

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 GRIEVANCE COMMISSION
OF THE SUPREME COURT OF IOWA

RESPONDENT-APPELLANT/CROSS-APPELLEE'S REPLY BRIEF

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BONNIE HEGGEN

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STATEMENT OF ISSUES

I. Was the appropriate sanction imposed against Bonnie Heggen?

Iowa Rule of Professional Conduct 32:1.5(a)

Iowa Rule of Professional Conduct 32:8.4(b)

Iowa Rule of Professional Conduct 32:8.4(c)

Iowa Supreme Ct. Att’y Disc. Bd. v. Aeilts, 2022 WL 1509540 (Iowa 2022)

Iowa Supreme Ct. Att’y. Disc. Bd. v. Smith, 904 N.W.2d 154 (Iowa 2017)

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CROSS-APPELLEES' ARGUMENTS

I. THE COMMISSION CORRECTLY FOUND THAT HEGGEN DID NOT VIOLATE RULE 32:1.5(a).

The Board must prove by a convincing preponderance of the evidence that Heggen violated Iowa Rule of Professional Conduct 32:1.5(a). *Iowa Supreme Court Att'y. Disc. Bd. v. Gailey*, 790 N.W.2d 801, 803 (Iowa 2010). A convincing preponderance of the evidence is more than the preponderance standard required in a typical civil case, but less than proof beyond a reasonable doubt. *Iowa Supreme Court Att'y. Disc. Bd. v. Keels*, 795 N.W.2d 507, 509 (Iowa 2011). Rule 32:1.5(a) states that, "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 the Board had not met their burden or persuasion, finding that Heggen had not violated this rule. The Commission found that the fee charged and collected by Heggen was reasonable given the work done.

The Board accuses Heggen of collecting an unreasonable fee from her clients the Burgetts. The Board cites *Iowa Supreme Court Att'y. Disc. Bd. v. Parrish*, as similar to the case against Heggen. 801 N.W.2d 580 (Iowa 2011). To be found of having collected an unreasonable fee, "an attorney violates [Rule 32:1.5(a)] by failing to refund fees that are unearned. *Iowa Supreme Court Att'y. Disc. Bd. v. Rhinehart*, 827 N.W.2d 169, 181 (Iowa 2013) (Citing *Parrish*, 801 N.W.2d 580 at 586). In *Parrish*, the attorney never returned the unearned fees to the clients. *Id* at

586. However, *Parrish* is distinguishable from this case, as while there was a slight delay in the return of funds to the Burgetts, the entire amount was returned to them by Heggen. Heggen's actions do not meet the standard to satisfy Rule 32:1.5(a) as required by the Boards' case on point.

Accordingly, the Commission correctly determined that Heggen did not violate Rule 32:1.5(a) as she did not fail to return unearned fees to her clients.

II. THE COMMISSION CORRECTLY FOUND THAT HEGGEN DID NOT VIOLATE RULE 32:8.4(b).

There is no evidence that Heggen intended to permanently deprive the Burgetts of their \$3,000. It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Iowa Rule of Professional Conduct 32:8.4(b). "A lawyer need not be charged or convicted of a crime in order to be found in violation of this rule." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Cross*, 861 N.W.2d 211, 222 (Iowa 2015). Heggen is accused of converting settlement funds which she received from her representation of the Burgetts. The applicable statute is Iowa Code § 714.1(1), This statute is violated "when the person takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof." Heggen consistently maintained that she would get the Burgetts their money. There is no evidence that Heggen attempted to deprive the Burgetts of their \$3,000.00 retainer. During her testimony she consistently

expressed remorse for the delay in providing the funds to the Burgetts. Throughout their brief the Board relies on cases in which attorneys were found to have converted client funds and acted with the specific intent to do so. *See Iowa Supreme Ct. Att’y Disciplinary Bd. v. Kozlik*, 943 N.W.2d 589 (Iowa 2020), *See Iowa Supreme Ct. Att’y Disciplinary Bd. v. Muhammad*, 935 N.W.2d 24, 38 (Iowa 2019). Neither of these cases are factually similar to the case against Heggen and must not be relied on.

The Board failed to prove by a convincing preponderance of the evidence that Heggen violated Rule 32:8.4(b). The following considerations factor into a determination of whether there was a Rule 32:8.4(b) violation, “the lawyer’s mental state; the extent to which the act demonstrates disrespect for the law... the presence of absence of a victim; the extent of actual or potential injury to a victim; and the presence or absence of a patten of criminal conduct.” *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Aeilts*, 2022 WL 1509540 (Iowa 2022). Heggens conduct does not violate any of these considerations. She did not have specific intent to steal from the Burgetts. She did not blatantly disrespect the law. There were no victims to her actions. Finally, this is the first disciplinary action taken against Heggen and she has no prior criminal record or pattern of criminal conduct.

The Board misrepresents the evidence in this case to attempt to portray Heggen as a criminal, lumping her with attorneys who made repeated payments to

themselves of money which they had no colorable future claim. Heggen and the Burgetts agreed to a contract in which Heggen would provide representation for the Burgetts in regard to obtaining special education resources for their minor child from the Des Moines School District. This attorney-fee contract started a \$3,000 retainer for Heggens services. Exhibit A. “In Cases where the attorney takes a retainer in anticipation of doing the work and withdraws money from the trust account before the attorney earns it, [the court] assumes the attorney has a colorable future right to those funds unless the Board proves otherwise. *See Iowa Supreme Ct. Att’y Disciplinary Bd. v. Thomas*, 844 N.W.2d 111, 117 (Iowa 2014). Heggen argued for and obtained a favorable result for the Burgetts. The Burgetts had absolutely zero issue with the representation Heggen provided. While there was no agreement that the Burgetts would pay Heggen for any additional work, more work was necessary to implement the services agreed to at mediation. Heggen had a colorable future claim to the settlement funds.

III. THE COMMISSION ERRED IN FINDING THAT HEGGEN VIOLATED RULE 32:8.4(C).

Heggen was honest to a fault with the Burgetts, she informed them that she had a personal emergency and immediately needed the money. Rule 32:8.4(c) states that it is professional misconduct for a lawyer to engage in misconduct involving dishonesty, fraud, deceit or misrepresentation. To find a violation of rule 32:8.4(c), there must be “a level of scienter that is more than negligent behavior or

incompetence” *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Barry*, 908 N.W.2d 217, 226 (Iowa 2018). “Scienter requires that the attorney acted knowingly, intentionally, or with the aim to mislead.” *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Guthrie*, 901 N.W.2d 497, 498 (Iowa 2017). On inquiry from the Burgetts, Heggen responded to them truthfully, “I had emergencies come up that put me in a position to either use \$\$ I had set aside for your reimbursement or do without air conditioning and hot water.” (App. p. 63). These are not the words of a person attempting to act dishonestly, fraudulently, deceptively, or a form of misrepresentation.

APPELLANTS' REPLY ARGUMENTS

I. A SANCTION THAT REQUIRES REVOCATION IS INAPPROPRIATE

Heggen had a colorable future claim to the funds at question in this case, therefore any recommended sanction that cites attorneys who committed conversion without a colorable future claim is incorrect. The sanction [the court] imposes on an attorney for a trust account violation depends on the facts of the violation. If an attorney has a colorable future claim to the money converted, [the court] will not revoke the attorney's license, *Thomas*, 844 N.W.2d at 117. Heggen received a settlement from the Des Moines School District in favor of the Burgetts. That settlement included attorneys' fees. There was work left to implement the new services awarded to the Burgetts son. "[A] colorable-future-claim defense may also involve the premature taking of a fee by an attorney in an amount greater than the actual fee ultimately earned." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Carter*, 847 N.W.2d 228, 234 (Iowa 2014). Therefore, all cases cited in the Burgetts' brief which recommend sanctions based on attorneys who converted funds without a colorable future claim are not instructive in the case against Heggen. "In those instances in which the attorney has a colorable future claim to the funds, the violation only pertains to the failure to follow the various requirements for the safekeeping of client funds. *Id* at 232.

We must then look to what an appropriate sanction on Heggen would be, as no precedent where an attorney converted funds without a colorable future claim is applicable. The correct sanction is a public reprimand. Heggen has no prior disciplinary history. She is a noted servant of the public, working tirelessly to ensure that the education system in Iowa is accessible to all. She has continuously been hailed by her clients as an exceptional attorney, continuously obtaining favorable results for her clients. Specifically, the Burgetts were blown away by the work done by Heggen on their child's case. Ensuring that the special needs children she represents have access to the same opportunities every other child is fortunate enough to already have.

Heggen is an attorney with significant mitigating factors along with no prior disciplinary history, which requires at most a sanction of a public reprimand. The conduct by Heggen is similar to the conduct of attorney Scott Sobel. In *Sobel*, he was found to have failed to render proper written accounting for legal services and was sanctioned with a public reprimand. *Iowa Supreme Court Atty. Disc. Bd. v. Sobel*. 779 N.W.2d 782 (Iowa 2010). Sobel had no prior disciplinary record and had been recognized for his volunteer work in assisting refugees in the community. *Id.* at 783. Sobel did not provide notice of withdrawal of attorney fees in writing and acknowledged that he had not earned the entire retainer at the time it was received. *Id.* at 789. The Court must adhere to the guidelines it set out when disciplining Scott

Sobel, “Consistent with our prior cases, we discipline Sobel by imposing a public reprimand.” *Id.* Citing *See Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Apland*, 577 N.W.2d 50, 60 (Iowa 1998); *Comm. On Prof’l Ethics & Conduct v. Garretson*, 515 N.W.2d 25, 28 (Iowa 1994) (Stating failure to render accounting for legal services warrants public reprimand). As like Sobel, Heggens conduct was not the type of conduct that reflected adversely on her fitness to practice law.

Additionally, the sanction against attorney Kenneth Smith is instructive in determining the correct discipline for Heggen. Smith was found to be in violation of Iowa Court Rule 45.2(3) and received a public reprimand. *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Smith*, 904 N.W.2d 154 (Iowa 2017). Smith received a public reprimand in large part to the presence of “significant mitigating factors” *Id.* at 160. “Smith has never before been the subject of professional discipline. He cooperated fully with the auditor, the commission, and the Board. He admitted his violation. No client suffered financial harm. Lastly, Smith has made considerable charitable contributions to the community and the legal profession.” *Id.* at 161. Like Smith, Heggen must receive a public reprimand for her conduct due to the presence of her substantial mitigating factors.

CONCLUSION

There is no basis for the sanction of license revocation on Bonnie Heggen. She had a colorable future claim to the funds at question, therefore any precedent sanction involving conversion without a colorable future claim is not relevant. Additionally, imposing a suspension of any length on Bonnie Heggen does not align with Court precedent, harms the rights of vulnerable populations, and is not warranted as Bonnie understood the severity of her infraction, seeking to immediately remedy the situation. The Court should not impose a suspension of any length on Bonnie Heggen. The appropriate sanction is a public reprimand, as was imposed on Sobel and Smith.

RESPONDENT-APPELLANT/CROSS-APPELLEE'S REQUEST FOR ORAL ARGUMENT

Respondent-Appellant/Cross-Appellee hereby states her desire to be heard in oral argument pursuant to Iowa Rule of Appellate Procedure 6.21(1).

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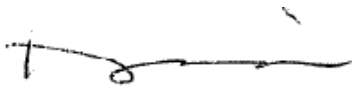
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