

ARTICLES

GENDER AND THE LANGUAGE OF JUDICIAL OPINION WRITING

MARY PAT GUNDERSON*

ABSTRACT

The “#MeToo” Movement has forced corporations and the entertainment industry, as well as state and federal executive and legislative branch officials, to take a hard look at gender inequities and sexual harassment in the workplace. But, how does our judicial system fare? Is the one branch of government charged with being fair and impartial in the interpretation and application of our laws truly fair and impartial?

Between 2010 and 2018, the Iowa Supreme Court was the only state supreme court in the country that did not include any women or people of color. Does it matter? Is there an institutional bias when only one gender reviews, decides and writes opinions? Is the lack of female perspective on the court detrimental to women?

This piece considers the real possibility of implicit gender bias in judicial opinion writing by deconstructing four recent Iowa Supreme Court ethics opinions written by an all-male Court wherein the survivors were female clients and/or intimate partners of the male attorney/abuser. Not only do the case results themselves raise questions but also the language those results are wrapped in may be even more revealing. This article examines both these results and language through the eyes of an Iowa woman who served as a trial Court judge in Iowa’s largest judicial district.

INTRODUCTION	2
I. IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD V. SCHMIDT: A REVISIONIST FACTUAL THEORY	6
II. IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD V. MOOTHART: “FIVE JANE DOES”	14
III. IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD V. BLESSUM: IT’S HER FAULT FOR HIRING HIM?	22

* Mary Pat Gunderson was appointed as a district court judge for Iowa’s Fifth Judicial District in 2011. She retired in 2017. © 2019, Mary Pat Gunderson.

IV. IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD V. DEREMIAH:
 EDUCATION IS KEY . . . OR IS IT? 26

V. GETTING UNSTUCK. 28

CONCLUSION 33

INTRODUCTION

One of my first personal experiences with the power of judicial opinion writing came not long after Iowa Governor Terry Branstad appointed me in 2011 to serve as a district court judge in Iowa’s Fifth Judicial District.¹ Soon after I was appointed, I handled a case where a woman alleged she had been assaulted and was currently being stalked by her former sexual partner.² She was seeking a temporary protective order preventing him from having any contact with her.³ This was not an atypical matter for me to handle—with one exception: the man who had assaulted and continued to stalk her was her attorney.⁴

She had hired him to handle her divorce.⁵ While he represented her, they began a sexual relationship.⁶ One night, he assaulted her repeatedly; she called 911 and the call, including the audio of him battering her, was recorded.⁷ An ambulance transported her to the hospital, where she was treated for her injuries, which included cuts to her mouth, a black eye, swelling on her cheek and mouth, and bruising to her upper body.⁸ Initially, the attorney was not criminally charged.⁹ When he was eventually charged, a plea agreement allowed him to plead guilty to two serious misdemeanors.¹⁰

After the woman was released from the hospital, the attorney started sending her letters and notes.¹¹ He appeared in her neighborhood.¹² He started attending her church.¹³ This is what brought her to court in 2011, seeking a temporary protective order.¹⁴ I placed her under oath and listened to her tearfully describe how she feared this man who held himself out as a capable and influential professional in the community. Based on her sworn testimony, I granted the temporary

1. O. Kay Henderson, *Governor Appoints Woman with Legal, Legislative Experience As Judge*, RADIOIOWA (Sep. 2, 2011), <https://www.radioiowa.com/2011/09/02/governor-appoints-woman-with-legal-legislative-experience-as-judge/>.

2. Iowa Sup. Ct. Att’y Disciplinary Bd. v. Blessum, 861 N.W.2d 575, 578 (Iowa 2015).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 579–580.

7. *Id.* at 580.

8. *Id.*

9. *Id.*

10. *Id.*

11. Iowa Sup. Ct. Att’y Disciplinary Bd. v. Blessum, no. 14-1201 (July 24, 2014).

12. *Id.*

13. *Id.*

14. *Id.*

protective order and made a referral to Iowa's Attorney Disciplinary Board ("the Board").¹⁵

The Board sought formal discipline, and a division of the Grievance Commission (the Commission) heard the case.¹⁶ The Commission, which included women, listened to witness testimony, reviewed the evidence, prepared its Findings of Fact and Conclusions of Law, and recommended that the attorney's license be suspended for four years.¹⁷ That recommendation was filed with the Iowa Supreme Court for final determination of the appropriate sanction.¹⁸

In March 2015, I was sitting in my chambers when the Iowa Supreme Court's opinion was released and appeared in my email inbox. The Supreme Court¹⁹ determined that four years was excessive; it imposed an 18-month license suspension, instead.²⁰

Not only had the Supreme Court significantly reduced the sanction recommended by the Commission, but the language it used throughout the opinion minimized the assault and sexual conduct of the attorney and subtly implicated the survivor. I sent an email to my female colleagues on the bench expressing my frustration with the opinion. Their responses were instantaneous. Not only did they share my concerns about this opinion, but they attached other opinions issued by the Iowa Supreme Court since 2011 that they found equally concerning.²¹

15. The Iowa Supreme Court Attorney Disciplinary Board is responsible for receiving and initiating ethics complaints against attorneys whose practice falls within the Board's jurisdiction. Following an investigation, the Board either (1) dismisses the complaint; (2) privately admonishes the attorney; or (3) seeks formal discipline by filing a complaint with the Iowa Supreme Court Grievance Commission (the Commission). The Supreme Court imposes all public discipline. The Board consists of nine volunteer attorneys (currently four women and five men) and three volunteer laypersons (currently two women and one man), all of whom are formally appointed by the Court for up to two three-year terms. The Board also includes four prosecutors, several investigators and support staff, and an administrator. If the Board seeks formal discipline, a complaint is filed by the Commission. The clerk of the Grievance Commission appoints a division of the Commission made up of four attorneys and one lay person (the Division) to hear the case. The prosecutor for the Commission presents witness testimony and introduces evidence on behalf of the complainant. The attorney under investigation may present evidence and cross-examine witnesses. The prosecutor for the Commission and the respondent's attorney both have the opportunity to file briefs. At the conclusion of the hearing, the Division files its Findings of Fact, Conclusions of Law and Recommended Sanctions with the Iowa Supreme Court. The Supreme Court considers the Division's recommendation and writes an opinion imposing the final sanction it determines appropriate. See *Attorney Disciplinary Board*, IOWA JUDICIAL BRANCH, <https://www.iowacourts.gov/opr/about-opr/attorney-disciplinary-board> (last visited Sept. 26, 2019).

16. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Blessum, 861 N.W.2d 575, 582 (Iowa 2015).

17. *Id.*

18. *Id.*

19. In this Article, "Supreme Court" or "Court" refers to the Iowa Supreme Court unless otherwise noted.

20. See *Blessum*, 861 N.W.2d at 578.

21. See Iowa Sup. Ct. Att'y Disciplinary Bd. v. Moothart, 860 N.W.2d 598 (Iowa 2015); State v. Nicoletto, 862 N.W.2d 621 (Iowa 2015); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Schmidt, 796 N.W.2d 33 (Iowa 2011).

I started reviewing ethics opinions from the past eight years specifically dealing with allegations of domestic abuse or sexual misconduct by male lawyers against women.²² I found that the recitation of facts in these opinions generally followed a pattern: minimizing the abusive actions of the male attorneys and highlighting their positive professional and personal attributes—while subtly implicating the actions of the female survivors. Additionally, factual findings the Commission found particularly compelling were often omitted by the Court. These imbalanced narratives created a basis for justifying a more minimal sanction than that recommended by the Commission for the male attorney’s predatory behavior; with that, this Article was born.²³

The ability to use language to communicate ideas clearly and succinctly is a necessary component of being an effective judge.²⁴ The law is a system built on language, and as such, the language used in a written judicial opinion has a powerful impact for a number of reasons—not the least of which is the fact that it creates a framework from which all similar, future cases will be analyzed and decided.²⁵ This is one of many reasons the black robe worn by judges can sometimes feel heavy. It is laden with the responsibility of getting the opinion “right”—not only by arriving at the correct legal conclusion but also by using language that accurately reflects the facts relied upon to arrive at that conclusion. It is imperative that the language does not reflect a bias, intentional or not.

This can be extraordinarily difficult.

Each judge takes the bench with unique life experiences shaping his or her perspective. Even with the best intentions, each of us sees the world through a

22. While there may be additional cases involving female attorneys committing acts of domestic violence or sexual misconduct against males, I did not find any during my research and have limited my assessment to instances of male-on-female violence, accordingly. This disparity tracks the general statistics surrounding domestic violence: while men also experience domestic violence, women are the survivors of domestic violence at a higher rate across most types and markers. *See, e.g., Statistics*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/statistics> (“One in 4 women and 1 in 9 men experience severe intimate partner physical violence, intimate partner contact sexual violence, and/or intimate partner stalking with impacts such as injury, fearfulness, post-traumatic stress disorder, use of victim services, contraction of sexually transmitted diseases, etc.”).

23. Before delving into these opinions, it is important to note that there are obvious hazards of parsing out pieces of a legal opinion for demonstrative purposes, not the least of which is that the sentence or phrase will be taken out of context. Yet, to demonstrate my concerns regarding implicit gender bias in judicial opinion writing, I am left with few alternatives other than to provide specific examples from specific opinions. Therefore, I strongly encourage reading the opinions in full to gain a better understanding of the writing and the analysis.

24. *See Anya Bernstein, Before Interpretation*, 84 U. CHI. L. REV. 567, 592 (2017) (“Judicial opinions present a particular form of communication. Their specific conventions differentiate them from other communicative genres, as does the fact that they arise from, and resolve, disputes.”).

25. *Stare Decisis* is the general policy of courts to stand by precedent and not to disturb a settled point. *See, e.g., Neff v. George*, 4 N.E.2d 338, 390-91 (1936). When a controlling court has laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to all future cases, where facts are substantially the same. *See Stare Decisis*, BLACK’S LAW DICTIONARY (9th ed. 2009).

specific lens, which is often reflected in the language a judge uses to describe circumstances or events.²⁶

During my years as a prosecutor and then as a district court judge, I found the language men and women use to describe a domestic or sexual assault to be often subtly but significantly different. I also found that the language chosen to describe an event can change one's perception of reality, leading to a conclusion that might not otherwise have been drawn. These two facts combined can create a particularly problematic situation when a reviewing body²⁷ is completely composed of one gender: there may be a tendency to view the facts with an unconscious gender bias for the simple reason that there is no one present to express a different opinion based on life experienced as a different gender. Where that is the case, disparate voices may go unheard or, if heard, be minimized.²⁸

Between 2010 and 2018, the Iowa Supreme Court was the only state supreme court in the country that did not include any women or people of color.²⁹ This changed August 1, 2018, when Iowa's first female Governor Kim Reynolds appointed a woman, Susan Christensen, to the Court.³⁰ Prior to this appointment, however, there had only been two female members on Iowa's highest court: Justice Linda K. Neuman from 1986 to 2003 and Justice Marsha K. Ternus from 1993 to 2010.³¹ Does it matter? Is there an institutional bias when only one gender reviews, decides and writes opinions? Is the lack of female perspective on the court detrimental to women?

A close reading of some of the Court's ethics opinions beginning in 2011—the first year of an entirely male court in 25 years—reveals one possible conclusion: having only one gender acting in an appellate capacity harms the unrepresented gender in demonstrable ways. Specifically, a fair reading of Iowa Supreme Court

26. As now-U.S. Supreme Court Justice Sonia Sotomayor stated in a speech she gave as a Federal Court of Appeals Judge, “[w]hether born from experience or inherent physiological or cultural difference . . . our gender and national origins may and will make a difference in our judging.” Sonia Sotomayor, *Lecture: ‘A Latina Judge’s Voice’*, N.Y. TIMES (May 14, 2009), <https://www.nytimes.com/2009/05/15/us/politics/15judge.text.html>.

27. In the law, the reviewing body is called an appellate court and it is charged with being objective and neutral. Supreme Court justices describe events by writing the facts of a case, analyzing those facts as described under the law, and ultimately rendering a final decision as to the legality of the relevant action.

28. Deborah Tannen, a professor of linguistics at Georgetown University, has spent a lifetime studying communication styles based on gender. She acknowledges that “[w]e tend to look through language and not realize how much power language has.” See Alison Roberts, *Say What?*, THE SACRAMENTO BEE (Apr. 5, 2006), <https://www.sun-sentinel.com/news/fl-xpm-2006-04-05-0604030352-story.html>.

29. There is not currently nor has there ever been a person of color on the Iowa Supreme Court. This article does not address implicit racial bias and focuses exclusively on the issue of gender bias. See *Past Supreme Court Justices*, IOWA JUDICIAL BRANCH, http://www.iowacourts.gov/For_the_Public/Court_Structure/Iowa_Courts_History/Past_Iowa_Supreme_Court_Justices (last visited Sept. 17, 2019).

30. *Gov. Reynolds Selects Susan Christensen as Supreme Court Justice*, OFF. OF THE GOV. OF IOWA, <https://governor.iowa.gov/2018/08/gov-reynolds-selects-susan-christensen-as-supreme-court-justice>.

31. See *Past Supreme Court Justices*, *supra* note 29.

attorney ethics opinions written between 2011 and 2018 demonstrates a marked lack of concern for male attorneys committing violent attacks or repeated predatory sexual behaviors against women in both client and non-client relationships.

In this Article, I will demonstrate how the Court moved away from proportionate sanctioning of male attorneys who abused female partners or clients when it became an all-male Court. I do so by discussing several recent ethics cases and comparing their sanctions to those imposed in similar cases where a woman was part of the reviewing body. Parts I through IV focus on the language used by the all-male Iowa Supreme Court to subtly rationalize the imposition of lesser sanctions.³² Both the language included and the facts left out of each opinion are telling.³³ Part V draws possible conclusions about those inclusions and omissions and provides potential avenues toward change.

Although the Court may rely on a variety of considerations when analyzing a case and determining the appropriate sanction for an offending attorney, this Article will review the selected ethics opinions through the prism of three specific sources. The first of these is the Findings of Fact, Conclusions of Law and Recommendation submitted to the Court by the Division of the Iowa Supreme Court Grievance Commission.³⁴ The second source is case law consisting of ethics opinions previously handed down when there was a woman on the Court. The final source consists of opinions from other state supreme courts comprised of both men and women. Even a cursory reading of these other states' ethics opinions, as well as the opinions of the Iowa Supreme Court when it included a woman, reflects a significant variance in the language used in the recitation of the facts and the sanctions imposed compared to that of the 2011-2018 all-male Iowa Supreme Court.³⁵

I. IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD V. SCHMIDT: A REVISIONIST FACTUAL THEORY

In 2006, a lawyer named Richard Schmidt violently attacked his wife, "Jill," in front of their three children.³⁶ He threw her to the ground into their air conditioner.³⁷ He then put both his hands around her neck and squeezed hard while

32. See Iowa Sup. Ct. Att'y Disciplinary Bd. v. Deremiah, 875 N.W.2d 728 (Iowa 2016); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Blessum, 861 N.W.2d 575, 575-82 (Iowa 2015); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Moothart, 860 N.W.2d 598, 601 (Iowa 2015); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Schmidt, 796 N.W.2d 33, 33-40 (Iowa 2011).

33. This article will focus on the various rhetorical devices used by the Court including but not limited to praising the male perpetrators for their professional service, using the passive voice to attenuate the attorney from his abusive actions, and minimizing the harm to the survivor.

34. The Findings of Fact, Conclusions of Law and Recommendation is submitted to the Court by the men and women of the Commission who heard the testimony of live witnesses and examined the evidence presented at the hearing. See *Attorney Disciplinary Board*, *supra* note 15.

35. Compare *People v. Falco III*, Case No. 15PDJ101, 2016 WL 4442171 (Colo. O.P.D.J. July 7, 2016), with Iowa Sup. Ct. Att'y Disciplinary Bd. v. McGrath, 713 N.W. 2d 682 (Iowa 2006).

36. *Schmidt*, 796 N.W.2d at 36, 38.

37. Iowa Sup. Ct. Att'y Disciplinary Bd. vs. Schmidt, no. 10-0912, Docket No. 682, 8 (June 4, 2010) (Amended Findings of Fact, Conclusions of Law and Recommendation).

saying, “You’re dead. You’re dead.”³⁸ He continued to push on her neck until she passed out.³⁹ When she regained consciousness, she ran into the mudroom of the house, where Schmidt grabbed her by her hair.⁴⁰ He threw her down again, this time hitting her head against the corner of the laundry-room sink.⁴¹

Schmidt strangled Jill four separate times that night, three times to the point of unconsciousness.⁴² This all occurred in front of their three young children.⁴³ Jill eventually ran to their neighbor’s house to call 911.⁴⁴ Schmidt followed and attacked her again, knocking the phone out of her hands.⁴⁵ Although Schmidt’s assaults prevented her from completing the call, dispatch remained on the line, and deputies were sent to the residence.⁴⁶ When they arrived, they placed Schmidt in the back of the patrol car; he broke out of the “cage” and grabbed the deputy’s cell phone.⁴⁷ Jill was hospitalized for treatment of the physical injuries inflicted by Schmidt, and she also suffered afterward from months-long anxiety, even testifying at the disciplinary hearing that she is “still deathly afraid” of Schmidt.⁴⁸ Witnessing their father assault their mother traumatized the children, as well.⁴⁹

Schmidt ultimately pled guilty to two aggravated misdemeanor charges of domestic abuse. He was referred to the Board for this incident and several other violations of the Iowa Rules of Professional Conduct.⁵⁰ The Board recommended Schmidt’s license to practice law be suspended for six months.⁵¹ Instead, the Iowa Supreme Court entered a unanimous decision suspending his license for just thirty days.⁵²

In *Schmidt*, the Court separated its Findings of Fact into three sections: “General Background,” “Prohibited Communication with a Represented Party,” and, relevant here, “Domestic Abuse.”⁵³ The first sentence of the “Domestic Abuse” section describes Schmidt’s violent battering of Jill in front of their three children as follows:

On June 6, 2006, the incident of domestic abuse by Schmidt of his wife occurred. Prior to June 6 Schmidt had never been violent toward

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Schmidt*, 796 N.W.2d at 36, 38.

43. *Id.* at 38.

44. *Id.*

45. *Id.*

46. *Schmidt*, no. 10-0912, Docket No. 682, at 11.

47. *Id.* at 11-12.

48. *Id.* at 12, 17.

49. *Id.* at 12.

50. *Schmidt*, 796 N.W.2d at 36.

51. *Id.* at 37.

52. *Id.*

53. *Id.*

his wife. Moreover, Schmidt had never acted with violence toward anyone else.⁵⁴

Note the use of the passive voice in this first sentence. When the passive voice is used, the subject receives the action.⁵⁵ The Court tells us that “Schmidt’s wife” receives an incident of domestic abuse; the battery simply occurred to her. In a sentence written in the active voice, the subject (Schmidt) performs the action.⁵⁶ If the active voice were used in this sentence, it might read: “On June 6, 2006, Schmidt battered his wife, Jill.” This difference in phrasing, while subtle, makes a crucial difference. Passive phrasing identifies the act that occurred—but omits naming the actor, and therefore fails to place any responsibility *on* the actor. In contrast, active-voice phrasing would accurately reflect that Schmidt is the batterer and the action did not simply occur to Jill. Schmidt did it.

The Court uses the passive voice again when describing injuries to Jill’s head:

On the evening of June 6, 2006, Schmidt and his wife began arguing about childcare issues. They were on the concrete patio near their hot tub. When his wife walked away from the argument, Schmidt grabbed her and threw her down, causing her to hit her head.⁵⁷

An alternative phrasing of that sentence using the active voice and placing responsibility for the head injuries squarely on the actor (Schmidt) might read something like this:

On the evening of June 6, 2006, Schmidt and his wife began arguing about childcare issues. They were on the concrete patio near their hot tub. When Jill walked away from the argument, Schmidt grabbed her and threw her to the ground, slamming her head into the concrete patio.⁵⁸

Additionally, the Court repeatedly describes an “incident” of domestic abuse.⁵⁹ By using the term “incident,” the Court gives the reader the sense that this was a single act—when in fact Schmidt strangled Jill four separate times, causing her to lose consciousness three of those times.⁶⁰ Referring to these actions with the neutralized language of “incident” without emphasis on the repeated and violent nature of the events does little to illustrate the full extent of Schmidt’s attacks. This was acknowledged by the Commission, which in contrast to the Court has sitting

54. *Id.* at 37-38.

55. PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION § 3.18 (6th ed. 2013).

56. *Id.*

57. *Schmidt*, 796 N.W.2d at 38.

58. In altered passages throughout this Article, the additional or modified text is underlined.

59. *Id.* at 37-39, 44.

60. *Id.* at 38.

female members.⁶¹ The Commission was clear in its recommendation that this was not a single incident of domestic abuse:

The Division (Commission) considers, as an aggravating factor, the horrific nature of the events described in Count I. This was not a single assault, but rather a series of assaults, albeit occurring over a relatively short period of time. Each of these assaults involved choices made by Respondent (Schmidt).⁶²

Consider the next two sentences of the “Domestic Abuse” section of the Court’s opinion: “Prior to June 6, Schmidt had never been violent toward his wife. Moreover, Schmidt had never acted with violence toward anyone else.”⁶³ We are told that Schmidt has not historically assaulted Jill or others. This is framed as a rare act for Schmidt. We are left to wonder: what events could have caused such a reasonable man to react in such an uncharacteristic way?

And then, the Court answers that question: the next two paragraphs are devoted to Schmidt’s numerous attempts to save his failing marriage through therapy and medication.⁶⁴ The Court explained:

Schmidt’s marriage was tumultuous. In 1997 Schmidt began seeking therapeutic assistance for problems in his marriage. He started taking doctor-prescribed medications, including medications for depression, consisting of Prozac, Wellbutrin, and Effexor. On June 6 Schmidt was taking Effexor. For about two and one-half years prior to June 6, Schmidt did not share a bedroom with his wife, but slept in the basement of the couple’s home. In Spring 2006 Schmidt’s wife informed him that she intended to leave him.⁶⁵

The last line of the foregoing paragraph speaks volumes to those familiar with the patterns of domestic abuse. Separation Assault is a phenomenon where a batterer further assaults a person who is attempting to leave an abusive relationship.⁶⁶ However, for those who are not familiar with this research, the Court’s characterization leads the reader to believe that Schmidt’s life was particularly stressful and troubled, due in large part to problems created, or at least exacerbated, by Jill.

61. See *Attorney Disciplinary Board*, *supra* note 15.

62. *Schmidt*, no. 10-0912, Docket No. 682, at 38.

63. *Schmidt*, 796 N.W.2d at 37-38.

64. *Id.* at 38.

65. *Id.*

66. See Ruth Fleury et al., *When Ending the Relationship Doesn't End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 12, 1365 (2010) (“Leaving represents a threat to the batterer’s control; violence is a way to attempt to regain or maintain that control.”).

The third paragraph tells us how despondent Schmidt became and connects Schmidt's declining emotional wellness to his failing marriage:

In August 2005 Schmidt attempted suicide but failed. After his attempt, Schmidt sought psychiatric care. In August 2006 Schmidt began seeing Dr. Easton, a psychiatrist. Also, after his suicide attempt, Schmidt began seeing P.J. McDonald, a licensed independent social worker and a marriage and family therapist. Schmidt continues to see both practitioners.⁶⁷

We now know that Schmidt has never previously been violent with his spouse (or anyone else) and he appears willing to do anything to solve his marital issues, including visiting two separate therapists and trying numerous prescription medications.⁶⁸ The court has planted a seed whereby the reader is thinking, "Something must have *caused* this normally peaceful man to react in such an atypical way. He was trying."

The Commission described in detail the testimony of the emergency room physician, Dr. Ernst Hoffman, who treated Jill at the hospital.⁶⁹ During his testimony before the Commission, Dr. Hoffman painstakingly distinguished strangulation from choking, explaining that strangulation involves an outside force closing an individual's airway and preventing the person from breathing.⁷⁰ Choking, on the other hand, involves something ingested, such as food.⁷¹ Dr. Hoffman specifically stated that the correct terminology to use in this case was "strangled."⁷²

Yet, the Court repeatedly uses the term "choking" instead:

When his wife walked away from the argument, Schmidt grabbed her and threw her down, causing her to hit her head. Schmidt then began to choke her, and she temporarily lost consciousness. Schmidt then chased her around the house, choking her two more times into unconsciousness. At some point, Schmidt let her up and she fled the house, running to a neighbor's house. Schmidt followed. Schmidt attacked his wife again in the neighbor's kitchen as she tried to call 911. Eventually, the couple began running through the neighbor's garage. The neighbor, who was in his backyard, went to his garage after hearing screaming coming from the garage. The neighbor asked Schmidt what happened, and Schmidt said his wife had fallen in the hot tub, hitting her head. The neighbor went to the kitchen and found the 911 dispatcher still on the line. The dispatcher said help was on the way.

67. *Schmidt*, 796 N.W.2d at 38.

68. *Id.*

69. *Schmidt*, no. 10-0912, Docket No. 682, at 13.

70. *Id.*

71. *Id.*

72. *Id.*

Throughout the entire incident, the couple's children watched and chased them. They screamed and cried for Schmidt to stop.⁷³

The choice to use the word “choke” rather than “strangle” subtly mitigates Schmidt's actions. As Dr. Hoffman explained, we choke on a piece of food; we are strangled by a person constricting our throat so as to cut off our air flow.⁷⁴ Though disregarded by the Court, this distinction was not lost on the Commission. Not only did the Court have Dr. Hoffman's testimony in the record available for review, it had specific findings by the Commission which laid out this distinction.⁷⁵ The Court completely disregarded both Dr. Hoffman's testimony and the Commission's findings of fact. Instead, the Court chose to refer to Schmidt's actions with the neutral term “choking” rather than the accurate descriptor: “strangling.”

Also telling is the Court's description of Schmidt's interaction with his neighbor. When asked what happened to Jill (presumably because the neighbor saw the bleeding from her head), Schmidt responded that she had hit her head on the hot tub.⁷⁶ Schmidt lied. Yet, the court made nothing of this dishonesty. Consider this alternative to the phrasing the court used:

Schmidt claimed prior to June 6 he had never been violent toward Jill. Moreover, he claimed he had never acted with violence toward anyone else. Yet, the Court notes Schmidt's questionable credibility, considering the fact that Schmidt knowingly lied to his neighbor regarding the source of Jill's injuries.

Finally, it is equally important to consider the facts the Court did not include in its opinion. For example, we never learn the age of Schmidt's children when they witnessed their father strangling their mother. We never learn much about Jill, who is only referred to as “Schmidt's wife”; the Court chooses to use the possessive form when describing her. Although the Court provides information about treatment Schmidt is currently undertaking, we do not know what, if any, type of therapeutic treatment the children—themselves exposed to traumatic conflict—were provided after witnessing these events. Nor do we know if Jill is receiving any type of treatment. The omission of any information about the lasting effects of Schmidt's actions on others suggests that consideration of the survivors played little role in the Court's determination of an appropriate sanction.

73. *Schmidt*, 796 N.W.2d at 38.

74. Non-fatal strangulation in the context of domestic violence has been identified as one of the risk factors increasing a woman's risk for future serious harm or death. U.S. studies show that in close to fifty percent of deaths involving intimate partner violence, women had experienced non-fatal strangulation at least once before they were killed. See Nancy Glass et al., *Non-fatal Strangulation is an Important Risk Factor for Homicide of Women*, 35(3) J. EMERGENCY MED. 329, 334 (2008).

75. *Schmidt*, no. 10-0912, Docket No. 682, at 13.

76. *Schmidt*, 796 N.W.2d at 38.

In contrast, we can surmise that these facts were important to the Commission in reaching a recommendation, because it included specific details about the family. The Commission's report refers to Schmidt's wife as "Jill."⁷⁷ The Commission informs us that Jill spent most of her early life in Ames, Iowa, has a master's degree in nursing, and works as a nurse practitioner.⁷⁸ She is not anonymous; she *is* autonomous. We also know from the Commission's report that the parties have three boys: twins and a younger brother.⁷⁹ When the boys witnessed their father strangling Jill, the twins were six years old and the younger brother was four.⁸⁰ Consider the information the Commission provided to the Court:

Respondent grabbed Jill yet again and brought her down to the floor again. He got on top of her, put his hands around her neck and started strangling her again. This, too, was done in the presence of all three of the parties' children. Indeed, one of the parties' children was right by Jill's head saying to Jill, "Mommy, mommy, quit your bleeding. Don't close your eyes. Don't close your eyes."⁸¹

The Court did not include any of this information in its opinion.

Instead, the Court took pains to describe in detail Schmidt's therapy and treatment, naming both his psychiatrist and treating therapist (yet never naming Jill).⁸² The Court considered Schmidt's treatment a mitigating factor when determining the appropriate sanction.⁸³ But the Court's opinion minimizes the facts surrounding the assault and provides only a brief paragraph discussing the lasting harm to Jill and the children—arguably an aggravating factor.⁸⁴ The Commission provided plenty of detail to the Court on this issue. Consider the following:

Jill testified that she still has flashbacks, and is still deathly afraid of Respondent, expressing to the Division her extreme reluctance to testify at Respondent's Disciplinary hearing . . . The parties' children were, quite understandably, significantly affected by the June 6, 2006 incident, including by their witnessing of their father's repeated attacks on their mother. The children have been in therapy and counseling since the incident. They are now seeing two different counselors and a psychiatrist. The children have exhibited apparent symptoms of anxiety including, especially in the immediate aftermath of the incident, when separated, for any reason, from their mother, Jill. Jill

77. *Schmidt*, no. 10-0912, Docket No. 682, 2-34.

78. *Id.* at 2.

79. *Id.*

80. *Id.*

81. *Id.* at 9.

82. *Schmidt*, 796 N.W.2d at 38.

83. *Id.* at 45.

84. The penalties associated with assault vary depending on the degree of harm caused to the survivor by the assaultive behavior. See IOWA CODE § 708.1 (2013); IOWA CODE § 708.2 (2010).

reports the children still have trouble being in crowds or in unfamiliar surroundings and are unable to spend the night at a friend's house. At least one of the children is having sleeping problems and is on medication for that and is taking antidepressants as well. In addition, the same child has stomach problems for which he takes medication.⁸⁵

The Court did include some of this information in its opinion.⁸⁶ However, it did not provide anywhere near the level of detail that was available in the Commission's report.⁸⁷

Courts frequently reference trauma experienced by children who witness one parent battering the other.⁸⁸ Consider this language from a 2016 ethics case out of Colorado, where a male attorney was sanctioned by the Colorado Supreme Court for beating his wife in their home:

Respondent caused his family serious physical and emotional injury. Ms. Falco suffered a concussion, which caused pain and other physical symptoms, and she endured the emotional trauma and indignity of being assaulted in the supposed safety of her own home. Respondent's children, even if they did not witness the assault, in all likelihood heard the fight and witnessed their visibly battered and distraught mother fleeing their home and summoning the police—an experience that could cause serious and lasting psychological harm to the children. Children exposed to domestic violence are “at risk for a range of effects on their emotional, social and cognitive functioning.” Such children may, for instance, become predisposed to commit violence themselves, fail to thrive or to develop primary attachments to their caretakers, or “experience severely diminished self-esteem, depression, withdrawal, developmental delays or regression, apathy, separation anxiety, guilt, shame, insomnia, and/or suicidal ideation.”⁸⁹

Although the Commission in *Schmidt* and other state supreme courts have chosen to include this type of information, the Iowa Supreme Court did not address any emotional, psychological, or social trauma suffered by Schmidt's children as a result of witnessing their father repeatedly strangle their mother.

The Court also chose to leave out the statements Schmidt made while strangling Jill. The Commission provided the following information to the Court:

85. *Schmidt*, no. 10-0912, Docket No. 682, at 17.

86. *Schmidt*, 796 N.W.2d at 39.

87. For example, the Commission's report included Dr. Hoffman's testimony that Jill suffered abrasions to her neck, a three-centimeter-long head laceration, abrasions on the bridge of her nose, minor abrasions to her knees, and tenderness on the front of her neck and stiffness and pain in range of motion of her neck. *Schmidt*, no. 10-0912, Docket No. 682, at 12.

88. See, e.g., *People v. Falco III*, Case No. 15PDJ101, 2016 WL 4442171, at *5 (Colo. O.P.D.J. July 7, 2016).

89. *Id.*

Respondent put both his hands on Jill's neck, squeezed and pushed hard. Respondent (Schmidt) told Jill, "You're dead, you're dead." Respondent kept pushing and pushing. Jill testified that she felt like she was on fire; that she tried to scratch and get her arms up, but that respondent kept squeezing, never letting go once. Throughout this first incident the boys are yelling and screaming. Then everything went black for Jill; she couldn't see, but she could still hear the boys screaming.⁹⁰

The Court did not include this information in its opinion, either.

The selective use of facts which focus on the positive attributes of the attorney while remaining chillingly silent as to the survivors is not unique to *Schmidt*. Consider two more ethics opinions from March 2015, wherein the Court highlights the male attorneys' positive qualities and uses neutral language to minimize the culpability of their actions: *Iowa Supreme Court Attorney Disciplinary Board v. Moothart*⁹¹ and *Iowa Supreme Court Attorney Disciplinary Board v. Blessum*.⁹²

II. IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD V. MOOTHART: "FIVE JANE DOES"

Moothart, issued on March 6, 2015, involved an Ames, Iowa, attorney's conduct while representing five different women in a variety of legal matters.⁹³ Each of these women filed complaints with the Ames Police Department and with the Board, alleging that Gerald Moothart engaged in various acts of predatory sexual misconduct.⁹⁴ All of the women were Moothart's clients when his sexual misconduct occurred.⁹⁵ All of the women were in difficult, powerless, or compromised positions.⁹⁶

The first woman was a 22-year-old college student who had been charged with operating while intoxicated (OWI).⁹⁷ With Moothart as her lawyer, she pled guilty, received a deferred judgment, and was placed on probation.⁹⁸ During their attorney-client meetings, Moothart made crude sexual remarks that made her feel uncomfortable.⁹⁹ Moothart instructed her to call him and set up a meeting to discuss discharging her probation early.¹⁰⁰ They met after hours in Moothart's office.¹⁰¹ During this meeting, Moothart mixed her three or four vodka lemonade

90. *Schmidt*, no. 10-0912, Docket No. 682, at 8.

91. 860 N.W.2d 598 (Iowa 2015).

92. 861 N.W.2d 575 (Iowa 2015).

93. See 860 N.W.2d at 601.

94. *Id.* at 602.

95. *Id.*

96. *Id.* at 601.

97. *Id.* at 607.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 608.

drinks while Moothart drank soda.¹⁰² Once she was intoxicated, Moothart asked her to show him her breasts. She did, but she said she felt “extremely uncomfortable.”¹⁰³

Moothart knew she was on probation for OWI at the time and that a condition of her probation was to abstain from alcohol.¹⁰⁴ This did not go unnoticed by the Commission, which included in its report that Moothart was encouraging his own client to violate her probation by drinking, thereby putting her at risk for having her probation revoked.¹⁰⁵ The Court, however, did not include this fact in its own decision.¹⁰⁶

Moothart came into contact with the second woman when he was appointed to represent her boyfriend in a probation revocation hearing.¹⁰⁷ The boyfriend was on probation when he was charged with domestic assault for battering his girlfriend.¹⁰⁸ Because she was the survivor in the domestic assault case, the woman was also the main witness in the probation revocation hearing, so Moothart met with her and asked about her relationship with her boyfriend.¹⁰⁹ Moothart complimented her body, specifically telling her she had nice breasts.¹¹⁰ At this first meeting, she also told Moothart she did not have a driver’s license, and Moothart stated he could help get her license reinstated.¹¹¹

Moothart met her a second time at the courthouse on the day of her boyfriend’s probation revocation hearing.¹¹² Moothart brought her into a conference room at the courthouse where he began kissing her and “stuff.”¹¹³ She did not object but stated, “I really didn’t want to do it, but I did it so [Moothart] would do his best to get my boyfriend out.”¹¹⁴ Afterward, Moothart sent her a letter offering to assist with reinstating her driver’s license.¹¹⁵ A few weeks later, he picked her up and took her to a hotel, where they had sex.¹¹⁶ Moothart had sex with her on at least two occasions while she was his client and he was her attorney.¹¹⁷

102. *Id.*

103. *Id.* at 609.

104. *See id.* (“[Moothart] recognized that serving alcohol to someone on probation for an alcohol offense was ‘the dumbest thing anybody could do, especially an attorney.’”).

105. Iowa Sup. Ct. Att’y Disc. Bd. v. Moothart, no. 14-1708, Docket No. 789, 2 (Oct. 14, 2014) (Findings of Fact, Conclusions of Law and Recommendation).

106. *See* 860 N.W.2d at 601.

107. *Id.* at 609.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* (alteration in original). *See generally* Lenore Walker, THE BATTERED WOMEN SYNDROME (4th ed. 2016) (discussing why some survivors of abuse support their abuser).

115. *See* 860 N.W.2d at 609.

116. *Id.* at 610.

117. *Id.*

The third woman “was a single mother of two young children,” who was in her early thirties.¹¹⁸ Her children had been placed in foster care, and Moothart was court-appointed to represent her in three misdemeanor criminal actions and two child-in-need-of-assistance matters.¹¹⁹ Moothart was aware of her extensive history of mental-health and substance-abuse issues.¹²⁰ At one of their first meetings in his office, he asked her to “flash” him.¹²¹ She showed him her breasts although she was uncomfortable, explaining, “Well, he was my lawyer. I was in a pretty tough situation. Going to lose my kids.”¹²²

At numerous attorney–client meetings, he made crude sexual remarks to her.¹²³ On one occasion, he scheduled a meeting with her after hours in his office.¹²⁴ He asked her to perform oral sex on him; she complied, and he paid her \$100.00.¹²⁵ He tried on numerous additional occasions to schedule meetings with her to have sex, but she refused.¹²⁶

The fourth woman was eighteen years old when she first came into contact with Moothart.¹²⁷ The court had placed her on probation following a conviction for a first-offense OWI charge.¹²⁸ She had allegedly violated the terms of her probation, and Moothart was appointed to represent her in the probation revocation hearing.¹²⁹ During their first meeting at his office, he commented on her cleavage and asked her to pull her shirt down.¹³⁰ When she asked him how much he charged for his legal services, he responded, “It depends on how much cleavage you show me.”¹³¹ She stated that as a result of his behavior she “felt kind of embarrassed . . . I didn’t know really what to do. I didn’t want to, I guess, risk having any issues with my case, so I just was compliant.”¹³²

The second meeting took place at the courthouse.¹³³ Because Moothart had sexually exploited her at his office, she brought her mother and sister with her to the courthouse.¹³⁴ She asked Moothart if they could accompany her into the conference room; he refused, and once inside, he again asked her to pull her shirt down so he could see her cleavage.¹³⁵ When her case was over and he no longer

118. *Id.* at 612.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 613.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

represented her, Moothart asked her to join him for drinks in his hot tub.¹³⁶ Because her case was over, she felt free to tell him his actions and comments were inappropriate.¹³⁷

The fifth woman began working for Moothart as a legal secretary in 2006.¹³⁸ Throughout the time she worked for him, he made crude sexual comments, looked up her skirt, and showed her sexual images.¹³⁹ She eventually quit due to his behavior.¹⁴⁰ In 2009, Moothart was court-appointed to represent her in a case involving her special-needs son.¹⁴¹ He represented her until the summer of 2011; over the two years of representation, he continuously commented on her breasts.¹⁴²

The Commission recommended a 30-month suspension of Moothart's law license and laid out "aggravating factors" it considered when making its recommendation.¹⁴³ One of these was Moothart's utter failure to acknowledge his misconduct: "Moothart took the bold position that he had done absolutely nothing unethical nor that he had done anything that would rise to the level of professional misconduct."¹⁴⁴

Here, the Supreme Court did follow the Commission's recommendation and even further required Moothart to show proof of completion of therapy and fitness to practice law before applying for reinstatement of his license.¹⁴⁵ However, the language the Court utilized in reaching that conclusion remains troubling. For example, the Court specifically refers to Moothart's clients as "Jane Does." Traditionally, the term Jane (or John) Doe is used when the identity of the person is unknown.¹⁴⁶ While the Commission also chose to refer to the women as Jane Does, ultimately it is the responsibility of the Court to ensure an accurate portrayal of the relevant facts; the Court's opinion is the final, published opinion.

Presumably, the Court intended to preserve the anonymity of the women to respect their privacy. Yet, there are alternatives that more accurately reflect these women's agency. The court could have used "Client #1," as this would have alluded to the ethical obligations required in an attorney-client relationship that Moothart so flagrantly violated.¹⁴⁷ A second alternative would have been to use "Victim #1" or "Survivor #1," which would more accurately reflect how Moothart subjugated these women during his various representations. Using the

136. *Id.*

137. *Id.*

138. *Id.* at 614.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Moothart, no. 14-1708, Docket No. 789, 26-29 (Oct. 14, 2014) (Findings of Fact, Conclusions of Law and Recommendation).

144. *Id.*

145. See *Moothart*, 860 N.W.2d at 617.

146. *Jane Doe*, BLACK'S LAW DICTIONARY (10th ed. 2014).

147. MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM. BAR ASS'N 2018).

term “Jane Doe” makes these women anonymous, but the indignities and assaults they suffered at the hands of someone who was supposed to legally assist them were anything but.

Furthermore, the Court described the first sexual encounter between Moothart and the second woman as a “tryst.”¹⁴⁸ This leads the reader to view the relationship as one that was mutual, secret, and romantic in nature: “Two months after the first hotel *tryst*,¹⁴⁹ Jane Doe # 2 and Moothart met at another hotel outside of Ames.”¹⁵⁰ That is not the tone set by the Commission, which explained that the woman “was a victim of domestic violence, she did not have a valid driver’s license, did not have enough money to hire an attorney, had low self-esteem, and was desperate to do anything she could to help her boyfriend and to get her driver’s license back.” That language does not suggest a “romantic rendezvous between lovers”; it suggests a clear power disparity and resulting coercive situation.

We get a sense of the Court’s opinion of the women before we even learn the facts. Consider this discussion in its “Burden of Proof” section:

In this case, as in all disciplinary cases, we note the Board bears the burden of proof of showing a violation of our disciplinary rules by a convincing preponderance of the evidence. *See, e.g.*, Evans, 537 N.W.2d at 784. We note it is one thing to make allegations or claims and another to provide evidence to meet the somewhat heightened burden of proof in an attorney disciplinary case. While we recognize that we live in an age in which there is often a rush to judgment on controversial questions, episodes such as the McMartin child abuse case and the Duke Lacrosse debacle show *the fallacy of assuming guilt when sexual misconduct is alleged*. On the other hand, we refuse to cast our eyes aside because of the uncomfortable nature of the allegations in cases concerning charges of sexual misconduct involving lawyers. It is our duty in this case, as it is in every case, to carefully sift through the evidence, examine it with a critical eye, and reach a fair and impartial result. We base our judgment solely on the facts of the case and the applicable law.¹⁵¹

While the Court purports to plainly and neutrally explain the burden of proof, it signals that it will do so only after considering the potential for falsely accusing men of sexual assault—but then goes on to re-assure the reader that they will do their duty and reach a fair and impartial decision.

148. *Moothart*, 860 N.W.2d at 610.

149. “Tryst” is defined as a private romantic rendezvous between lovers. *Tryst*, OXFORD UNIV. PRESS (2019).

150. *Moothart*, 860 N.W.2d at 610.

151. *Moothart*, 860 N.W.2d at 603 (emphasis added).

Another critical aspect of this case is the power disparity between Moothart and each of his clients. The Commission understood this and highlighted several ways the disparity appeared—which the Court omitted. First, the Commission included Moothart’s age in the first paragraph of its findings.¹⁵² We then learn that one client was twenty-two years old¹⁵³ and another was eighteen years old¹⁵⁴ when Moothart—fifty at the time—assaulted them. Including this fact and addressing the disparity in age and attendant professional power should have informed the appropriate sanction. The Court also fails to point out that in just one 12 month period, Moothart took advantage of (at least) four women.¹⁵⁵ These are not the actions of an occasionally inappropriate lawyer; they are the actions of a serial sexual predator.

The idea that court decisions should be guided, if not controlled, by precedent is one of the polestars of our legal system.¹⁵⁶ One would think the Court in deciding *Moothart* would have reviewed and applied the same analysis used in a 1999 Iowa ethics opinion, *Iowa Supreme Court Board of Professional Ethics and Conduct v. Steffes*.¹⁵⁷ There, a court-appointed defense attorney took photographs of a partially clothed client, who suffered from a mental illness, claiming he was taking the photos to document a back injury in connection with a drug prosecution case.¹⁵⁸

In the *Steffes* case, the Commission recommended that the attorney’s license to practice law be suspended for six months.¹⁵⁹ The Supreme Court rejected the Commission’s recommendation as too lenient and suspended his license to practice law for two years.¹⁶⁰ The language surrounding the Court’s decision to increase the sanction shows a clear understanding of the power dynamic at play between a vulnerable female client and an exploitive male attorney:

The facts of this case are very disturbing for several reasons. As in *Hill I*, Steffes exploited a very vulnerable client for his own sexual gratification. Second, Steffes tried to get his client to destroy the photographs—incontrovertible evidence of his professional impropriety—by telling her that the county attorney would introduce them as evidence at her criminal trial, a patently absurd proposition. And finally, in arguing for leniency before the Commission, Steffes attempted to shift the focus to the bad character of his client and her failure to actively resist his requests or exhibit emotion when she was

152. Iowa Sup. Ct. Att’y Disciplinary Bd. v. Moothart, no. 14-1708, Docket No. 789, 2 (Oct. 14, 2014).

153. See *Moothart*, 860 N.W.2d at 607.

154. See *id.* at 613.

155. See *id.* at 607-14.

156. See *Stare Decisis*, BLACK’S LAW DICTIONARY, *supra* note 25.

157. 588 N.W.2d 121 (1999).

158. *Id.* at 122.

159. *Id.* at 125.

160. *Id.*

photographed. He apparently holds the belief that Post was not worthy of the respect and loyalty an attorney owes a client, and that the event was not sufficiently traumatizing to warrant a severe sanction. We find these suggestions unpersuasive.

Steffes's ethical obligation to Post did not depend on her financial situation, or whether she used drugs, or whether she had the misfortune to suffer from mental illness. Nor did it depend on whether Post was guilty of unrelated criminal conduct. Most certainly, his client's failure to actively resist or register horror at her attorney's plainly inappropriate requests do not serve to mitigate in any degree the reprehensible nature of Steffes's conduct.¹⁶¹

Steffes involved one client.¹⁶² The attorney's violation was photographing her while she reluctantly exposed her breasts during the course of his representation of her in a criminal matter. His license was suspended for twenty-four months.¹⁶³

Almost fifteen years later, the attorney in *Moothart* took advantage of multiple clients based on actions ranging from coercing clients into engaging in sexual intercourse to undressing for him. The Court suspended his license for thirty months—a mere six more months than the attorney in *Steffes*. Is it unsurprising that the *Steffes* opinion was written by the only female member of the Iowa Supreme Court at the time, whereas the *Moothart* opinion was handed down by an all-male Supreme Court?¹⁶⁴

Absent the influence of even a single female voice, consider the language the Court uses toward the end of *Moothart* when describing the basis for the thirty-month suspension:

The nature and extent of these ethical violations is very disturbing. Although we credit Moothart for his lack of prior disciplinary record, his voluntary work in connection with his daughter's school and extracurricular activities, his contributions to the local bar and legal organizations, and his general reputation in the Ames legal community, we are alarmed by the nature and pattern of his ethical violations. All five women sought Moothart's help with matters of personal importance. Preying upon their vulnerability, Moothart manipulated each woman for his own sexual gratification. We therefore think a lengthy suspension is warranted to provide adequate deterrence and to protect future potential clients and the reputation of the bar, particularly in light of the seriousness of the offenses.¹⁶⁵

161. *Id.*

162. *Id.* at 122.

163. *Id.* at 125.

164. Justice Marsha Ternus served on the Iowa Supreme Court from 1993 to 2010. She served as Chief Justice from 2006 to 2010. See IOWA JUDICIAL BRANCH, *Marsha K. Ternus*, <https://www.iowacourts.gov/for-the-public/iowa-courts-history/past-justices/marsha-k-ternus/> (last visited Sept. 26, 2019).

165. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Moothart, 860 N.W.2d 598, 617 (Iowa 2015).

Now consider an alternative version of that same paragraph that might present the facts in an equally accurate way but convey a very different message:

The nature and extent of these ethical violations is stunning. We are alarmed by the fact that five separate women have all relayed details describing Moothart's sexually assaultive, predatory actions occurring within the course of one year. Although Moothart does not have any prior disciplinary actions and he has volunteered in his daughter's school, these activities cannot begin to mitigate the damage Moothart has caused these five women. Moothart weaponized his law license, targeting vulnerable, powerless women. All five women needed Moothart's legal assistance and they had few, if any, alternatives. Preying upon their vulnerability, Moothart manipulated each woman for his own sexual gratification. We therefore find it necessary to revoke his license indefinitely. We cannot risk the safety of future female clients and the reputation of the bar. It is imperative we send a clear message that this abuse of power is never acceptable.

This rewritten paragraph captures the intentionality of Moothart's actions. It acknowledges his volunteer work and recognizes the fact that he has no prior disciplinary record, but it does not unduly stress these factors. It puts the focus on the women and holds Moothart directly responsible for his actions toward them, thereby justifying the revocation of his license. Rather than finding that a lengthy suspension "is warranted," the tone of the second paragraph puts the emphasis on the actor, Moothart, and the fact that it was Moothart's actions that justify a total suspension of his license.

Is an indefinite suspension too extreme? Not for Delaware. In 2005, Delaware attorney Joel Tenenbaum received a three-year suspension for sexually harassing two employees and having sexual relations with four clients.¹⁶⁶ In 2007, another woman came forward, stating she had been sexually assaulted by Tenenbaum when she was his client some twenty years prior.¹⁶⁷ The Court then permanently disbarred Tenenbaum, using the following powerful language to describe his actions:

This evidence and the evidence from the prior suspension proceeding demonstrate that, for more than two decades, Tenenbaum has committed egregious abuses of his female clients' trust, by engaging in a repeated and systematic pattern of sexual misconduct that was not only unethical but also unlawful. Accordingly, we are in complete agreement with the analysis and recommendation in the Board's Discipline Report. We conclude that any sanction other than disbarment would not provide the necessary protection for the public, serve as a deterrent to the legal

166. *In re Tenenbaum*, 880 A.2d 1025, 1026 (Del. 2005).

167. *In re Tenenbaum*, 918 A.2d 1109, 1111-12 (Del. 2007).

profession, or preserve the public's trust and confidence in the integrity of the Delaware lawyers' disciplinary process.¹⁶⁸

A woman was on the Delaware Supreme Court when both *Tenenbaum* decisions were rendered.¹⁶⁹

III. IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD *V.* BLESSUM: IT'S HER FAULT FOR HIRING HIM?

Three weeks after the *Moothart* decision was filed, the Court issued its ethics opinion in the case that started in my courtroom as a temporary protective order hearing: *Iowa Supreme Court Attorney Disciplinary Board. v. Blessum*.¹⁷⁰ As described in the Introduction, Blessum engaged in a sexual relationship with one of his clients.¹⁷¹ During the course of the relationship, he violently assaulted her.¹⁷² The woman was taken to the hospital by ambulance and treated for her injuries, which included “lacerations to her mouth, a black eye, a torn piercing, swelling on her eye, cheek, and mouth, and bruises to her arm, abdomen, face, and neck.”¹⁷³ Blessum pled guilty to assault causing bodily injury, spent seven days in jail, and was subsequently placed on probation.¹⁷⁴ His former client filed two complaints with the Board.¹⁷⁵

The Commission recommended suspending Blessum's license for four years.¹⁷⁶ The Supreme Court deviated from the recommendation and suspended his license for just a year and a half.¹⁷⁷ The language used throughout the opinion, like those opinions discussed above, minimizes Blessum's role in the assault and his conduct toward the woman after the attack:

After the assault, Blessum contacted Doe repeatedly to apologize. In a note, he said, “I am sorry for hitting you and terrorizing you.” Doe initially agreed to get back together with Blessum. Blessum also instructed Doe to call the Dallas County courthouse and tell the authorities she did not want to press charges. However, when the two of them broke up for good in August, Doe made further contact with the police and obtained a no-contact order from the court.¹⁷⁸

168. *Id.* at 1115.

169. Justice Carolyn Berger served on the Delaware Supreme Court from 1994 to 2014. *Statement by Governor Markell on Retirement of Supreme Court Justice Carolyn Berger*, *Delaware News*, DELAWARE.GOV (June 9, 2014), <https://news.delaware.gov/2014/06/09/statement-by-governor-markell-on-retirement-of-supreme-court-justice-carolyn-berger/>.

170. 861 N.W.2d 575 (Iowa 2015).

171. *Id.* at 579–80.

172. *Id.* at 580.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 578.

177. *Id.* at 595.

178. *Id.* at 580.

Notably, the Court chooses to recite Blessum's language from the letter—highlighting the admission, but also including the apology. Yet, a familiarity with patterns of domestic abuse would indicate the apology is a tool of manipulation rather than a demonstration of remorse.¹⁷⁹ Indeed, Blessum immediately follows the apology with a request for the woman to dismiss any pending charges against him.¹⁸⁰ Here is a potential alternative discussion of the facts that removes the apology and describes the repeated, unwanted behavior as aggressive rather than remorseful.

Blessum repeatedly contacted Doe, including writing a note in which he admitted to hitting and terrorizing her. The repeated and unwanted contact eventually required Doe to obtain a no-contact order from the court.

The Court's recitation of the facts also contains multiple instances of language that simultaneously minimizes Blessum's actions and subtly blames the woman. Consider this sentence, which comes toward the end of the opinion: "Doe was a client. Had she never retained Blessum as her attorney, she never would have been assaulted by him."¹⁸¹

There is a certain irony that comes with the Court's choice to use language that relieves Blessum of responsibility: one of the Commission's greatest concerns was his failure to take responsibility for his actions. Consider these passages in the Commission's report to the Court:

Throughout the course of the testimony Respondent (Blessum) repeatedly directed the panel (Commission) to examine Jane Doe's behavior as evidence of mitigating circumstances. Respondent provided no legal authority for this proposition. By sharp contrast, the caselaw emphasizes the vulnerability of the client.

[. . .]

Even during his sentencing proceedings, he equivocated his responsibility and tried to shift focus to Doe. During the hearing with this panel, he continued to shift focus from his culpability to her.¹⁸²

179. The "honeymoon phase" includes the batterer apologizing for the abuse as a form of manipulation. See Zlatka Rakovec-Felser, *Domestic Violence and Abuse in Intimate Relationship from Public Health Perspective*, 2:1821 HEALTH PSYCHOL. RES. 62, 63 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4768593/pdf/hpr-2014-3-1821.pdf>.

180. See *Blessum*, 861 N.W.2d at 580.

181. *Id.* at 590.

182. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Blessum, no. 14-1201, 17-18 (July 24, 2014).

As the Commission reached its final recommendation to suspend Blessum's license for four years, it explained that "[t]he panel is particularly disturbed by [Blessum's] cavalier attitude toward the substance of the charges."¹⁸³

In the Court's explanation of its decision to shorten Blessum's sanction, it states: "[T]he totality of Blessum's behavior shows considerable disrespect for the law and the legal system."¹⁸⁴ To portray his actions as disrespectful toward the law and the legal system demonstrates no consideration of Blessum's actions in relationship to or against his former client. The fact of the matter is, Blessum used his position of power to batter, stalk, and threaten a woman who was his client, yet the Court is more concerned about respect for the judicial process.

Consider the following alternative: "Doe was a client. Once she hired Blessum, she was entitled to competent representation, including representation free from battering, sexual assault, and stalking. The profession holds itself to the highest ethical standards—which Blessum disregarded." Additionally, the Court could have more strongly emphasized Blessum's flagrant disrespect for the profession by finding, for example: "Blessum preyed on his client's vulnerability. The totality of Blessum's behavior shows a complete lack of respect for the law and the legal system—let alone women. His actions are reprehensible considering the ethical standards to which all attorneys are held."

If some of the language throughout the opinion had been more squarely centered on Blessum's criminal acts and the power disparity inherent in an attorney-client relationship, would the Court have accepted the Commission's recommendation to suspend Blessum's license for four years rather than eighteen months?

In answering this question, first consider a 2014 case out of the state of Georgia, wherein an attorney was disbarred after suggesting his client perform oral sex in lieu of paying fees, exposing himself to that same client, then trying to kiss her while touching her breast.¹⁸⁵ In that case, the attorney had no prior disciplinary history.¹⁸⁶ Certainly *Blessum* is distinguishable from the Georgia case in that there was no attempt to exchange sex for fees. Yet, one could argue that Blessum's actions were more egregious. He did not merely *attempt* to have sex with a client; he *was having sex* with his client and then beat her, causing injuries that necessitated medical treatment, before beginning to stalk her. Blessum received an eighteen-month suspension. The Georgia attorney was disbarred.¹⁸⁷ In 2014, there was a woman on the Georgia Supreme Court.¹⁸⁸

183. *Id.* at 19.

184. *Blessum*, 861 N.W.2d at 594.

185. *In re Hall*, 761 S.E.2d 51, 52 (Ga. 2014).

186. *Id.*

187. *Id.*

188. Justice Carol W. Hunstein was appointed to the Supreme Court of Georgia in 1992 and served as Chief Justice from 2009 to 2013. Her term expired in 2018. See *Georgia Supreme Court Justice to Deliver UGA Law School Commencement Address*, UGA TODAY (May 8, 2017), <https://news.uga.edu/hunstein-law-school-commencement-address/>.

Closer to home in Iowa, consider a 2006 ethics opinion wherein an attorney had sex with one client for payment of legal fees and solicited sex from a second client in exchange for legal fees: *Iowa Supreme Court Attorney Disciplinary Board v. McGrath*.¹⁸⁹ The facts in the *McGrath* case are less egregious than those in *Blessum*. Both Blessum and McGrath engaged in sexual relationships with their clients. However, unlike Blessum, McGrath never battered or threatened his client.¹⁹⁰ The Commission that heard the evidence in the *McGrath* case recommended the Court suspend his license for one year. Justice Marsha Ternus, writing on behalf of a unanimous Court, found this sanction to be insufficient and suspended his license for three years, citing powerful language from an earlier Iowa case.¹⁹¹ She wrote:

The unequal balance of power in the attorney-client relationship, rooted in the attorney's special skill and knowledge on the one hand and the client's potential vulnerability on the other, may enable the lawyer to dominate and take unfair advantage. When a lawyer uses this power to initiate a sexual relationship with a client, actual harm to the client, and the client's interest, may result. Such overreaching by an attorney is harmful in any legal representation but presents an even greater danger to the client seeking advice in times of personal crisis such as divorce.

This court has recognized that "the professional relationship renders it impossible for the vulnerable layperson to be considered 'consenting.'" Professional responsibility involves many gray areas, but sexual relationships between attorney and client is not one of these. Such conduct is clearly improper.

[...]

McGrath's behavior was a gross breach of the trust bestowed on members of the bar and shows he is unfit to continue to serve as an officer of the court. We think a lengthy suspension is also necessary to protect members of the public as well as to discourage similar misconduct by other lawyers.¹⁹²

McGrath had sex with one client and solicited a second client for sex, and the Court suspended his license for thirty-six months. Almost eight years later, Blessum—who not only had sex with his client but also battered, threatened, and continued to blame her even as he testified in front of the Commission—received

189. 713 N.W.2d 682, 686 (Iowa 2006).

190. *Id.*

191. Iowa Sup. Ct. Att'y Disciplinary Bd. v. McGrath, 713 N.W.2d at 702-03 (quoting Iowa Sup. Ct. Bd. of Prof'l Ethics v. Furlong, 625 N.W.2d 711, 714 (Iowa 2001)).

192. *Id.*

a mere eighteen-month suspension of his license from the all-male Iowa Supreme Court.

It is hard not to notice one glaring difference in the cases: the make-up of the Court at the time of each decision. *McGrath*, a unanimous opinion which addresses the sexual exploitation of women by a male attorney and more than doubles the sanction recommended by the Commission, was written by the only woman to have served as Chief Justice of the Iowa Supreme Court.¹⁹³

IV. IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD V. DEREMIAH: EDUCATION IS KEY . . . OR IS IT?

In October 2015, the Court held its annual judicial conference. The keynote speaker, Claudia Bayliff, educates others about how language impacts perceptions of sexual violence, particularly in judicial opinion writing.¹⁹⁴ It seemed as though the Court was taking steps to address some of the concerns my female colleagues and I raised after the *Blessum* opinion came out. However, just one year after the conference, my colleagues and I were proven mistaken when the Court issued *Iowa Supreme Court Attorney Disciplinary Board v. Deremiah*.¹⁹⁵ The facts are as follows:

Jamie Deremiah is a practicing attorney in Iowa.¹⁹⁶ In July 2014, following an altercation with his girlfriend, Deremiah attempted to break into her home, smashing in her door.¹⁹⁷ Eventually, he forced his way into her home, and then into her bedroom, where he battered and punched her so severely that the police officer who responded to the scene believed her eye socket was broken because of the significant swelling.¹⁹⁸ Deremiah pulled her hair so violently that police officers found clumps of her hair in the bedroom where he had battered her.¹⁹⁹ He ultimately entered a plea of guilty to one count of domestic abuse assault with intent to inflict serious injury, an aggravated misdemeanor, and one count of criminal trespass causing bodily injury and/or property damage—a serious misdemeanor.²⁰⁰

A majority of the Commission supported a thirty-day suspension of Deremiah's license with a two-year probationary period to follow and specific requirements to maintain sobriety and provide medical documentation showing compliance.²⁰¹ Two Board members separately dissented, with one recommending instead a sanction of ninety days, and the other recommending a public

193. See IOWA JUDICIAL BRANCH, *supra* note 164.

194. See CLAUDIA BAYLIFF, <http://www.claudiabayliff.com/> (last visited Nov. 16, 2017); see also Cindy Peternelj-Taylor, *Patient, Victim, or Survivor: Does Language Matter? A Conversation with Claudia Bayliff*, 11 J. FORENSIC NURSING 2, 63–65 (2015).

195. 875 N.W.2d 728 (Iowa 2016).

196. *Id.* at 730.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 731.

201. *Id.* at 732.

reprimand.²⁰² The Supreme Court suspended Deremiah’s license to practice law for three months—but with no probationary period to follow.²⁰³

The Court yet again detailed the abuse in a way that subtly blames the woman. For example, in the last four paragraphs of its factual findings, the Court applauds Deremiah for successfully completing treatment, remaining sober, and attending counseling.²⁰⁴ The record is silent as to the health status of the survivor.²⁰⁵ The last two sentences of the factual findings read: “At the time of the hearing, Deremiah and Doe talked to each other on a daily basis and saw each other weekly. Deremiah testified that he avoids being with Doe when she consumes alcohol.”²⁰⁶

The subtle implication here is that it is not Deremiah whose behavior is problematic, but rather that it is Doe and her drinking which causes problems. Here is an alternative:

At the time of the hearing, Deremiah and Doe talked to each other on a daily basis and saw each other weekly. Deremiah must understand he remains fully responsible for his actions at all times. He further understands that even if he is in the company of people who drink, including Doe, he cannot assault them.”

Once again, the Court chooses to ignore certain facts and information that negatively reflect on the perpetrator. A clear example of this can be found in the Commission’s report to the Court. The Commission noted the following:

Complainant cites many aggravating factors in Respondent’s case, including that he testified to multiple offenses and a pattern of criminal misconduct and disrespect for the law—“two or three” arrests for minor in possession involving alcohol, a guilty plea and deferred judgment to an [operating while under the influence] charge in 2005 (before his graduation from law school), as well as Respondent’s admission that he recently used cocaine. Respondent’s controlled substance usage was a weekly pattern of conduct since age 13 and resulted in problems while he worked as a lawyer at Hope Law Firm.²⁰⁷

The Court paints a different picture of Deremiah’s substance abuse issues, completely eliminating any mention of his admitted recent cocaine use (a crime in Iowa) while practicing law.²⁰⁸ Instead, the Court addresses Deremiah’s

202. *Id.*

203. *Id.* at 739.

204. *Id.* at 731.

205. *See id.*

206. *Id.*

207. Iowa Sup. Ct. Att’y Disciplinary Bd. v. Deremiah, no. 15-1917, Docket No. 813, 10 (Nov. 16, 2015) (Findings of Fact, Conclusions of Law and Recommendation).

208. *See* Iowa Sup. Ct. Att’y Disciplinary Bd. v. Deremiah, 875 N.W.2d 728, 730 (Iowa 2016).

substance-abuse issues as if these were minor scrapes from the past rather than criminal activity that was ongoing when this crime occurred. It writes:

Deremiah began drinking alcohol at an early age and had a number of alcohol-related incidents prior to becoming a lawyer. Specifically, he had “two or three” citations for possession of alcohol and one incident of operating a motor vehicle while under the influence (OWI) while attending college but prior to attending law school. He had no involvement with the criminal justice system for alcohol related offenses until the recent events described in this opinion.²⁰⁹

The Court’s decision to disregard the recent cocaine usage by Deremiah is stunning. The Court addressed this matter as if it were merely an alcohol related incident. This fact, combined with both the Court singling out Deremiah’s quote wherein he blames Doe’s drinking for his abusive behavior and the minimal sanction, made it clear that the judicial training provided by Claudia Bayliff had fallen on deaf ears.

V. GETTING UNSTUCK

In June 2017, I was asked to speak to a group of about 200 young Iowa women, all between their junior and senior years of high school, who were participating in what has become a summer tradition for those hoping to become leaders in business, politics and life in general—Girls State.²¹⁰ Typically, young Iowa women travel to Des Moines for a week to learn about democratic processes.²¹¹ This involves being shuttled among various government buildings for tours of the state capitol and meetings with elected officials.²¹² One afternoon is usually spent touring the Iowa Supreme Court and learning about the judicial branch.²¹³ The tour typically ends with one of the Supreme Court Justices or Court of Appeals judges speaking to the participants and taking questions. Due to scheduling conflicts, I found myself standing in the Iowa Supreme Court chambers in front of the state’s best and brightest young women.

209. *Id.*

210. A University of Loyola Law professor, Hayes Kennedy, and a high school teacher and Chairman of the Boy Scouts, Harold Card, created Boys State in 1935 as an alternative to the then-popular “Young Pioneer Camps.” Kennedy and Card developed Boys State to educate young American men on the values of democracy and encourage them to play a role in perpetuating and preserving it. Kennedy happened to be the Chairman of the Illinois department of the American Legion who approved and sponsored the first Boys State at the Illinois State Fair in 1935. The program was a success and other states soon followed. In 1937, the American Legion Auxiliary started a version for girls; thus, Girls State was born. *See generally, About Boys State*, AMERICAN LEGION, <https://www.legion.org/boysnation/stateabout> (last visited Nov. 11, 2017); *About Girls State*, IOWA GIRLS STATE, http://www.iowagirlsstate.org/?page_id=5 (last visited Nov. 11, 2017).

211. *About Girls State*, *supra* note 210.

212. *Id.*

213. *Id.*

I told them it was an exciting time to be a woman in Iowa, noting that the state had finally elected its first female Governor and United States Senator. If they were willing to overcome a few obstacles, I went on, they could expect to build an impactful career in public service. To them, I may have been stating the obvious. While gender discrimination was something their mothers and grandmothers had faced, now more women graduate from four-year colleges than men.²¹⁴ Growing up, these young women were just as likely to have had a female pediatrician as a male one.²¹⁵ But, gender discrimination is still far from a non-issue.²¹⁶ The decisions by the all-male Iowa Supreme Court discussed in this article may appear dated in their treatment of gender and power. Yet, they were all written within the last decade.

So, what is the answer? There is no silver bullet, but options for improvement merit serious consideration. First, the Court could defer more to the recommendations of the Commission. It is well established that a reviewing body should generally defer to the body that hears the live testimony on issues of credibility.²¹⁷ This is because the body that sees, hears and observes the actual complainants and respondents has insights in making its sanction recommendations not available to a reviewing court with no opportunity to consider live testimony.²¹⁸ Consider this passage from the Commission in the *Moothart* case:

Moothart completely denies each and every allegation made by Jane Doe #3 . . . The panel does not find Moothart's explanation credible nor persuasive. By contrast, the panel finds the testimony of Jane Doe #3 very credible and persuasive. Actually, painfully credible and persuasive. . . She experienced great emotional distress while testifying about her interactions with Moothart. This distress manifested itself physically. She was shaking and had trouble breathing at various times during her testimony. The Commission respects and applauds her courage.²¹⁹

214. *Bachelor's, Master's, and Doctor's Degrees Conferred by Postsecondary Institutions, by Sex of Students and Discipline Division: 2014-15*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d16/tables/dt16_318.30.asp?current=yes (last visited Nov. 18, 2017).

215. *Demographics of Women Physicians and Pediatricians*, AM. ACAD. OF PEDIATRICS, https://www.aap.org/en-us/Documents/dwmep_women_med_demographics.pdf (last visited Nov. 18, 2017).

216. See Nikki Graf et al., *The Narrowing, But Persistent, Gender Gap in Pay*, PEW RESEARCH CTR. (Mar. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/>.

217. See Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 271 (2009) ("As Maurice Rosenberg once stated, trial judges 'smell the smoke of battle' and can get a sense of the interpersonal dynamics.").

218. *Id.*

219. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Moothart, no. 14-1708, Docket No. 789, 12 (Oct. 14, 2014).

Compare that paragraph to the Court’s two references to credibility:

The Commission found that Moothart had committed all the violations as charged by the Board. In making its findings and conclusions, the Commission generally credited the testimony of the complaining witnesses and not that of Moothart.²²⁰

[...]

We note the Commission made two credibility determinations: it found Jane Doe #2 credible, while it found Moothart’s testimony incredible.”²²¹

The contrast is striking.

All ethics cases in Iowa are currently given *de novo* review.²²² Should this remain the standard? Maybe the Court should instead adopt a clear error standard with ethics cases to show more deference to the body that actually heard the live testimony and assessed the credibility of witnesses.

Alternatively, the Court might stop considering *Schmidt* as the benchmark by which all other cases should be measured. Why not use the *McGrath* case as the benchmark? Why not simply admit that *Schmidt* was a poorly constructed and poorly reasoned decision that reached the wrong result? If the Iowa Supreme Court wants to consider itself the moral compass for Iowans, it is important that the opinions of the Court reflect the values celebrated by our communities. That includes considering the implications of the language used to describe a set of events.

The Court could also consider applying the American Bar Association’s standards.²²³ The Commission refers to the standards in its findings and recommendations to the Court, so this might be a good starting point. Relying on the criminal system’s treatment of these male attorneys is not sufficient for maintaining the integrity of the profession. Clear, strong statements from the Court and truly proportionate law licensing sanctions should be the standard.

Another option might be to hold attorneys to the same standards as other professionals dealing with emotionally vulnerable clients. For example, Iowa criminalizes sexual activity between a counselor or therapist with an emotionally dependent patient or client.²²⁴ A physician providing mental-health services to an emotionally vulnerable client may be charged with a Class “D” felony—which carries a possible 5-year prison sentence—for committing a sex act with the

220. Iowa Sup. Ct. Att’y Disciplinary Bd. v. Moothart, 860 N.W.2d 598, 602 (2015).

221. *Id.* at 610-11.

222. *See, e.g.*, Iowa Sup. Ct. Att’y Disciplinary Bd. v. Stowe, 830 N.W.2d 737, 739 (Iowa 2013).

223. *See* MODEL RULES OF PROF’L CONDUCT: TABLE OF CONTENTS (AM. BAR ASS’N 2018)

224. *See* IOWA CODE § 709.15 (2019).

client.²²⁵ In contrast, the only available avenue for recourse when an attorney engages in sex acts with an emotionally vulnerable client is filing a complaint with the Iowa Attorney Disciplinary Board. In 2018, two separate attorneys received the same sanction from the Court for engaging in sex acts with their respective clients—a thirty-day license suspension.²²⁶

The Court should also reconsider its analysis of Iowa Rule of Professional Conduct 32:8.4(d).²²⁷ Prior to 2005, all ethics cases were analyzed under the Iowa Code of Professional Responsibility; however, in 2005, Iowa adopted its own version of the ABA’s Model Rules of Professional Responsibility.²²⁸ One of the most significant changes that occurred when the Model Rules were adopted was the elimination of ethical rules related to moral turpitude.²²⁹ The theory in eliminating the moral turpitude component was that there may be instances where a person behaves in a morally questionable way, but the behavior does not affect his or her fitness to practice law.²³⁰ This has allowed for some creative interpretations of the Iowa Rules of Professional Conduct, especially as they relate to Rule 32:8.4(d), which states in relevant part that “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”²³¹

The first Iowa case to address this troublesome language was *Iowa Supreme Court Attorney Disciplinary Board v. Templeton*.²³² Mark Templeton became a licensed Iowa lawyer in January 1986.²³³ He practiced law until 2000, at which time he took inactive status.²³⁴ In 2007, he began delivering newspapers in Des Moines.²³⁵ While delivering newspapers in the early morning hours, he would “window peep” in a home where three women lived: the eighty-year-old owner of the house and two tenants, a twenty-four-year-old nurse and a twenty-one-year-old intern.²³⁶ After an investigation, Templeton admitted to “window peeping” at the residence.²³⁷ Templeton was charged with six counts of invasion of privacy and on November 7, 2007, he entered pleas of guilty to all six counts of invasion of privacy-nudity.²³⁸ He was sentenced to one year for each of the six

225. *Id.*

226. *See* Iowa Sup. Ct. Att’y Disciplinary Bd. v. Jacobsma, 920 N.W.2d 813 (Iowa 2018); Iowa Sup. Ct. Att’y Disciplinary Bd. v. Nine, 920 N.W.2d 825 (Iowa 2018).

227. IOWA R. CIV. P. § 32:8.4 (2015).

228. *Alphabetical List of Jurisdictions Adopting Model Rules*, ABA (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/.

229. *See* Iowa Sup. Ct. Att’y Disciplinary Bd. v. Deremiah, 875 N.W.2d 728, 732 (Iowa 2016).

230. MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2019).

231. IOWA R. CIV. P. § 32:8.4 (2015).

232. 784 N.W.2d 761, 762 (Iowa 2010).

233. *Id.* at 764.

234. *Id.*

235. *Id.*

236. *Id.* at 765.

237. *Id.* at 765-66.

238. *Id.* at 766.

counts, to run consecutively.²³⁹ His sentence was suspended and he was placed on probation for a period of six years, and he was ordered to complete sex-offender treatment as a condition of his probation.²⁴⁰

Templeton was referred to the Board, and on February 12, 2010, the Commission concluded that Templeton's conduct violated Iowa Rules of Professional Conduct 32:8.4(a), (b) and (d)—respectively, professional misconduct for violating or attempting to violate the rules of professional conduct; committing a criminal act that adversely reflects on honesty, trustworthiness, or fitness as a lawyer in other respects; and engaging in conduct that is prejudicial to the administration of justice.²⁴¹ The Commission recommended Templeton's license to practice law be suspended for two years with no possibility of reinstatement.²⁴²

The Court reviewed the Commission's finding and determined that Templeton had violated 32:8.4(a) and (b)—but not (d).²⁴³ The Court suspended Templeton's license for only three months.²⁴⁴ In finding that Templeton did not violate 32:8.4(d) the Court stated in part:

In the past, we have found the mere fact a lawyer was convicted of an OWI, third offense, was conduct prejudicial to the administration of justice. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Johnson*, 774 N.W.2d 496, 498-99 (Iowa 2009) (finding a lawyer's third OWI conviction was a violation of rule 32:8.4(d)); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Dull*, 713 N.W.2d 199, 204 (Iowa 2006) (finding a lawyer's third OWI conviction was a violation of DR 1-102(A)(5)). We now believe, under Rule 32:8.4(d), the mere act of committing a crime does not constitute a violation of this rule because the rule does not simply prohibit the doing of an act. Rather, Rule 32:8.4(d) specifically prohibits an act that is prejudicial to the administration of justice by violating the well-understood norms and conventions of the practice of law. To hold otherwise would be contrary to the intent of the ABA's Model Rules of Professional Conduct when it proposed the model rule, which we adopted in Rule 32:8.4(d) without change.

[. . .]

Applying these principles to this record, there is nothing in the record to indicate Templeton's criminal conduct was prejudicial to the administration of justice by deviating from the well-understood norms and conventions of practice. Templeton complied with every order and

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 768-69.

243. *Id.*

244. *Id.* at 771.

time deadline in his criminal proceeding. *See Iowa Supreme Ct. Att’y Disciplinary Bd. v. Curtis*, 749 N.W.2d 694, 699 (Iowa 2008) (holding failure to meet appellate deadlines in a postconviction relief action was conduct prejudicial to the administration of justice). He did nothing to impede the progress of his criminal proceeding and did not make any statements falsely impugning the integrity of the judicial system. Without any evidence showing Templeton’s criminal conduct violated the well-understood norms and conventions of practice, the Board did not prove a violation of Rule 32:8.4(d). Consequently, the Board has failed to prove Templeton’s conduct violated Rule 32:8.4(d).²⁴⁵

In this one case, the Court overruled *Steffes* and *McGrath*. It further set up a framework wherein an attorney could perpetrate domestic and sexual violence against a partner or client, and as long as he met filing deadlines, complied with court orders, and did not “impugn the integrity of the justice system,” he would not violate Iowa Rule of Professional Conduct 32:8.4 (d).²⁴⁶ The absurdity of this analysis is striking: if the Commission had only found that Templeton violated 32:8.4(d), the Court would have returned Templeton’s license to practice law when he was merely three months into a six-year probationary period based on a criminal conviction. Templeton could be practicing law while on probation for six counts of invasion of privacy-nudity.

Templeton was handed down in 2010. Over the next eight years, the Court cited *Templeton* in *Schmidt*,²⁴⁷ *Moothart*,²⁴⁸ *Blessum*,²⁴⁹ and *Deremiah*.²⁵⁰ One simple way to reconsider 32:8.4(d) in light of *Templeton* would be to assume that criminal activity is by default prejudicial to the administration of justice. Finding that a specific criminal activity is not prejudicial to the administration of justice should be the very rare exception—not the rule.

CONCLUSION

Imagine if the cases we just reviewed had been argued before an all-female Supreme Court: would the language throughout the opinions have been different? Would the results have been different? Would the men have thought they had been treated fairly?

Two of these cases involved clients of the male attorney perpetrators. All of the cases involved either horrific violence or clear, power-defined, predatory sexual acts. In three of the cases, the Commission recommended a more severe

245. *Id.* at 768-69.

246. *Id.* at 269.

247. 796 N.W.2d at 41-42.

248. 860 N.W.2d at 615-17.

249. 861 N.W.2d at 589.

250. 875 N.W.2d at 734.

licensing sanction than what the Supreme Court imposed.²⁵¹ And in one case, the Court imposed a variation of the sanction recommended by a majority of the Commission; the sanction itself was minor considering the offenses and completely eliminated a recommended two-year probationary period for the male attorney.

I recently heard implicit bias described as “instinctive, unconscious thinking that can run counter to our stated values.” This seems to perfectly describe the men who wrote these opinions.²⁵² I do not believe they hold sexist ideologies or wrote these decisions aiming to hold women back.²⁵³ That is the challenge of implicit bias, however, and remedying its effects requires an admittance of its influence and active efforts to address the harms it can propagate. In order to change the discourse, the language, and the decisions, women must be part of the decision-making process.

Change also comes when we hear stories from people we love, respect and trust. So, if nothing else, all of us—not just male judges—need to listen to the experiences of our wives, daughters, sisters, mothers, colleagues, and friends. Talk to the women around you. Hear stories from people you love whose gender contributes to how they experience the world in a way that is different from your own experience. Allow yourself to acknowledge your own biases—and hold yourself and those around you to the highest standards of justice and fairness.

251. See e.g., *Schmidt*, 796 N.W.2d at 36 (imposing a thirty-day suspension despite the Grievance Commission’s recommendation of a six-month suspension); *Blessum*, 861 N.W.2d at 578 (imposing an eighteen-month suspension despite the Grievance Commission’s recommendation of a four-year suspension); *Deremiah*, 875 N.W.2d at 729 (imposing a ninety-day suspension and no probationary period despite the Disciplinary Board’s recommendation of a thirty-day suspension and two-year probationary period).

252. Iowa Summit on Justice and Disparities October 15, 2019., FFA Enrichment Center, Ankeny, Iowa

253. See, e.g., *Nicoletto*, 845 N.W.2d at 432-36 (Waterman J., dissenting) (rejecting the majority’s holding finding a coach was not a school employee for purposes of a sexual abuse statute and reciting additional facts and context as to defendant’s actions reflecting a clear understanding of gender and power.).