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In the Supreme Court of Iowa

Supreme Court No. 22-0376
Grievance Commission No. 920

Iowa Supreme Court
Attorney Disciplinary Board,

Complainant–Appellee/Cross-Appellant,

vs.

Bonnie J. Heggen,

Respondent–Appellant/Cross-Appellee

Appeal from the Report of the Iowa Supreme Court Grievance Commission

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Complainant–Appellee/Cross-Appellant'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 Bonnie J. Heggen ("Heggen") alleging violations of the Iowa Rules of Professional Conduct and Iowa Trust Account Rules associated with an audit of Heggen's trust account records and Heggen's representation of Joann Burgett ("Joann") and her husband Robert Burgett, Jr. ("Rocky") (collectively "the Burgetts").

Course of Proceedings and Disposition

On March 3, 2021, the Board filed a Complaint against Heggen. Complaint. On March 17, David L. Brown and Alexander E. Wonio entered their appearances on behalf of Heggen. (Amended Appendix ("App.") 18). On March 23, Heggen filed her Answer and Request for In-Person Hearing. (App. 19–23).

On November 8–9, 2021, a hearing was held in this matter before the 640th Division of the Grievance Commission ("the Commission"). On December 27, the Board submitted its Post-Hearing Brief. Heggen filed her own a day later. On February 25, the Commission filed its Findings of Fact, Conclusions of Law, and Recommendation ("Report"). (App. 26–39).

Commission's Conclusion and Recommendations

The Commission found that Heggen violated Iowa Rules of Professional Conduct 32:1.15(a), 32:1.15(c), 32:1.15(d), and 32:8.4(c) and Iowa Court Rules 45.1, 45.2(2), 45.2(3)(a)(1), 45.2(3)(a)(2), 45.2(3)(a)(9), 45.7(3), and 45.7(4). (App. 32–37). The Commission determined that the Board did not prove a violation of rules 32:1.5(a) and 32:8.4(b).[1] (App. 31–32, 34). The Commission also declined to find a violation of Rule 32:1.15(f).[2] (App. 33). The Commission recommended

[1] The Board had initially charged Heggen with Rule 32:1.16(d) but dismissed the charge in its post-hearing brief to the Commission. Rather than address the Board's dismissal of the charge, the Commission concluded the Board had not proved the violation. The Board does not appeal this finding.

[2] The Commission concluded that it was not "necessary to penalize Heggen twice for the same violation" and that "Rule 32:1.15(f) is not an ethics rule which stands on its own—it is merely the provision which incorporates the client account rules into the ethical standards." (App. 33). The Board disagrees. This Court has stated that "a violation of an

that Heggen's license to practice law be suspended for six months. (App. 39).

Heggen's Appeal and the Board's Cross-Appeal

On February 28, 2022, Heggen filed her notice of appeal with the Commission clerk. (App. 40). The Board filed its Application for Leave to Cross-Appeal on March 3. (App. 42). The Court granted the application on March 16. Order. The Board filed its Notice of Cross-Appeal on March 17. (App. 45).

STATEMENT OF FACTS

Heggen was admitted to practice law in Iowa on September 20, 2004. (App. 221 (Transcript ("Tr.") II 130:15–17)). Heggen is a solo practitioner who practices primarily in special education. (App. 221 (Tr. II 130:21–25)).

Trust Account Violations

In 2018, Iowa Supreme Court Client Security Commission ("CSC") auditor Steven Bly ("Bly") initiated an audit of Heggen's client trust account ("CTA"). (App. 67, 190 (Tr. I 67:23–68:5)). The audit disclosed

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attorney's obligations under chapter 45 also constitute a violation of rule 32:1.15(f)." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Eslick*, 859 N.W.2d 198, 201 (Iowa 2015).

Heggen's failure to maintain a check register and conduct monthly triple reconciliations. (App. 103, 190–91 (Tr. I 69:20–70:14), 191 (Tr. I 71:23–72:5)). Bly advised Heggen of the problems he identified in the audit and provided her with a copy of his report. (App. 102, 190 (Tr. 69:3–9)).

Heggen did not address her problematic bookkeeping, continuing to ignore her obligation to conduct monthly triple reconciliations of her CTA or maintain the necessary check register. (App. 197 (Tr. I 96:13–19), 227 (Tr. II 153:8–10)).

In September 2020, CSC Auditor Jerry Murphy ("Murphy") audited Heggen's CTA. (App. 77, 192 (Tr. I 76:16–19)). Based upon his review of Heggen's records, Murphy concluded she failed to deposit funds into her trust account, failed to maintain client ledger cards, failed to maintain a receipt and disbursements journal, failed to retain records of all electronic transfers from her CTA, withdrew fees before those fees were earned, failed to notify clients in writing of withdrawals from the CTA, and failed to do monthly triple reconciliations. (App. 102–04, 193 (Tr. I 78:6–79:1)).

Heggen does not appeal the Commission's findings that she violated Iowa Rules of Professional Conduct 32:1.15(a), 1.15(c), 1.15(f), and 8.4(c) in connection with the 2020 audit. Heggen also does not

contest her violations of chapter 45 of the Iowa Court Rules in connection with the 2020 audit.

Burgett Matter

The Burgetts hired Heggen on January 10, 2020, to represent them in a case against the Des Moines public school district in order to secure appropriate services for their son with special needs. (App. 177 (Tr. I 15:1–17), 183 (Tr. I 40:20–21)).

Pursuant to the Attorney Fee Contract, the Burgetts paid Heggen a $3000 retainer, plus $50 for expenses. (App. 47–51, 177 (Tr. I 16:10–14)). The contract also stated, "If attorney is paid in full by district, clients receive refund of retainer advanced in the amount of $3000.00." (App. 50). The Burgetts paid Heggen $3050 via check on January 10, 2020, and Heggen deposited the check into her CTA that same day. (App. 55, 93, 197 (Tr. I 97:17–23)). At the time Heggen deposited the Burgetts' funds into her CTA, the balance in the CTA was $5.25. (App. 149). On January 10, Heggen withdrew $2555.25 from her CTA, leaving a balance of $500. (App. 149). On January 16, Heggen transferred $475 into her checking account, leaving a balance of $25. (App. 149). Heggen did not notify the Burgetts of either withdrawal. (App. 178 (Tr. I 19:12–20), 185 (Tr. I 48:5–25)). Despite having withdrawn the entire retainer (plus much of

the $50 for expenses) by January 16, Heggen performed no billable work for the Burgetts until January 20. (App. 58).

On May 22, 2020, the Burgetts successfully mediated their case against the school district. (App. 178 (Tr. I 20:6–17)). In addition to the sought-after services for their son, the Burgetts were also awarded Heggen's full attorney fees in the amount of $6765. (App. 56, 178 (Tr. I 20:13–27)). Heggen testified as to those fees:

> Q. And it would be understood that those fees would be paid by Employers Mutual Insurance Company to you directly as the attorney for the Burgetts, and then when you get the money, that's where the skin in the game is then returned and then the $3,000 retainer is paid back to the Burgetts?
>
> A. That's right.

(App. 233 (Tr. II 175:15–21)).

On May 24, Heggen emailed the Burgetts, stating that she would cut the Burgetts a check for their $3000 "as soon as" she received the check from the insurance company for her fee, which was typically in "about 2–3 weeks." (App. 57). There was no agreement that the Burgetts would pay Heggen for any additional work, although all parties understood that more work was necessary to implement the services for the Burgetts' son pursuant to mediation, as Heggen stated in her May 24 email. (App. 57, 178 (Tr. I 21:19–25), 185 (Tr. I 49:8–11), 223–24 (Tr. II 138:24–139:13)).

Heggen received the check from the insurance company for her fee on or about June 3, 2020, a few days within the estimate Heggen had given the Burgetts. (App. 176 (Tr. I 12:4–14), 224 (Tr. II 139:23–140:3)). Although she had promised to give the Burgetts their money "as soon as" she received it, she spent the funds instead of giving the Burgetts their $3000. (App. 225 (Tr. II 143:10–19), 241–42 (Tr. II 210:24–211:15)). On July 1, the Burgetts emailed Heggen to inquire about the status of their check. (App. 60). Heggen's reply heavily implied that she had not yet received the check from the insurance company and stated that she would pay the Burgetts by July 15. (App. 60, 179 (Tr. I 25:8–13), 224 (Tr. II 141:3–11)). That date came and went without Heggen paying the Burgetts their money. (App. 179 (Tr. I 25:14–16), 224 (Tr. II 141:19–21)).

On July 21, Rocky called Heggen and left a voicemail to inquire about the status of their money. (App. 179 (Tr. I 25:17–21), 186 (Tr. I 50:2–10)). Heggen called Joann back on July 23 and left a voicemail in which she stated that she had a "huge problem" and that it would take her another two to three weeks to get the Burgetts their money. (App. 61, 179 (Tr. I 25:21–24)). Heggen also stated that the reason why she had not gotten the Burgetts their money was that she had encountered some

"things that were completely out of [her] control." (App. 61). Although Heggen stated that Joann could come to her with concerns about the situation if she had them, Heggen admitted at the hearing that it would not have mattered because she had already taken the money and did not have it to give to Joann, no matter what concerns Joann might have had about it. (App. 225 (Tr. II 143:20–144:6)).

After receiving the July 23 voicemail, Joann called Heggen back to discuss the $3000 that belonged to them. (App. 179–80 (Tr. I 25:18–27:2)). During that phone call, Heggen told Joann she had some unexpected personal expenses that had delayed the return of their money—she had spent their money on her hot water heater. (App. 180 (Tr. I 26:21–27:2), 225 (Tr. II 144:21–145:1)).

Joann and Heggen spoke on the phone again on August 5, as Heggen still had not given the Burgetts their money. (App. 180 (Tr. I 27:3–8)). During that call, Heggen stated that she would try to get the Burgetts $2000 of their money but did not know when that would be or when she would get the rest of the money. (App. 180 (Tr. I 27:9–14). By August 11, Heggen still had not given the Burgetts any of their money, prompting Joann to email Heggen about it. (App. 63, 180 (Tr. I 28:5–7)). Heggen replied, stating,

> Joann, you cannot be paid with what I don't have; you and I are waiting for EMC to cut me a check for the fee they agreed to pay. There were outstanding issues that had to be worked through on behalf of this client. I have a phone call scheduled with opposing counsel at 3 o'clock today. We will finalize the last issue and I will file the dismissal this afternoon. So the check will be cut in the [sic] two or three days. Unfortunately, I don't control that end. As soon as I have it, you will be reimbursed. Try to bear in mind that I am currently working on your case again now.

(App. 63). Although Heggen entreated Joann in this email to remember that she was doing some work on the case, there was no agreement between the Burgetts and Heggen that they would pay anything more to Heggen beyond what she had already earned. (App. 178 (Tr. I 21:19–22), 180 (Tr. I 29:3–7), 224 (Tr. II 139:7–13)). There was also no agreement that Heggen could use the Burgetts' $3000 in exchange for more work on the case, even as a loan. (App. 180 (Tr. I 29:8–12)). Heggen never believed that the Burgetts would pay her for any additional work; she understood that the agreement was that they would *not* need to pay for any additional attorney fees. (App. 224 (Tr. II 139:7–13)).

Joann then replied to Heggen's email, noting her confusion about the situation. (App. 63). Heggen called Joann and left a voicemail, stating that she had "spent money on things [she] had to spend money on and that was the money that [she] was going to give to [the Burgetts] to

reimburse [them]." (App. 62). After leaving this voicemail, Heggen sent a follow-up email to Joann, in which she stated in part, "I had emergencies come up that put me in a position to either use the $$ I had set aside for your reimbursement or do without air conditioning and hot water." (App. 63). Heggen also explained that she intended to pay the Burgetts as soon as she received a payout from settling a case for a different client. (App. 63). Heggen finally paid the Burgetts their $3000 on August 25, 2020, nearly three months after she received full payment of all fees owed to her. (App. 63; Exhibit 11).

ARGUMENT

Error Preservation

The Board agrees Heggen preserved the issues presented for appellate review. The Board has also preserved the issues presented for appellate review through its exhibits and hearing record and the Report.

Scope and Standard of Appellate Review

The Board agrees with Heggen that the scope and standard of appellate review is de novo. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Fischer*, 973 N.W.2d 267, 272 (Iowa 2022). The Board also agrees that the Court gives "respectful consideration to commission findings" but is "not bound by them." *Id.*

I. THE COMMISSION ERRED IN FINDING HEGGEN DID NOT VIOLATE RULE 32:1.5(a).

According to Iowa Rule of Professional Conduct 32:1.5(a), "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses, or violate any restrictions imposed by law."

The Commission found that Heggen had not violated this rule, despite the fact that Heggen withdrew fees before they had been earned. In *Iowa Supreme Court Attorney Disciplinary Board v. Parrish (Parrish I)*, the court stated that " 'taking fees in advance of earning them is illegal.' " 801 N.W.2d 580, 586 (Iowa 2011) (quoting *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. D'Angelo*, 619 N.W.2d 333, 337 (Iowa 2000)) (alteration omitted). Because the attorney in that case had withdrawn his clients' entire advanced fees before they had been earned—an illegal act—the attorney had collected an unreasonable fee in violation of rule 32:1.5(a). *Id.*

Similarly, Heggen withdrew client fees belonging to the Burgetts before they had been earned. The Commission erred finding that the Board did not prove this violation.

II. THE COMMISSION ERRED IN FINDING HEGGEN DID NOT VIOLATE RULE 32:8.4(b).

Heggen misappropriated the Burgetts' $3000 without a colorable future claim to those funds in violation of rules 32:8.4(b) and (c).[3] 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." "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 *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Cross*, 861 N.W.2d 211, 222 (Iowa 2015)). 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

[3] Although the Commission concluded that the Board had not proved a violation of rule 32:8.4(b) but did find a violation of 32:8.4(c), the Commission's discussion regarding rule 32:8.4(b) included reference and analysis of rule 32:8.4(c). Thus, the Board has included its own analysis of both rules here.

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)).

Heggen's conversion of the Burgetts' $3000 "was not a mere mistake but was an intentional act." *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Muhammad*, 935 N.W.2d 24, 38 (Iowa 2019); *see also Fischer*, 973 N.W.2d at 274. Heggen fully understood that the $3000 was not hers to use and keep. Heggen admitted at the hearing, "Well, I can't remember for sure whether [the check from the insurance company] went into the trust or my personal account, I don't—I don't remember, but I know that 3,000 of it belonged to the Burgetts because I had agreed to refund that money." (App. 242 (Tr. II 211:11–15)). She also admitted

that she understood her taking of the Burgetts' funds "wasn't appropriate." (App. 243 (Tr. II 217:13–218:6)). Her decision to take the money and spend it on her heating and cooling system was an intentional act.[4] Heggen's intentional taking of the Burgetts' funds demonstrates Heggen had the sufficient scienter to show a violation of rule 32:8.4(c).

This Court has stated that "misappropriation of funds is a clear violation of both rules." *Kozlik*, 943 N.W.2d at 595 (citations omitted); *see also Fischer*, 973 N.W.2d at 273. Thus, Heggen's misappropriation of funds in the Burgett matter is a clear violation of both rule 32:8.4(b) and 8.4(c). *See Kozlik*, 943 N.W.2d at 595. Heggen took $3000 belonging to the Burgetts and used it for her own personal expenses.

As the Commission stated, "[t]here is no dispute that Heggen used funds that should have been refunded to the Burgetts for her own personal use . . . ." (App. 34). By the correct definition, Heggen committed theft when she misappropriated the Burgetts' funds entrusted to her by

[4] Heggen testified at the hearing that she did not fully understand her fiduciary duties at the time and that had she given it "the importance it's due," she "wouldn't have done it wrong." (App. 243 (Tr. II 216:23–217:9)). However, the court has stated that it is irrelevant whether an attorney "realize[s] the ethical implications of her conduct," as "[t]heft by misappropriation . . . is a general intent crime." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Muhammad*, 935 N.W.2d 24, 38 (Iowa 2019).

converting them to her own use. *See* Iowa Code § 714.1(2). The Commission, however, incorrectly looked to subsection 1 of section 714.1, which requires a showing of the intent to deprive the Burgetts of their funds, and found that Heggen had not converted the Burgetts' funds and had not violated rule 32:8.4(b). *See id.* § 714.1(1). The correct subsection is subsection 2:

> A person commits theft when the person . . . [m]isappropriates property . . . of another which the person has in the person's possession or control . . . 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.

Id. § 714.1(2). This Court has consistently found that an attorney violated rules 32:8.4(b) and (c) where the attorney violated section 714.1(2).[5] *See, e.g.*, *Kozlik*, 943 N.W.2d at 596 (noting misappropriation of funds violates section 714.1(2) and rules 32:8.4(b) and (c)). Heggen's conduct violated Iowa Code section 714.1(2) and rules 32:8.4(b) and (c).

At the outset of Heggen's representation of the Burgetts, Heggen immediately paid herself the entirety of the Burgetts' $3000 retainer.

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[5] Additionally, the Court has explicitly found that an attorney's "professed lack of intent to deprive . . . is no defense to the crime of misappropriation." *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Bell*, 650 N.W.2d 648, 652 (Iowa 2002) (citing *State v. Ludvigson*, 482 N.W.2d 419, 423 (Iowa 1992)).

(App. 149, 222 (Tr. II 132:23–133:13)). During her representation of the Burgetts, Heggen earned a total of $6765 in attorney fees. (App. 57–60, 224 (Tr. II 139:3–13)). By the time of mediation, Heggen had already paid herself $3000 of those fees, meaning she was only entitled to an additional $3765. The rest of it belonged to the Burgetts. When the check came from the insurance company, Heggen took and used the entire $6765. Although Heggen had only *earned* $6765 in fees, she paid herself a total of $9765. Heggen paid herself her attorney fees twice, and in so doing, she stole from the Burgetts. Heggen's conduct violated Iowa Code section 714.1(2) and rules 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 rules 32:8.4(b) and 32:8.4(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 (Parrish II)*, 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)); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Carter*, 847 N.W.2d 228, 230–31 (Iowa 2014) (finding the attorney misappropriated from multiple clients when he withdrew funds from an estate and insurance claim proceeds without a colorable claim to those funds and concluding the attorney violated rules 32:8.4(b) and 8.4(c)).

In stealing the Burgetts' funds to pay for her heating and cooling system, Heggen clearly converted client funds for her personal use. *See Kowalke*, 918 N.W.2d at 163 (finding 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) (finding an attorney converted $630 for her personal use); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Guthrie*, 901 N.W.2d 493, 499–501 (Iowa 2017) (finding the attorney misappropriated and converted client funds for his personal use); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wengert*, 790 N.W.2d 94, 104 (Iowa 2010) (finding the attorney misappropriated client settlement funds for "other purposes"); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Carroll*, 721 N.W.2d 788, 792 (Iowa 2006) (finding 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) (finding the attorney misappropriated funds he withdrew for his personal use from an escrow account); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Lett*, 674 N.W.2d 139, 146 (Iowa 2004) (finding the attorney converted client funds, neglected client matters, and lied 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) (finding the attorney misappropriated for his own use funds for not-for-profit organization for which he acted as treasurer); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Leon*, 602 N.W.2d 336, 339 (Iowa 1999) (finding the attorney misappropriated funds 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).

In *Iowa Supreme Court Attorney Disciplinary Board v. Kozlik*, Kozlik acted as administrator for his uncle's estate and made repeated unauthorized payments to himself from the estate. 943 N.W.2d at 593. Kozlik deposited funds from the estate into his personal account and business operating account and used them for his own purposes. *Id.* at 596. The court concluded that Kozlik violated both Iowa Rule of Professional Conduct 32:8.4(b) and 32:8.4(c). *Id.* at 595.

In *Iowa Supreme Court Attorney Disciplinary Board v. Kowalke*, Kowalke represented coexecutors of an estate who deposited estate funds into Kowalke's CTA. 918 N.W.2d at 160. Kowalke then withdrew estate funds without court authorization on several occasions. *Id.* He withdrew estate funds from his CTA for his personal use and "to cover expenses relating to other client matters." *Id.* The court found that Kowalke had violated, among other rules, rules 32:8.4(b) and 8.4(c) and Iowa Code section 714.1(2). *Id.* at 162.

Similar to *Kozlik* and *Kowalke*, Heggen withdrew client funds she had not earned for her own purposes, violating rules 32:8.4(b) and (c) and Iowa Code section 714.1(2).

Additionally, Heggen did not have a colorable future claim to the funds she stole from the Burgetts. "A colorable-future-claim defense to revocation of a license to practice law as a sanction for conversion of client funds broadly applies to the premature conversion of client funds intended as attorney fees, as opposed to the conversion of client funds with no future claim of right to the funds." *Carter*, 847 N.W.2d at 233 (citations omitted). In this instance, Heggen did not have a colorable future claim to the funds she stole from the Burgetts because there was no universe in which she could have earned the $3000 she stole from the

Burgetts. The funds she took from the Burgetts were not part of a retainer intended to be used for fees in the future; in fact, she and the Burgetts explicitly agreed that they would *not* pay Heggen additional fees. (App. 224 (Tr. II 139:7–13)).

Instead, this case more closely mirrors cases in which an attorney used settlement funds belonging to a client—funds to which the attorney clearly had no colorable future claim because there was no circumstance in which the attorney would earn those in the future—for his or her own purposes. For example, in *Iowa Supreme Court Attorney Disciplinary Board v. Wengert*, the court found Wengert had misappropriated client funds without a colorable future claim when she used a client's settlement funds for "other purposes." 790 N.W.2d at 102, 104. The court noted that it was "not a situation where Wengert had a colorable claim to the funds but failed to follow the proper procedures for withdrawals." *Id.*

Similarly, in *Iowa Supreme Court Attorney Disciplinary Board v. Earley*, Earley received settlement funds on behalf of his client and was supposed to pay subrogation obligations but instead used those funds for his own purposes. 774 N.W.2d 301, 306, 308 (Iowa 2009). The court found that he had misappropriated those funds to which he had no colorable future claim. *Id.* at 309.

In another case, the attorney assisted his client in obtaining a $23,000 settlement. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Thomas*, 844 N.W.2d 111, 113 (Iowa 2014). Thomas and the client agreed that from that money, Thomas would take his fees and settle the client's responsibilities to various other third parties, as well as keep $500 for expenses should they arise. *Id.* at 114. The remainder belonged to the client. *Id.* Thomas did not pay all of the third parties as agreed. *Id.* at 114–15. The client asked Thomas to disburse her settlement funds, but he withheld them. *Id.* Instead of disbursing the remainder to the client upon her request, he wrote a series of checks from the settlement proceeds in his CTA "for personal and business purposes that exceeded his fees." *Id.* The court concluded that Thomas "could not have earned any other fees or been reimbursed any other expenses from the [client's] settlement he deposited in his trust account." *Id.* at 117. He converted client funds without a colorable future claim. *Id.* at 117–18.

Lastly, *Iowa Supreme Court Attorney Disciplinary Board v. Kelsen*, 855 N.W.2d 175 (Iowa 2014), is instructive in determining whether Heggen had a colorable future claim to the Burgetts' funds. In that case, Kelsen spent the $7500 retainer given to him by his client without having earned it. *Id.* at 178. Importantly, the memo line of the check as

completed by the client said, "Advance payment for deposition, discovery, etc." *Id.* Additionally, the fee agreement between Kelsen and his client made it clear that the $7500 was for litigation expenses. *Id.* The court concluded that Kelsen had converted without a colorable future claim to those funds because the retainer was only for expenses and was *not* for fees and costs. *Id.* at 185. Had the retainer been for fees and costs, Kelsen could have argued that he "merely made premature *withdrawals*," but instead he "had at most an argument that he expected to generate an *offset* in the future." *Id.* The funds in Kelsen's possession could not have been used in any circumstance for his own purposes. *Id.*

Similarly, Heggen did not have a colorable future claim to the Burgetts' funds. Heggen could not in any way argue that she would be permitted in the future to make a withdrawal from the Burgetts' $3000 that Heggen received from the insurance company. *See id.*; *see also Muhammad*, 935 N.W.2d at 36–37 (finding the attorney misappropriated funds without a colorable present or future claim when she deposited $7500 from her client that was explicitly to be used for legal expenses rather than legal services directly into her personal account); *see, e.g.*, *Suarez-Quilty*, 912 N.W.2d at 155, 159 (finding the attorney "knowingly misappropriated and converted client funds" when she "had 'no

reasonable explanation for not returning the $630 given to her to cover the cost of the appeal,' nor did she have a colorable future claim to the $630").

Those funds were never anything but the Burgetts'. The fact that Heggen eventually repaid those funds does not excuse misappropriation without a colorable future claim. *See Kozlik*, 943 N.W.2d at 593. It is also worth considering that Heggen was only able to repay the Burgetts when she settled a different case; had she never successfully settled another case, she might never have been able to repay the Burgetts.

Additionally, Heggen's actions after she took the money reveal that she never believed that she was entitled to use those funds. If she had believed it was proper for her to spend the entire check from the insurance company, her communications with the Burgetts apologizing for having spent the money instead of giving it to them right away make little sense.

The Board has proved by a convincing preponderance of the evidence that Heggen violated Iowa Rules of Professional Conduct 32:8.4(b) and 8.4(c) when she misappropriated client funds for her own use without a colorable future claim to those funds.

Heggen violated Iowa Rules of Professional Conduct 32:8.4(b) and 8.4(c) when she misappropriated client funds without a colorable future claim to those funds. Heggen converted the Burgetts' funds when she used the $3000 that belonged to the Burgetts. The Board proved by a convincing preponderance of the evidence that Heggen violated rules 32:8.4(b) and 8.4(c).

III. HEGGEN'S REQUESTED SANCTION AND THE COMMISSION'S RECOMMENDED SANCTION ARE IMPROPER.

The Commission's recommended sanction of a six-month suspension is improper because, as discussed above, the Commission incorrectly found that Heggen had not converted client funds without a colorable future claim. Heggen for her part seeks a public reprimand based solely upon violations of the trust account rules and not upon her misappropriation of client funds. The correct sanction is revocation of Heggen's license to practice law. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Crum*, 861 N.W.2d 595, 604, 606 (Iowa 2015) (revoking Crum's license and stating, "[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.").

There is no standard sanction with respect to misconduct in attorney disciplinary cases. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Blessum*, 861 N.W.2d 575, 591 (Iowa 2015). In determining sanction, the court takes into account the "totality of facts and circumstances" of each case. *Iowa Supreme Ct. Att'y Disciplinary Bd v. Deremiah*, 875 N.W.2d 728, 737 (Iowa 2016). This Court's considerations include "the nature of the violations, the need for deterrence, protection of the public, maintenance of the reputation of the bar as a whole, and the attorney's fitness to continue practicing law, as well as any aggravating or mitigating circumstances." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Bartley*, 860 N.W.2d 331, 337 (Iowa 2015) (citation omitted).

"Sanctions for violations involving dishonesty have ranged from a brief suspension . . . to revocation." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Barnhill*, 885 N.W.2d 408, 425 (Iowa 2016) (quoting *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kieffer-Garrison*, 847 N.W.2d 489, 496 (Iowa 2014)).

> Fundamental honesty is the base line and mandatory requirement to serve in the legal profession. The whole structure of ethical standards is derived from the paramount need for lawyers to be trustworthy. The court system and the public we serve are damages when our officers play fast and loose with the truth.

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct. v. Gallner, 621 N.W.2d 183, 187–88 (Iowa 2001) (quoting *Comm. on Prof'l Ethics & Conduct v. Bauerle*, 460 N.W.2d 452, 453 (Iowa 1990)).

"One of the lawyer's most important fiduciary responsibilities—the failure of which demands a strong disciplinary response—is to protect client property and funds." 16 Gregory C. Sisk & Mark S. Cady, *Iowa Practice Series: Lawyer and Judicial Ethics* § 2.4 (2021). Sanctions for attorneys who violate the trust account rules have ranged from public reprimands to license revocation. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Lubinus*, 869 N.W.2d 546, 550 (Iowa 2015). When the "trust account violations are coupled with other ethical missteps," longer suspensions have been imposed. *Id*. at 551–52. The court has imposed a six-month suspension in a case involving an attorney whose "record-keeping and management deficits were severe and they persisted over a long period of time even after the Client Security Commission intervened with an audit and provided information that should have facilitated compliance with the applicable rules." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Morris*, 847 N.W.2d 428, 436 (Iowa 2014).

The appropriate sanction here is revocation of Heggen's license to practice law. The court has "found revocation appropriate 'in nearly

every case where an attorney converts client funds without a colorable future claim.' " *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Moran*, 919 N.W.2d 754, 760 (Iowa 2018) (quoting *Guthrie*, 901 N.W.2d at 500). "It is almost axiomatic that [the court] revoke[s] licenses of lawyers who do so." *Id.* (quoting *Thomas*, 844 N.W.2d at 117).

A. Aggravating Factors

Because Heggen converted client funds without a colorable future claim to those funds, aggravating factors are superfluous in determining sanction. *See Guthrie*, 901 N.W.2d at 500. Nevertheless, there were some aggravating factors present here, including substantial experience, failure to learn from earlier audits, conscious disregard for the trust account rules, multiple rule violations, and client harm.

"[S]ubstantial experience in the practice of law is [an] aggravating factor." *Parrish II*, 925 N.W.2d at 181. Heggen was admitted to practice law in 2004. (App. 221 (Tr. II 130:15–17)). "Multiple rule violations are an aggravating factor giving rise to more serious sanctions." *Parrish II,* 925 N.W.2d at 181. Heggen violated multiple rules in this matter.

Client harm is an aggravating factor. *Id*. at 182. Although Heggen claims that no clients were harmed from Heggen's violations, this is simply not true. The Burgetts both testified at the hearing that they truly

needed their funds after Heggen stole the money. (App. 184 (Tr. I 44:1–3), 188–89 (Tr. I 61:23–62:23)). The Burgetts, who had eight children and a son with special needs, needed the money for their own hot water heater and air conditioner to be repaired in July, but instead Heggen decided her own air conditioning and hot water needs were more important than giving the Burgetts their money. (App. 188–89 (Tr. I 61:23–62:23)).

"[A]n attorney's failure to learn from an earlier audit is an aggravating factor." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Turner*, 918 N.W.2d 130, 154 (Iowa 2018) (citation omitted). After the audit in 2018, Heggen should have learned from her prior mistakes and taken proactive steps to ensure her compliance with the trust account rules but failed to do so. In the 2020 audit, Heggen's records were found to have some of the issues previously identified in the prior audit, such failure to keep a client check register and conduct monthly triple reconciliations. Heggen's "failure to learn" from the earlier audit is an aggravating factor even though no discipline stemmed from that audit. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Santiago*, 869 N.W.2d 172, 183 (Iowa 2015) (failing to correct problems identified in a previous trust account audit was an aggravating factor despite no discipline being issued).

Heggen's conscious disregard for the trust account rules is aggravating. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Ricklefs*, 844 N.W.2d 689, 700 (Iowa 2014). Despite Bly discussing with Heggen the problems he identified in the 2018 audit and explaining to Heggen the importance of keeping a check register and how to prepare a monthly triple reconciliation, Heggen did nothing to incorporate those into her bookkeeping practices to comply with the rules until the next audit. (App. 197 (Tr. I 96:13–19), 227 (Tr. II 153:8–10)).

B. Mitigating Factors

Because Heggen converted client funds without a colorable future claim to those funds, mitigating factors are also superfluous in determining sanction. *See Guthrie*, 901 N.W.2d at 500. Nevertheless, the record does contain evidence of some mitigating factors. Lack of disciplinary history can be a mitigating factor. *Lubinus*, 869 N.W.2d at 546. Heggen serves an underserved part of the community. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Beauvais*, 948 N.W.2d 505, 518 (Iowa 2020). Heggen relies heavily on this fact in requesting a more lenient sanction. The Board does not dispute that Heggen has been an effective advocate for her clients in resolving their matters, nor that there are few attorneys in the state who serve those clients. However, Heggen made

the choice to convert client funds. It is regrettable that her choice will prevent her from being able to serve clients in the future.

Additionally, Heggen seems to imply that her repayment of the funds to the Burgetts is mitigating. This Court has stated that paying money owed to a client "is not a valid defense or excuse" for ethical violations. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. D'Angelo*, 710 N.W.2d 226, 235 (Iowa 2006). The *D'Angelo* court stated, "To allow such payments to serve as mitigating factors 'might imply to the public that an officer of the court can buy his way out of professional difficulties if financially able to do so.' " *Id.* (quoting *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Havercamp*, 442 N.W.2d 67, 72 (Iowa 1989)). Furthermore, "restitution of client funds does not preclude [the Court] from revoking an attorney's license as a sanction." *Guthrie*, 901 N.W.2d at 500 (quoting *Thomas*, 844 N.W.2d at 117).

Heggen also discusses at length her acceptance of responsibility regarding her trust account violations. This may have been a mitigating factor were those the only violations, but because Heggen converted client funds without a colorable future claim, it has no bearing on the appropriate sanction here. *See 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.

C. Case Law

Heggen cites to several cases in support of a lesser sanction, particularly relying upon *Iowa Supreme Court Attorney Disciplinary Board v. Smith*, 904 N.W.2d 154 (Iowa 2017). As with all of the cases cited by Heggen, *Smith* is inapplicable because in that case "only rule 45.2(3) was violated"; the attorney did not convert without a colorable future claim. *Id.* at 156. The Commission, on the other hand, concluded that this case was most similar to *Iowa Supreme Court Attorney Disciplinary Board v. Ricklefs*, 844 N.W.2d 689. Like *Smith*, *Ricklefs* also does not involve conversion without a colorable future claim but instead only involved trust account violations and dishonest statements to the CSC. *Id.* at 697–99. Therefore, the three-month suspension imposed by the court in that case does not apply here, where Heggen misappropriated client funds. *See id.* at 699–702.

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 *Carter*, 847 N.W.2d at 232). Heggen had no colorable future claim to the Burgetts' funds, and she admitted at the hearing that it was inappropriate for her to take their money. (App. 243 (Tr. II 217:13–218:6)). Finding that the attorney in *Kozlik* converted client funds without a colorable future claim, the court revoked his license to practice law. 943 N.W.2d at 600. Just as revocation was the appropriate sanction in *Kozlik*, so it is here. *See id*.

Heggen's situation is sadly similar to a recent case in New Jersey, *In re Wade*, where the court of that state determined that the respondent's many admirable attributes could not overcome the necessary consequence to her misappropriation of client funds—revocation of her license to practice law. 250 N.J. 581, 275 A.3d. 426 (N.J. 2022) (regional reporter pagination pending as of date of filing). The court noted at the outset that the attorney's "remarkable personal and professional accomplishments [were] clear from the record" and that she had "overc[o]me obstacles early in life and persevered with her studies." *Id.* at 584. She "provided pro bono legal services to underserved clients." *Id.*

at 584–85. She had no disciplinary history. *Id.* at 585. A random audit of her account revealed that she had been "borrowing" client funds "because she needed the money to cover personal and business expenses." *Id.* at 584, 589. The attorney showed that no client had been harmed by her conversion and testified that "she never intended to steal from clients and intended to pay the money back at all times." *Id.* at 584, 590. Although disbarment is a "terribly harsh" consequence to an attorney's actions, the court determined it was necessary for the attorney in that case to protect "the continued confidence of the public in the integrity of the bar and the judiciary," and "[i]f that 'confidence is destroyed' . . . 'the bench and the bar will be crippled institutions.' " *Id.* at 587 (quoting *In re Wilson*, 409 A.2d 1153, 1157–58 (N.J. 1979)).

This court has made the same call. "[R]evocation of license is virtually automatic when a lawyer converts client funds." *Muhammad*, 935 N.W.2d at 38; *see also Kozlik*, 943 N.W.2d at 599–600; *Kowalke*, 918 N.W.2d at 163; *Suarez-Quilty*, 912 N.W.2d at 159–60; *Guthrie*, 901 N.W.2d at 499–501; *Wengert*, 790 N.W.2d at 104; *Carroll*, 721 N.W.2d at 792; *Anderson*, 687 N.W.2d at 590; *Lett*, 674 N.W.2d at 146; *Bell*, 650 N.W.2d at 655; *Leon*, 602 N.W.2d at 339; *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 has revoked attorneys' licenses for theft of entrusted funds).

"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). This Court should revoke Heggen's license to practice law.

CONCLUSION

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

IOWA SUPREME COURT
ATTORNEY DISCIPLINARY BOARD

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REQUEST FOR NONORAL SUBMISSION

The Board requests submission of the case without oral argument.

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7/8/22
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