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In the Supreme Court of Iowa

Supreme Court No. 23-0099
Grievance Commission No. 935

Iowa Supreme Court
Attorney Disciplinary Board,

Appellee,

vs.

David L. Leitner,

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 David L. Leitner ("Leitner") alleging violations of the Iowa Rules of Professional Conduct and Iowa Trust Account Rules associated with Leitner's creation and use of Foodprairie, L.L.C. on behalf of client Mitchell; his representation of Barney in a dissolution-of-marriage action; his representation of Lu-Jen Farms, Inc. in a contract dispute; his representation of Elizabeth John in a guardianship matter; and an audit of Leitner's trust account records.

Course of Proceedings and Disposition

On March 9, 2022, the Board filed a Complaint against Leitner. (Appendix ("App.") 4). On March 24, David L. Brown entered an appearance on behalf of Leitner. Leitner failed to file his answer by the filing deadline of April 13. On April 18, the Board filed its Motion to Deem Complaint Admitted. Leitner

resisted on April 28. The panel president granted the Board's motion on May 13, after a hearing on the matter and by which point Leitner had still filed no answer. (App. 40).

On October 5, 2022, a hearing was held in this matter before the 655th Division of the Grievance Commission ("the Commission"). On November 14, the Board and Leitner submitted Post-Hearing Briefs. On January 19, 2023, the Commission filed its Findings of Fact, Conclusions of Law, and Recommendation. (App. 49).

Commission's Conclusion and Recommendations

The Commission concluded that Leitner violated Iowa Rules of Professional Conduct 32:1.2(d) and 32:8.4(d) with respect to Count I (Foodprairie Matter); rules 32:3.3(a)(1), 32:8.4(c), and 32:8.4(d) with respect to Count II (Barney Matter); rules 32:1.7(a)(2), 32:1.9(a), and 32:1.9(c) with respect to Count III (Lu-Jen Matter); rule 32:8.4(d) with respect to Count IV (Elizabeth John Matter); and rules 32:1.15(a), 32:1.15(c), and 32:8.4(d) and Iowa Court Rules 45.2(3)(a)(9), 45.7(3), and 45.7(4) with respect to Count V

(Trust Account Audit).[1] (App. 52–55). The Commission recommended that Leitner's license to practice law be revoked. (App. 55–56).

Leitner's Appeal

On January 24, 2023, Leitner filed his notice of appeal with the Commission clerk. (App. 57).

STATEMENT OF FACTS

Leitner was admitted to practice law in the state of Iowa on July 25, 1979, and maintains a law practice in West Des Moines. (App. 4–5).[2]

Representation of Marvin Mitchell and Creation of Foodprairie, LLC

Leitner has long served as the attorney for an individual named Marvin Mitchell ("Mitchell"), representing him in various matters since at least 2004. (App. 5). Mitchell has been involved in the farming industry for several decades, and his business has involved the sale and distribution of seed. (App. 5). In or around 2007, Mitchell was indicted for bankruptcy fraud in federal court and was subsequently sentenced to 18 months in prison. (App. 5).

[1] The Board also charged a violation of rule 32:1.15(f) in connection with Leitner's audit, although the Commission declined to address the rule in its Report. (App. 55).

[2] Because of Leitner's failure to file a timely answer and the Commission's subsequent order deeming allegations admitted, the allegations contained in the Complaint are considered facts proven true in the record. For ease, the Board will cite to the Complaint itself when referencing these facts.

Mitchell pled guilty to concealing assets by creating various business entities and then transferring funds, land, equipment, and other assets to those entities prior to declaring bankruptcy. (App. 5). Mitchell owes substantial sums of money to the federal government and, as a consequence, any income he receives is potentially subject to garnishment by federal authorities. (App. 5). Mitchell owes approximately $71,000.00 to the United States Department of Agriculture and also has several federal tax liens against his home. (App. 5).

On or about March 27, 2013, Leitner filed a certificate of organization with the Iowa Secretary of State creating a limited liability company known as Foodprairie, L.L.C. ("Foodprairie"). (App. 6). In subsequent biennial reports filed by Leitner, he describes himself as the "managing member" of Foodprairie. (App. 6). Leitner created Foodprairie as part of a deliberate scheme to hide Mitchell's funds from creditors, including the federal government. (App. 6). On or about November 28, 2016, Leitner opened a bank account for Foodprairie at Central Bank in Iowa. (App. 6). In the account agreement Leitner signed when opening the account, he described Foodprairie as a "single-member LLC." (App. 6). Leitner further certified that he was the "manager or designated member" of Foodprairie. (App. 6).

Mitchell has continued to work in the farming industry since his criminal conviction and has received income from that work. (App. 6). At least part of that income has been concealed using the Foodprairie business entity and bank account established by Leitner. (App. 6). Mitchell's work in the farming industry since his conviction has included the sale of seed. (App. 6). In or around March of 2017, Mitchell entered into a contract to become a dealer of Pfister Seed ("Pfister") products.[3] (App. 6–7). Eric Schweinefus, a Pfister employee at that time, knew Mitchell from previous business dealings and approached Mitchell about becoming a Pfister dealer. (App. 7). Mitchell told Schweinefus that he wanted to become a Pfister dealer but said that he did not want his own name associated with the Pfister dealership. (App. 7). Mitchell told Schweinefus that his lawyer, Leitner, could help establish the Pfister dealership without using Mitchell's name. (App. 7).

Schweinefus provided Mitchell with a copy of Pfister's standard dealership agreement, which was later signed by Leitner. (App. 7). The completed dealership form listed Foodprairie as the dealer and Leitner as Foodprairie's "sole member." (App. 7). Mitchell's name does not appear on the

[3] Pfister Seeds subsequently merged with NuTech Seed, which is a subsidiary of Corteva, Inc. (App. 7 n.4).

form. (App. 7). The completed dealership agreement form was subsequently sent to Jim Riefenrath ("Riefenrath"), an Assistant General Manager for Pfister. (App. 7).

Upon receiving the dealership agreement, Riefenrath was initially confused, as he had previously been told by Schweinefus that the dealership agreement would be between Pfister and Mitchell. (App. 7). Riefenrath subsequently participated in a telephone conference call with both Mitchell and Leitner, during which Leitner indicated that Foodprairie was his company. (App. 8). Leitner and Mitchell both agreed that Mitchell's dealership agreement with Pfister should be in Foodprairie's name. (App. 8).

After executing the dealership agreement, Mitchell began selling Pfister products and earning commissions and fees for his sales. (App. 8). Some or all of the funds owed to Mitchell under the terms of the dealership agreement were wired to the Foodprairie account at Central Bank. (App. 8). While working as a dealer of Pfister products, Mitchell earned substantial sums of money from Pfister, but the funds were always cloaked in the Foodprairie name. (App. 8).

Creating Foodprairie, opening a bank account in its name, and entering into the contract with Pfister under the name of Foodprairie were all an artifice developed with Leitner's assistance to provide Mitchell with a means of

receiving funds without detection by creditors, including the federal government. (App. 8). Leitner allowed Mitchell to use an LLC that Leitner created—Foodprairie—to help Mitchell conceal income from his creditors, including the federal government. (App. 8). Leitner opened a bank account in Foodprairie's name and allowed Mitchell to use the account to receive money surreptitiously. (App. 9). Leitner facilitated the contract between Mitchell and Pfister and executed the dealership agreement with Pfister in the name of Foodprairie so that Mitchell could do business without detection or garnishment of funds earned. (App. 9).

Barney Matter

On April 14, 2020, Leitner filed an appearance on behalf of Brooks Barney ("Barney") in Polk County Case No. DRCV060024—a dissolution-of-marriage-action filed by Barney's then-spouse, Deena Fries ("Fries"). (App. 10). Leitner had previously represented Barney in a criminal case in which Barney was charged with assaulting Fries (*State v. Barney*, Polk County Case No. FECR336891). (App. 10).

The parties participated in a successful mediation regarding the dissolution-of-marriage action and signed a mediated agreement on July 21, 2020. (App. 10). Based upon the mediation agreement, Fries's counsel,

Elizabeth Kellner-Nelson ("Kellner-Nelson"), prepared a stipulation comprised of the agreed-upon terms and emailed it, in a PDF format, to Leitner on August 3, 2020. (App. 10). Leitner returned what appeared to be the same PDF, signed by himself and Barney, to Kellner-Nelson by email on or about August 21, 2020. (App. 10).

Unbeknownst to Kellner-Nelson, Leitner had modified the PDF document containing the stipulation, adding a significant provision regarding custody of the parties' minor child. (App. 10). Paragraph 3 of the original PDF Kellner-Nelson sent to Leitner states:

> Visitation. Unless otherwise agreed, Brooks will be entitled to time with B.S.B. every other weekend from Saturday at 4:00 p.m. until Sunday at 7:00 p.m. and every Tuesday from 6:00 p.m. until Wednesday at 7:00 a.m.

(App. 11). Leitner modified the PDF to state:

> Visitation. Unless otherwise agreed, Brooks will be entitled to time with B.S.B. every other weekend from Saturday at 4:00 p.m. until Sunday at 7:00 p.m. and every Tuesday from 6:00 p.m. until Wednesday at 7:00 a.m. *Respondent sha [sic] first right of refusal to have B.S.B. whenever Petitioner is otherwise unable to care for him.*

(App. 11) (emphasis added).

At no point did Leitner notify Kellner-Nelson that he had modified the PDF document to add the "right-of-first-refusal provision." (App. 11). The right-of-first-refusal provision was also not part of the parties' mediation

agreement. (App. 11). Moreover, neither the parties nor their respective counsel had ever previously discussed a right-of-first-refusal provision. (App. 11). Rather, Leitner unilaterally inserted the provision without notifying or consulting with Kellner-Nelson. (App. 11).

Because the stipulation had been sent and returned as a PDF document, and because Leitner did not notify her of the modification to paragraph 3, Kellner-Nelson reasonably believed the PDF document Leitner returned to her was the same as the one she had sent to him, changed only to add the signature of his client. (App. 11–12). Kellner-Nelson had reviewed the stipulation with Fries before sending it to Leitner, so after Leitner returned the stipulation that he had surreptitiously modified, Fries signed it, reasonably believing it to be the same stipulation she had previously reviewed with her attorney. (App. 12).

The stipulation was filed with the district court on August 25, 2020. (App. 12). In January of 2021, Barney—who at the time was subject to both a criminal and a civil no-contact order in which Fries was the protected party—notified Fries of his right of first refusal based upon the modified stipulation. (App. 12). On January 25, Kellner-Nelson filed a motion to vacate the order approving the parties' stipulation. (App. 12). On March 29, Leitner filed an application to initiate contempt proceedings based in part on the allegation that Fries had

failed to honor the right-of-first-refusal provision Leitner had furtively added to the stipulation. (App. 12).

Following a hearing on June 29 regarding the motion to vacate the stipulation and the application to initiate contempt proceedings, the district court entered an order granting Fries's motion to vacate the order approving the stipulation. (App. 12). The court also found Leitner and his client engaged in fraud when modifying the stipulation to include the right-of-first-refusal provision. (App. 12–13).

The court found that Leitner and his client intentionally deceived Fries and Kellner-Nelson, finding "an intent to deceive based on the manner in which the provision was inserted and returned without any suggestion that a revision had been made." (App. 13). The court further noted that Fries was damaged by the fraudulent insertion of the right-of-first-refusal provision. (App. 13). The court explained:

> Fries is currently protected by a five-year criminal No Contact Order after Barney plead [sic] guilty to domestic abuse assault by impeding breathing without injury. Barney's interpretation of the right of first refusal would require Fries to alert him anytime she decided to leave the minor child in someone else's care (such as at home with her older children), even if it was only for an hour to go to the gym or the grocery store. Essentially Fries would have to disclose far greater information about her daily life to someone against whom she is protected by a No Contact Order.

> The testimony in this case demonstrates the problematic nature of Barney's claims. Barney called two different witnesses to report that Fries had been seen at a bar on a weekend night and a Prairie Meadows on New Year's Eve. He messaged Fries while she was at the grocery store to ask where the child was if he wasn't with her. Clearly, Barney is keeping tabs on Fries' whereabouts, despite the existence of a No Contact Order.

(App. 13) (footnote omitted). The court also denied Barney's application to initiate contempt proceedings. (App. 14).

Leitner's covert modification of the stipulation was not Leitner's only dishonest act while representing Barney. (App. 14). On December 2, 2020, Kellner-Nelson filed an application to initiate contempt proceedings based on Barney's failure to pay either child support or his required $200 monthly car payments to Fries. (App. 14). In response, Leitner filed a motion to dismiss the contempt application in which he falsely stated that Barney had "brought his child support current," Barney had paid the $200 monthly car payment, and the contempt application was "frivolous." (App. 14). On January 14, 2021, the district court entered an order holding Barney in contempt and finding that he had willfully failed to pay child support and the car payment. (App. 14).

On February 25, 2021, Kellner-Nelson filed a motion to waive a mediation that had been ordered in response to her application to vacate the parties' stipulation. (App. 14). On March 3, Leitner filed a resistance to the motion in

which he falsely claimed that he had "tried, without success, to get opposing counsel to set up the mediation or at least provide alternative dates." (App. 14). Leitner had made no effort to contact Kellner-Nelson about mediation. (App. 14).

A hearing was scheduled for July 8, 2021, to determine if Barney had complied with the contempt order, but neither Leitner nor Barney appeared for the hearing. (App. 15). The presiding judge contacted Leitner by phone to inquire why he and his client had not appeared for the hearing. (App. 15). Leitner stated that he believed the hearing was by phone and that he had told his client he did not need to participate in the hearing. (App. 15). The hearing was rescheduled for July 19. (App. 15). At the July 19 hearing, however, Barney testified that Leitner had not notified him of the July 8 compliance hearing, and he was not told of any hearing until July 16. (App. 15).

Lu-Jen Matter

On April 16, 2020, Leitner filed an answer on behalf of Lu-Jen Farms, Inc. ("Lu-Jen") and Cliff Bowie in Cedar County Case No. LACV036444. (App. 16). The suit was initiated by the James D. Jamison Irrevocable Trust ("Jamison") against Lu-Jen and alleged breach of contract, among other claims. (App. 16). The petition alleged the parties entered into a contract in which Lu-Jen agreed

to purchase all of its corn and soybean crop from Jamison, but Lu-Jen had failed to make payment to Jamison as required by the contract. (App. 16).

Leitner previously represented Jamison; Leitner drafted the contract in question on behalf of Jamison.[4] (App. 16). Although he himself drafted the contract, in the answer he filed on behalf of Lu-Jen, Leitner stated, "the alleged contract is unconscionable and void as against public policy." (App. 16). Leitner also stated in the answer that Jamison, his former client, "is not and was not at the time claimed a licensed dealer of agricultural seed." (App. 17).

On April 23, 2020, Jamison's counsel, Daniel Rockhold, sent Leitner a letter asking Leitner to withdraw from representing Lu-Jen because of the conflict of interest. (App. 17). Rockhold also notified Leitner that he would likely be a witness in the case, as Leitner had firsthand knowledge regarding the formation and execution of the contract. (App. 17). Leitner replied to Rockhold by letter dated April 30, acknowledging the conflict of interest and stating, "[U]pon further reflection, I do agree that I may have a conflict of interest." (App. 17). Leitner indicated that he would be withdrawing because of the conflict of interest. (App. 17).

[4] Leitner drafted the contract for Jamison and Sons, a predecessor entity to the Jamison Irrevocable Trust. (App. 16 n.2).

Leitner did not withdraw his representation of Lu-Jen. (App. 17). On July 15, 2020, Rockhold filed a motion to disqualify Leitner, as Leitner had not voluntarily withdrawn. (App. 17). The district court entered an order disqualifying Leitner on August 3. (App. 17).

Following Leitner's disqualification, Jamison filed an amended petition on September 28, 2020. (App. 17). On October 20, Jamison served Lu-Jen with notice of intent to file an application for default judgment, as Lu-Jen had not filed an answer to the amended petition. (App. 17). On October 29, Leitner filed an answer to the amended petition on behalf of Lu-Jen. (App. 18). The answer was signed by Cliff Bowie, a representative of and co-defendant with Lu-Jen. (App. 18). However, the answer was filed by Leitner through his electronic document management account. (App. 18).

Elizabeth John Matter

On April 2, 2019, Leitner filed an appearance on behalf of Elizabeth John ("Elizabeth") in Polk County Case Nos. TRPR074630 and TRPR074636. (App. 19). The cases were initiated by Elizabeth's daughter, Kimberly Milliken ("Milliken"), and related to two trusts for which Elizabeth was the designated trustee. (App. 19). The petitions filed by Milliken alleged Elizabeth had been

deemed by a medical professional incapable of making financial decisions and sought to have Elizabeth replaced as trustee. (App. 19).

After the cases were initiated, Elizabeth met with her longtime attorney, Richard Howes ("Howes"), and informed him she wanted him to represent her in the trust cases. (App. 19). Howes contacted Leitner and informed him that he would be taking over representation of Elizabeth. (App. 19–20). On July 11, 2019, Howes filed an appearance in the trust cases on behalf of Elizabeth, and Leitner filed a withdrawal of his appearance on behalf of Elizabeth the following day. (App. 20).

On August 1, 2019, Milliken and Elizabeth filed a joint stipulation—signed by Elizabeth, Howes, and Milliken's counsel—in which the two agreed that an amendment to the two trusts at issue should be revoked. (App. 20). The amendment had been prepared by Leitner on or around March 28, 2019. (App. 20). The March 28 amendment made several changes to the trusts, including eliminating or significantly reducing Milliken's interests in two properties and granting those properties to Elizabeth's son, Timothy John ("Timothy"). (App. 20).

Although he had withdrawn from the trust cases, Leitner filed an objection on behalf of Timothy to the stipulation on August 2, 2019. (App. 20). In the objection, Leitner stated:

> The undersigned [Leitner] can attest to the fact that that amendment was executed by Betsey John at a time when she was fully competent and had total testamentary capacity as defined in Iowa law. She insisted that that amendment be drafted, and it was. She signed of her own free will fully understanding its terms and its import.

(App. 20). On August 8, the court entered an order approving Milliken and Elizabeth's stipulation and revoking the March 28 amendment to the trusts. (App. 21).

On October 15, 2019, Milliken filed a petition to appoint a guardian and conservator in which Elizabeth was the proposed protected person. (App. 21). The petition was based on the same grounds as the trust cases and alleged that Elizabeth's decision-making ability was significantly impaired. (App. 21). On October 16, the court entered an order appointing Howes as counsel for Elizabeth. (App. 21). The order also appointed Kim Walker of Transitional Life Counseling, LLC as Guardian ad Litem for Elizabeth and Milliken as temporary guardian. (App. 21).

Following the court's October 16 order, Timothy brought Elizabeth to meet with Leitner at Leitner's office to discuss the pending cases. (App. 21).

Leitner did not notify Howes, Walker, or Milliken of the meeting. (App. 21). Howes later learned of the meeting and thus contacted Leitner to inform him that he did not have permission to communicate with Howes's client Elizabeth. (App. 21).

On October 23, 2019, Howes sent the following email to Leitner:

> David,
>
> You may know that Kim has been appointed as Betsy's temporary guardian. If not, I am, as a courtesy, attaching a copy of the order and affidavit of mailing.
>
> As Betsy is my client at this time as stated in the court order you do not have permission to communicate with her alone or with anyone else. Please respect that request.
>
> Richard

(App. 21–22). On October 24, Howes sent another email to Leitner:

> David,
>
> I understand Tim may be planning to bring Betsy to meet with you. I am requesting again you do not meet with her or otherwise communicate with her as she is my client per court order and is under a guardianship and conservatorship and does not have the ability to make decisions for herself at this time.
>
> Please take notice and govern yourself accordingly.
>
> Richard

(App. 22).

Despite Howes's emails, Leitner met with Elizabeth at his office. (App. 22). Thereafter, Howes received a typewritten letter dated October 24, 2019, purportedly signed by Elizabeth, stating that she wished to terminate Howes as

her attorney and retain Leitner. (App. 22). On October 29, Howes sent the following email to Leitner:

> David,
>
> I am following up [on] my previous emails to you regarding your contact with my client, Elizabeth John. Subsequent to my last email to you, I received in the mail a typewritten note purportedly signed by my client advising me that she is discharging me and engaging your services. To the extent you had contact with her and had any part in this communication you have violated my admonition to not contact her and have crossed an ethical line.
>
> Elizabeth is under a court ordered guardianship and conservatorship and at this time does not have the ability to engage or discharge attorneys on her own. That matter would have to be done under the auspices of the court.
>
> Again I am admonishing you not to have contact with my client, Elizabeth John. As her court appointed attorney I am obligated to so advise you and warn you that further contact will not only again cross an ethical line but potentially violate a court order.
>
> Richard

(App. 22–23).

Also on October 29, Milliken, through counsel, filed a motion to disqualify Leitner from the guardianship case. (App. 23). The motion additionally sought an order preventing Timothy from having further contact with Elizabeth. (App. 23). The motion alleged Timothy, aided by Leitner, unduly influenced Elizabeth and interfered with her well-being and assets. (App. 23). It also alleged that Leitner's attempts to represent Elizabeth created a conflict of interest due to his previous joint representation of Timothy and Elizabeth. (App. 23). The

motion noted that Leitner had met with Elizabeth while she was represented by Howes. (App. 23).

On November 20, 2019, the district court entered an order prohibiting Leitner from having any further contact with Elizabeth without express permission from Howes. (App. 23). On March 6, 2020, however, Leitner filed a new petition in the Polk County District Court on behalf of Elizabeth and Timothy. (App. 24). The petition purported to be signed by Elizabeth and named Milliken and Howe as defendants, among others. (App. 24). Leitner did not have permission from the court or Howes to communicate with Elizabeth about the petition or to file the petition on her behalf. (App. 24).

The petition was not well-grounded in law or fact. (App. 24). Leitner alleged the defendants had violated Elizabeth and Timothy's constitutional rights and sought damages pursuant to 42 U.S.C. §§ 1983 and 1985. (App. 24). The petition also sought to have the guardianship and conservatorship invalidated. (App. 24).

The defendants moved to dismiss Leitner's petition; on April 16, 2020, the district court dismissed the petition. (App. 24). The court also sanctioned Leitner, noting in its sanction order that Leitner had been prohibited from having any contact with Elizabeth but nevertheless filed the petition on her

behalf. (App. 24). The court further found that Leitner's petition amounted to a collateral attack on the probate and guardianship cases. (App. 24).

Client Security Commission Audit

In July of 2020, the Iowa Supreme Court Client Security Commission ("CSC") initiated an audit of Leitner's client trust account ("CTA"). (App. 25). The audit revealed Leitner failed to comply with chapter 45 of the Iowa Rules of Court when handling money entrusted to him by clients. (App. 25). The audit revealed that Leitner had negative sub-account balances in his CTA totaling $5153.16 and that he did not perform timely monthly triple reconciliations. (App. 26).

In his 2020 Combined Statements and Questionnaire, Leitner answered "yes" to the following question: "Are reconciliations of your trust account balances with bank statement balances and individual client ledger balances performed monthly?" (App. 26). Leitner knowingly provided a false answer to that question. (App. 26).

The audit further revealed that Leitner received $1000.00 from a client on May 22, 2020, as an advanced payment of fees but failed to deposit those funds in his CTA. (App. 26). The audit also showed that Leitner failed to provide contemporaneous written notice of withdrawals from his CTA, nor did he

provide clients an accounting of the funds he held from them in his CTA. (App. 26). Lastly, the audit revealed client ledger activity that was not reflected in the CTA records, meaning there were expenses paid with respect to a client from the operating account instead of from the CTA. (App. 26).

ARGUMENT

Error Preservation

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

Scope and Standard of Appellate Review

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

I. THE REJECTED OFFER BY THE BOARD TO RECOMMEND A 60-DAY SUSPENSION IN CONNECTION WITH A CONSENT TO DISCIPLINE—MADE BEFORE ITS DISCOVERY OF ADDITIONAL MISCONDUCT—HAS NO EFFECT ON THE APPROPRIATE DISPOSITION.

Leitner claims in his brief that "[t]here is no reasonable basis or support for the most severe sanction." (Appellant's Proof Brief 10). Notably, Leitner has cited no case law in support of that claim. He has made no argument to show why his misconduct is not worthy of revocation of his license to practice.

Instead, Leitner relies upon smoke and mirrors and focuses on an issue that has no bearing at all on the appropriate sanction to be imposed.

First, Leitner's entire claim regarding the Board's 60-day offer rests upon a blatant misrepresentation. Leitner offered Exhibit 2 to show that on June 23, 2021, Board counsel Larry Dempsey offered to recommend a 60-day suspension if Leitner agreed to consent to a suspension as a result of his trust-account-related violations. (App. 64–65). Leitner and his counsel then claimed that Leitner accepted this offer, and Leitner's counsel asserted in closing argument that the Board's actions in later prosecuting him and recommending revocation of his license were "abusive" and had "gone way too far."[5] (App. 122 (Tr. 57:7–14)). Leitner continues this argument on appeal.

But Leitner's Exhibit 2 conveniently omitted his explicit rejection of the Board's offer that it would recommend a 60-day suspension if he were to consent. In rebuttal, the Board offered the full conversation between Leitner

[5] Leitner's accusations against Board counsel at the hearing and in briefing are troubling. Leitner in the same breath lauds his own supposed cooperation with and respect for the Board while also hurling unfounded and irrelevant ethical accusations against the Board's counsel. As discussed below, Leitner highlighted at the hearing his contributions to the profession by writing about ethical issues. An attorney who requests that this Court consider such a thing as mitigating should not be permitted to denigrate the process or those who work to ensure compliance with the ethics rules.

and Mr. Dempsey. Exhibit A revealed that Leitner responded to Mr. Dempsey's email the same day and stated, "I cannot survive financially without income for 60 days. Since my issue is poor bookkeeping and I have remedied that by hiring a CPA and since no one lost any money, perhaps 15 days would be more reasonable."[6] (App. 59). Leitner's omission of this response is deceptive, and his argument that he later orally agreed to consent if the Board recommended a 60-day suspension is disingenuous.[7]

Mr. Dempsey's later email to Leitner on behalf of the Board confirms this conclusion. On November 3, 2021, Mr. Dempsey wrote to Leitner that the Board had learned of his violations in relation to his fraudulent concealment of assets through Foodprairie. (App. 59). Additionally, Mr. Dempsey stated,

> With respect to our previous discussions regarding a consent to a sixty day suspension, you previously indicated that you were not interested in consenting to such a suspension. . . . In light of the subsequent complaints, a sixty day suspension is no longer a consent arrangement we are willing to accept.

(App. 59). Tellingly, Leitner did not reply to this email to correct Mr. Dempsey's statement that Leitner had rejected the initial offer. Furthermore, Leitner has

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[6] As the Board later learned and included in its prosecution, Leitner's other conduct did in fact result in a loss of money to the federal government.

[7] It is perhaps worth noting that in connection with Count II of the Board's Complaint, Leitner fabricated two other communications, one with opposing counsel and one with his client. (App. 14–15).

yet again deceptively omitted the Board's Exhibit A from his account in his own briefing to this Court. Leitner's telling of the events is not credible, as the Commission correctly found. (App. 52).

Secondly, even assuming arguendo that Leitner's version of events was not based upon a lie, Leitner's assertion that the 60-day offer should dictate the ultimate disposition ignores the procedure for consents to discipline. Iowa Court Rule 34.16 governs discipline upon consent. Iowa Ct. R. 34.16. Ultimately, any "offer" extended by the Board is subject to review and acceptance by the Court. *Id.* r. 34.16(3) (noting that upon receipt of an attorney's affidavit of consent to discipline, "[i]f the supreme court determines the affidavit does not set forth facts that support imposition of the discipline to which the attorney has consented, it may either enter an order allowing the parties to supplement the affidavit or an order declining to accept the affidavit"). Given the serious nature of Leitner's misconduct that the Board discovered after extending the original offer, a 60-day suspension would likely have been rejected by this Court as insufficient. *See id.*

Additionally, the Board's acquiescence to an attorney's consent to discipline is not necessary. If an attorney wishes to consent to discipline, he or she may initiate that process without the Board's involvement, and the Board

need only participate upon the filing of the consent affidavit, when it must file a response to the affidavit. *Id.* r. 34.16(1), (2). Leitner made no attempts to execute or file such a consent affidavit. Indeed, Leitner's own statements at the hearing make it clear that he had no intention of ever filing a consent affidavit, with or without the Board's approval and agreement to recommend a suspension of any particular length. A consent to discipline would have required Leitner to swear by affidavit to having committed the misconduct alleged, but Leitner stated unequivocally at the hearing that, "given the opportunity, [he] could refute every single one" of the allegations against him except the violations of the trust accounting rules. (App. 114 (Tr. 49:11–13)). Leitner has continued this assertion on appeal. (Appellant's Proof Brief 7).

II. THE ALLEGATIONS AGAINST LEITNER WERE DEEMED ADMITTED BECAUSE OF HIS FAILURE TO FILE A TIMELY ANSWER, AND THE COMMISSION PROPERLY RECOMMENDED REVOCATION OF LEITNER'S LICENSE TO PRACTICE LAW IN LIGHT OF THE ADMITTED MISCONDUCT.

This case comes before the Court upon a unique procedural posture. The allegations against Leitner were deemed admitted pursuant to Iowa Court Rule 36.7 because of his failure to file a timely answer. *See* Iowa Ct. R. 36.7 (stating that a respondent "must file a written answer to the complaint within 20 days from the completed service of notice" and further stating "[i]f the respondent

fails or refuses to file an answer within the time specified, the allegations of the complaint are deemed admitted, and the matter will proceed to a hearing on the issue of the appropriate sanction"). Leitner has not challenged this order by the Grievance Commission or the Commission's findings that the admitted conduct violated the rules but instead only disputes the recommended sanction. The question, then, is whether the proven conduct warrants revocation of Leitner's license to practice law.

In determining the appropriate sanction for an attorney's misconduct, this Court will "consider 'the nature of the violations, protection of the public, deterrence of similar misconduct by others, the lawyer's fitness to practice, and the court's duty to uphold the integrity of the profession in the eyes of the public.' " *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Heggen*, 981 N.W.2d 701, 713 (Iowa 2022) (quoting *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Earley*, 729 N.W.2d 437, 443 (Iowa 2007)). The Court will also consider aggravating and mitigating circumstances. *See id.*

The now-admitted allegations provided the basis for the Commission's recommended sanction of revocation of Leitner's license to practice law. *See Iowa Sup. Ct. Att'y Disciplinary Bd. v. Alexander*, 727 N.W.2d 120, 122 (Iowa 2007) ("Admissions may be relied upon to meet the evidentiary burden of the

Board."). Setting aside the other concerning misconduct in connection with Counts II through V of the Board's Complaint, Leitner's assistance to his client Mitchell in defrauding the federal government warrants this recommendation on its own.

While neither Leitner nor his client technically converted funds, their conduct in fraudulently hiding assets that should have belonged to the federal government most closely aligns with the act of conversion. The federal government did not have possession or control over the funds when Leitner and Mitchell diverted them—but that was the whole point. The only reason the federal government did not have dominion over the money was because of the very nature of the scheme. Leitner and Mitchell took active steps to keep the government from ever finding out the money existed. Leitner and Mitchell effectively swindled the federal government out of money that it rightfully should have possessed.

When an attorney aids his clients in converting funds, even if the attorney does not personally convert or benefit financially from the conversion, the proper sanction is revocation of the attorney's license to practice law. The Court imposes this harsh sanction for a reason: the "obligation to protect the public from theft and deceit." *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Nelsen*, 807

N.W.2d 259, 267 (Iowa 2011) (quoting *Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Carr*, 588 N.W.2d 127, 129 (Iowa 1999)).

> This obligation is no less important when the theft and deceit does not directly involve client funds. The same lack of trust is implicated. Likewise, the need to maintain the reputation of the bar as a whole is the same, as is the need to deter other lawyers from engaging in similar conduct. Trust is not reserved for clients, but lies at the very heart of the profession.

Iowa Sup. Ct. Att'y Disciplinary Bd. v. Den Beste, 933 N.W.2d 251, 257 (Iowa 2019) (quoting *Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Schatz*, 595 N.W.2d 794, 796 (Iowa 1999)). The same reasoning applies here.

This case is remarkably similar to *Iowa Supreme Court Attorney Disciplinary Board v. Nelsen*, wherein the attorney assisted his clients in diverting thousands of dollars of his client's accounts receivable from the control of the court-appointed receiver. 807 N.W.2d at 265. The attorney "knowingly approved and agreed to [his client's] conversion of the bank's funds by actively participating in the conversion." *Id.* at 265–66. As a result of this misconduct, the *Nelsen* court was faced with "decid[ing] whether revocation is the proper sanction when an attorney aids and abets a client in converting funds, without receiving any personal gain from those funds, and he is not charged with or convicted of a crime." *Id.* at 267. It made no matter that the attorney did not receive personal gain from the fraud; it mattered only that "he

knowingly and willfully participated in his client's scheme to defraud" the bank. *Id.* The court decided this conduct merited revocation, noting that other jurisdictions "have not hesitated to revoke the license of an attorney who has been convicted of aiding and abetting a *fraud* or theft." *Id.* at 267–68, 268 n.2 (emphasis added) (citations omitted). Leitner's aid to his client Mitchell in defrauding the federal government by concealing assets in the Foodprairie account mirrors Nelsen's conduct in aiding his clients in defrauding the bank and concealing assets rightfully belonging to the bank.

Also similar is *Iowa Supreme Court Attorney Disciplinary Board v. Engelmann*, where the court revoked an attorney's license because he assisted his client in defrauding a financial institution, which also resulted in the attorney being convicted of federal felonies. 840 N.W.2d 156, 164, 166–67 (Iowa 2013). Important to the court's analysis was that the attorney intended to cause the lenders financial harm, even though he did not "personally benefit[] from these transactions." *Id.* at 159, 166. Similarly, in the instant case, Leitner without question acted with the intent to cause financial harm to the government, as the purpose behind Leitner and Mitchell's actions was to prevent the federal government from learning of the money to which it was

entitled. *See id.* The clear intent was to stop the federal government from collecting the thousands of dollars Mitchell owed. (App. 6–9).

In contrast, in *Iowa Supreme Court Attorney Disciplinary Board v. Springer*, the court issued a two-year suspension for the attorney's preparation of fraudulent documents in transactions involving the sale of real estate, despite finding that he "knowingly executed a scheme to defraud a financial institution" and "did so with the intent to defraud." 904 N.W.2d 589, 591–92, 596 (Iowa 2017). The key to the conclusion that a lesser sanction than the one imposed in *Engelmann* was appropriate was the attorney's intent: "Springer did not necessarily act with the specific intent of causing financial institutions to suffer a loss." *Id.*; *see also Iowa Sup. Ct. Att'y Disciplinary Bd. v. Bieber*, 824 N.W.2d 514, 528 (Iowa 2012) (suspending an attorney's license for six months for a fraudulent scheme because he did not know the funds were being converted); *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Wheeler*, 824 N.W.2d 505, 512 (Iowa 2012) (issuing a six-month suspension because although the attorney submitted false financial documents to a bank, "his intention was to obtain a loan from the bank, not for the bank to suffer a loss"). As stated, the whole point of Leitner's Foodprairie scheme was to deprive the federal government of the

funds to which it had rights. As a result, the appropriate sanction is revocation of Leitner's license to practice law.

Neither do any mitigating factors present here vitiate the need for revocation. Leitner's lack of a disciplinary history is mitigating, although not dispositive. *See Engelmann*, 840 N.W.2d at 164, 167 (revoking the attorney's license after he aided his client in defrauding a financial institution despite the attorney's lack of a disciplinary history). Additionally, Leitner claims his "unenviable" health should be mitigating, although as the Commission pointed out, Leitner "offered no evidence or testimony that any of his health issues specifically impacted or led to any of the charged misconduct." (App. 55). Leitner testified that he performs some pro bono work, which is typically mitigating, although Leitner indicated that his pro bono work was often unintended. *See Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Frerichs*, 671 N.W.2d 470, 473 (Iowa 2003). (App. 94, 96 (Tr. 29:5–9, 31:6–9)). Leitner also makes much of his supposed "cooperation with the Board," although this is minimally mitigating at best, given that his cooperation is the same cooperation expected of all attorneys in Iowa.[8] *See Iowa Sup. Ct. Att'y Disciplinary Bd. v.*

[8] Leitner was arguably *not* cooperative. Although he claims that he did not attempt to avoid service of the Complaint, Leitner did have to be served by the Clerk of the Grievance Commission pursuant to Rule 36.5(3) after multiple

Dunahoo, 730 N.W.2d 202, 207 (Iowa 2007) ("[C]ooperation is 'expected and required' and therefore is not a significant mitigating circumstance." (quoting *Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Bell*, 650 N.W.2d 648, 653 (Iowa 2002)); *see also* Iowa R. Prof'l Conduct 32:8.1 (requiring cooperation in connection with disciplinary matters). Leitner presented no evidence at the hearing that his cooperation with the Board rose above the expected level. Overall, Leitner's presentation of mitigating factors is "insufficient to forestall revocation." *See Iowa Sup. Ct. Att'y Disciplinary Bd. v. Bauermeister*, 927 N.W.2d 170, 176 (Iowa 2019) (revoking an attorney's license for participating in drug trafficking despite the mitigating factors of no prior discipline, cooperation with the Board, lack of client harm, and community service).

There are several aggravating factors also present here. Leitner's extensive experience, having been licensed since 1979, is aggravating. *See Iowa Sup. Ct. Att'y Disciplinary Bd. v. Parrish*, 925 N.W.2d 163, 181 (Iowa 2019). (App. 4–5). Not only has Leitner been practicing for more than four decades, he also testified at the hearing about his writings on tax and ethics—experience that is

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unsuccessful attempts were made to serve him by sheriff at both his home and his office addresses and Leitner did not return phone calls by the sheriff. (App. 33–36). At the most, Leitner's cooperation with the Board is only partial, which is not mitigating. *See Comm. on Prof'l Ethics & Conduct v. Pracht*, 505 N.W.2d 196, 199 (Iowa 1993).

particularly eyebrow-raising when his misconduct involves financial fraud. *See Parrish*, 925 N.W.2d at 181. (App. 61–63, 87 (Tr. 22:14–16)). Leitner's misconduct spanned multiple matters and demonstrates a pattern of misconduct. *See Iowa Sup. Ct. Att'y Disciplinary Bd. v. Aeilts*, 974 N.W.2d 119, 132 (Iowa 2022) (finding aggravating that there were multiple rule violations involving two unrelated events); *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Kieffer-Garrison*, 847 N.W.2d 489, 496 (Iowa 2014) (noting that a pattern of misconduct—as opposed to an isolated incident—normally gives rise to enhanced sanctions).

Lastly, Leitner's untruthful and evasive testimony at the hearing—perpetuated in his brief to this Court—is aggravating. *See Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Tofflemire*, 689 N.W.2d 83, 92 (Iowa 2004). Leitner's testimony and introduction of Exhibit 2 were deliberately misleading. (App. 59, 64–65, 103–119 (Tr. 38:7–54:16)).

The Commission's recommended sanction of revocation is appropriate here. Given the nature of Leitner's misconduct and the minimally mitigating factors and significant aggravating factors, this Court should revoke Leitner's license to practice law in Iowa.

CONCLUSION

Leitner's admitted conduct is worthy of revocation, and Leitner has not presented any case law to argue otherwise. The Commission reviewed the admissions in light of Leitner's testimony and found that Leitner—who the Commission found not to be credible—no longer deserved a place in this profession. The Board's initial offer of a recommendation to the Court of a 60-day suspension has no bearing on the appropriate discipline to be imposed in this case. Based on the serious nature of the allegations admitted by operation of law, the Court should revoke Leitner's 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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4/3/23
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