In the Supreme Court of Iowa

Supreme Court No. 21-1068
Grievance Commission No. 910

Iowa Supreme Court
Attorney Disciplinary Board,

Appellee,

vs.

John Karl Fischer,

Appellant

Appeal from the Report of the Iowa Supreme Court Grievance Commission

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Appellee's Final Brief

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ROUTING STATEMENT

The Supreme Court should retain this case pursuant to Iowa Rule of Appellate Procedure 6.1101(2) because this is a case involving lawyer discipline.

STATEMENT OF THE CASE

Nature of the Case

The Iowa Supreme Court Attorney Disciplinary Board ("the Board") brought this lawyer disciplinary action against John Karl Fischer ("Fischer") alleging violations of the Iowa Rules of Professional Conduct and Iowa Trust Account Rules associated with litigation involving Fischer's client and company AlphaGen, an audit of Fischer's trust account records, and Fischer's representation of RB Homes and the Osborn brothers.

Course of Proceedings and Disposition

On June 5, 2020, the Board filed a Complaint against Fischer. (App. 7). On June 25, Fischer filed a Response to Complaint. The Board filed a Motion to Strike Answer on July 8 on the grounds that the Response did not comply with the rules. On July 17, Fischer filed an Amended Answer of Respondent. (App. 39). On September 23, the Board filed a Motion for Leave to Amend Complaint and Amended Complaint. (App. 44). On

September 30, Eashaan Vajpeyi entered an appearance on behalf of Fischer. Fischer filed his Answer to the amended complaint on October 13. (App. 72). On March 16, 2021, the Board filed its Second Motion for Leave to Amend Complaint and Second Amended Complaint, removing certain allegations and Count II. (App. 76).

On April 5–6, 2021, a hearing was held in this matter before the 630th Division of the Grievance Commission ("the Commission"). On May 24, the Board and Fischer submitted Post-Trial Briefs. On August 2, the Commission filed its Findings of Fact, Conclusions of Law, and Recommended Sanctions. (App. 641).

Commission's Conclusion and Recommendations

The Commission concluded that Fischer violated Iowa Rules of Professional Conduct 32:3.2, 3.4(c), 3.4(d), and 8.4(d) with respect to Count I (AlphaGen Matters); rules 32:1.15(a), 1.15(c), 1.15(f), 5.3(a), 5.3(c)(2), and 8.4(c) and Iowa Court Rules 45.2(3)(a)(9) and 45.7(3) with respect to Count III (Trust Account Audit); and rules 32:1.4(a)(3), 1.15(c), 8.4(b), and 8.4(c) with respect to Count IV (RB Homes Matter). (App. 648–50). The Commission recommended that Fischer's license to practice law be revoked. (App. 652).

Fischer's Appeal

On August 6, 2021, Fischer filed his notice of appeal with the Commission clerk. (App. 653).

STATEMENT OF FACTS

Fischer was admitted to practice law in Iowa on June 15, 1979. (App. 310 (Tr. 380:17–19)). Fischer is the sole member of Fischer Law, P.L.L.C. in Vinton, Iowa. (App. 258 (Tr. 263:12–15)). Before he became a solo practitioner, Fischer practiced with his cousin, Robert Fischer. (App. 258 (Tr. 263:12–15)). In 2011, Fischer started his own practice. (App, 258 (Tr. 263:12–15)). Starting in February 2014, Fischer was the only attorney practicing at his law firm. (App. 257 (Tr. 229:1–3), 258 (Tr. 263:19–22)). Fischer practices primarily in trust and estate work, probate, real estate, and tax. (App. 258 (Tr. 263:16–18)).

AlphaGen Litigation

AlphaGen Materials Technology, Inc. ("AlphaGen") is an Iowa corporation for which Fischer has acted as a director since its incorporation in 2008. (App. 259 (Tr. 265:3–9)). In addition to being a shareholder, Fischer is the vice president, secretary, and treasurer of AlphaGen, as well as its attorney. (App. 259 (Tr. 265:10–13, 19–20), 261 (Tr. 267:7–12)).

Fischer does not dispute the facts regarding the AlphaGen matter as found by the Commission, which adopted the facts as set forth in the Board's Complaint against Fischer. (App. 80–86, 643–44; Respondent–Appellant's Proof Brief ("Br.") 11–12).

On March 12, 2012, attorney Daniel Kresowik ("Kresowik") filed a Petition in Benton County Case No. LACV008250 on behalf of his clients Marc Jalbert et al. against AlphaGen because of a contract dispute. (App. 341–53). In the course of that case, Fischer repeatedly failed to comply with court orders and provide complete discovery. (App. 410). Finally, following judgment against AlphaGen and repeated noncompliance with discovery orders in connection with the debtors' examinations, the parties entered into a Settlement Agreement with AlphaGen, Fischer, and AlphaGen shareholder Matthew Merchant ("Merchant"), whereby AlphaGen, Fischer, and Merchant agreed to pay $524,000 to the plaintiffs by March 6, 2015, to settle Case No. LACV008250. (App. 462–65). The parties executed the Settlement Agreement on October 31, 2014. (App. 462, 465).

On March 20, 2015, Kresowik filed a Petition to Enforce Settlement Agreement and Pierce Corporate Veil in Benton County Case No. EQCV008984 on behalf of Marc Jalbert et al. against AlphaGen, Fischer,

and Merchant (collectively, "the Defendants"). (App. 455–61). The Defendants had failed to pay the plaintiffs by the agreed-upon date. (App. 455–61). Fischer represented the Defendants in that case. (App. 470).

Kresowik served AlphaGen with discovery requests on April 27, 2015. (App. 466–65). Fischer was served with discovery requests in his individual capacity on April 28. (App. 468–69). On July 23, Kresowik filed a Motion to Compel and Motion to Set Hearing on Motion to Compel, as the Defendants had not provided complete discovery responses. (App. 471–73). On September 15, the court granted the Motion to Compel, ordering the Defendants to provide full and complete responses to the discovery requests by October 5 and pay reasonable attorney fees. (App. 474–75).

The Defendants did not provide full and complete answers to the discovery requests by that date, causing Kresowik to file an Application for Rule to Show Cause/Hold in Contempt on October 13, 2015. (App. 477–79). On January 4, 2016, the court issued its Order Re: Rule to Show Cause. (App. 481–83). The court noted in its order, "Under the circumstances the court finds beyond a reasonable doubt, that Defendants have willfully and intentionally failed to comply with the September 14, 2015 Order compelling discovery." (App. 482). The court

ordered the imposition of sanctions "for Defendants' continued lack of cooperation in the discovery process" and ordered the Defendants to provide full and complete answers by January 6, 2016. (App. 482).

The Defendants did not provide complete discovery responses by that date. (App. 207 (Tr. 39:2–4)). Thus, Kresowik filed a Motion for Sanctions on January 7, 2016. (App. 484–88). On February 1, the court issued an order on the Motion for Sanctions and stated, "The Court is greatly troubled by Defendants' willful failure to provide discovery as twice previously ordered in this case." (App. 490). The court sustained the Motion for Sanctions and further ordered that the Defendants provide complete discovery responses by March 1. (App. 490–91).

The Defendants still did not provide complete discovery responses by that date. (App. 208 (Tr. 41:17–23)). Kresowik filed a Motion for Sanctions, Entry of Judgment on Petition, and Dismissal of Counterclaims on March 24, 2016, based upon the Defendants' repeated disregard of the court's orders. (App. 493–500). On June 1, the court issued its Ruling on Kresowik's motion. (App. 501–10). Based upon the Defendants' failure to comply with the orders regarding discovery, the court granted the motion and entered default judgment against the Defendants in the

amount of $524,000 plus interest, which was "the amount of the mediated settlement agreement between the parties." (App. 501–10).

Following entry of judgment against the Defendants, Kresowik filed motions for debtors' examinations against each of the Defendants. (App. 511–23). On November 23, 2016, the court ordered that the Defendants produce the documents sought by December 5, 2016. (App. 524). Despite the previous court orders rebuking Fischer and the other Defendants for their willful failure to provide discovery, Fischer and the other Defendants did not provide the required documents, causing Kresowik to file an Application to Show Cause/Hold in Contempt on December 14, 2016. (App. 526–32). On April 17, Kresowik filed a Dismissal of Application for Contempt with Prejudice and Notice of Cancellation of May 19, 2017 Hearing based upon a resolution of the dispute between the parties. (App. 540–41). That same date, Kresowik filed a Satisfaction of Judgment, although the judgment had not been paid and satisfied at that time. (App. 214 (Tr. 62:2–12), 308–09 (Tr. 373:16–374:8), 640).

Throughout the AlphaGen litigation, rather than assert that he did not have access to the documents and could not obtain them, Fischer repeatedly told Kresowik that he was going to get him the documents that

were requested. (App. 213 (Tr. 57:17–20)). Fischer admitted that he failed to provide timely discovery responses. (App. 262 (Tr. 270:17–19)). In the second AlphaGen case, Fischer was himself a defendant and nevertheless missed the discovery deadline regarding his personal debtor exam and failed to produce documents to which he unambiguously had access. (App. 209 (Tr. 45:20–22), 263–66 (Tr. 278:23–281:2)). Kresowik noted that in his fifteen years as a litigator, he had never experienced such extensive discovery issues. (App. 210 (Tr. 49:15–20)). Furthermore, this was the only time he had ever seen a judgment entry due to a lack of discovery responses. (App. 210 (Tr. 49:11–14)).

Trust Account Violations

In 2015, Iowa Supreme Court Client Security Commission ("CSC") auditor Charles Brinkmeyer ("Brinkmeyer") initiated an audit of Fischer's client trust account ("CTA"). (App. 542; Supp. App. 5 (Tr. 125:14–17)). The audit disclosed multiple problems in Fischer's bookkeeping, and Brinkmeyer explained to Fischer how to keep individual client ledger sheets and how to perform a monthly triple reconciliation. (Supp. App. 6–8 (Tr. 135:22–137:5), 9 (Tr. 286:18–22)).

Fischer did not remedy his problematic bookkeeping. (App. 268 (Tr. 292:7–16), 324–25 (Tr. 407:12–408:17), 326 (Tr. 409:19–25)). In August 2019, CSC auditor Steven Bly ("Bly") audited Fischer's CTA. (App. 565). Fischer provided Bly with his records, which were "extremely messy and incomplete." (App. 248 (Tr. 187:7–9)). The audit revealed that Fischer had not been completing triple monthly reconciliations and that his account was underfunded by $10,042.93.[1] (App. 249–50 (Tr. 195:25–196:9)).

Fischer does not contest that he violated Iowa Rules of Professional Conduct 32:1.15(a), 1.15(c), 1.15(f), 5.3(a), 5.3(c)(2), and 8.4(c). Fischer also does not contest his violation of Iowa Court Rules 45.2(3)(a)(9) and 45.7(3) in connection with the 2019 audit.

RB Homes Matter

Joshua Osborn ("Josh") and James Osborn ("James") are brothers who together created RB Homes, Inc. ("RB Homes"), for the purpose of

[1] As will be discussed below, the RB Homes matter actually reveals that Fischer's CTA was underfunded by an additional $6168, as information regarding an uncashed check for this amount was not provided to Bly during the audit. (App. 255–56 (Tr. 221:19–222:13)).

building spec homes. (App. 215–16 (Tr. 64:20–65:8)). RB Homes, James, and Josh were sued because of storm damage to a roof. (App. 216 (Tr. 65:9–15)). Fischer represented RB Homes and James and Josh as individuals in that lawsuit. (App. 216 (Tr. 65:20–24), 274 (Tr. 317:14–17), 336–37 (Tr. 433:20–434:9)).

In May 2014, the plaintiffs and defendants in that lawsuit reached an agreement whereby James and Josh would pay a total of $15,000 to settle the case. (App. 217 (Tr. 66:12–16), 603). The brothers agreed that each would pay half of the settlement amount. (App. 217–18 (Tr. 66:24–67:8)). The brothers also had an agreement with Fischer that each brother was responsible for his own share of the attorney fees owed to Fischer. (App. 217 (Tr. 66:17–20), 218 (Tr. 67:2–15), 322–23 (Tr. 403:18–404:6)).

On September 4, 2014, Josh met with Fischer at the bank in order to pay his half of the settlement fees, as well as attorney fees Josh owed to Fischer. (App. 219–20 (Tr. 68:4–69:5), 231 (Tr. 89:14–16), 320 (Tr. 401:11–18), 599). Fischer told Josh how much Josh owed in attorney fees. (App. 229–30 (Tr. 84:20–85:7)). Josh paid Fischer a total of $9200 that day, with $7500 of that to pay for Josh's portion of the settlement and $1700 to pay for his portion of Fischer's attorney fees. (App. 219–20 (Tr.

68:15–69:2)). Josh explicitly told Fischer how the money was to be used. (App. 220 (Tr. 69:3–5)).

On September 8, 2014, Scott Bardole ("Bardole"), the attorney for the plaintiffs in the case against RB Homes and the Osborn brothers, emailed Fischer, instructing him to issue a check payable to Travelers Commercial Insurance Company ("Travelers") for the full settlement amount of $15,000. (App. 607). On September 9, despite having already received payment from Josh, Fischer emailed Bardole, "I had apparently told the Osborns $10,000 total; do we have anything in writing to confirm $15,000; not trying to back out only confirm what was agreed." (App. 607). Bardole provided the confirmation as requested. (App. 609).

On September 11, 2014, Fischer issued a check to Travelers from his CTA for $6168, noting in the memo line the check was for "Josh Osborn/part payt. settlement." (App. 611). Rather than issue a check for Josh's full half of the $15,000 settlement—which Josh had already given to Fischer for that purpose—Fischer took attorney fees owed by James out of Josh's funds. (App. 275 (Tr. 319:16–24), 277 (Tr. 321:6–9)). This was explicitly contrary both to Josh's instructions on September 4 and to the agreement between Fischer, Josh, and James that the brothers would

each be responsible for his own fees. (App. 275 (Tr. 319:12–24), 276 (Tr. 320:1–21), 323 (Tr. 404:7–10)).

Fischer admitted regarding his fees,

> [Josh] or his brother wanted to divide that up, I agreed, and then when his brother didn't come in the day or two after, I was unhappy, so I just took the entire fee for RB Homes that was due that I had shown him, and, yes, in my agreement with him, I was going to take half and half, but the other brother didn't -- did not come in as promised.

(App. 275 (Tr. 319:16–24)).

Essentially, Fischer took funds from Josh when James did not pay Fischer when he wanted to be paid. (App. 284–85 (Tr. 329:25–330:2)). When asked whether he had permission to do that, Fischer stated, "No. No, I was mad." (App. 276 (Tr. 320:11–13)). He went on, "I knew that was not in accordance with what [Josh] had directed me to do . . . . The agreement with him was that he and his brother would split that." (App. 276 (Tr. 320:16–21)).

> Q. … So we're all on the same page, you took $1300 of Josh's money that he wanted you to give to Traveler's?
>
> A. That's correct.

(App. 277 (Tr. 321:6–9)). Fischer admitted, "[U]nder the agreement that I had with Josh and James, they were -- that was not his fee to pay for his brother, even though it was billed to RB Homes, and he was the

president." (App. 284 (Tr. 329:20–23)). He went on, "And I did that because I felt that -- I just felt unhappy with the brother for not complying." (App. 284–85 (Tr. 329:25–330:2)).

Fischer again stated that he took the money not because he thought Josh owed him the money but because he was "mad."

> MR: ANDERSON: Did you have any agreement or contract in place with Josh Osborn that he would be responsible for paying his brother's --
>
> THE WITNESS: No.
>
> MR. ANDERSON: -- attorney's fees?
>
> THE WITNESS: No, that was my fault, because I was -- I was mad.

(App. 319–20 (Tr. 400:23–401:4)).

Travelers did not receive any payments from Fischer beyond the $6168 payment. (App. 242 (Tr. 165:10–11)). As Bardole had previously indicated to Fischer, Travelers would not cash any check unless they received the full $15,000 settlement amount. (App. 279–80 (Tr. 323:25–324:5), 323 (Tr. 404:21–24), 606–07). Thus, Travelers did not cash the check for $6168. (App. 241 (Tr. 164:19–25), 601). When Travelers did not cash that check, Fischer at some point withdrew those funds from his CTA. (App. 238 (Tr. 132:20–24), 272 (Tr. 315:14–23), 321–22 (Tr. 402:25–403:7)). Fischer admitted to taking the $7500 out of his CTA

without a colorable future claim to those funds. (App. 287 (Tr. 333:7–19), 321–22 (Tr. 402:25–403:7)). Fischer claimed this taking was unintentional. (App. 286 (Tr. 331:10–14), 287 (333:17–19)).

Because Travelers did not receive full payment of the settlement, Bardole filed a Plaintiffs' Motion to Enforce Settlement on May 31, 2016, seeking the full $15,000 settlement amount. (App. 601–02). Fischer did not tell James or Josh about the motion. (App. 220–21 (Tr. 69:15–70:6), 234 (Tr. 110:7–10), 320 (Tr. 401:19–22)). Fischer appeared at the hearing on behalf of the defendants and did not resist the motion. (App. 243 (Tr. 166:6–11), 278 (Tr. 322:20–24), 616). He did not argue that the motion should not be granted or should be granted only in part because Travelers had already cashed the check he had issued in September 2014. (App. 616). The court granted the motion on July 22, 2016, ordering that James, Josh, and RB Homes pay $15,000 no later than August 31. (App. 616). Fischer did not tell James or Josh about this court order. (App. 221 (Tr. 70:7–23), 234 (Tr. 110:7–10), 320 (Tr. 401:19–22)).

On December 5, 2016, Bardole filed Plaintiffs' Motion for Entry of Final Judgment, since Travelers had not received $15,000 pursuant to the August 31 order. (App. 619–20). Fischer did not tell James or Josh about this motion. (App. 222 (Tr. 71:7–19), 234 (Tr. 110:7–10), 320 (Tr.

401:19–22)). Fischer did not resist the motion or file any pleading requesting the court enter judgment for $8832, the $15,000 less the previously issued check, though he appeared personally at the hearing on the motion and indicated no opposition to the motion. (App. 280 (Tr. 324:11–17), 600). On December 22, the court issued its Order for Judgment against James, Josh, and RB Homes "jointly and severally for $15,000 plus interest computed from August 31, 2016, and for court costs." (App. 623). Fischer did not tell James or Josh about this judgment against them. (App. 222–23 (Tr. 71:20–72:12), 320 (Tr. 401:19–22)). At the time this order was entered, and indeed, at the time Bardole filed his original Motion to Enforce Settlement, Josh believed that all necessary payments had been made to Travelers. (App. 221–22 (Tr. 70:24–71:6), 233 (Tr. 98:22–25)).

In fact, he continued believing the matter was resolved until James sold his home in 2020. In December 2019, James received an offer to purchase his home. (App. 234 (Tr. 110:21–23)). When the house sold in February 2020, James and his wife Brein Osborn learned of the judgment because of a lien on the property. (App. 234 (Tr. 110:15–23), 625). They did not know of the judgment or lien before that point. (App. 235 (Tr. 111:2–4)). When the property ultimately sold, the judgment payoff was

$17,990.21. (App. 625). They paid the judgment through their proceeds because they had no other choice; they had to sell their home. (App. 235 (Tr. 111:15–17)). James paid $2,990.21 more than the original $15,000 settlement because of the interest accrued on the judgment. (App. 236 (Tr. 112:10–14)). Fischer did not reimburse James for this additional cost. (App. 237 (Tr. 113:13–15)).

When James paid the judgment because of the lien on his property, Josh contacted Fischer to ask why his payment had not been applied to the settlement. (App. 224 (Tr. 73:6–8), 626). Fischer then sent a letter to Josh, stating,

> We have tried, since your first call stating that your brother had paid our negotiated settlement with Travelers Ins., to obtain the status of our check to Travelers in Sept. of 2014. Finally, on April 6th, 2020[,] a legal secretary from Bardole's office emailed that the check was voided and destroyed after 5 yrs. prior to your brother's payment.
>
> We have yet to receive the check as requested and have not reviewed our trust acct – going back 5 yrs. because of the fire in 2018.
>
> In the interim we enclose a check for $2,225 as part of the escrow amt, assuming Travelers can provide some explanation.

(App. 626). This letter, dated April 10, 2020, was sent almost four years after Fischer received official notice that the check had not been cashed

when Bardole filed his Plaintiffs' Motion to Enforce Settlement in May 2016. (App. 277–78 (Tr. 321:23–322:3), 601, 626).

Fischer sent periodic reimbursement checks to Josh from April 10 to August 20, 2020. (App. 626–31). The total amount of the reimbursement was $6168. (App. 626–31). Fischer did not reimburse Josh for the portion he took to cover James's fees. (App. 228 (Tr. 78:13–15), 322 (Tr. 403:8–17)).

> Q. … So it's true that you never reimbursed [Josh] for the $1300 in attorney fees that you took without his permission, correct?
>
> A. No. That was an amount that had been owed five years ago, but I didn't – I didn't – I took – I took that amount as attributed to James, because he was supposed to pay the next day, and yes, that is what happened.

(App 283–83 (Tr. 328:19–329:1)).

ARGUMENT

Error Preservation

The Board agrees Fischer preserved the issues presented for appellate review.

Scope and Standard of Appellate Review

The Board agrees with Fischer that the scope and standard of appellate review is de novo. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Watkins*, 944 N.W.2d 881, 884 (Iowa 2020).

I. THE COMMISSION CORRECTLY DETERMINED FISCHER'S CONDUCT IN THE ALPHAGEN MATTER WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

Iowa Rule of Professional Conduct 32:8.4(d) states, "It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice." This Court has repeatedly found that "an attorney violates rule 32:8.4(d) when the misconduct results in additional court proceedings or causes court proceedings to be delayed or dismissed." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Noel*, 933 N.W.2d 190, 204 (Iowa 2019) (quoting *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Vandel*, 889 N.W.2d 659, 666 (Iowa 2017)). Fischer's "neglectful and untimely handling of discovery matters resulted in additional court proceedings and caused other court proceedings to be delayed." *See id.* Fischer's conduct caused opposing counsel to file multiple motions to compel, motions to show cause/hold in contempt, and motions for sanctions; these in turn caused the court to spend time reviewing the file and holding hearings on those motions. (App. 365–66, 408, 421–24, 436–

41, 471–75, 477–79, 481–82, 484–91, 493–509, 526–32). Fischer's "conduct interfered with the operation of the court system" by causing five additional hearings. *See Noel*, 933 N.W.2d at 204 (noting that the attorney's conduct interfered by causing *three* additional hearings). Fischer's conduct necessitated a continuance of the trial. (App. 266 (Tr. 281:8–14), 490).

Fischer argues that he was not the one responsible for the numerous delays, costs, and additional court proceedings, so he could not violate rule 32:8.4(d).[2] This is false and inconsistent with the record.

Fischer portrays his continued implicit refusal to comply with discovery orders as "proper and not prejudicial to the administration of justice" because he "believ[ed] his client" when he told him discovery

[2] Although Fischer denies now that his conduct in relation to the AlphaGen matter was prejudicial to the administration of justice, Fischer admitted as much both in his Amended Answer and at the hearing. (App. 39, 267 (Tr. 282:16–20)). "Admissions may be relied upon to meet the evidentiary burden of the Board." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Alexander*, 727 N.W.2d 120, 122 (Iowa 2007).

responses were forthcoming. This does not explain why Fischer did not at any point during the AlphaGen litigation tell anyone—not even opposing counsel—that the delayed discovery responses were because his client had not provided them. (App. 211–12 (Tr. 52:22–53:16)). Fischer never asked opposing counsel or the court for extensions of deadlines to allow his client time to respond to discovery. (App. 455). Despite the numerous communications from opposing counsel requesting the information and noting missed deadlines, Fischer never told opposing counsel that he simply could not provide the information because he did not have it yet. In spite of the wasted judicial resources in delayed hearings and additional proceedings, Fischer never indicated to the court that the only reason the information had not been provided to opposing counsel was because his client had not provided it. It was only when Fischer faced professional discipline for this conduct that he claimed his client withheld this information.

Fischer did *nothing* in litigation that might indicate the discovery issues stemmed from his client's failure to provide information. When asked at the hearing why Fischer had not simply told the court that his client was being difficult and that was why he could not turn over discovery responses, Fischer merely stated that since he was not a trial

lawyer, he did not know why he did not do it. (App. 318–19 (Tr. 399:19–400:6)). Fischer then admitted, "It's my fault. I did it because I didn't know what else to do and -- Yes, it's my fault. It's nobody else's. I knew better." (App. 319 (Tr. 400:13–16)). Fischer filed no motions to indicate this problem and made no mention at any of the hearings about his client's failure to provide discovery responses.

Furthermore, the record indicates that Fischer did have access to the information sought in discovery. When the case was originally filed against AlphaGen in 2012 and throughout the pendency of the entire case, Fischer was a director of AlphaGen. (App. 259 (Tr. 265:3–9), 260 (Tr. 266:7–10)). In addition to being a director and attorney for AlphaGen, Fischer was also a shareholder, vice president, secretary, and treasurer of AlphaGen. (App. 259 (Tr. 265:10–13, 29–20), 261 (Tr. 267:7–12)). It is disingenuous for Fischer to argue that, despite wearing all of these hats for AlphaGen, he had no means of accessing the information sought in discovery.

Additionally, Fischer failed to comply with court orders to provide discovery responses even in his individual capacity. In the second AlphaGen case filed in March 2015, Fischer was both a defendant and the attorney for the Defendants. (App. 456–61, 470). Fischer failed to

respond to discovery requests in his individual capacity, as well as the requests on behalf of his client, resulting in multiple motions by plaintiff's counsel, hearings, and court orders. (App. 471–510). Even after the court entered default judgment against the Defendants based upon their failure to comply with discovery orders, Fischer still did not comply. After opposing counsel filed motions for debtors' examinations against the Defendants, including Fischer, the Defendants did not produce the documents requested. (App. 511–32). Fischer's client had nothing to do with his failure to provide his own discovery responses.

Fischer's tactic of blaming his client for his lack of communication with the court and opposing counsel, disregard of court orders, and failure to provide discovery does not excuse Fischer's behavior. Fischer's conduct was prejudicial to the administration of justice. In *Iowa Supreme Court Board of Professional Ethics & Conduct v. Waples*, the attorney took a similar tack to Fischer's; he blamed his legal assistant and his client for his failure to file the required affidavits in a custody matter. 677 N.W.2d 740, 742–43 (Iowa 2004). The court was unpersuaded and found that the fault lay not with the client but with the attorney's "mishandling of the case," and the attorney's conduct was found to be prejudicial to the administration of justice. *Id.* at 743. Fischer likewise cannot blame his

client for his own misconduct. *See id.*; *see also Iowa Supreme Ct. Att'y Disciplinary Bd. v. Barnhill*, 885 N.W.2d 408, 423 (Iowa 2016) (finding "unavailing" the attorney's argument that her failure to comply with discovery order was due to the uncooperativeness of her client where the record revealed she had access to the documents to be produced); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Fleming*, 602 N.W.2d 340, 342 (Iowa 1999) (finding the attorney's conduct was prejudicial to the administration of justice because "[a]lthough Fleming attempt[ed] to shift the blame for his neglect to the corporate executor, the record makes clear that he permitted several important deadlines to pass without any action whatsoever"); *cf. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Belay*, 420 N.W.2d 783, 784 (Iowa 1988) (finding the attorney's conduct was prejudicial to the administration of justice and rejecting the attorney's argument that his failure to file a tax return did not amount to a violation because his employer was "partly to blame for failure to furnish adequate income data" for him to compute his tax liability because the attorney knew of the filing deadlines and of his own failure to comply with them).

The Commission correctly found that the Board proved by a convincing preponderance of the evidence that Fischer violated rule 32:8.4(d) in the AlphaGen matter.

II. THE COMMISSION CORRECTLY FOUND FISCHER VIOLATED RULES 32:1.15(c), 8.4(b), AND 8.4(c) IN THE RB HOMES MATTER.

A. Fischer Violated Rule 32:1.15(c) When He Withdrew Unearned Fees from the Osborn/RB Homes Account.

Iowa Rule of Professional Conduct 32:1.15(c) states, "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." An attorney violates this rule "by withdrawing fees and expenses before they [are] earned." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Cross*, 861 N.W.2d 211, 219–20 (Iowa 2015). In *Iowa Supreme Court Attorney Disciplinary Board v. Earley*, the court found that the attorney had violated rule 32:1.15(c) when he withdrew unearned fees from his trust account. 933 N.W.2d 206, 213 (Iowa 2019). Similarly, Fischer admitted at the hearing that he withdrew $6168 from his client trust account belonging to Josh Osborn when the check was not cashed by Travelers. (App. 287 (Tr. 333:7–19), 321–22 (Tr. 402:25–403:7)). Fischer admitted that he had not earned these fees. (App. 287

(Tr. 333:7–19), 321–22 (Tr. 402:25–403:7)). This was a violation of rule 32:1.15(c). *See Earley*, 933 N.W.2d at 213; *see also Iowa Supreme Ct. Att'y Disciplinary Bd. v. Weiland*, 885 N.W.2d 198, 206 (Iowa 2016) (noting that "[p]rematurely withdrawing fees violates rule 32:1.15(c)"). Although Fischer attempts to muddle the issue of whether he withdrew unearned fees from his trust account, the violation is clear.

Fischer claims that "[t]here was confusion regarding whether Traveler's (sic) had cashed the check." That is patently false. There is no confusion about this. The record is unambiguous that Travelers had not cashed the check and counsel for Travelers had explicitly told Fischer that the check would not be cashed. (App. 241–42 (Tr. 164:19–165:6), 244–45 (Tr. 169:24–170:2), 601, 612–13).

Regardless, whether Fischer was initially "confused" about the status of the check is irrelevant. Fischer admitted at the hearing that he withdrew $6168 belonging to Josh Osborn from his CTA when the check was not cashed by Travelers. (App. 287 (Tr. 333:7–19), 321–22 (Tr. 402:25–403:7). Fischer admitted that he had not earned these fees. (App. 287 (Tr. 333:7–19), 321–22 (Tr. 402:25–403:7)).

Even if Fischer's withdrawal of $6168 that he had not earned was somehow based upon a confusion, this still does not justify or excuse his

violation of this rule. Fischer's CTA had been audited by the Client Security Commission. (App. 542). During that audit, auditor Brinkmeyer and trainee Paul Gilbert—based upon Fischer's input and records he provided—compiled a list of all of Fischer's clients with balances remaining in Fischer's CTA. (App. 238 (Tr. 132:1–19), 548–49). Neither Josh Osborn nor RB Homes was among the clients with a balance in the CTA. (App. 238 (Tr. 132:20–24), 548–49). The audit made it very clear that Josh's funds were not in the CTA. When Bardole filed the Motion to Enforce Settlement in 2016, Fischer was put on explicit notice that Travelers had not cashed the check and the funds therefore should still have been sitting in his CTA. At that point, Fischer knew both that Travelers had not cashed the check and that the funds were not in his trust account. As the sole signatory to his trust account and a solo practitioner, the only party who could have withdrawn those funds was Fischer himself. (App. 331–32 (Tr. 417:18–418:2)). Thus Fischer was *fully* aware in 2016 that the check had *not* been cashed and the funds were not in his trust account, and he *did nothing*. Fischer did not reimburse his trust account. If Fischer's taking of the funds had indeed somehow been an honest mistake, as soon as he was informed in 2016 that the check had not been cashed, he would have reimbursed his trust

account and informed his clients about the litigation. He did neither. Instead, Fischer did not reimburse his trust account and did not tell the Osborns about the motions filed by opposing counsel or the hearing that took place.

Fischer violated Iowa Rule of Professional Conduct 32:1.15(c) when he withdrew $6168 of Josh's settlement funds from his CTA, as that money was neither earned fees nor incurred expenses. (App. 321–22 (Tr. 402:25–403:7)). The Commission correctly found that the Board proved by a convincing preponderance of the evidence that Fischer violated rule 32:1.15(c).

B. Fischer Violated Rules 32:8.4(b) and 8.4(c) When He Misappropriated Funds Without a Colorable Future Claim.

Iowa Rule of Professional Conduct 32:8.4(b) states, "A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." This Court has found that "[a] lawyer who commits a theft of funds engages in conduct involving moral turpitude, dishonesty, and conduct that adversely reflects on the lawyer's fitness to practice law." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kozlik*, 943 N.W.2d 589, 595 (Iowa 2020) (citations omitted). "A lawyer need not be charged or convicted of a crime in order

to be found in violation of this rule." *Id.* (quoting *Cross*, 861 N.W.2d at 222). Pursuant to Iowa Code section 714.1(2) (2020), "[a] person commits theft when the person … [m]isappropriates property which the person has in trust … by using it 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."

Rule 32:8.4(c) states, "It is professional misconduct for a lawyer to engage in misconduct involving dishonesty, fraud, deceit, or misrepresentation." The Board must show that an attorney "acted with some level of scienter greater than negligence or incompetence" to show a violation of this rule. *Kozlik*, 943 N.W.2d at 595 (citations omitted). "An attorney's 'casual, reckless disregard for the truth' … establishes sufficient scienter to support a violation of the rule." *Id.* (quoting *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Clarity*, 838 N.W.2d 648, 656 (Iowa 2013)).

This Court has stated that "misappropriation of funds is a clear violation of both rules." *Id.* (citations omitted). Thus, Fischer's misappropriation of funds in the Osborn matter is a clear violation of both rule 32:8.4(b) and 8.4(c). *See id.*

Fischer's conversion of funds is two-fold. First, Fischer converted $1332 from Josh when he took funds from Josh's settlement payment to pay himself attorney fees owed by another client, James Osborn. Second, Fischer converted $6168 from his CTA—funds belonging to Josh—when he withdrew the funds after Travelers did not cash the check. Fischer did not have a colorable future claim to those funds in either instance.

i. Misappropriation of $1332

Fischer converted $1332 of Josh's money to pay himself for attorney fees owed by James without a colorable future claim to those funds. Fischer misappropriated the funds entrusted to him by Josh by converting them to his own use, contrary to the clear directive of Josh.

Fischer seems to imply that he was entitled to take the $1332 from Josh because RB Homes was a defendant in the case and Josh was the representative for the entity. This is untenable given the evidence presented at hearing, other testimony, and Fischer's own admissions.[3] It

[3] Fischer's argument also fails because Iowa Code section 490.622(2) states, "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation." Fischer, an experienced lawyer who

is plain from the record that Fischer knew that the funds Josh gave to him on September 4, 2014, were for the very specific purpose of paying the entirety of his half of the settlement and the attorney fees that *he* owed to Fischer. (App. 219–20 (Tr. 68:15–69:5)). Josh testified that Fischer, James, and Josh had agreed that James and Josh would pay their own attorney fees. (App. 217 (Tr. 66:17–20), 218 (Tr. 67:2–15), 322 (Tr. 403:18–404:6)). Fischer himself admitted that James and Josh had agreed with Fischer that each was responsible for his own fees. (App. 275 (Tr. 319:16–24), 284 (Tr. 329:20–23)). Nevertheless, Fischer took from Josh's settlement portion attorney fees that were owed to him by another client without permission from Josh to do so. (App. 276 (Tr. 320:11–21)). In so doing, Fischer violated Iowa Code section 714.1(2) and Iowa Rules of Professional Conduct 32:8.4(b) and 32:8.4(c). *See Kozlik*, 943 N.W.2d at 596 (noting misappropriation of funds violates section 714.1(2) and

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was both attorney and party to the AlphaGen lawsuit in which the opposing party sought to pierce the corporate veil, would be well aware of this principle. Additionally, Fischer did not represent only RB Homes in the lawsuit; he also represented James and Josh as individual defendants in the lawsuit. (App. 337 (Tr. 434:3–9), 600).

rules 32:8.4(b) and (c)); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Den Beste*, 933 N.W.2d 251, 254 (Iowa 2019) (finding attorney's theft of funds belonging to the law firm violated section 714.1(2) and subsequently was a violation of rule 32:8.4(b)); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Parrish*, 925 N.W.2d 163, 178 (Iowa 2019) (noting theft of client funds would be a violation of section 714.1(2) and rules 32:8.4(b) and 32:8.4(c)); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kowalke*, 918 N.W.2d 158, 163 (Iowa 2018) (finding that the attorney converted estate funds in violation of section 714.1(2) and rules 32:8.4(b) and 32:8.4(c)).

As the Commission noted, this case is similar to *Iowa Supreme Court Attorney Disciplinary Board v. Wengert*, 790 N.W.2d 94 (Iowa 2010). (App. 651–52). In that case, the court revoked the attorney's license to practice law because, in addition to the other violations, she misappropriated client funds. *Wengert*, 790 N.W.2d at 104. The attorney misappropriated funds from a client but compounded the issue when she used another client's funds to pay back the money she had taken. *Id.* at 102. Although Fischer had earned his fees from Josh, like the attorney in *Wengert*, he was not entitled to convert from one client to cover the responsibilities for another client. *See id.* Similarly, in *Iowa Supreme Court Board of Professional Ethics & Conduct v. Leon*, an attorney

neglected client matters and then misappropriated other clients' funds in an effort to cover his actions. 602 N.W.2d 366, 338–39 (Iowa 1999). There, the court made it abundantly clear that the act of taking from one client to pay for another is conversion. *Id.*

A key point linking *Wengert* and *Leon* to Fischer is that there were separate clients in each case. Josh and James were separate clients that Fischer represented as individuals and who owed separate fees to Fischer. Fischer admitted as much at the hearing. (App. 275 (Tr. 319:12–24), 276 (Tr. 320:1–21), 323 (Tr. 404:7–10), 336–37 (Tr. 433:20–434:9)). Fischer also admitted in general that he had taken money from one client to pay for work done for another client.

> MR. FISHER: So you received money from another -- from one client's account to pay for work done for another client?
>
> THE WITNESS: No. I might have -- Well, it's however you look at it. I may have overpaid the firm for work that had been done for that specific client, and then, as a consequence, I guess you could say that that was taken from somebody else, but it wasn't intentional that it was viewed like that.

(App. 329 (Tr. 412:15–23)). It is clear that he did this in the RB Homes matter. Not only that, but it is simply not true that Josh and James had an agreement for division of fees that Fischer did not know about, as Fischer implies. (Br. 36). Fischer admitted at the hearing that although he also

represented RB Homes, he had an agreement with Josh and James that they would be responsible for their individual attorneys' fees. (App. 284 (Tr. 329:20–23)). Fischer did not take the fees from Josh because of a misunderstanding or miscommunication; Fischer stole the fees because he was "mad." (App. 319–20 (Tr. 400:23–401:4)). As the Commission found, Fischer had "no colorable future claim to the funds because there was no circumstance under which Josh would be required to pay another client's fees." (App. 652).

When Fischer stole from one client to pay for the fees of another, it was theft or misappropriation, as he converted that money for his own personal use. *See Kozlik*, 943 N.W.2d at 599–600 (revoking attorney's license where the attorney misappropriated funds from an estate); *Kowalke*, 918 N.W.2d at 163 (revoking attorney's license where the attorney converted funds held in trust for his own personal use); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Suarez-Quilty*, 912 N.W.2d 150, 159–60 (Iowa 2018) (revoking the license of an attorney who converted $630 for her personal use); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Guthrie*, 901 N.W.2d 493, 499–501 (Iowa 2017) (revoking an attorney's license where the attorney misappropriated and converted funds for his personal use); *Wengert*, 790 N.W.2d at 104 (revoking an attorney's

license where, among other violations, the attorney misappropriated funds and additionally attempted to cover her actions by paying a client with another client's money); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Carroll*, 721 N.W.2d 788, 792 (Iowa 2006) (revoking an attorney's license where the attorney misappropriated for his own personal use $9449 from a nonprofit on whose counsel he served as treasurer); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Anderson*, 687 N.W.2d 587, 590 (Iowa 2004) (revoking attorney's license for withdrawing funds for his personal use from an escrow account); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Lett*, 674 N.W.2d 139 (Iowa 2004) (revoking an attorney's license for converting client funds, neglecting client matters, and lying to clients to cover her failings); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Bell*, 650 N.W.2d 648, 655 (Iowa 2002) (revoking attorney's license where attorney misappropriated for his own use funds for not-for-profit organization for which he acted as treasurer); *Leon*, 602 N.W.2d at 339 (revoking an attorney's license where he wrote checks to clients from the CTA to cover his failures in doing legal work for the clients and the clients had no funds in the account); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Allen*, 586 N.W.2d 383, 389–90 (Iowa 1998)

(listing cases where the court revoked attorneys' licenses for theft of entrusted funds).

In his claim that he did not use this money for personal use and thus cannot possibly have converted it, Fischer relies heavily on testimony by auditor Bly that there was no evidence Fischer withdrew funds from his trust account for personal use. However, documentation of the funds that belonged to Josh was entirely absent from anything Fischer provided to Bly during his audit because Fischer had already spent the funds long before the audit. (App. 249–50 (Tr. 195:25–196:4), 569). In the same vein, Fischer contends that the trust account itself does not show that he converted the funds for personal use. At the hearing, however, Fischer admitted that his firm received the funds, he and his firm are one and the same, and his firm could therefore use the funds however Fischer wanted. (App. 329–30 (Tr. 412:24–413:6), 333–34 (Tr. 424:14–425:13)).

Fischer stole funds from Josh to cover another client's attorney fees. Fischer did not take the $1332 in attorney fees from Josh because he thought Josh owed them as the representative of the entity; he took it because he was "mad." (App. 276 (Tr. 320:11–13), 284–85 (Tr. 329:20–330:2)). Fischer's taking of the $1332 was a misappropriation of client funds with no colorable future claim to those funds in violation of rules

32:8.4(b) and 8.4(c). The Commission correctly found the Board proved these violations by a convincing preponderance of the evidence.

ii. Misappropriation of $6168

Fischer's misappropriation of $6168 from his CTA—of the funds intended to be used for Josh's portion of the settlement—is also clear. Fischer admitted at the hearing that when Travelers did not cash the check for Josh's portion of the settlement, he nevertheless withdrew the funds from his CTA without a colorable future claim to those funds. (App. 287 (Tr. 333:7–19), 321–22 (Tr. 402:25–403:7)).

Despite this admission on the record, Fischer's current arguments regarding the conversion of $6168 are inconsistent. He appears to argue both that he did not withdraw the funds at all from his CTA and, paradoxically, that he did withdraw them, but did so unintentionally. (Br. 31, 38 (arguing Fischer did not withdraw the funds), 23, 27, 38 (admitting that it was removed from the CTA but arguing it was not intentional)).

There is no question from the record that Fischer withdrew the $6168 belonging to Josh Osborn from his CTA. As stated, Fischer himself admitted that he took the funds without a colorable future claim to those funds. (App. 287 (Tr. 333:7–19), 321–22 (Tr. 402:25–403:7)). In addition to his own admissions, the audits conducted in 2015 and 2019

reveal that Fischer had withdrawn the settlement funds from his CTA. As previously stated, when auditor Brinkmeyer compiled a list of all of Fischer's clients with balances remaining in the CTA based upon information Fischer provided, neither Josh Osborn nor RB Homes were among the clients with a balance in the CTA. (App. 238 (Tr. 132:20–24), 548–49). Furthermore, the subsequent audit in 2019 revealed that the CTA was underfunded by $10,000—with Fischer admitting at the hearing that the amount was $16,000 with the missing Osborn funds. (App. 272 (Tr. 315:18–23), 273 (Tr. 316:19–21), 328 (Tr. 411:4–6). Josh Osborn and RB Homes were again missing from the "official" client list in the 2019 audit. (App. 569). Josh also testified at the hearing that he did not receive any statements showing that he had a balance remaining in trust. (App. 96 and Supp. App. 4 (Tr. 96:24–97:3)). Attorney Bardole also testified that Travelers did not cash the check. (App. 241 (Tr. 164:19–25), 244–45 (Tr. 169:24–170:2)). Fischer withdrew the funds with no colorable future claim to the funds.

Fischer's alternative claim that his withdrawal of the $6168 from his trust account was unintentional is also unavailing. First, it is clear that Fischer's conversion of the funds was not in any way unintentional. Fischer's conduct in this matter only makes sense if his conversion of

those funds was purposeful, and so the logical conclusion is that Fischer withdrew these funds knowingly and intentionally.

In considering Fischer's intent, the Court need only ask why Fischer behaved the way he did when Travelers did not cash the partial settlement check. In 2016, attorney Bardole filed the Motion to Enforce Settlement on behalf of Travelers, stating that the check had not been cashed and affirmatively seeking the full $15,000 settlement amount. (App. 601). Why did Fischer not argue that Travelers had already cashed the check and was only entitled to half of the settlement amount? Because he knew that Travelers had not cashed the check and he had withdrawn it himself. And why did Fischer not inform Josh and James of the Motion to Enforce Settlement and subsequent proceedings and judgment? Because it would have required Fischer to confess to Josh that he had already converted Josh's money from his CTA. Fischer withheld the Motion to Enforce Settlement and hearing on the motion from Josh and James because he had stolen the money and did not want to be found out.[4]

[4] Informing Josh and James of the judgment would have also required Fischer to repay what he had taken, and Fischer had

As discussed above regarding his conversion of the $1332, Fischer's intentional withdrawal of client funds not belonging to him and to which he had no colorable future claim is a clear violation of rules 32:8.4(b) and 32:8.4(c). *See Kozlik*, 943 N.W.2d at 595–96 (noting "misappropriation of funds is a clear violation of both rules" and the necessary scienter of rule 32:8.4(c) "is satisfied where an attorney acted knowingly, intentionally, or with the aim to mislead"); *see also Iowa Supreme Ct. Att'y Disciplinary Bd. v. Muhammad*, 935 N.W.2d 24, 38 (Iowa 2019) (finding the attorney violated rules 32:8.4(b) and 32:8.4(c) where she had deposited client funds into her personal account as "an intentional act" with "no colorable present or future claim offsetting her misappropriation").

Even assuming arguendo that Fischer somehow accidentally withdrew $6168 from his CTA because of a "confusion" about the check and his poor bookkeeping, his handling of his trust account and subsequent withdrawal of the $6168 belonging to Josh demonstrate a "casual, reckless disregard for the truth" in violation of rule 32:8.4(c). *See*

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admittedly experienced financial troubles. (App. 317 (Tr. 394:17–20), 632).

Kozlik, 943 N.W.2d at 595–96. To prove a violation of rule 32:8.4(c), the Board must show the attorney acted with some level of scienter, which is satisfied where the attorney acted with "casual, reckless disregard for the truth." *Id.* (citations omitted).

Fischer claimed at the hearing that, after issuing the check to Travelers, he removed Josh Osborn from his active client list because he assumed that Travelers *would* cash the check. Fischer should have been made aware that Travelers did not cash the check by doing the required triple monthly reconciliations in 2014. Fischer did not do this. Fischer then withdrew the funds belonging to Josh. As stated, when auditor Brinkmeyer conducted his audit in 2015, neither Josh Osborn nor RB Homes was on Fischer's current client list, and Fischer did not identify funds belonging to Josh in the account during the course of the audit. Brinkmeyer made it abundantly clear to Fischer that his books were in a sorry state and were in violation of the rules. Fischer nevertheless did nothing to remedy his accounting practices.

Additionally, when Bardole filed the Motion to Enforce Settlement in 2016, Fischer was put on notice that Travelers had not cashed the check and the funds therefore should still have been sitting in his CTA. At that point, Fischer knew both that Travelers had not cashed the check and

that the funds were not in his account. As the sole signatory to his trust account and a solo practitioner, the only party who could have withdrawn those funds was Fischer himself. (App. 331–32 (Tr. 417:18–418:2)). Despite this, Fischer did nothing to reimburse the account once he was on notice that he had withdrawn funds from the account that did not belong to him. It was then that Fischer's conduct crossed the line from negligent bookkeeping to casual, reckless disregard for the truth of the fact that he had misappropriated funds to which he had no colorable future claim.[5] Even a generous assumption that he had initially

[5] The Board is not arguing in this particular case that failure to perform triple monthly reconciliations *without more* is sufficient to demonstrate the level of scienter necessary for a violation of rules 32:8.4(b) and (c) following an inappropriate taking from the trust account. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Powell*, 830 N.W.2d 355, 360–65 (Iowa 2013) (Wiggins, J., dissenting) ("Powell's alleged accounting errors caused him to use client's money, of which he had no colorable claim, to support his law office. We have previously characterized this conduct as conversion. . . . We should not reward with leniency those attorneys who steal by devising evasive accounting

withdrawn the funds only because of poor bookkeeping and a "confusion" regarding the status of the check, the failure to do anything about it once he became aware that he had taken funds to which he had no right amounts to conversion.

An instructive case is *Iowa Supreme Court Attorney Disciplinary Board v. Kozlik*, where the court found that the attorney violated Iowa Rules of Professional Conduct 32:8.4(b) and 8.4(c) when the attorney misappropriated funds from an estate for which he was the administrator. 943 N.W.2d at 595–96. In that case, the attorney also argued that the unauthorized payments to himself were "an honest mistake and that he lacked the requisite intent to commit theft or misappropriation of the estate's funds." *Id.* at 596. The court rejected this argument, as the attorney had been licensed in Iowa for nearly twenty years and had plenty of exposure and experience as to what he was supposed to do, finding instead that the attorney's "denial of a rudimentary understanding of Iowa probate law falls flat" and that his prior experience "demonstrates he was well aware of the statutory

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practices, while simultaneously imposing the harshest discipline on attorneys who steal client monies through more transparent means.").

requirement that he obtain court approval prior to the payment of administrator fees." *Id.* at 596–97.

As the court did in *Kozlik*, we can infer Fischer's intent here, given his level of experience and legal training. The court there noted,

> When making those inferences [as to a person's intent], we do so understanding that lawyers have specialized knowledge:
>
> > More than this, the law takes account of a lawyer's legal training and experience in assessing his or her state of mind. A lawyer is an adult, a man or woman of the world, not a child. He or she is also better educated than most people, more sophisticated and more sharply sensitized to the legal implications of a situation. The law will make inferences as to a lawyer's knowledge with those considerations in mind.

Id. at 597 (quoting *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Barry*, 762 N.W.2d 129, 138–39 (Iowa 2009)). Fischer has been a practicing attorney since 1979. He has been doing trust and estate work for more than thirty years and is by his own admission "familiar with financial recordkeeping," doing it in his "day-to-day legal practice." (App. 324 (Tr. 407:4–16)). He was well aware of the requirements in his trust accounting practices. Fischer has had multiple audits over the years. (App. 335 (Tr. 426:4–6)). He had been told following these audits that his bookkeeping was problematic and needed to be remedied. Fischer

even admitted at the hearing that in the years between his audits, he never modified his accounting to bring them into compliance with the rules. (App. 326–27 (Tr. 409:19–410:1)). He never considered refraining from taking retainer funds until sorting out what were clearly problematic accounting issues. (App. 331 (Tr. 417:3–17)). Fischer's treatment of these client funds cannot be hand waved. Fischer's legal experience and training—in addition to the specific circumstances alerting him to the fact that he had withdrawn funds to which he had no colorable future claim—allow us to conclude that Fischer demonstrated a casual, reckless disregard of the truth in his handling of his CTA and subsequent misappropriation of client funds. Fischer simply cannot excuse his conversion with his bad bookkeeping. *See Muhammad*, 935 N.W.2d at 28, 38 (revoking the license of an attorney for intentional conversion of funds where she had claimed, " 'I never converted funds knowingly, that is not true . . . . [M]y intentions were good and remained good, it was my paperwork that was lousy. I admit that.' "); *Clarity*, 838 N.W.2d at 656 (finding a violation of rule 32:8.4(c) where the attorney had made false representations on his CSC questionnaire because the surrounding circumstances indicated he that he knew that his practice was incorrect and "yet, he never followed through to correct" the

problem, which was sufficient to demonstrate "a casual, reckless disregard for the truth").

iii. Lack of colorable future claim

As discussed above, Fischer did not have a colorable future claim to any of the funds he converted. Fischer incorrectly claims that he had a "clear colorable future claim" to the attorney fees he converted from Josh to pay for fees owed by James because RB Homes was the client and all attorney fees were essentially owed by the entity. (Br. 33–35). As discussed above, this is not true. Fischer represented James and Josh as individuals in the lawsuit, and he had explicit agreements with Josh and James that each would pay his own share of fees. Fischer was under no illusion that he had a colorable present or future claim to those funds; he took them because he was "mad."[6] (App. 276 (Tr. 320:11–13), 284–85

[6] At first glance, Fischer's argument appears to mirror that put forth by the attorney in *Iowa Supreme Court Attorney Disciplinary Board v. Parrish*, 925 N.W.2d 163, which dealt with conversion of limited use client funds. There, the attorney took funds that had been specifically earmarked for the client to pay for a transcript and used the funds instead to pay his own fees. *Id.* at 176. That case is easily distinguishable from

(Tr. 329:20–330:2)). The Commission correctly concluded that Fischer "had no colorable future claim to the funds because there was no circumstance under which Josh would be required to pay another client's fees." (App. 652). Fischer does not claim he had a colorable future claim to the $6168 he converted from Josh.

Fischer violated Iowa Rules of Professional Conduct 32:8.4(b) and 8.4(c) when he misappropriated client funds without a colorable future claim to those funds. First, Fischer converted funds from Josh when he took fees owed by another client out of Josh's funds, without a colorable future claim to those funds. Second, Fischer converted funds without a colorable future claim when he withdrew funds from his CTA that were for the purpose of paying Josh's portion of the settlement. The Commission correctly found that the Board proved by a convincing

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the present case, as the attorney took those earmarked funds from his client to pay himself funds that would be potentially earned for that *same client* in the future. *Id.* Here, Fischer did not convert fees from limited use client funds, but rather stole from one client to pay for another client's fees. He could not reasonably think he had a colorable future claim because of that.

preponderance of the evidence that Fischer violated rules 32:8.4(b) and 8.4(c).

III. THE COMMISSION'S RECOMMENDED SANCTION IS PROPER.

The Commission's recommended sanction of revocation of Fischer's law license is proper because the Commission determined Fischer converted funds without a colorable future claim as discussed above. It is therefore unnecessary to determine the appropriate sanction of Fischer's trust account violations in isolation as Fischer suggests. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Crum*, 861 N.W.2d 595, 604 (Iowa 2015) ("[T]here is ample evidence in the record to prove Crum misappropriated client funds. Therefore, it is unnecessary for us to address Crum's other violations.").

IV. THE COMMISSION'S RECOMMENDED SANCTION OF REVOCATION IS SUPPORTED BY THE EVIDENCE, AND THE COMMISSION CONSIDERED ALL RELEVANT FACTORS.

The Commission's recommendation to the Court is revocation of Fischer's law license. Fischer argues the Commission's Report does not support its recommendation and the Commission failed to make the appropriate considerations. Contrary to Fischer's argument, the Commission's Report provides, "we must look at 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." (App. 652). The Report also states, "The Commission finds that both instances of taking money from Josh Osborn were misappropriations that reflect adversely on [Fischer's] honesty, trustworthiness, and fitness to practice law." (App. 651).

Further, Fischer erroneously argues the Commission did not support its sanction recommendation. The Commission cites to the *Guthrie* case stating, "A lawyer's license to practice law will virtually always be revoked if an attorney converts funds without a colorable future claim." (App. 652). The Commission correctly concluded because the Board proved by a convincing preponderance of the evidence that Fischer converted client funds without a colorable future claim, Fischer's license should be revoked. "[R]evocation of license is virtually automatic when a lawyer converts client funds." *Muhammad*, 935 N.W.2d at 38.

A. The Commission Appropriately Considered All Aggravating and Mitigating Factors.

Fischer argues the Commission failed to give *equal* consideration to aggravating and mitigating factors but fails to cite to any rule or case law in support of its assertion that *equal* consideration is necessary or required. And in this particular case, the Commission need not consider

the aggravating or mitigating factors at all because this is a case of conversion without a colorable future claim. *See Kozlik*, 943 N.W.2d at 600 (quoting *Guthrie*, 901 N.W.2d at 500) ("When an attorney converts funds without a colorable future claim, 'we need not consider mitigating and aggravating factors that may be present.' "). Even though the mitigating and aggravating factors are superfluous in this matter, the Commission did consider those factors and discuss them in its Report. (App. 640–41).

i. The Commission considered Fischer's military service and personal health.

Under the mitigating factors section in its Report, the Commission acknowledged Fischer served in the Navy and had "suffered rather severe medical conditions over the years." (App. 647). Fischer argues there was error because the Commission "dedicated only one sentence" in its Report to Fischer's health issues. (Br. 42). All the details Fischer argues the Commission should have specifically mentioned in its Report are contained in the record, which the Court reviews de novo. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Widdison*, 960 N.W.2d 79, 86 (Iowa 2021). While the Court "give[s] respectful consideration to commission findings, especially when considering credibility of witnesses, [the Court is] not

bound by them." *Id*. at 87 (quoting *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Said*, 953 N.W.2d 126, 142 (Iowa 2021)); *see Watkins*, 944 N.W.2d at 890 ("Upon de novo review, our aggravating and mitigating factors do not mirror the commission's factors.").

ii. Lack of client harm is not a mitigating factor in this case.

The Board respectfully disagrees with Fischer that lack of client harm should have been considered by the Commission or should be considered by the Court to be a mitigating factor. As previously stated, the Commission was not required to consider mitigating factors, and the Court reviews disciplinary cases de novo. However, the Commission did make findings as to the mitigating factors present in this case and correctly did not determine lack of client harm to be one of those mitigating factors. Fischer's conduct did cause client harm to the Osborns, which is an aggravating factor.

While there was no evidence presented at the hearing that Fischer's numerous trust account violations rendered him unable to fulfill a client request for a refund or that he failed to refund a client retainer, there is clear evidence Fischer failed to refund settlement funds to Josh Osborn for almost four years after Fischer had received notice the check had not been cashed. (App. 277–78 (Tr. 321:23–322:3), 601, 626).

Additionally, Fischer never refunded Josh the portion he took to cover James's fees. (App. 228–29 (Tr. 78:13–15), 322 (Tr. 403:8–17)). James also had to pay $2990.21 in interest when selling his home because Fischer failed to notify him there was a judgment against him and his brother. (App. 222–23 (Tr. 71:15–72:18), 234 (Tr. 110:7–19), 236–37 (Tr. 112:8–113:15). Further, while the auditor testified he did make a determination that Fischer converted client funds, Fischer omits from his brief the auditor's testimony that Fischer's CTA deficit could have been due to Fischer withdrawing unearned fees. (App. 253 (Tr. 217:9–19)).

iii. The Commission considered Fischer's proactive trust account measures.

Contrary to Fischer's argument, the Commission did consider Fischer's proactive trust account measures as a mitigating factor stating, "[W]e acknowledge the respondent has made strides with his trust account and his willingness to conduct reconciliations." (App. 647). The Commission is not required to discuss mitigating factors at any certain length. Additionally, "the Commission's decision is not a final adjudication of the case." *Comm. on Prof'l Ethics & Conduct v. Behnke*, 276 N.W.2d 838, 842 (Iowa 1979). The specifics that Fischer complains the Commission left out of its Report are contained in detail in the record

which is reviewed by the Court before making its final determination in the matter.

iv. The Commission was not required to consider Fischer's acceptance of responsibility for certain rule violations.

As previously stated, mitigating factors are irrelevant here because Fischer converted funds without a colorable future claim. So even if the Commission had concluded Fischer's acceptance of responsibility to be a mitigating factor, it would not have had any bearing on the correct sanction recommendation. *Earley*, 933 N.W.2d at 212 (holding revocation was appropriate in conversion case despite commission's finding that attorney "had admitted his wrongdoing and expressed remorse"). This is because "mitigating factors do not come into play." *Id*. at 214.

B. The Commission Did Not Consider Unproven Violations in Making Its Recommended Sanction.

There is overwhelming evidence to support all of the violations the Commission determined Fischer to have committed in this matter. The Commission correctly concluded Fischer violated rule 32:8.4(d) as outlined in section I of this brief and violated rules 32:1.15(c), 8.4(b), and 8.4(c) as outlined in section II of this brief. The Board respectfully disagrees with Fischer that "[i]t is difficult to discern the Commission's

basis for recommendation of revocation" in this case. (Br. 45–46). The Commission clearly cited to applicable case law that revocation is the appropriate sanction when an attorney converts funds without a colorable future claim.

C. *Hedgecoth*, *Noel*, *Kersenbrock*, and *Boles* Are Inapplicable as to the Proper Sanction in This Matter.

The appropriate sanction here is revocation of Fischer's license to practice law. "[I]n nearly every case where an attorney converts client funds without a colorable future claim, [the Court] revoke[s] the attorney's license to practice law." *Guthrie*, 901 N.W.2d at 500 (citations omitted). "It is almost axiomatic that [the Court] revoke[s] licenses of lawyers who do so." *Id.* Additionally, "restitution of client funds does not preclude [the Court] from revoking an attorney's license as a sanction." *Id*. (quoting *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Thomas*, 844 N.W.2d 111, 117 (Iowa 2014)).

Fischer cites to several cases in his brief in support of his argument for a lower sanction. However, all of the cases Fischer mentions are inapplicable to this matter because none of those cases involve conversion without a colorable future claim. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Hedgecoth*, 862 N.W.2d 354, 357–59 (Iowa 2015) (case

involving appellate neglect, delayed discovery responses, and lack of cooperation with Board); *Noel*, 933 N.W.2d at 206 (case involving lack of communication with client and delayed discovery responses); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kersenbrock*, 821 N.W.2d 415, 419–21 (Iowa 2012) (case involving violations associated with the attorney's trust account); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Boles*, 808 N.W.2d 431, 439–40 (Iowa 2012) (case involving neglect and safekeeping of property violations).

As previously discussed, the court found in *Kozlik* that the attorney violated rules 32:8.4(b) and 32:8.4(c) when he misappropriated funds from his uncle's estate for his personal and business expenses. 943 N.W.2d at 595–98. "Misappropriation of funds held in trust 'results in revocation, except in instances in which the attorney had a colorable future claim to the funds or did not take the funds for personal use.' " *Id*. at 598 (quoting *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Carter*, 847 N.W.2d 228, 232 (Iowa 2014)). Fischer admitted at the hearing that he had no colorable future claim to Josh's money. (App. 287 (Tr. 333:11–17)). Fischer also admitted that his firm received the funds, he and his firm are one in the same, and his firm could therefore use the funds

however Fischer wanted. (App. 329–30 (Tr. 412:24–413:6), 333–34 (Tr. 424:14–425:13)).

Just as revocation was the appropriate sanction in *Kozlik*, the Commission correctly recommended Fischer's license be revoked. *See* 943 N.W.2d at 600. "There is no place in our profession for attorneys who convert funds entrusted to them." *Guthrie*, 901 N.W.2d at 500 (quoting *Thomas*, 844 N.W.2d at 117).

CONCLUSION

Based on the testimony received and the exhibits admitted in the record, the Court should conclude that Fischer converted client funds without a colorable future claim and should revoke his license to practice law.

IOWA SUPREME COURT
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REQUEST FOR NONORAL SUBMISSION

The Board requests submission of the case without oral argument.

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Certificate of Compliance with Typeface Requirements and Type–Volume Limitation

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Cambria in 14 point and contains 12,217 words,

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_10/20/21_____	__/s/ Alexis W. Grove__
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