

Iowa Supreme Court Attorney Disciplinary Opinions in 2014

Presentation for the Polk County Bar Association

by
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Supreme Court Scope of Review in Attorney Discipline Case:

“Our review of attorney disciplinary proceedings is de novo. Iowa Ct. R. 35.10(1); Iowa Supreme Ct. Att’y Disciplinary Bd. v. Fields, 790 N.W.2d 791, 793 (Iowa 2010). We give respectful consideration to the commission’s findings and recommendations but are not bound by them. Iowa Supreme Ct. Att’y Disciplinary Bd. v. Lickiss, 786 N.W.2d 860, 864 (Iowa 2010). The burden is on the Board to prove attorney misconduct by a convincing preponderance of the evidence. Id. “This burden is less than proof beyond a reasonable doubt, but more than the preponderance standard required in the usual civil case.” Iowa Supreme Ct. Bd. of Prof’l Ethics & Conduct v. Lett, 674 N.W.2d 139, 142 (Iowa 2004). It is also a less stringent burden than clear and convincing evidence which is “the highest civil law standard of proof.” Iowa Supreme Ct. Bd. of Prof’l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 517 (Iowa 1996). If a violation is established, we “may impose a lesser or greater sanction than recommended by the commission.” Iowa Supreme Ct. Att’y Disciplinary Bd. v. Murphy, 800 N.W.2d 37, 42 (Iowa 2011); see also Iowa Ct. R. 35.10(1).”

Supreme Court Considerations in Determination of Sanctions in Attorney Discipline Case:

“We have repeatedly held that the goal of our ethical rules is to maintain public confidence in the legal profession as well as to provide a policing mechanism for poor lawyering. Important considerations include the nature of the violations, protection of the public, deterrence of similar misconduct by others, the lawyer’s fitness to practice, and our duty to uphold the integrity of the profession in the eyes of the public. In fashioning the appropriate sanction, we look to prior similar cases while remaining cognizant of their limited usefulness due to the

variations in their facts. Often, the distinction between the punishment imposed depends upon the existence of multiple instances of neglect, past disciplinary problems, and other companion violations, including uncooperativeness in the disciplinary investigation. Aggravating and mitigating circumstances are also important.”

Mitigating factors:

No prior record of discipline; active in community service; show remorse and take responsibility for actions; well respected in the legal community; isolated incident; cooperation with Board in resolving the matter; illness; winding down of practice; that motive was not personal financial gain.

Notes on Revocation:

In most states, revocation can be temporary, with readmission permitted. See James R. Zazzali, *The Whys and Hows of Permanent Disbarment: New Jersey’s Wilson Rule*, 21 *Geo. J. Legal Ethics* 311, 337 n.224 (2008) (listing Iowa as one of approximately six states where license revocation is permanent). ABA standards also note disbarment may only be temporary. See ABA Model Rules for Lawyer Disciplinary Enforcement R. 25 (2002) (permitting and setting forth the criteria for readmission after disbarment). By contrast, revocation of an Iowa law license is permanent.

The Court May Also Suspend an Attorney's License for:

Suspension upon Conviction of a Crime

The Iowa Supreme Court may temporarily suspend the license of a lawyer who has pled guilty to or been convicted of a crime. The temporary suspension usually remains in effect until a final disciplinary disposition is made by the Court through the Grievance Commission process.

Disability Suspension

The Iowa Supreme Court may suspend the license of a lawyer who is incapacitated or unable to discharge professional duties due to physical, mental, or emotional disability, abandonment of practice, or disappearance. Upon suspension of the lawyer's license, a trustee may be appointed to notify the lawyer's clients and take appropriate action to safeguard the interests of clients and other affected persons.

Reciprocal Discipline

When a lawyer licensed to practice law in the State of Iowa has been suspended or otherwise disciplined in another jurisdiction, the Iowa Supreme Court may impose an identical disciplinary sanction on the lawyer unless he or she shows cause why identical discipline should not be imposed in this state.

Suspension for Failure to Comply with a Support Order

Upon the filing of a certificate of noncompliance by the child support recovery unit, a lawyer's license may be suspended for failure to comply with a child support order.

Suspension for Failure to Comply with a Student Loan Obligation

Upon the filing of a certificate of noncompliance by the College Student Aid Commission, a lawyer's license may be suspended for defaulting on a student loan obligation.

Interim Suspension for Threat of Harm

Pending final disposition of a disciplinary proceeding, the Iowa Supreme Court may impose an interim suspension upon finding that a lawyer has committed an ethical violation that poses a substantial threat of serious harm to the public.

Temporary Suspension for Failure to Respond to Board

The Iowa Supreme Court shall enter an order temporarily suspending an attorney's license if the attorney has failed to respond to a notice of complaint filed by the disciplinary board.

Iowa Supreme Court Attorney Disciplinary Board v. Eric David L. Strand, filed January 3, 2014.

Violations: (1) Conversion of client funds; and many others not addressed by the court because this violation resulted in license revocation.

Summary: Strand failed to get court approval or notify estate administrators when he reached a settlement in a wrongful death suit. Strand also failed to notify estate administrators when he received the settlement funds, and never provided an accounting for the funds he kept as payment. In a separate real estate transaction, when the sale price was deposited into his trust account, Strand refused to disburse these funds to the seller, his client.

Sanction: License revoked.

Lesson: “It is almost axiomatic that we will revoke the license of an attorney who converts a client’s funds to his or her own use.”

Board v. Aaron J. Thomas, filed March 14, 2014.

Violations: (1) Conversion of client funds; and others not addressed by the court because this violation resulted in license revocation.

Summary: Thomas retained a client settlement payout in excess of his fees in his trust account for months, contrary to the client agreement and after the client repeatedly requested disbursement of the funds. Thomas used the funds to write a series of checks for personal and business purposes. Also, contrary to the client agreement, Thomas failed to reimburse the client’s insurance carrier, and failed to pay the client’s remaining unreimbursed medical bills from the settlement funds. At his hearing, Thomas admitted that he wrote checks for his own

benefit that exceeded his colorable claim to funds from the settlement, and stated that at the time, he was unfamiliar with client trust account rules.

Sanction: License revoked.

Lesson: 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. If an attorney has a colorable future claim to the money converted, the court will not revoke the attorney's license. If not, the penalty is revocation.

Board v. Jeffrey K. McGinness, filed March 21, 2014.

Violations:

- (1) Knowingly making false statements to a tribunal;
- (2) Conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (3) Conduct prejudicial to the administration of justice.

Summary: Five days before a scheduled deposition in a civil case, McGinness realized that he had failed to serve discovery requests on opposing counsel. Instead of seeking an accommodation from opposing counsel or simply moving forward with the deposition, McGinness lied about his failure to serve discovery. McGinness emailed opposing counsel demanding responses to the unserved discovery requests by the end of the day "to avoid the need to reschedule the deposition." When opposing counsel replied that he had never received discovery requests, McGinness sent two discovery requests containing his signature with fabricated certificates of service purported to have been served in March. Opposing counsel, suspicious, examined the electronic data attached to the documents and found they were created in June, not in March. Opposing counsel further hired a handwriting expert who determined that

the certificates of service were photocopies of ones previously sent. When opposing counsel confronted McGinness, he stated that he specifically remembered preparing and signing these discovery requests. When opposing counsel filed a motion for sanctions, McGinness again lied, filing a response with the court stating that he did not fabricate the certificates of service. McGinness also hired a handwriting expert to defend a position that he knew was false. McGinness represented to the court that his handwriting expert had found that the signatures were not identical, and therefore the certificates of service were not photocopies of prior certificates. In a hearing, McGinness represented to the court that he had not fabricated the certificates of service. Finally, after the court found that McGinness had lied, issued sanctions, and filed a disciplinary complaint with the Board, McGinness admitted his lies to the Board.

Sanction: Six month suspension.

Lesson: “The persistence of McGinness in perpetuating his falsehood is a remarkable aggravating factor.”

Board v. Mason James Ouder Kirk, filed March 28, 2014.

Violations: (1) None, claim dismissed.

Summary: How far can a lawyer go to assist a client in preserving assets from a potential creditor? Ouder Kirk represented Rodney Heemstra, who was charged with first degree murder, at the outset of the criminal proceedings and during part of the civil wrongful-death litigation, which later resulted in a multimillion dollar judgment against Heemstra. Ouder Kirk drafted transfer documents which conveyed property from Heemstra to his wife, then to various trusts, and finally to purported third parties who were actually Heemstra relatives. The estate of the murder victim brought collection actions challenging the asset transfers as fraudulent

conveyances. The district court ruled in favor of the estate and found the transactions with which Ouderkirk assisted to be “part of a complex shell game.” The court found the Heemstras transferred assets in an “intentional, harsh and cruel effort to put truth in Rodney Heemstra’s arrogant claim that [his victim’s wife] would never see a dime of his money.” The court unwound a number of the asset transfers and awarded actual and punitive damages against the Heemstras. After the victim’s wife filed an ethics complaint against Ouderkirk, the Grievance Commission found that the Heemstras had deceived Ouderkirk, and that he lacked actual knowledge that the transactions were a sham. Nevertheless, the commission found that Ouderkirk had violated several rules and recommended a public reprimand. However, the Supreme Court found that the Board failed to prove any rule violations and dismissed the complaint against Ouderkirk.

Sanction: None.

Lesson: The Board argued that assisting clients to defraud creditors is a type of behavior that increases public distrust of attorneys, but the Court noted that lawyers routinely and appropriately advise clients on asset protection measures and represent clients defending collection actions. The Board failed to prove by a convincing preponderance of the evidence that Ouderkirk had actual knowledge that the transfer was fraudulent, so the Court dismissed the complaint.

Board v. Ronald L. Ricklefs, filed March 28, 2014.

Violations: (1) Failure to properly maintain client trust account;
(2) Misconduct involving dishonesty, fraud, deceit, or misrepresentation.

Summary: A routine audit of Ricklefs' trust account in 2012 revealed many instances of noncompliance with the trust account rules which were similar to issues found in an audit in 2008. At his hearing, Ricklefs admitted that he knowingly violated the rules by using his trust account for personal purposes. The Court also found that Ricklefs had engaged in misconduct involving dishonesty for misleading statements on his client security questionnaire, stating that he had properly maintained his trust account for the preceding year.

Sanction: Three month suspension.

Lesson: The fact that no clients suffered harm from Ricklefs' improper handling of his trust account is a mitigating factor in determining his sanction.

Board v. James Stephen Conroy, filed April 4, 2014.

Violations:

- (1) Lack of competence in practice area;
- (2) Failure to withdraw from representation when that representation will violate the Iowa Rules of Professional Conduct;
- (3) Failure to act with reasonable diligence and promptness;
- (4) Failure to keep client reasonably informed;
- (5) Failure to make reasonable efforts to expedite litigation;
- (6) Conduct prejudicial to the administration of justice.

Summary: After being appointed appellate counsel in six different cases, Conroy, a solo practitioner, neglected the appeals. Default notices were issued to Conroy by the Iowa Supreme Court, and he failed to cure the defaults. His failure to cure the defaults subjected each appeal to dismissal. Rather than dismiss each appeal, however, in each case the Iowa Supreme Court removed Conroy as appellate counsel and new counsel was appointed. At his hearing, Conroy

admitted the allegations and stated that he was unfamiliar with the appeals process and neglected to educate himself.

Sanction: Six month suspension.

Lesson: Neglect, while not a violation in and of itself, can cause violations of several other rules.

Board v. William S. Morris, filed April 25, 2014.

Violations:

- (1) Charging an unreasonable fee;
- (2) Violation of trust account rules;
- (3) Misconduct involving dishonesty, fraud, deceit, or misrepresentation.

Summary: Trust account auditors discovered several bookkeeping and management deficiencies after being alerted to several overdrafts on Morris' trust account. The trust account also showed that Morris collected his fee in an estate before it was authorized by the court, justifying this by saying that he had been privately retained. Finally, Morris was dishonest in answering the Iowa Supreme Court Client Security Statement when he represented that he regularly reconciled his trust account but in fact did not.

Sanction: Six month suspension.

Lesson: Don't neglect your trust account records.

Board v. John Michael Carter, filed May 23, 2014.

Violations:

- (1) Conversion of client funds; and others not addressed by the court because this violation resulted in license revocation.

Summary: Carter funds in his trust account for personal use on multiple occasions. Based on one of these cases, the Nebraska Supreme Court revoked his license to practice law in Nebraska.

Sanction: License revocation.

Lesson: The Court rejected Carter's colorable-future-claim to the funds defense in part because he had told different investigators different reasons why he had taken the funds from the trust account.

Board v. Kathryn S. Barnhill, filed May 30, 2014.

Violations:

- (1) Conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (2) Conduct that adversely reflects on the fitness to practice law;
- (3) Conflict of interest;
- (4) Actions that serve merely to harass or maliciously injure another;
- (5) Advancing an unwarranted claim;
- (6) Conduct prejudicial to the administration of justice;
- (7) Failure to safeguard client property;
- (8) Failure regarding responsibilities toward nonlawyer assistants;
- (9) Failure to act with reasonable diligence and promptness in representation;
- (10) Knowingly disobey an obligation under the rules of a tribunal;
- (11) Failure to provide competent representation;
- (12) Bringing or defending a frivolous claim.

Summary: In one matter, Barnhill represented a class of homeowners in a lawsuit against a defendant she had previously represented in another matter, and made false statements to the court in this representation. Additional violations resulted when Barnhill's employee, whom Barnhill had previously discovered to have embezzled approximately \$55,000 from her but was still employed with Barnhill, began another embezzlement scheme by paying herself with client

funds from the trust account. In another matter, Barnhill repeatedly failed, over a six month period, to comply with an Iowa Supreme Court order to serve a party with a copy of an order. Finally, in an additional matter, the Iowa Supreme Court affirmed the district court's sanctions on Barnhill for bringing a frivolous lawsuit.

Sanction: Sixty day suspension.

Lesson: The Court found that the violations mostly resulted from overzealousness and sloppy practices.

Board v. Lori Jo Kieffer-Garrison, filed May 30, 2014.

Violations:

- (1) Failure to act with reasonable diligence and promptness;
- (2) Failure to make reasonable efforts to expedite litigation;
- (3) Engage in conduct that prejudicial to the administration of justice;
- (4) Failure to abide by client's decisions concerning objectives of representation;
- (5) Knowingly make a false statement of fact to a tribunal.

Summary: Kieffer-Garrison repeatedly missed appellate deadlines in several criminal cases, received twenty default notices as a consequence of those missed deadlines, failed to pay resulting penalties in a timely fashion over a period of two years, and allegedly made a knowingly false statement to the court.

Sanction: Six month suspension.

Lesson: When neglect is the primary violation, the sanction generally ranges from a public reprimand to a six-month suspension, but when neglect is accompanied by other misconduct, the sanction imposed will likely be more severe.

Board v. Richard Clay Mendez, filed September 5, 2014.

- Violations:
- (1) Trust account violations with regard to forty-three clients;
 - (2) Charging a nonrefundable fee;
 - (3) Charging an unreasonable fee;
 - (4) Entering a fee-splitting agreement without client approval;
 - (5) Act with reasonable diligence;
 - (6) Failure to keep client reasonably informed;
 - (7) Knowingly fail to respond to a lawful demand for information from the Board;
 - (8) Failure to promptly deliver funds or other property to which client is entitled;
 - (9) Failure to surrender papers and property to which client is entitled upon termination of representation;
 - (10) Failure to withdraw from a matter when conflict of interest arose.

Summary: Mendez is not licensed to practice law in Iowa but acquired a Des Moines-based immigration practice and represented Iowa residents in federal immigration proceedings, as permitted by the Iowa Rules of Professional Conduct. However, in his practice, Mendez failed to comply with Iowa trust account rules, charged nonrefundable fees, and failed to timely file an appeal, in violation of the Iowa Rules of Professional Conduct.

Sanction: Mendez is ordered to cease and desist from the practice of law in Iowa for sixty days.

Lesson: Even if a lawyer is not admitted to the Iowa bar, a lawyer may be subject to the disciplinary authority of Iowa if the lawyer provides or offers to provide any legal services in Iowa. Iowa R. Prof. Conduct 32:8.5(a).

Board v. David S. Kelsen, filed September 5, 2014.

Violations: (1) Conversion of client funds; and many others not addressed by the court because this violation resulted in license revocation.

Summary: Kelsen failed to notify his client when he withdrew funds from the client trust account, and never provided the client with an accounting. Kelsen used unearned client funds to cover his overdue business office rent and other office expenses instead of depositing them in the trust account. When the client consulted another attorney and decided to terminate Kelsen's services, Kelsen failed to promptly return all of the unearned fees to the client.

Sanction: License revocation.

Lesson: Even though the Commission recommended a public reprimand, Kelsen had no record of prior violations, and Kelsen had cited mitigating personal circumstances that led to his conversion, the Supreme Court held fast to its general rule that conversion of client funds results in license revocation.

Board v. Seth Eugene Baldwin, filed December 12, 2014.

Violations:

- (1) Failure to act with reasonable diligence in representation;
- (2) Failure to return funds or property to which client is entitled;
- (3) Failure to reasonably protect client's interests upon termination of representation;
- (4) Trust account violations;
- (5) Failure to give notice of the withdrawal of fees from trust account;
- (6) Knowingly disobey an obligation under the rules of a tribunal;
- (7) Conduct prejudicial to the administration of justice.

Summary: In his representation of one client over three years with several family court matters, Baldwin failed to comply with the rules of civil procedure regarding a motion for an emergency temporary order, service of subpoenas, the requirement to provide notice of service, and failed to comply with the court deadline for witness and exhibit lists. Baldwin also failed to provide his client with contemporaneous written notice of withdrawals of funds from the trust account, and never provided written accountings.

Sanction: Three month suspension.

Lesson: “Here we have an attorney who neglected a single client matter, compounded this neglect by failing to meet deadlines, failing to comply with the rules of civil procedure leading to unnecessary court and client expenses, improperly refusing to return client files and records after representation was terminated, and mishandling client fees.”

Board v. Robert Allan Wright Jr., filed December 26, 2014.

Violations:

- (1) Unauthorized practice of law;
- (2) Engage in representation that will result in a violation of the Rules of Professional Conduct;
- (3) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (4) Failure to keep client reasonably informed;
- (5) Withdrawals of unearned funds from trust account;
- (6) Failure to promptly return unearned funds to a client;
- (7) Other trust account violations.

Summary: Before the current complaint, Wright was suspended for failing to comply with requests from the client security commission for documents to complete a trust account audit,

and then suspended again for the unauthorized practice of law while his license was suspended.

In the current complaint, the Court found that Wright had again violated the rule against unauthorized practice of law, and also committed various trust account violations.

Sanction: No further sanction, because his license is already suspended for a time that meets or exceeds the length of time the Court would suspend for the current violations.

Lesson: An attorney should not be making use of his trust account during a time that he is suspended from the practice of law.