

IN THE SUPREME COURT OF IOWA

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NO. 21-1068

(Grievance Commission Docket No. 910)

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IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD,

Complainant-Appellee,

vs.

JOHN KARL FISCHER,

Respondent-Appellant.

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APPEAL FROM THE GRIEVANCE COMMISSION, 630<sup>th</sup> DIVISION

BRIAN J. WILLIAMS, PRESIDENT

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

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ATTORNEYS FOR RESPONDENT-APPELLANT

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. THE COMMISSION ERRED IN CONCLUDING MR. FISCHER'S CONDUCT IN THE ALPHAGEN MATTER WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Noel*, 933 N.W.2d 190 (Iowa 2019) (*Noel II*).

- II. THE COMMISSION ERRED IN CONCLUDING MR. FISCHER VIOLATED RULE 32:1.15(c) IN THE R.B. HOMES MATTER

- A. Mr. Fischer's conduct in handling funds received in the R.B. Homes matter was in accordance with Rule 32:1.15(c).

Iowa R. Prof'l Conduct 32:1.15(c).

*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Morris*, 847 N.W.2d 428 (Iowa 2014).

i. *Funds for Payment of R.B. Homes Settlement*

ii. *Funds for Payment of Attorney Fees*

- B. Mr. Fischer did not misappropriate funds received in the R.B. Homes matter and had a colorable future claim to said funds as attorney fees.

i. *Misappropriation of Funds*

Iowa R. Prof'l Conduct 32:8.4(b).

*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Guthrie*, 901 N.W.2d 493 (Iowa 2017).

*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Thomas*, 844 N.W.2d 111 (Iowa 2014).

Iowa Code § 714.1(2) (2011).

ii. *Colorable Future Claim*

*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Carter*, 847 N.W.2d 228 (Iowa 2014).

iii. *Misconduct and Adverse Reflection on Mr. Fischer*

Iowa R. Prof'l Conduct 32:8.4(b).

Iowa R. Prof'l Conduct 32:8.4(c).

*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Green*, 888 N.W.2d 398 (Iowa 2016).

III. THE COMMISSION DID NOT RECOMMEND THE PROPER SANCTION FOR MR. FISCHER'S VIOLATION OF TRUST ACCOUNT RULES

IV. THE SANCTION RECOMMENDED BY THE COMMISSION IS NOT SUPPORTED BY THE EVIDENCE PRESENTED AND THE COMMISSION FAILED TO CONSIDER ALL RELEVANT FACTORS

*Iowa Supreme Court Att'y Disciplinary Bd. v. Guthrie*, 901 N.W.2d 493 (Iowa 2017).

*Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. D'Angelo*, 619 N.W.2d 333 (Iowa 2000).

A. The Commission failed to give equal consideration to aggravating and mitigating factors.

*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kingery*, 871 N.W.2d 109 (Iowa 2015).

i. *Military Service and Personal Health*

ii. *Lack of Client Harm*

iii. *Proactive Trust Account Measures*

iv. *Accepting Responsibility for Rule Violations*



- B. The Commission considered unproven violations in making a sanction recommendation.
- C. Prior attorney discipline cases guide the proper sanction of Mr. Fisher.

*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Hedgecoth*, 862 N.W.2d 354 (Iowa 2015).

*Iowa Supreme Court Att'y Disciplinary Bd. v. Noel*, 933 N.W.2d 190 (Iowa 2019) (“*Noel II*”).

*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Parrish*, 801 N.W.2d 580 (Iowa 2011).

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*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Boles*, 808 N.W.2d 431 (Iowa 2012).

## V. REQUESTED RELIEF

## **ROUTING STATEMENT**

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

## **STATEMENT OF THE CASE**

### **Nature of the Case**

The Iowa Supreme Court Disciplinary Board (“Board”) filed a Complaint alleging unprofessional conduct by Respondent-Appellant John Karl Fischer on June 5, 2020. Mr. Fischer filed a Response to Complaint on June 25, 2020. The Board filed a Motion to Strike Answer on July 8, 2020 asserting the Response to Complaint did not comply with the Iowa Rules of Civil Procedure. Mr. Fischer filed an Amended Answer of Respondent on July 17, 2020. On September 23, 2020, the Board filed a Motion for Leave to Amend Complaint and Amended Complaint. Mr. Fischer obtained counsel and filed an Answer to the Amended Complaint on October 13, 2020. On March 16, 2021, the Board filed a Second Motion for Leave to Amend Complaint and Second Amended Complaint, removing certain allegations and Count II from its Amended Complaint.

The matter came on for a two-day hearing before the 630<sup>th</sup> Division of the Grievance Commission (“the Commission”) of the Supreme Court of Iowa on April 5 and 6, 2021. Both the Board and Mr. Fischer submitted Post Trial Briefs. On August 2, 2021, the Commission found the Respondent-

Appellant had violated the Iowa Rules of Professional Conduct in regards to three separate matters. AlphaGen Matter: 32:3.2, 32:3.4(c), 32:3.4(d), and 32:8.4(d). R.B. Homes Matter: 32:1.4(a)(3), 32:1.15(c), 32:8.4(b), and 32:8.4(c). Trust Account: 32:1.15(a), 32:1.15(c), 32:1.15(f); Iowa Court Rule 45.2(3)(a)(9); Iowa Court Rule 45.7(3), 32:5.3(a), 32:5.3(c)(2), and 32:8.4(c).

In its Findings of Fact, Conclusions of Law, and Recommended Sanctions, the Commission recommended that Mr. Fischer's license to practice law be revoked. A Bill of Costs was filed by the Clerk of the Grievance Commission on August 2, 2021, in the total amount of \$2,209.25.

Notice of Appeal was filed with the Clerk of the Grievance Commission on August 6, 2021. Notice of Appeal was filed with the Clerk of the Iowa Supreme Court on August 9, 2021.

### **STATEMENT OF THE FACTS**

This appeal concerns three separate matters: the AlphaGen matter, the R.B. Homes matter, and Mr. Fischer's Trust Account. The Findings of Fact of the Commission as stated in Count I: AlphaGen Litigation, Count II: Trust Account, and Count IV: Osborn Matter of the Findings of Fact, Conclusions of Law, and Recommended Sanctions are adopted by the Respondent-Appellant. (App. pp. 643-646).

## **SCOPE AND STANDARD OF REVIEW**

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

## ARGUMENT

### I. THE COMMISSION ERRED IN CONCLUDING MR. FISCHER'S CONDUCT IN THE ALPHAGEN MATTER WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

The Board argued Mr. Fisher's actions in the AlphaGen matter were prejudicial to the administration of justice in violation of Iowa Rule of Professional Conduct 32:8.4(d). There is no typical form of conduct that prejudices the administration of justice. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Noel*, 933 N.W.2d 190, 204 (Iowa 2019) ("*Noel II*"). Conduct by an attorney that results in additional court proceedings or causes court proceedings to be delay or dismissed is prejudicial to the administration of justice in violation of Iowa Rule of Professional Conduct 32:8.4(d). *Id.* The focus for determining violations of Iowa Rule of Professional Conduct 32:8.4(d) is on the conduct *of the attorney* in causing delays or additional proceedings. In this case, it was not the conduct of Mr. Fischer that resulted in delays in responding to discovery requests and court orders to provide discovery responses, it was the conduct of Matt Merchant, the President and director of AlphaGen.

The Commission accepted the facts as alleged by the Board in its summary of events in Section II(a)(i) of the Board's Post-Trial Brief. (App. p. 134). The Board's summary of events in the AlphaGen Litigation

provides an accurate summary of the procedural history of in the AlphaGen matter but fails to discuss the fact that Mr. Fischer was dealing with an uncooperative client who refused to provide the necessary information to comply with discovery despite repeated assurances to Mr. Fischer that such information would be provided.

The Board's summary of events criticizes Mr. Fischer for not telling opposing counsel or the court that he did not have access to the discovery documents and could not obtain them. The Board also criticizes Mr. Fischer for telling Dan Kresowik, counsel for plaintiff in the AlphaGen matter, that discovery responses would be provided in the future. (App. p. 142). The Board implies that Mr. Fischer was disingenuous in this promise. However, Mr. Fischer's actions were not bred of dishonesty. Instead, Mr. Fischer did not claim to not have access to the documents because he did not believe that to be the case. Indeed, Mr. Fischer believed he could obtain them, in due time, from his client Mr. Merchant. While Mr. Fischer was later proven wrong in this belief, he did, in fact, believe his client would eventually cooperate. Mr. Merchant responded to Mr. Fischer's multiple requests to provide the documents with assurances that the documents would be provided. (App. pp. 302-304). The Board faults Mr. Fischer for believing his client, Mr. Merchant, when his client assured him the documents would be

provided. It was on this basis that Mr. Fischer made his own assurances to Mr. Kresowik regarding the discovery responses. (App. pp. 302-306). It would not have been proper or truthful for Mr. Fischer to assert he did not have access to the documents and could not obtain them when the communications he was receiving from his client was that the requested documents would be provided. When Mr. Fischer assured Mr. Kresowik that the documents would be provided, Mr. Fischer was acting on a good faith belief that the information was forthcoming from Mr. Merchant. (App. pp. 304-305). Such conduct by Mr. Fischer was proper and not prejudicial to the administration of justice.

The Commission concluded, “[t]here is no question that the Respondent ignored deadlines resulting in multiple court orders in both cases.” (App. p. 648). This statement by the Commission is unsupported by the record. Mr. Fischer admits that he failed to provide complete and timely discovery responses in the AlphaGen matter. (App. p. 266) At no point during the Grievance Hearing on April 5 and 6, 2021 did Mr. Fischer testify to that he ignored deadlines nor was such evidence produced. It is undisputed that deadlines were missed in the AlphaGen matter, but the reason for those missed deadlines was not ignorance or willful disregard by Mr. Fischer. Mr. Fischer testified:

Q. Did you ever have enough information to answer the discovery, but then you decided to intentionally withhold that information from plaintiffs?

A. No.

Q. Did you ever intentionally claim to Dan Kresowik that, hey, the information's not there, but it really was in your possession?

A. No.

Q. Was the discovery incomplete because you had the materials, but you just didn't feel like answering the discovery?

A. No. I was obligated to provide it -- the best answer I could give them based upon the material that he provided.

Q. Was the failure to give discovery responses to the plaintiff any attempt by you, as an attorney, to frustrate the plaintiff's right to recovery?

A. No. You know, they –

(App. pp. 304-305). As evidenced by Mr. Fischer's testimony, Mr. Fischer's conduct was what we would expect of an attorney – he did not intentionally withhold discovery, he did not make false claims regarding information in his possession, he did not willfully fail to provide documents in his possession, and he had no intention to frustrate the plaintiff's right to recovery.



Mr. Fischer testified to the difficulty he had working with Matt Merchant of AlphaGen in obtaining discovery documents. Mr. Fischer did not have personal knowledge or possession of the information and documents responsive to the discovery requests (App. pp. 301-302); he had to rely on Mr. Merchant to provide responsive information and documents. Mr. Fischer made multiple requests for Mr. Merchant to provide the necessary information, and Mr. Merchant repeatedly assured Mr. Fischer he would provide the necessary information. (App. p. 302). The Commission concluded in their Findings of Fact, Conclusions of Law, and Recommended Sanctions that “[t]here was no testimony that Respondent was at the mercy of Matt Merchant’s actions.” (App. p. 641). This is a mischaracterization of Mr. Fischer’s testimony. As related to the order for a more specific answer, Mr. Fischer testified:

Q. And again, did you have the information yourself to provide that more specific answer?

A. No.

Q. Who did?

A. Merchant.

Q. Did you talk to him at all about the need for more information to properly answer the petition?

A. Yes.

Q. Did you identify to him what information you needed?

A. Yes.

Q. Did he provide you that information?

A. To a degree.

Q. And when you say "to a degree," give us some context as to generally how your conversations would go with him when you said -- when you requested additional information for this case.

A. He said, I'll get you that information, and then he never would provide it.

(App. 302). Mr. Fischer further testified regarding obtaining discovery information from Mr. Merchant:

Q. Did that pattern of you asking for information and him [Merchant] not providing the information, as you just described, or not providing it, as you just described, did that continue --

A. Ahh

Q. -- through the course of the litigation when discovery was propounded.

A. Ahh. Yes. I mean, it was a problem compounded by them trying to ask for everything, a prototypical fishing exhibition -- or fishing exhibit -- group trip, and so -- their requests were overexpansive, and then his requests were almost nonexistent, and then --

(App. pp. 303-304). This is two instances of clear testimony by Mr. Fischer that he was at the mercy of Matt Merchant's actions, or inaction, that resulted in missed deadlines.

The conduct of Mr. Fischer in the AlphaGen matter was not prejudicial to the administration of justice. Mr. Fischer admits that he failed to provide complete discovery in the AlphaGen matter. (App. pp. 266-267) and there was a delay in court proceedings. (App. p. 267). However, this was not the direct result of conduct by Mr. Fischer. Mr. Fischer made every effort to comply with discovery requests and court orders to provide discovery responses. (App. pp. 304-305). Mr. Fischer had to rely on Mr. Merchant to provide responsive information and documents. Mr. Fischer made multiple requests for Mr. Merchant to provide the necessary information, and Mr. Merchant repeatedly assured Mr. Fischer he would provide the necessary information. (App. pp. 302-304). Based on these assurances, Mr. Fischer provided his own assurances to Mr. Kresowik that discovery responses would be provided. (App. pp. 302-306). When making those assurance, Mr. Fischer had full and honest belief that the discovery responses would be forthcoming, based on the assurance he had received from Mr. Merchant. (App. p. 307). In his requests for extension to provide discovery responses, Mr. Fischer was acting on a good faith belief that the

information to provide complete discovery responses was forthcoming from Mr. Merchant. (App. pp. 305-307).

When Mr. Merchant failed to provide complete information, Mr. Fischer provided incomplete discovery responses; however, Mr. Fischer provided all responsive information in his possession and received from Mr. Merchant. While these responses were incomplete, the alternative was for Mr. Fischer to withdraw and leave the plaintiffs to seek discovery from an uncooperative pro se defendant. The outcome would not have changed if Mr. Fischer had withdrawn and had that been the case it is likely less information would have been provided by Mr. Merchant in discovery due to Mr. Merchant's clear lack of cooperation in the discovery process.

Mr. Fischer does not dispute that his conduct in the AlphaGen matter violated Iowa Rules of Professional Conduct 32:3.2, 32:3.4(c), and 32:3.4(d). However, he does dispute the proper sanction. See *infra* Section IV. He acknowledges that he failed to provide complete discovery responses despite multiple court orders. (App. p. 266). However, his conduct in this regard does not rise to the level of conduct prejudicial to the administration of justice in violation of Iowa Rule of Professional Conduct 32:8.4(d). The Commission erred in concluding the Board proved Mr. Fischer violated Iowa Rule of Professional Conduct 32:8.4(d). Therefore, the Court should

not consider a violation of 32:8.4(d) when determining the appropriate sanction for Mr. Fischer related to the AlphaGen matter.

II. THE COMMISSION ERRED IN CONCLUDING MR. FISCHER VIOLATED RULE 32:1.15(c) IN THE R.B. HOMES MATTER

A. Mr. Fischer's conduct in handling funds received in the R.B. Homes matter was in accordance with Rule 32:1.15(c).

The Board charged Mr. Fischer with violation of Iowa Rule of Professional Conduct 32:1.15(c) for his handling of funds received from Josh Osborn in the R.B. Homes matter. This charge is unsupported and the Commission erred in concluding the Board has proven the allegation. Rule 32:1.15(c) requires an attorney to deposit legal fees and expenses paid in advance in a client trust account and to withdraw such funds only as fees are earned or expenses incurred. (Iowa R. of Prof'l Conduct 32:1.15(c); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Morris*, 847 N.W.2d 428, 434 (Iowa 2014)). Mr. Fischer's conduct was in accordance with this rule.

Mr. Fischer represented the entity of R.B. Homes in litigation alleging unworkmanlike construction by R.B. Homes. (App. pp. 216, 292). Joshua Osborn and James Osborn were co-owners of R.B. Homes. (App. pp. 215-216). Joshua Osborn was the president of R.B. Homes and was the individual listed with the Secretary of State to receive information on behalf of R.B. Homes (App. pp. 288-289). Joshua and James Osborn directed Mr.

Fischer to send all correspondence and billings concerning the R.B. Homes matter solely to Joshua Osborn. (App. p. 289). As co-owners, Joshua and James Osborn were jointly and severally liable for payment of the settlement and associated legal fees incurred by R.B. Homes. Mr. Fischer acted with this understanding in his handling of funds received in the R.B. Homes matter.

*i. Funds for Payment of R.B. Homes Settlement*

Mr. Fischer received a check from Joshua Osborn in the amount of \$9,200 to pay for legal fees and to put towards the settlement of litigation in which R.B. Homes was the defendant. (App. p. 219). Mr. Fischer deposited the full amount of \$9,200 in his client trust account. Mr. Fischer sent a check from his trust account to Traveler's Insurance Company in the amount of \$6,168 for partial settlement of the R.B. Homes matter (App. p. 240) and the remainder of the \$9,200 was used for payment of attorney fees. (App. p. 219). The deposit of client funds into Mr. Fischer's client trust account and withdraw of said funds pay a client's settlement was the proper procedure for handling client funds.

The Commission mischaracterizes this sequence of events as Mr. Fischer "took over \$6,000 from his trust account that belonged to Josh Osborn." (App. p. 649). The Commission is correct that \$6,168 was

removed from Mr. Fischer's client trust account, but the Commission fails to recognize that these funds were provided to Mr. Fischer by Joshua Osborn for the purposes of paying the settlement for R.B. Homes and this is the purpose for which Mr. Fischer issued a check to Traveler's Insurance Company. There was confusion regarding whether Traveler's had cashed the check – an action Mr. Fischer had repeatedly requested be completed (App. p. 282) – but this confusion does not make Mr. Fischer's issuance of a check for the purpose intended by the client improper handling of client funds.

The Board and Commission focus on the fact that the check issued from Mr. Fischer's client trust account to Traveler's was not cashed and Mr. Fischer should have been aware of this fact. (App. pp. 649, 149). The situation is not as clear-cut as the Board and Commission suggest. Mr. Fischer sent a check in the amount of \$6,168 from his client trust account to Traveler's for partial payment of the R.B. Homes settlement on September 11, 2014. (App. pp. 601, 240). Mr. Fischer understood that the R.B. Homes matter was settled for the total amount of \$15,000. (App. p. 274). Mr. Fischer sent the \$6,168 check to Traveler's to show a good faith payment towards the R.B. Homes settlement. (App. p. 282). Scott Bardole, staff counsel for Traveler's (App. p. 239), did not cash the check received from Mr. Fischer. (App. p. 241). Mr. Fischer made multiple inquiries with Mr.

Bardole as to the status of the check and with each inquiry asked Mr. Bardole to cash the check as a good faith payment towards the R.B. Homes settlement. (App. pp. 282, 323). Mr. Fischer made the request that the check be cashed at least six or seven times. (App. p. 323). At the 2016 hearing to enforce the R.B. Homes settlement, Mr. Fischer, again, asked Mr. Bardole to cash the check, citing an additional concern of Joshua and James Osborn having to pay more for the settlement if the check was not cashed. (App. pp. 282-283). Mr. Fischer did not realize the check had not been cashed by Traveler's, despite his multiple requests. (App. p. 282). It was not clear to Mr. Fischer that Traveler's would not cash the check until the full \$15,000 settlement had been received. Mr. Bardole testified that he did not tell Mr. Fischer that the partial settlement check would not be cashed:

Q. Okay. Did -- I know you testified on direct that you certainly were not going to take less than the \$15,000 settlement to dismiss the case, but did you actually -- did you personally, we'll start with, ever tell Mr. Fischer that the check wouldn't be cashed? And I mean literally cashed, not for satisfaction of the judgment, but literally cashed.

A. I --I don't recall telling him that, and I --I can't tell you whether -- I just don't remember, but -- I don't think so, but I don't remember for sure.

Q. Okay. And do you have any knowledge as to whether anyone from your office would have told Mr. Fischer that this is not -- not only is it not



accepted for full satisfaction of the judgment, but it is literally not going to be cashed?

A. No one from my office, other than me, would have talked to Mr. Fischer.

(App. pp. 246-247).

The Commission, in their Findings of Fact, Conclusions of Law, and Recommended Sanctions also cites an email exchange between Mr. Bardole and Mr. Fischer regarding payment of the full settlement and obtaining a Release as evidence that Mr. Fischer should have been aware that Traveler's was not going to cash the check for settlement until the full settlement proceeds had been received by Travelers. (App. p. 614). It is not clear in this email exchange that the check sent by Mr. Fischer, for \$6,168, had not yet been cashed. (App. p. 614). This email does not provide conclusive evidence that Mr. Fischer should have known the check had not been cashed and would not be cashed until full payment of the settlement was received. The email itself refers to "what has already been paid" indicating Traveler's had either already, or had every intention, to cash the \$6,168 check from Mr. Fischer for partial payment of the settlement. (App. p. 604).

The confusion regarding whether the check had been cashed by Traveler's, with Mr. Fischer believing the check had been cashed in accordance with his multiple requests, lead to him operating his trust

account under the belief that the \$6,168 had been withdrawn from his trust account. The finding by the Commission that Mr. Fischer “took” or “withdrew” the funds received from Joshua Osborn for settlement of the R.B. Homes Matter ignores the fact that Mr. Fischer was operating his trust account with the understanding that the funds had been paid to Traveler’s, through Traveler’s cashing the check. Mr. Fischer reasonably believed the check had been cashed based on his repeated requests the check be cashed, Traveler’s retaining the check, emails referring to “what has already been paid,” and Mr. Bardole never informing Mr. Fischer the check would not be cashed as partial settlement. When Mr. Fischer discovered Traveler’s had not cashed the check and the R.B. Homes settlement had been paid in its entirety by James Osborn, Mr. Fischer fully reimbursed Joshua Osborn the \$6,168 Joshua Osborn had provided to Mr. Fischer for use of the R.B. Homes settlement. Mr. Fischer repaid Joshua Osborn by issuing to Joshua Osborn six checks, totaling \$6,168. (App. pp. 225-227, 283, 627-631)

During the time period Mr. Fischer was operating his trust account under the belief that the \$6,168 had been withdrawn by Traveler’s, Mr. Fischer did not, at any point, use the R.B. Homes funds for personal use. Mr. Fischer testified:

Q. Now, we know through the testimony, that this check never cashed that you wrote out of your trust

account to Travelers, and so really there's about 6168 of cash in your trust account that technically belongs to Josh. You think it's out of there --

A. Yes.

Q. -- rightfully or wrongfully, you know. Did you ever intend to take that money --

A. No.

Q -- and use it for your own personal use?

A: No.

(App. p. 295). Mr. Bly, the auditor from the Client Security Commission, also testified that in his audit of Mr. Fischer's trust account he found no evidence Mr. Fischer took money from the trust account and directed it to himself as an individual. (App. pp. 252, 254).

*ii. Funds for Payment of Attorney Fees*

The check for \$9,200 was also intended as payment for legal fees for R.B. Homes. (App. p. 219). The portion be used as attorney fees was not required to be deposited in a trust account. Rule 32:1.15(c) applies to circumstances where an attorney receives funds for a client for *advance* payment of attorney fees. That was not the case in the R.B. Homes matter. Mr. Fischer had performed legal work on behalf of his client, R.B. Homes, over a period of three years, had obtained a settlement for R.B. Homes, and he had written off a substantial amount of fess for legal work performed.

The payment of legal fees Mr. Fischer received from Joshua Osborn, on behalf of R.B. Homes, was not an advance payment. Mr. Fischer already performed the legal work and a balance was due for payment of attorney fees. The \$9,200 check was intended to be used, in part, to pay legal fees; that is how Mr. Fischer used a portion of the check. Thus, it does not trigger application of Rule 32:1.15(c).

There is a dispute about the amount of funds Mr. Fischer received in the R.B. Homes matter that were intended to be used as legal fees. Mr. Fischer admits that lack of clear communication with his clients led to a misunderstanding regarding the payment of attorney fees. (App. p. 114).

The Commission proved Mr. Fischer violated Iowa Rule of Professional Conduct 32:1.4(a)(3) concerning an attorney's communications with their client. Mr. Fischer does not contest this violation and acknowledged his communication with Joshua and James Osborn in the R.B. Homes matter was not to par with the standard required of attorneys in Iowa. (App. p. 124-125). However, Mr. Fischer's lack of clear communication with his clients concerning the R.B. Homes matter is not evidence that Mr. Fischer also violated Rule 32:1.15(c) concerning the safekeeping of client property. Mr. Fischer's conduct in receiving funds in the R.B. Homes matter intended to be used for attorney fees, depositing those funds into his trust

account, and withdrawing those funds for work that had been performed over the three prior years was all proper conduct. As discussed in the preceding paragraph, Mr. Fischer received payment for legal work already performed and was, therefore, not subject to Rule 32:1.15(c) for payment of attorney fees, as there was no advance payment of attorney fees made or intended by Joshua Osborn.

B. Mr. Fischer did not misappropriate funds received in the R.B. Homes matter and had a colorable future claim to said funds as attorney fees.

The Grievance Commission concluded Mr. Fischer misappropriated funds received in the R.B. Homes matter, thus committing a criminal act in violation of Rule 32:8.4(b) and constituting attorney misconduct under Rule 32:8.4(c). The Commission further concluded that Mr. Fischer did not have a colorable future claim to these funds as attorney fees in violation of both Rules 32:8.4(b) and 32:8.4(c). The Commission erred in its conclusions concerning Mr. Fischer's use of funds received on behalf of R.B. Homes, as Mr. Fischer used said funds in accordance with the Iowa Rules of Professional Conduct.

*i. Misappropriation of Funds*

The Board characterizes Mr. Fischer's handling of the R.B. Homes funds as misappropriation of client funds. This characterization is incorrect

and not supported by the evidence. Mr. Fischer received a check from Joshua Osborn in the amount of \$9,200 to pay for legal fees and to put towards the settlement of litigation in which R.B. Homes was the defendant and both Joshua and James Osborn were members of the corporation. (App. p. 219). Mr. Fischer deposited the full amount of \$9,200 in his client trust account. Mr. Fischer sent a check from his trust account to Traveler's, in the amount of \$6,168 for partial settlement of the R.B. Homes matter. (App. p. 240). Mr. Fischer withdrew the remaining \$3,032 for payment of attorney fees he had already earned. (App. p. 219).

An attorney violates Iowa Rule of Professional Conduct 32:8.4(b) when they commit a criminal act that reflects adversely on their honesty, trustworthiness, or fitness as a lawyer in other respects. (Rule 32:8.4(b)). A person commits the criminal action of theft by misappropriation when the person:

[m]isappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.

*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Guthrie*, 901 N.W.2d 493, 498 (Iowa 2017) (citing *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Thomas*, 844 N.W.2d 111, 116 (Iowa 2014) (quoting Iowa Code § 714.1(2) (2011))).

This definition does not describe the conduct of Mr. Fischer in the R.B. Homes matter. Mr. Fischer held the \$9,200 in his trust account, withdrawing the funds only when they had been earned as attorney fees or to pay the expense of settlement. Joshua Osborn provided the funds to Mr. Fischer for these two specific purposes and intended the funds be used for these two specific purposes. (App. pp. 217-218). When the purpose of paying for the settlement was no longer needed, Mr. Fischer returned the funds intended for settlement to Joshua Osborn, as President of R.B. Homes. (App. pp. 225-227, 283, 627-631). There was no misappropriation of client funds, thus no violation of Rule 32:8.4(b).

The Commission, in its Findings of Fact, Conclusions of Law, and Recommended Sanctions, states that Mr. Fischer does not contest the acts of withdrawing funds and infers an admission of guilt. (App. p. 650). However, the Board conflates admitting withdraw of funds and an admission of wrongdoing. Mr. Fischer would have no reason to dispute withdrawing funds for payment of earned attorney fees. Mr. Fischer would have no reason to dispute returning the settlement funds to the client when the

settlement was paid with other funds. Mr. Fischer took no wrongful or sanctionable action related to the funds received in the R.B. Homes matter, thus he has no reason to deny these acts occurred. The Board's characterization of these acts as misappropriation imposes upon the acts a characterization not supported by the evidence. Mr. Fischer does not deny these transactions occurred; Mr. Fischer does contest the Board's characterization of these transactions as misappropriation.

The Board did not present any evidence that Mr. Fischer converted the R.B. Homes funds for personal use. Mr. Fischer testified that he did not intend to use funds received in the R.B. Homes Matter for his own personal use. (App. p. 295). Mr. Bly of the Client Security Commission also testified that there was no evidence of Mr. Fischer withdrawing funds from his trust account for personal use. (App. pp. 252, 254).

Mr. Fischer did not misappropriate client funds, thus, he did not commit a criminal action reflecting adversely on his honesty, trustworthiness, or fitness as a lawyer in violation of Rule 32:8.4(b).

*ii. Colorable Future Claim*

The Commission concluded Mr. Fischer did not have a future colorable claim to the entirety of the R.B. Homes funds. Mr. Fischer had a clear future colorable claim for the \$3,032 he withdrew as attorney fees. Mr.



Fischer had earned and billed at least \$3,000 for the R.B. Homes matter and wrote off amounts above that. (App. pp. 290-291). Josh Osborn was the president of R.B. Homes and the main contact for Mr. Fischer in the R.B. Homes matter. (App. pp. 288-289, 323). There was a dispute over the amount of attorney fees Joshua Osborn intended Mr. Fischer to take out of the \$9,200 check he gave to Mr. Fischer, but that does not change the fact that Mr. Fischer had a colorable future claim to the entirety of the \$3,032 he withdrew as attorney fees out of the \$9,200. A future colorable claim defense exists when the attorney prematurely takes a fee, including when an attorney prematurely takes a fee in an amount greater than the actual fee ultimately earned. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Carter*, 847 N.W.2d 228, 233 (Iowa 2014).

Assuming, arguendo, that Mr. Fischer was entitled to only \$1,700 in attorney fees from the funds paid by Joshua Osborn on behalf of R.B. Homes, as argued by the Board and assumed by the Commission, Mr. Fischer had a colorable future claim to the additional \$1,332 he withdrew from those funds as attorney fees. That the parties had agreed that those additional funds could be literally paid by James Osborn is immaterial. Fischer had billings for work on R.B. Homes totaling in excess of \$3,000 and told Joshua Osborn he would only require payment of \$3,032 on the

R.B. Homes matter. Both Joshua and James Osborn owed the total amount of legal fees jointly and severally. When Joshua Osborn gave Mr. Fischer a check for \$9,200, Mr. Fischer had a claim to \$3,032 of that amount as earned attorney fees. (App. pp. 290-291, 294). Joshua Osborn testified that he intended \$1,700 of the \$9,200 check be used for attorney fees. (App. pp. 219-220). Mr. Fischer's claim to the additional \$1,332 was consistent with his intent to use the funds as attorney fees, an essential element to a future colorable claim defense. See *Carter*, 847 N.W.2d at 234. The entirety of the amount Mr. Fischer used as payment for attorney fees was earned attorney fees.

The Commission supports its conclusion that Mr. Fischer did not have a colorable future claim to the additional \$1,332 he withdrew from R.B. Homes' trust account as attorney fees by reasoning "there was no circumstance under which Josh[ua] would be required to pay another client's fees." (App. p. 652, 177). While this is certainly an accurate statement in its own regard, it is not an accurate statement in the context of the R.B. homes matter.

Mr. Fischer represented R.B. Homes. (App. p. 216). Joshua Osborn was the president of R.B. Homes and was the individual listed with the Secretary of State to receive information on behalf of R.B. Homes (App. pp.

288-289), however, both James and Joshua Osborn were partners and co-owners in the corporation. (App. p. 215-216). All correspondence and billings from Mr. Fischer's office concerning the R.B. Homes matter were directed solely to Joshua Osborn, as requested by the clients. (App. p. 289). James Osborn was involved with R.B. Homes, but was at no point the representative of R.B. Homes with whom Mr. Fischer interacted. (App. p. 289). Joshua and James Osborn had made an oral agreement between themselves to each pay one-half of the R.B. Homes settlement and Mr. Fischer's attorney fees. (App. p. 276). There was not a written fee agreement between Mr. Fischer and either Joshua Osborn or James Osborn as to how attorney fees would be paid, or potentially split among the brothers. (App. p. 276). Mr. Fischer performed legal services on behalf of R.B. Homes and used funds received from Joshua Osborn, as president of R.B. Homes, to pay those attorney fees. (App. p. 275). This is not a case where funds received on behalf of one client were used to pay the bill for another client. R.B. Homes was the client for which Mr. Fischer performed work, and Joshua and James Osborn were both representatives of R.B. Homes. Mr. Fischer received funds from Joshua Osborn on behalf of R.B. Homes and had a clear colorable future claim to those funds as attorney fees for work he had performed on behalf of R.B. Homes. If the reverse had occurred, and James

Osborn had provided funds to Mr. Fischer on behalf of R.B. Homes, Mr. Fischer would have had a colorable future claim to those funds in an amount equal to the attorney fees he had incurred for work performed on behalf of R.B. Homes.

*iii. Misconduct and Adverse Reflection on Mr. Fischer*

Iowa Rules of Professional Conduct 32:8.4(b) and 32:8.4(c) both have elements that focus on how an attorney's conduct affects their honesty, trustworthiness, and other elements of fitness as a lawyer and conduct in general. Mr. Fischer has not engaged in conduct that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer (*see* Iowa R. Prof'l Conduct 32:8.4(b)) and he has not engaged in misconduct involving dishonesty, fraud, deceit, or misrepresentation (*see* Iowa R. Prof'l Conduct 32:8.4(c)).

The Commission concluded Mr. Fischer engaged in misconduct involving dishonesty, fraud, deceit, and misrepresentation. This conclusion was based on the Commission's erroneous conclusion that Mr. Fischer misappropriated client funds, and did so without a colorable future claim. As discussed, Mr. Fischer did not misappropriate client funds, and even if the Court finds misappropriation occurred, Mr. Fischer had a colorable future claim to funds for legal work performed on behalf of R.B. Homes.

In its Findings of Fact, Conclusions of Law, and Recommended Sanctions, the Commission fails to consider the direction from caselaw that a violation of Iowa Rule of Professional Conduct 32:8.4(c) requires an attorney acted knowingly, intentionally, or with the aim to mislead. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Green*, 888 N.W.2d 398, 403 (Iowa 2016). Mr. Fischer did not act in this manner as related to the R.B. Homes matter and in handling funds received for payment of attorney fees and settlement. Mr. Fischer testified that he never acted intentionally to take funds received in the R.B. Homes matter for his own personal use. (App. p. 286). Mr. Fischer received funds from Joshua Osborn for the specific purposes of paying attorney fees for work already performed by Mr. Fischer and to pay the R.B. Homes settlement. (App. p. 219). This is the manner in which Mr. Fischer attempted to use the funds. When the R.B. Homes settlement was paid with separate funds, Mr. Fischer refunded the funds held in his trust account for the R.B. Homes settlement to Joshua Osborn, as President of R.B. Homes. (App. pg. 225-227, 283). Even during the time period when it was uncertain whether the check sent to Traveler's had been cashed, Mr. Fischer did not withdraw from his trust account the funds received for settlement of the R.B. Homes matter.

The Commission finds it “unexplainable” why Mr. Fischer claims he did not know the settlement check sent to Traveler’s was not cashed (App. p. 651), but as discussed above, there were several factors that lead to Mr. Fischer’s belief that the check was either cashed or being held by Traveler’s with the intention of being cashed. Mr. Fischer also did not cut off communication with Joshua and James Osborn, as the Commission states (App. p. 651). Rather, Mr. Fischer was responsive to communications from Joshua Osborn that the R.B. Homes settlement had been paid with other funds and sent Joshua Osborn several checks and communications regarding the reimbursement of the settlement funds. (App. pp. 281-281, 225-227).

### III. THE COMMISSION DID NOT RECOMMEND THE PROPER SANCTION FOR MR. FISCHER’S VIOLATION OF TRUST ACCOUNT RULES

Mr. Fischer did not contest the alleged violations related to this trust account and does not appeal from the Commission’s conclusions that such violations occurred. Mr. Fischer does appeal the manner in which such violations were considered in determining a recommended sanction by the Commission. This will be discussed in Section IV.

IV. THE SANCTION RECOMMENDED BY THE COMMISSION IS NOT SUPPORTED BY THE EVIDENCE PRESENTED AND THE COMMISSION FAILED TO CONSIDER ALL RELEVANT FACTORS

The Commission recommends a sanction of revocation of Mr. Fischer's license to practice law. (App. p. 652). In making their sanction recommendation, the Commission cites to Mr. Fischer's statement, "No, I was mad." (App. p. 276) and cites caselaw stating "[a] lawyer's license to practice law will virtually always be revoked if an attorney converts funds without a colorable future claim." *Iowa Supreme Court Att'y Disciplinary Bd. v. Guthrie*, 901 N.W.2d 493 (Iowa 2017) (App. p. 652). These are the only two references to Mr. Fischer's specific conduct in this case in the Commission's Recommendation section. While this was a statement made by Mr. Fischer and a correct citation to caselaw, these two statements alone do not support a sanction of revocation of license to practice law. The Commission cites to the considerations for an appropriate sanction, including "the nature of the violations, protection of the public, deterrence of similar misconduct by others, the lawyer's fitness to practice, and for the court to uphold the integrity of the profession to the public." *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. D'Angelo*, 619 N.W.2d 333, 338 (Iowa 2000). However, the Commission fails to evaluate these factors in making its recommendation for sanctions, and instead simply focuses on one

statement by Mr. Fischer and a statement of caselaw that is inapplicable in light of Mr. Fischer having had a colorable future claim to funds received in the R.B. Homes matter. The Commission's recommendation for the sanction of revocation is unsupported and should, therefore, not be adopted by the Iowa Supreme Court.

A. The Commission failed to give equal consideration to aggravating and mitigating factors.

In attorney discipline cases, the Iowa Supreme Court considers mitigating and aggravating circumstances present in each case. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kingery*, 871 N.W.2d 109, 121 (Iowa 2015). The caselaw does not note a preference or emphasis on aggravating factors over mitigating factors. In its Findings of Fact, Conclusions of Law, and Recommended Sanctions, the Board gives more time and attention, more than an entire page, to the aggravating factors in Mr. Fischer's case while utilizing only four lines of text to consider the mitigating factors. There is a clear discrepancy that is not representative of the presence of multiple mitigating factors present in Mr. Fischer's case.

i. *Military Service and Personal Health*

The Commission recognized the mitigating factor that Mr. Fischer has been on active duty in the Navy. (App. p. 647). The Commission also recognized, in a glance-over fashion, that Mr. Fischer has suffered from



severe medical conditions in the past. Mr. Fischer has a notable health history that has impacted his ability to practice law. Mr. Fischer began psychiatric treatment for anxiety and depression, caused by ADHD, in 2001. (App. pp. 312-313). During the time period of 2013 through 2020, Mr. Fischer began taking increased medications for depression, insomnia, and ADHD. (App. p. 386, 639). Mr. Fischer testified that his ADHD led to him exercising avoidance, including avoidance of booking issues with his trust account, and that the increase in his medication helped with this issue. (App. pp. 315-316). Mr. Fischer also underwent brain surgery for removal of a tumor in May of 2017 (App. pp. 315-316, 639) in addition to undergoing a total of five eye surgeries from September 2017 through August of 2018. (App. p. 311, 639). The Commission dedicated only one sentence in their Findings of Fact, Conclusions of Law, and Recommended Sanctions to Mr. Fischer's multiple medical conditions. (App. p. 647).

*ii. Lack of Client Harm*

There are multiple mitigating factors related to Mr. Fischer's legal work that support a lesser sanction. As related to his trust account practices, the violations committed by Mr. Fischer did not result in any client harm. Mr. Fischer testified the deficit in his trust account was never due to him writing personal checks out of the trust account or his intent to defraud any

client. (App. pp. 296-297). There was also never a time when Mr. Fischer was unable to fulfill a client request for a refund of trust account funds or failed to refund a client retainer at the conclusion of a case. (App. p. 297). Mr. Fischer should have maintained better records and done so for individual client accounts (App. p. 297-300), but his admitted failure in doing so did not result in harm or loss to any of his clients and the audits of his trust account showed no evidence of misappropriation of funds. (App. pp. 206-207). The Commission failed to consider this mitigating factor in their recommendation for sanctions. (App. p. 647).

*iii. Proactive Trust Account Measures*

Mr. Fischer has engaged in proactive measures to avoid further trust account violations. Mr. Fischer testified that he worked with several secretaries at his firm to try to balance and reconcile the client ledgers. (App. p. 268). In working with his secretary to reconcile the trust account, Mr. Fischer believed he had a good understanding on where he stood in terms of the trust account balance and what accounts were owed funds. (App. pp. 268-269). The 2019 audit by Mr. Bly of the Client Security Commission revealed that this was not the case (App. p. 269), but Mr. Fischer responded appropriately by promptly depositing into his trust account the amount Mr. Bly determined was needed to balance the trust account. (App. pp. 338-339).

Mr. Fischer took further proactive measures, still in place today, as he now sends his trust account records to an accountant each month to have the accountant perform reconciliation of his trust account. (App. p. 315).

Currently, Mr. Fischer's trust account is balanced to the penny and it has been so balanced since the 2019 audit. (App. p. 339). The Commission acknowledged Mr. Fischer has made improvements to his trust account practices, but once again gave, minimal consideration to this mitigating factor, providing a single sentence of acknowledgement and no discussion. (App. p. 647).

*iv. Accepting Responsibility for Rule Violations*

Mr. Fischer admits and takes responsibility for certain violations of the Iowa Rules of Professional Conduct. Pertaining to his trust account, Mr. Fischer admits he encountered problems completing his monthly reconciliations and maintaining individual client ledgers. (App. p. 299-300). Mr. Fischer admits he was capable of maintaining his trust account in the manner required by the Iowa Rules of Professional Conduct, but failed to do so on his own account. (App. pp. 299-300). Mr. Fischer has taken responsibly for these trust account violations. When a discrepancy was discovered in his trust account balance by Mr. Bly, the auditor for the Client Security Commission, Mr. Fischer promptly deposit and amount equal to the

discrepancy determined by Mr. Bly. (App. pp. 338-339). Mr. Fischer's willingness to take responsibility and admit to his trust account violations is a mitigating factor in consideration of any sanction imposed for these violations and should have been considered by the Commission. The Commission failed to consider this mitigating factor in their recommendation for sanctions. (App. p. 647).

**B. The Commission considered unproven violations in making a sanction recommendation.**

Allegations of violations unproven by the Board should not be considered in the imposing of sections. The Commission erroneously concluded that Mr. Fischer violated Iowa Rules of Professional Conduct 32:8.4(d) in the AlphaGen matter and 32:1.15(c), 32:8.4(b), and 32:8.4(c) in the R.B. Homes matter. Presumably, the Commission's recommendation for sanctions considered these alleged violations. It is difficult to discern the Commission's basis for a recommendation of revocation given the limited discussion for the basis for such recommendation. Mr. Fischer can only assume all allegations the Commission concluded proven by the Board were considered in arriving at a sanction recommendation. The four alleged violations that are unsupported by the evidence, as discussed in this brief, should not have been considered in the imposition of sanctions against Mr.

Fischer. Any sanction imposed by the Iowa Supreme Court should consider only those sanctions proven by the Board.

C. Prior attorney discipline cases guide the proper sanction of Mr. Fisher.

Mr. Fischer has been charged with several violations of the Iowa Rules of Professional Conduct. Mr. Fischer admits to violation of Iowa Rules of Professional Conduct 32:3.2, 32:3.4(c), and 32:3.4(d) in the AlphaGen matter; 32:1.4(a)(3) in the R.B. Homes matter; and 32:1.15(a), 32:1.15(c), 32:1.15(f), 32:5.3(a), 32:5.3(b), 32:5.3(c)(2), 32:8.4(c), 45.2(3)(a)(9), and 45.7(3) relating to his trust account. Mr. Fischer does not admit, and the Board has failed to prove, that Mr. Fischer violated 32:8.4(d) in the AlphaGen matter and 32:1.15(c), 32: 8.4(b), and 32:8.4(c) in the R.B. Homes matter. For the violations Mr. Fischer admits, the circumstances of the individual violations and mitigating factors present support a lesser sanction than complete revocation of Mr. Fischer's license to practice law.

Prior attorney discipline cases are a guide to the proper sanction for Mr. Fischer, and those cases suggest suspension only for a limited period is warranted in this case. As to the AlphaGen Matter, Mr. Fischer's actions were similar to those of the attorney in *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Hedgecoth*, 862 N.W.2d 354, 360-61 (Iowa 2015). *Hedgecoth*

concerned violations of Rule 32:3.2, 32:3.4(c), and 32:2.4(d) – the same violations committed by Mr. Fischer.

In *Hedgecoth*, the attorney failed to provide timely discovery after two court orders and representations to the court that responses would be provided, resulting in motions to compel and motions for sanctions. The attorney was found to have violated Rules 32:1.3, 32:3.2, 32:3.4(c), 32.3.4(d), 32:8.1(b), and 32:8.4(d), and a three-month suspension was imposed. *Id.* at 366. In imposing the sanction, the Court considered that the attorney’s principal violation was lack of diligence, but his neglect did not cause any demonstrable financial or other harm to clients and was not accompanied by auxiliary misrepresentation or misconduct. *Id.* at 365-66. The Court also considered as an aggravating factor the attorney’s failure to timely respond and cooperate with inquiries from the Supreme Court’s Attorney Disciplinary Board. *Id.* at 363.

Comparing Mr. Fischer’s conduct in the AlphaGen matter to that of the attorney in *Hedgecoth*, Mr. Fischer conduct is less severe than the conduct in *Hedgecoth*. Mr. Fischer’s conduct regarding the discovery responses is similar to the conduct in *Hedgecoth*, as both cases involve violations of Rules 32:3.2, 32:3.4(c), and 32:3.4(d). Mr. Fischer failed to provide complete discovery responses after court orders to provide responses

and representations to the court and opposing counsel that responses would be provided. Mr. Fischer's inability to provide documents stemmed directly from his client's lack of cooperation and was never the result of Mr. Fischer not disclosing information or documents in his possession. Unlike the attorney in *Hedgecoth*, Mr. Fischer undertook diligent efforts to comply with the discovery requests. When his client was uncooperative and Mr. Fischer was unable to provide complete responses, the court entered the appropriate motions to compel. Any sanction imposed on Mr. Fischer should reflect his efforts to comply with court orders and his lack of intention to mislead the court as to the status of discovery, cause delay, or frustrate the plaintiff's right to recovery. The attorney in *Hedgecoth* also violated 32:8.4(d), an allegation against Mr. Fischer that the Board has not proven. Mr. Fischer's conduct can also be differentiated from the attorney in *Hedgecoth* in light of Mr. Fischer's cooperation and responsiveness to the Board's inquiries and lack of neglect. Mr. Fischer's conduct was less severe than the conduct of the attorney in *Hedgecoth* where the court imposed a sanction of suspension of license to practice law for three months.

The only violation at issue in the R.B. Homes matter is Mr. Fischer's lack of communication with this client, in violation of Iowa Rule of Professional Conduct 32:1.4(a)(3). In regards to the R.B. Homes matter, a

sanction similar to that imposed in *Iowa Supreme Court Att’y Disciplinary Bd. v. Noel*, 933 N.W.2d 190 (Iowa 2019) (“*Noel II*”) would be appropriate. In *Noel II*, the attorney committed several Rule violations, including failure to communicate with his clients in violation of 32:1.4(a)(3). The attorney in *Noel II* failed to respond to several emails from a client asking for advice and suggestions on how to handle her legal matter, resulting in the client having to repeatedly inquire and request information about the status of her case. *Id.* at 199-200. The attorney admitted he should have kept the client more updated. *Id.* at 200. The sanction of a public reprimand was imposed. *Id.* The attorney had committed several other Rule violations, and the Court observed that in cases with similar conduct, including neglect, the Court has imposed discipline ranging from a public reprimand to a six-month suspension. *Id.* at 200-202. The Court in *Noel II* focused on neglect as a violation that will increase discipline when paired with other violations. Mr. Fischer admits to multiple violations of the Iowa Rules of Professional Conduct but neglect is not one of those such admissions; Mr. Fischer was not charged with neglect in his handling of the R.B. Homes matter. Any sanction imposed on Mr. Fischer should reflect that lesser sanctions, along the lines of a public reprimand, were imposed in similar instances of failure to clearly communicate with a client.



Mr. Fischer has admitted to all charged violations concerning his trust account. When dealing with client trust account violations, sanctions have ranged from a public reprimand when the violation was relatively minor and isolated, to license suspension when the violation involved poor office management and neglect, to license revocation when the violation amounted to a misappropriation of client funds. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Parrish*, 801 N.W.2d 580, 588 (Iowa 2011). Mr. Fischer was not charged with neglect of any client matters and did not commit a misappropriation of client funds. In cases where attorneys have committed pervasive trust account violations, sanctions of a suspension of the attorney's law license for 30 days have been imposed. The cases concerning pervasive trust account violations involve similar instances of conduct as Mr. Fischer while also demonstrating the sanctions imposed in cases of conduct more severe than Mr. Fischer's conduct.

In *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kersenbrock*, the attorney violated 32:1.15(a), 32:1.15(c), 32:1.15(f), 32:8.4(c), and 45.2(2) when she failed to deposit clients' retainers into a trust account, did not keep adequate trust account records, prematurely withdrew fees in a probate case, and misrepresented her trust fund practices on her annual client security questionnaire. 821 N.W.2d 415, 419-21 (Iowa 2012). No clients were

harm, the attorney had no disciplinary history, and the attorney acknowledged the inadequacies in her accounting practices and had taken steps to address the inadequacies. *Id.* at 422. Even considering the cumulative impact of multiple violations as an aggravating factor, the court found a suspension of 30 days appropriate. *Id.*

Mr. Fischer is charged with violations similar to those found in *Kersenbrock*. Mr. Fischer admits he violated Rule 32:1.15(a), (c), and (f) relating to his trust account practices, but the Board has not proven Mr. Fischer violated 32:1.15(c) in the R.B. Homes matter and has similarly not proven Mr. Fischer violated 32:8.4(c) in the R.B. Homes matter. The sanction in *Kersenbrock* reflected conduct more severe than Mr. Fischer's conduct, finding violations that are unproven against Mr. Fischer, and the Court found the proper sanction was a suspension of 30 days. As with Mr. Fischer, the attorney in *Kersenbrock* acknowledged the misconduct related to her trust account practices and took steps to address and prevent future misconduct. An additional mitigating factor present in both *Kersenbrock* and Mr. Fischer's case is the fact that no clients were harmed; however, the Commission failed to consider this mitigating factor in recommending a sanction for Mr. Fischer. Mr. Fischer, admittedly, has engaged in other sanctionable conduct not at issue in *Kersenbrock*, but the sanction in

*Kersenbrock* is instructive as to limited-in-time suspension for trust account violations. Mr. Fischer admits to the alleged trust account violations, and his sanction for these violations should reflect cases imposing limited-in-time suspensions for such violations.

In *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Boles*, the attorney's "flagrant, multiyear disregard for the billing and accounting requirements of our profession" warranted a 30 day suspension of his license to practice. 808 N.W.2d 431, 441, 443 (Iowa 2012). The attorney in *Boles* committed several Rule violations, but the Court found his violations primarily resulted from the above-quoted behavior. *Id.* at 440. The attorney in *Boles* withdrew unearned fees, delayed responses to client requests for accurate billings, and failed to promptly refund unearned fees, in addition to neglect of a client matter. *Id.* at 434-437. In determining a sanction, the Court focused on the attorney's trust account violations and failure to promptly refund unearned fees. *Id.* at 441. The Court found the attorney in *Boles* had extensive problems with his trust account stemming across multiple client matters. *Id.* at 442. However, the Court noted that *Boles* had corrected his trust account practices to prevent recurrence and had no instances of reoccurrence for four years; this was a mitigating factor for the Court. *Id.* The Court also noted an

additional mitigating factor that no clients were harmed by the attorney's trust account violations. *Id.*

The conduct of the attorney in *Boles* concerning his trust account is similar to the conduct of Mr. Fischer. Mr. Fischer has admitted to violations concerning his failure to maintain proper trust account records. In *Boles*, the Court specifically noted as an important mitigating factor that the attorney had corrected his trust account practices and had been maintaining proper trust account records for a period of time. *Id.* Similarly, Mr. Fischer has taken proactive measures to avoid further trust account violations, including sending his trust account records to an accountant each month to perform reconciliations and maintaining a trust account balanced to the penny since his 2019 audit. (App. pp. 315, 339). Mr. Fischer's conduct also did not result in harm to his clients, which was noted as a significant mitigating factor in *Boles*. Mr. Fischer's conduct related to his trust account is similar to the conduct in *Boles* where such conduct was sanctioned with a 30 day suspension; a similar sanction would be appropriate to address Mr. Fischer's conduct.

Mr. Fischer has admittedly committed several Rules violations related to this trust account, but several mitigating factors are in his favor for a less severe sanction. Mr. Fischer has a history of discipline, having received a

public reprimand and private admonition, however, neither of these were a result of trust account violations at issue in this action. Even with this history, Mr. Fischer has multiple mitigating factors, two of the most important being no clients were harmed and he has taken proactive measures to prevent future violations, that support him receiving a sanction of license suspension for a reduced period of time for his violations of the Iowa Rules of Professional Conduct.

#### V. REQUESTED RELIEF

Mr. Fischer violated Iowa Rules of Professional Conduct 32:3.2, 32:3.4(c), and 32:3.4(d) in the AlphaGen matter; 32:1.4(a)(3) in the R.B. Homes matter; and 32:1.15(a), 32:1.15(c), 32:1.15(f), 32:5.3(a), 32:5.3(b), 32:5.3(c)(2), 32:8.4(c), 45.2(3)(a)(9), and 45.7(3) relating to his trust account. The Board has alleged and failed to prove violations of 32:8.4(d) in the AlphaGen Matter; and 32:1.15(c), 32:8.4(b), and 32:8.4(c) in the R.B. Homes matter. The Commission's recommend sanction erroneously considered the unproven violations and failed to give due consideration to mitigating factors in making a sanction recommendation. Upon consideration of the proven violations, Mr. Fischer requests the Court impose a sanction of license suspension for a reduced period of time.

**REQUEST FOR ORAL SUBMISSION**

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

**CERTIFICATE OF COST**

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

**CERTIFICATE OF ELECTRONIC FILING AND SERVICE**

I hereby certify that on October 19, 2021, I, Melissa Ament, the undersigned, did electronically file the foregoing instrument with the Clerk of the Supreme Court, Case No. 21-1068, using the Court ECF System, which will send a notice of electronic filing to the following registered parties per Iowa Ct. R. 16.317(1); whom I understand to be Attorneys and parties of record on the EDMS Service List at the time and date of this filing:

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 9,543 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

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