount of case law and misconstrued citations to try and shift attention away from what should be obvious ethical violations. The Appellant is attempting to use this platform to discuss merits and introduce evidence beyond the scope of the appellate court.

Despite representing the Appellee numerous times in the last handful of years, the Appellant recklessly pursued guardianship of his client's child. The only true issue before the Court is whether dismissal was an appropriate avenue for the district court to take.

I – THE DISTRICT COURT DID NOT ACT OUTSIDE OF ITS JURISDICTION

Standard of Review/Error Preservation

The Appellee agrees with the Appellant's statement of when it is appropriate to review issues of Subject Matter Jurisdiction and that questions of jurisdiction are reviewed for correction of errors at law.

Argument

The Appellant argues, correctly, that Chapter 34 of the Iowa Court Rules lays out the general provisions of the Attorney Disciplinary Board and Rule 34.10 *does* specifically address Jurisdiction. Where the Appellant seems to get off track is that the rule says that attorneys admitted to practices law in Iowa are "subject to the *disciplinary jurisdiction* of the Iowa Supreme Court, the disciplinary board, and the grievance commission" (emphasis added). Iowa Ct. R. 34.10. What Rule 34 does *not* do is discuss subject matter jurisdiction. In fact, the phrase "subject matter jurisdiction" does not come up at all within Chapter 34.

The plain language of Rule 34 is to give disciplinary authority to the Iowa Supreme Court, the disciplinary board, and the grievance commission. This rule does nothing to say that a Judge cannot determine that a rule has been violated by an attorney, particularly when rules are so flagrantly disregarded as they were here. It merely says that a Judge not acting on behalf of the Supreme Court, the disciplinary board, or the grievance commission can take disciplinary action against the rule-breaker. The Iowa Judicial Branch website even elaborates on this fact, stating "The [Attorney Disciplinary] Board's jurisdiction extends to the attorney's license alone."[1]

Here, Judge Price did not take any disciplinary action against the Appellant. He, as the district court, dismissed a guardianship petition because the sole petitioner was not appropriate to bring the petition, which is within the Juvenile Court's discretion to do.

Further, the Iowa Rules of Professional Conduct (hereinafter "IRPC") *require* a lawyer to act when they know that another has committed a violation of the IRPC. *See Iowa R. Prof. Cond. 32:8.3(a).* One could argue that it would have been a violation of IRPC Rule 32:8.4(a) for Judge Price to allow the case to continue while knowingly allowing the Appellant to continue to violate the IRPC.

The argument that the Juvenile Court of Polk County lacks subject matter jurisdiction to make findings on whether there is a violation of the Rules of Professional Conduct is incorrect. The court may lack the authority to take disciplinary action on rule violations, but they are required to address them. Had the district court tried to discipline the Appellant in some fashion, subject matter may have been at issue. As it is, the court

[1] https://www.iowacourts.gov/opr/attorneys/attorney-discipline

acted fully within the subject matter of a juvenile guardianship, as was appropriate, and any argument pertaining to subject matter is incorrect.

II – PETITIONER FAILED TO MAKE A CASE THAT WOULD TRUMP DUTIES OWED TO A FORMER CLIENT

Standard of Review/Error Preservation

The Appellant has not made a statement on error preservation, scope of review, and standard of review. It is therefore impossible for the Appellee to lay out if she agrees with the Appellant. The Appellee argues that any review regarding whether there was a "prima facie case" and/or a "claim" would be Abuse of Discretion.

State v. Webster cites prior Iowa case law and defines an abuse of discretion as "when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Rodriquez,* 636 N.W.2d 234, 239 (Iowa 2001) (quoting *State v. Maghee,* 573 N.W.2d 1, 5 (Iowa 1997)). *Webster* goes on to quote "'A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.' " *Id.* (quoting *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000)). The burden is on the party seeking to overturn the verdict. *See State v. Henning,* 545 N.W.2d 322, 324–25 (Iowa 1996). *State v. Webster*, 865 N.W.2d 223, 231 (Iowa 2015).

The burden would be on the Appellant to show this, as he is the one seeking a reversal of the decision.

Argument

The first paragraph of the Appellant's argument in this section should be stricken based on the Appellee's Motion to Strike. Should the Court finds that it is not appropriate

to strike any/all of that portion, it should still not be considered heavily. The Appellant sought affidavits from clients, his law firm partner, and his paramour to disparage Appellee in this case.

The Appellant essentially argues that if there is a prima facie case for guardianship that a claim for guardianship exists, and, if a claim for guardianship does exist, he is a "suitable person" with "an interest" under the law to be said guardian. Appellant states "As Petitioner [Appellant] has such an interest, he is permitted to establish said claim against Mother, regardless of her status as a former client." Appellant's Brief. p. 25-26.

This argument is heavily flawed. It needs to be broken down and addressed in three parts: 1) is there a prima facie case for guardianship, 2) if there is a prima facie case established, is Appellant a "suitable person" under the law, and, finally, 3) if there is a prima facie case and Appellant is a suitable person, does that trump any rights that Mother/Appellee has as a former client?

Is there a prima facie case?

No. The Appellant argues that a prima facie case was made through his Petition for Guardianship and proposed Exhibits "A" through "I." Appellant correctly lays out Iowa Code section §232D.204(1) for establishing a Guardianship without parental consent. However, there are several problems with his logic in assuming he has met the grounds. First, Appellant takes for granted that he is a "de facto" guardian of the minor. Appellant makes lofty assertations that, cumulatively, everything he did for the minor would mean he "functioned as a de facto guardian." Appellant's Brief. *See Section II.*

The Appellant did not define for this Court what a de facto guardian is, or why it is that he, or his proposed co-guardian, meet that standard, and apparently have since 2013. In his brief, Appellant states that "the petition contains all allegations necessary to establish a prima facie claim for guardianship under Iowa Code § 232D.204(1) at paragraphs 1, 2, 4, 5, 9, 10, and 13-17." P. 22-23.

When one refers to the petition itself 1-5 are merely naming the parties in the case and 9 is a statement saying Appellant and Wildt have been de facto guardians. Paragraph 10 does state some duties that Appellant and Wildt have allegedly been doing, but there are still concerns with this. Paragraph 10, subsection "a" states that the proposed guardians "tak[e] custody of the Proposed Ward and establishing her primary residence *when not actively prevented from doing so by Mother*." App. p. 10. This is a contradiction to future arguments made by Appellant in his brief that claim Mother is "unable" or "unwilling" to care for the minor child. *See Generally Appellants Brief Section II.* Paragraph 13 talks about Mother executing releases to ensure the minor child received care. Paragraphs 14 and 15 attempt to minimize the communication and visitation that Mother had with the minor child while the minor child stayed with Appellant and proposed co-guardian. However, they acknowledge that, despite not being up to their preferred standards, Mother *did* maintain a relationship and communication with the minor child. Petitioner/Appellant did not do enough to establish a prima facie case based on § 232D.204(1).

Next, Appellant argues that the exhibits admitted on a limited basis are enough to establish a prima facie case under §232D.204(2). In order for this to be met "(a) No parent having legal custody of the minor is willing or able to exercise the power the court

will grant to the guardian if the court appoints a guardian" AND "(b) Appointment of a guardian for the minor is in the best interest of the minor. Iowa Code §232D.204(2). Element §232D.204(2)(a) is clearly not met here, as the has been in Appellee's care full time since November of 2020. Even if the Court determines that, at the time of filing the Petition, element (a) was met there is still the hurdle of element (b). *Matter of Guardianship of I.P.* states the following:

> To overcome the strong parental preference, Gonzalez cannot simply demonstrate she has functioned as a satisfactory de facto guardian of the children in the past. *See id.* at 212 ("Recognition that the non-parental party is an excellent parent to the child will rarely be strong enough to interfere with the natural rights of the parent."). In fact, "we have acted in some cases to remove children from conscientious, well-intentioned custodians with a history of providing good care to the children and placed them with a natural parent." *Id.* at 213. Instead, Gonzalez must "show that placement with [Kelly] 'is likely to have a seriously disrupting and disturbing effect upon the child[ren]'s development'" to prove establishing a guardianship is in the children's best interest. *M.D.*, at 127–28 (quoting *Knell*, 537 N.W.2d at 782).

928 N.W.2d 863 (Iowa App. 2019). In summary, Appellant would have a hefty burden showing that a guardianship with him and/or Wildt would be in the minor child's best interest, given the strong parental preference given. "The parents of [a] minor [child], if qualified and suitable, are preferred over all others for appointment as their guardians." *In re Guardianship of Stodden,* 569 N.W.2d 621 (Iowa App.1997)(citing Iowa Code § 633.559). Based on all of these factors, a prima facie case is not made.

If there is a prima facie case established, is Appellant a "suitable person" under the law?

A prima facie case was not established so parts 2 and 3 are moot. Assuming, however, that this Court finds that a prima facie case was made, Appellant still would not be a "suitable person" under the law. A "suitable person" is considered on a case specific

basis. While the Appellant may be a fine guardian or parent in some situations, it is negated by the fact that it is altogether inappropriate to become the guardian of a client's child.

Appellant argues that Iowa Code §232D.301(1) allows guardianship proceedings to be initiated via the filing of a petition "by any person with an interest in the welfare of the minor." Again, the Appellant cites the code correctly but completely context. It is true that §232D.301(1) does not say "by any person with an interest in the welfare of the minor, barring any ethical conflicts of interest."

If there is a prima facie case and Appellant is a suitable person, does that trump any rights that Mother/Appellee has as a former client?

Again, there is no prima facie case and Appellant is not a suitable person, so this argument is moot. Assuming, though, that both of those elements had been established, it *still* would not trump the duties owed to Appellee as a former client of Appellant. The district court succinctly addressed this in App. p. 222.

> It is further Mr. van Cleaf's position that his "claim" outweighs his former clients' right to confidentially and any conflict of interest. Mr. van Cleaf offered no authority on either issue other than in Mr. van Cleaf's argument on this issue. Mr. van Cleaf likened removing custody of a child from a former client parent to a lawyer collecting a fee from a client. Nothing could be further from the truth. To accept Mr. van Cleaf's position would mean that a client is entitled to confidentiality only when convenient for the lawyer. Lawyers receive huge benefits from the practice of law that far exceed financial considerations. With those benefits come weighty burdens. Client confidentially is one of those burdens. Mr. van Cleaf did not have to represent Jaishia Walker as a client. Once he did so, his relationship with her was changed forever as to the issues and communications in the five representations.

This is not to say that confidentiality with a lawyer is without exception. Comment 6 to Rule 32:1.6 provides that disclosure is permittable when "reasonably necessary to prevent

reasonably certain death or substantial bodily harm." Clearly, that was not the situation here.

III – THE COURT DID NOT ERR IN ALLOWING CONSIDERATION OF EXHIBITS "A"-"H" ON A LIMITED BASIS

Standard of Review/Error Preservation

The Appellee agrees with the Appellant's position that the standard to apply would be abuse of discretion and that error was preserved.

Argument

As previously argued in this brief, the Court did not err in limiting consideration of exhibits "A"-"H." The hearing at hand was not one on the merits, where full consideration of the exhibits may have been appropriate. Rather, it was a hearing to determine if there were ethical violations and, if so, the proper remedy.

The Appellant's only defense was that he had a "claim" that allowed him to violate his ethical duties and petition for guardianship. The Court allowed the exhibits in for purposes of the Appellant making his claim defense. Further, the parties were not there to testify, and the affidavits were provided immediately prior to court, which did not allow time for other parties to review and fact check any information. To allow anything beyond the limited consideration would have been beyond the scope of the current hearing, untimely, and inappropriate. Appellant argues that IRPC 32:1.6(b)(5) would allow him to breach confidentiality to create a claim. This rule is intended to allow lawyers to be able to defend themselves from actions against them and to collect entitled

fees. *See IRPC Rule 32:1.6, notes 10 and 11.* What it is not intended to do is give lawyers a free pass to seek out claims against former clients.

Appellant argues that the exhibits were relevant to determine if facts were generally known regarding Appellee and former cases. This is irrelevant. Appellant cites the portion of Rule 32:1.9(c)(1) that permits use of generally known information but chooses to ignore 32:1.9(a) and (b) in their entirety. Additionally, if it was found that something was generally known, what measures would be in place to assure that information is not "generally known" because Appellant told them as such? "The Court should not allow Mr. van Cleaf to manipulate his way around his ethical duties to his former client." App. p. 9.

IV – THE COURT DID NOT ERR IN APPLYING ONE OF THE PROPOSED REMEDIES BASED ON THE MOTION MADE BY PETITIONER

Standard of Review/Error Preservation

Appellant's position that the standard to apply would be 1) errors at law for Argument IV and 2) abuse of discretion for Argument V. Appellee believes that both should be considered under the same standard but also finds that these arguments are moot.

Appellant argues in his Argument IV and V that "Mother's Motion" either should have been construed as a motion to dismiss or a motion to disqualify. On page 28 of Appellant's brief, he states "While mother never tendered a written motion…" This acknowledgement alone makes Arguments IV and V moot. Mother never independently, nor through counsel, made a motion to the Court to dismiss or to disqualify.

Appellant seems confused about the process that took place, despite having initiated it himself. Appellant involved the Court by filing a "Notice to the Court/Request for Enumeration of the same" and therefore directly asking the Court to intervene and decide re: the alleged ethical violations. The hearing that Appellant is referring to, where Mother supposedly made a motion to dismiss, was solely about whether Appellant could proceed as a petitioner, given his obvious and numerous conflicts. Again, the appellant asked Appellee's counsel to "a. list the alleged ethical issues; and b. List the remedies sought for the alleged ethical issues." App. p. 53-54. Appellant now seeks to treat this as a motion made on behalf of Mother based on a proposed remedy that he asked Mother's counsel to provide. As such, any reference to "Mother's Motion" are moot.

Subsections A-C have been addressed intermittently above. In the appellant's next attempt of throwing everything at the wall in hopes of making something stick, he claims in subsection D that the court erred both in determining that prior representation was substantially related and that he could not proceed without revealing information. The district court addresses both with clarity.

A prima facia case of ethical violation was established by Mother, through her counsel. The burden of proof then shifted to Petitioner/Appellant to show "by clear and convincing evidence that there had not been nor will there be a breach of an ethical duty to the mother." App. p. 214. Appellant would have parties believe that representing Mother in five previous cases is not related enough. Each of those five previous cases involved a coparent of Mother's; four of which directly involve custody of minor

children. One of those four custody cases, in fact, involves the specific minor child being discussed in this guardianship case.

The district court later recalls "Mr. van Cleaf failed to present any credible evidence that he did not have a conflict of interest as a party in this guardianship proceeding. In fact there is clear and convincing evidence of multiple conflicts of interest and breach of his ethical duties on the part of Jacob van Cleaf due to the attorney/client relationship with his former client." App. p. 224

In subsection E, Appellant argues that "Petitioner has demonstrated that he could prove his case without need of information relating to representation." Appellant Brief. P. 46. This is blatantly false, as evidenced by the fact that Appellant revealed information relating to representation via Exhibit "J" at the hearing. This sentiment was echoed by the district court. App. p. 220-21.

Subsection F alleges that the Court Erred by finding 32:1.8 relevant. This is incorrect. While the Appellant focuses on which came first, representation of Mother or hiring Ms. Wildt, that is irrelevant. The issue at hand is the fact that they overlapped, and the Appellant's sole legal assistant/office manager was allegedly acting as a de facto guardian for a current client's child for several years.

Subsection G alleges that the court erred in applying dismissal as a remedy. The court did not err but applied the only acceptable remedy without the court, itself, risking becoming compliant with ethical violations. The court acknowledges that a violation of one of the IRPC rules does not necessarily warrant disqualification and should be used as

guidance. However, in this case it did require disqualification. For reasons already discussed, the Petitioner could not proceed *pro se* and would have been in the same situation if he sought independent counsel. There was no co-petitioner anymore, as Ms. Wildt had been ruled a non-party based on lack of appropriate paperwork/signatures. Without Appellant being able to proceed, there were no remaining petitioners, thus the petition had to be dismissed.

Appellant argues that, at worst, he should not be allowed to proceed as attorney, but should be allowed to proceed pro se. He claims that there is no case law supporting dismissal in a case such as this. A case where an attorney brings a petition for guardianship to forcibly take over custody and care of their former repeat client's child (who he helped her get custody of) *is* unique. The district court ruling states that "in this case the actions of Jacob van Cleaf constitute a flagrant betrayal of his duties…This Court finds that there are no conditions or combination of conditions that would allow this litigation to go forward without further violations… to his former client." App. p. 225.

Some of the actions taken and statements made by the Appellant are troubling. First and foremost is the lack of accountability for his ethical violations, even those that are blatantly clear. When the issue was raised of communication with a represented party the district court found Appellant to be "completely unapologetic." App. P. 224. Appellant knew these conversations were happening with a represented party in violation of the IRPC 32:4.2(a) made by his legal assistant, whom he has a duty to supervise under IRPC 32:5.3(c) and condoned the action, even filing it as an exhibit. App. P. 41-44. The

court found that Appellant had "troublingly casual" attitude towards those rules and "took no responsibility." App. P. 224.

Beyond the Appellant's lack of accountability, there is the concern that this is not the first time alleged ethical violations have been brought to this appellate court's attention. In *In re the Marriage of Christopher Leroy Riggs and Carrie Riggs* the Appellant was initially disqualified from representing Mr. Riggs due to a conflict of interest in a CINA matter involving Carrie Riggs. 886 N.W.2d 107 (Iowa App. 2016). Appellant would argue that this was overturned upon appeal, which is true. However, in that case both parties had executed waivers, which Appellee did not. In that case, no party alleged that Appellant's actions were "directly adverse" to his other client, as is obviously the case here. Instead, the only allegation was a risk of potential conflict whereas here it is current adverse action and almost guaranteed future conflict. Even despite *Riggs* having been reversed, the appellate court entered a footnote stating "We want to be clear that, as a practical matter, we question the wisdom of Van Cleaf representing Christopher under this circumstances." *Id.* at footnote 3.

Frequently, Appellant talks about potential "relief" he might be owed in this case. Appellants Brief. P. 28-29. This is not a case where the appellant was wronged and is therefore potentially owed relief. Appellant sought out this claim, brought it to court, and seeks to remove a child from her natural parent's home. As the district court eloquently said, "There are few situations wherein interests are more adverse than threatening to remove a child from the custody of a parent." App. p. 220.

Solely as a matter of public policy it would cause detrimental waves to allow an attorney to petition for guardianship of a former client's child. Any lawyer who practices in juvenile or family law knows that they often see parents on their worst days. To allow an attorney, who is already in a position of power compared to a client, to manipulate the case and/or to be waiting to recall all the client's shortcomings as soon as the case closes would be a terrible precedent to set.

CONCLUSION AND RELIEF REQUESTED

The undersigned respectfully requests Appellate Court confirm that the district Court made no error, nor abused discretion, and ruled appropriately within the scope of its jurisdiction. As such, the District Court ruling should be upheld.

The undersigned requests attorney's fees be assessed to the Appellant, the District Court ruling be upheld, and any other remedies this Court should deem appropriate.

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CERTIFICATE OF FILING

The undersigned hereby certifies that she did file the Appellee's Proof Brief with the Clerk of the Supreme Court, Des Moines, Iowa, by electronic filing through EDMS on September 10, 2021.

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PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned hereby certifies that a copy of the Appellee's Proof Brief was served upon the below listed parties via the Iowa Courts EDMS System on September 10, 2021.

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CERTIFICATE OF COMPLIANCE

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

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[ ] this brief has been prepared in a monospaced typeface using [Times New Roman] in [font size 12] and contains [state the number of] lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

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