

Review of Attorney Disciplinary Cases 2016 Iowa Supreme Court

Roger J. Kuhle
Assistant Polk County Attorney

References will be made throughout this paper to the **BOARD** and the **COMMISSION**.

The Iowa attorney disciplinary cases are normally prosecuted by the IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD (See Iowa Court Rule 35.2) before the GRIEVANCE COMMISSION of the IOWA SUPREME COURT (Id. Rule 35.1).

The cases almost always involve violations of the Iowa Rules of Professional Conduct (the "Rules" found in Ct. Rules Ch. 32) and the Attorney trust account rules found in Ch. 45.

In 2016, to date, there have been 13 attorney disciplinary cases (plus three Judicial Qualifications Commission cases and a relevant certiorari case) issued by the court compared to previous years:

19 in 2015

14 in 2014

18 in 2013

23 in 2012

15 in 2011

16 in 2010

The Board acts like a grand jury when it investigates a complaint and prosecutor when it files with Commission.

The Commission is fact finder. Recommends sanction to Supreme Court ranging from reprimand to revocation if it finds violation. Court reserves power to decide the appropriate sanction even if Board and lawyer stipulate to sanction.

Frequently, there is no appeal from the Commission's report but the parties can still "argue" their positions on final disposition.

Board v. Doe, 2-5-16

- ▶ Doe licensed 1998 but never practiced and license inactive until 2011
- ▶ 2007 hired lawyer for his own employment case
- ▶ Fee dispute went to Arbitration Committee
- ▶ \$25k requested. Awarded \$3,050
- ▶ D. Ct upheld award

Doe, continued

- ▶ Doe felt court too collegial with Committee members
- ▶ Requested reconsideration
- ▶ Court denied Motion
- ▶ 6 days later (12:30 AM) Doe sent scathing email to Judge (read verbatim)
- ▶ Judge sent the email to Board

Doe, continued

- ▶ April, 2014 Doe activated license
- ▶ Next week, Board filed Complaint with Committee
- ▶ Commission found false statements about a judge and ex parte communication
- ▶ Recommended Public Reprimand
- ▶ Split whether Doe was layman w/o appreciation Rules

Doe, continued

- ▶ Court gave private admonition reasoning no interfere with Admin Justice but it was ex parte
- ▶ Discussion of 1st Amend Free Speech issue
- ▶ But not objectively reasonable to believe Judge involved in cover up
- ▶ Opinion with Private Admonition to inform lawyers on proper communication with bench

Board v. Jamie Deremiah, 2-26-16

- ▶ Plead guilty Domestic Assault w BI on girlfriend
- ▶ Incident occurred sometime after they went separate ways on evening of apparent heavy drinking
- ▶
- ▶ Criminals case: He underwent Substance Abuse eval, counseling in AA and lawyer assistance
- ▶ Commission split between reprimand, 30 day or 90 day suspension

Deremiah, continued

- ▶ **Lawyer said he had alcoholic blackout**
- ▶ **Girlfriend called 911 but later said she could not remember as she too was drinking**
- ▶ Extended discussion of private conduct and whether discipline is warranted if practice not affected
- ▶ Court: Conduct reflected adversely on fitness to practice

Deremiah, continued

- ▶ Behavior of lawyer doing criminal or family law may impede ability to recognize clients' behavior and adequately represent
- ▶ Court gave three month suspension
- ▶ **Aggravating factors: Injury to girlfriend**
- ▶ **Mitigating: robust effort addressing drinking**

Commission on Judicial Qualification v Joseph Sevcik, 4-8-16

- ▶ Part time magistrate judge requested criminal files from clerk of court (expunged files)
- ▶ Used in private practice case hearing to impeach witness
- ▶ Commission found abuse of office for intentional disclosure
- ▶ Expunged files are confidential and cannot be used other than for judicial function

Commission on Judicial Qualification v Joseph Sevcik, 4-8-16

- ▶ Dissection of Rule 51:3.5 re undermining integrity of judiciary
- ▶ Magistrate did not misrepresent anything about intended use to clerk to get files
- ▶ Therefore did not use prestige of office but reprimand for intentional misuse

Board v. Larry Stoller, 5-13-16

- ▶ 2 counts of Conflict of interest
- ▶ Represented lessor of restaurant property
- ▶ Lessee corporation had 3 owners
- ▶ Lessees defaulted and abandoned property
- ▶ Lawyer set up new corp for 1 owner of lessee

Stoller, continued

- ▶ Lawyer prepared new lease for lessor with new corp including use of equipment
- ▶ Lease gave ownership of equipment to lessor to pay rent owing from lessee 1
- ▶ Other 2 owners of Lessee #1 sued to recover equipment
- ▶ Dist. Ct: Deal by 2nd corp was sham and set aside

Stoller, continued

- ▶ Lawyer prepared new lease for lessor with new corp including use of equipment
- ▶ New lease gave ownership of equipment to lessor to pay rent owing from lessee number 1
- ▶ Lessee #1 other 2 owners then sued to recover equipment

Stoller, continued

- ▶ Dist. Ct: Deal by 2nd corp was sham/ set aside
- ▶ Conflict representing both lessor and lessee w/o waiver
- ▶ After fact consent was not informed because no independent counsel

Stoller, continued

- ▶ 2nd case: Lawyer represent Client A on various matters;
- ▶ A negotiated sale of business to Company B without lawyer's involvement
- ▶ Lawyer representing A on small claim against unrelated 3rd party; trial and case submitted
- ▶ While case pending lawyer assisted B to get A to deliver a deed on the business sale

Stoller, continued

- ▶ Commission found conflict and misrep and deceit on first case and concurrent conflict in second
- ▶ Lawyer threatened A with litigation to get deed
- ▶ Meanwhile SC decision adverse to A and lawyer advised an Appeal

Stoller, continued

- ▶ 30 days later Lawyer filed suit for B against A; Court granted motion to disqualify
- ▶ Appeal to Sup Ct
- ▶ Multiple Rule violations on concurrent conflict
- ▶ Commission recommended 3 month suspension
- ▶ Court made extensive analysis of Rule 32:1.7

Stoller, continued

- ▶ Directly adverse interests between clients exists when lawyer's representation of one or other client is materially limited
- ▶ Conflict was concurrent
- ▶ Lawyer can sometimes cure conflict by getting after fact written consent but not when clients not fully independently advised

Stoller, continued

- ▶ Case #1 Sham transaction because lawyer knew one owner of lessee did not have authority to convey equipment to satisfy unpaid rent
- ▶ Dishonesty in transaction additional violation in conflict
- ▶ In second case Court disagreed with Commission about extent of conflict and closely analyzed facts
- ▶ Court found conflict because lawyer began threatening client 1 about deed before withdrawing from small claim matter

Stoller, continued

- ▶ But did not find any misuse of any confidential communications in representing both and he had advised client 2 to consider getting separate counsel

Stoller, continued

- ▶ Precept: Primary goal is protect the public, not punish the attorney.”
- ▶ Aggravating factors: role and combative relationships caused delay and attorney fees
- ▶ Mitigating: depression, assistance now being given to other lawyers and long practice without recent discipline for related kind of misconduct

Stoller, continued

- ▶ Court issued 60 day suspension
- ▶ Commission ‘s concerns with evidence of brandishing firearm in his office not considered because not part of Board complaint

In re Mary Howes, 5-20-16

- ▶ Judicial Qualifications Application for Discipline
- ▶ District Ct Judge
- ▶ Divorced Spring 2012
- ▶ Spring 2013 Ex demanded she pay him \$3500 for taxes he had to pay on their 2010 tax return withheld from his 2012 refund generated by her cashing a retirement account

In re Mary Howes, 5-20-16

- ▶ May, 2013 Howes sent Ex half through her lawyer (via letter) asserting that was all Howes willing to pay.
- ▶ On 7-25 **Howe's lawyer appeared before her in Court for different client with Motion for Emergency Restraining Order as she was only judge available**
- ▶ **(7-31) Even tho he cashed check Ex demanded full payment or he would seek contempt. No response.**
- ▶

Howes, continued

- ▶ Howes lawyer did not charge fee even though she offered to pay.
- ▶ .
- ▶ Howes granted.

Howes, continued

- ▶ Ex filed contempt October and Howes lawyer represented her
- ▶ Ex's lawyer partner representing the client against whom Howe's lawyer had obtained TRO
- ▶ Ex's Lawyer learned of Howes grant of TRO

Howes contd

- ▶ Complaint filed with Judicial Qualifications
- ▶ Howes response: when she signed TRO she thought the tax dispute was resolved and her lawyer was no longer acting as her lawyer when presenting the TRO
- ▶ Also said her lawyer had not represented for over a year when TRO entered.

Howes contd

- ▶ In Commission hearing, Howes and lawyer acknowledged an atty-client relationship when the May letter and half payment sent to Ex but that **they thought the tax matter was resolved and relationship ended**
- ▶ Commission found violation of Rule requiring disqualification when her lawyer appeared before her inside of 1 year of Atty-client relationship

Howes, continued

- ▶ But said she was untruthful in response letter to Commission by saying that she had no client relationship within 1 year (given her belief relationship had ended)
- ▶ At hearing, Howes acknowledged she accepted free legal services from another lawyer in the past.

Howes, continued

- ▶ Commission recommended public reprimand
- ▶ Court: (46 pp opinion) Judicial Conduct Code has 4 Canons and various rules under each Canon
- ▶ Judge cannot rule in case where bias exists for or against lawyer
- ▶ Rule requiring **mandatory disqualification if impartiality might reasonably be questioned is objective test not based on judge's belief she can be impartial**

Howes, continued

- ▶ Rules had no time limitation after client relationship ends before lawyer can appear before judge
- ▶ Old Board Ethics Opinion held one year minimum should be followed
- ▶ Court: Parties can waive conflict question after full disclosure

Howes, continued

- ▶ Court: Reasonable person with knowledge of all facts 7-25 would have reasonable basis to question Judge's impartiality
- ▶ Without full disclosure Judge had to disqualify self 7-25
- ▶ Disclosure would require revealing that Judge did not pay fee to her atty

Howes, continued

- ▶ Ex parte TRO could still be excused RULE OF NECESSITY as not other judge available
- ▶ Comments to R 51:2.11 contain 4 part test on **necessary; see page 27**
- ▶ **6 or 7 judge in courthouse that day of finding another judge**

Howes, continued

- ▶ **Court: Record did not show that none of the other 6 or 7 judges in courthouse that day could possibly see the lawyer to review the TRO**
- ▶ **Court could not believe that no other judge could be found on reasonable wait for break in schedule and neither judge or lawyer made record of impossibility**
- ▶ **Court: found no case where Rule of Necessity ever successfully invoked**

Howes, continued

- ▶ Free legal services: Rules forbid Judge accepting a gift in numerous circumstances including from a party or lawyer
- ▶ Intent to avoid appearance of judicial influence
- ▶ Notwithstanding exceptions: Lawyer presently appearing before judge is **Restricted donor**
- ▶ Acceptance of any lawyer's gift is not violation

Howes, continued

- ▶ Just from those presently appearing before judge
- ▶ Violation for not disqualification:
- ▶ **Sanction:** No standard form or length of punishment
- ▶ **Discipline purpose** to assure public of judicial integrity, fairness and honesty

Howes, continued

- ▶ Mitigating: Isolated non intentional act over 23 yr judicial career and good reputation as judge
- ▶ Reprimand not necessary to protect public or court's integrity
- ▶ Public admonition sufficient to avoid future appearance of impropriety and instruct members of bench

In re Matter of James Martinek 6-17-16

- ▶ Part time Magistrate with law practice
- ▶ Website for his practice mentioned that he was PT Magistrate and performed weddings; included photo of him in judicial robes
- ▶ Self reported possible violation of rules after another published 1a Sup Ct opinion that advertising one's judicial position violated rule against failure to promote public confidence in judiciary and abuse of prestige of office.

In re Matter of James Martinek 6-17-16

- ▶ Commission charged him with violating those rules
- ▶ Magistrate responded by denying intent to violate
- ▶ Clerk of Court had sign that weddings could not be performed on spot but gave names of PT magistrates who could be reached

Martinek, continued

- ▶ Martinek: After the *Varnum* case, there were many requests for on spot weddings and it was very hard to do at work so he advertised it as service for fee
- ▶ Website did inform public that weddings at courthouse were performed free although he said would always inform potential wedding clients of that fact.
- ▶ Commission found violations and recommended public reprimand

Martinek, continued

- ▶ Commission found violations and recommended public reprimand;
 - Martinek resigned before case submitted to Sup Ct.
 - Court: No showing that resignation was to avoid discipline and while Ct had jurisdiction to do so, it would not discipline
 - But for guidance purposes, Court found violations to advertise in lawyers website, including photos and not disclosing that weddings at courthouse are free.

Martinek, continued

- ▶ Dissent found abuse of prestige rule and urged Court follow Colorado rule that only official court website could mention the service from all willing members of judiciary.

Board v. Michael Reilly, 9-2-16

- ▶ Lawyer with gambling addiction misappropriated clients (\$137,000) in 2000 and license revoked in 2006 notwithstanding Commission only asked for 3 year suspension
- ▶ 2009 Court denied reinstatement saying lawyer had not carried burden to show it need **for permanent revocation debatable and if he had undergone reformation.**
- ▶ **2015 Court amended Court rule** creating procedure for revoked lawyer to seek reinstatement

Reilly, continued

- ▶ Reilly applied November, 2015
- ▶ Board resisted and Board of Law Examiners reported against readmission, the latter was particularly because reports about his success in handling addiction were old
- ▶ After hearing, Court ordered review by both Boards including interviewing him.

Reilly, continued

- ▶ Disciplinary Board continued to strongly resist but Law Examiners reported 4 of 6 members believed that he was in control of gambling and of good moral character.

- ▶ Court: Reilly met new Rule's demand that he show:
 - Be of good moral character
 - Fit to practice law
 - Compliance with terms of revocation order
 - Proof of good moral character and worthy of readmission

Reilly, continued

- ▶ Reilly did not cost client security any money

- ▶ Worked as a mediator, consultant to lawyers and claims

- ▶ Adjusters had kept him abreast of law.

Reilly, continued

- ▶ Court cites Model Rule and declared six main factors:
 - Nature of original conduct for revocation
 - Lawyer's recognition of wrongfulness of acts
 - Demonstration of candor and sincerity on qualities mentioned above
 - Rehabilitation from disability associated with prior bad acts
 - Amount of time passed and whether lawyer engaged in unauthorized practice of law
 - Opinions of lawyers recommendations
- ▶ Other matters bearing on fitness

Reilly, continued

- ▶ Ct: Reilly satisfied factors and ordered Readmission **CONDITIONED**:
 - 30 hours of CLE with 3 hrs Ethics
 - Take and get an 80 on MPRE
 - Secure and keep malpractice insurance

Board v. Deborah Johnson 9-2-16

- ▶ Solo practitioner entered into sexual relationship with client she defended on numerous criminal case and civil matters.
- ▶ Client went to prison; detention officers monitoring phone calls reported a suspected non professional relationship.
- ▶ County Atty contacted lawyer who admitted relationship and agreed to request that she withdraw.
- ▶ Lawyer then self reported; Board filed with Commission.

Johnson, continued

- ▶ Stipulated Commission decision without hearing; Recommendation of 30 days suspension for sexual relationship rule violation and interference with Admin of Justice.
- ▶ Ct: Accepted 30 day suspension but did not find an Admin Justice violation as no additional or delays or dismissals involved. Sex Relationship not automatic violation of rule against interfering with Admin of Justice.

Johnson, continued

- ▶ Ct: **Sexual relationship W/ client never consensual as relationship is not equal**; and it did not start before the client relationship and they were not married.
- ▶ Sanction: Conduct not as egregious as many other cases. **Aggravating factors are the client relationship was in criminal and family law cases, situations where client most vulnerable.**
- ▶ Mitigating: No priors and some mental health issues that contributed to conduct.
- ▶ Self report only after FBI confronted her about client's serious ongoing offenses.

Board v Sheree Smith, 9-9-16

- ▶ Smith, a sole practitioner, deposited a retainer into trust in February, 2012 and sent client a letter with her fee schedule.
- ▶ In July she filed TRO application and continued the matter indefinitely. She withdrew the fee but never notified client.
- ▶ Client hired new lawyer in October who asked Smith
 - ▶ to withdraw and forward balance of retainer.
- ▶ Smith did not respond.
- ▶ Client complained to Board which asked for explanation. Smith responded by saying she had exhausted the retainer but did not respond to follow up requests about her trust account.

Smith, continued

- ▶ Trust account audit followed: Findings were commingled in trust account, did not deposit all fees into trust before earned, did not promptly return unearned fees, not returning papers promptly, inadequate record retention, etc...
- ▶ Board and lawyer stipulated to facts and 30 days suspension.

Smith, continued

- ▶ Commission held hearing on stipulation; Smith claimed computer crashed and lost current records and old records lost in flood of 2008.
- ▶ Commission recommended 2 month suspension.
- ▶ Court accepted and said taking fees without compliance was admitted and Commission and Court not bound by stipulation with Board on anything.

Smith, continued

- ▶ Court said that record problems (no records dating six years) were not factor with the primary case because fees received long after flood and after the computer crash.
- ▶ Found factual allegations established by stipulation
- ▶ Sanction rejected because lawyer had three previous admonitions about trust account deficiencies and numerous efforts to blame problems on everyone but her self.

Smith, continued

- ▶ Also admitted to using trust account as an operating account for decade (deposited income tax refund and personal insurance settlement checks) and found to have withdrawn cash numerous times contrary to rule requiring checks.
- ▶ Only mitigating factor was she primarily served disadvantaged clientele
- ▶ 60 days imposed because of similar problems for which she was admonished

Board v Kenneth Weiland 9-9-16

- ▶ Lawyer charged with trust account violations and not being diligent with one client
- ▶ March 2014 retained for file dissolution
- ▶ \$1,000 retainer paid in installments
- ▶ 3-26-1 client signed Petition
- ▶ Petition rejected as not correctly filed in EDMS

Weiland, continued

- ▶ Client not advised but told for 4 months that Sheriff was attempting service
- ▶ In August Client determined no request pending and Petition not filed .
- ▶ Client mailed termination letter and requested fee be returned
- ▶ Lawyer would not respond to client for months

Weiland, continued

- ▶ Lawyer meanwhile had filed Petition and pre trial set conference scheduled
- ▶ Client and lawyer did not appear
- ▶ Client hired new counsel and complained
- ▶ Board filed with Commission
- ▶ From August until January lawyer had no contact with Client but then withdrew from case

Weiland, continued

- ▶ Case finalized in May
- ▶ Fee returned in November on day of hearing
- ▶ Lawyer explanation was he did not know how to correct EDMS filing mistake and did not want to admit to client so he avoided responding
- ▶ **Froze up**
- ▶ Commission and Court agreed

Weiland, continued

- ▶ Failed to be diligent and misrepresented status of case (failure to inform)
- ▶ Improper use of retainer
- ▶ Failure to withdraw
- ▶ Failure to refund
- ▶ Interference with Admin Justice

Weiland, continued

- ▶ Aggravating factors: Numerous past admonition, reprimand and suspensions justified 60 day suspension
- ▶ Mitigating factor; Remorse and represents low income clients

Board v Katherine Barnhill, 9-16-16

- ▶ Commission recommended 6 months suspension after she was sanctioned in Dist Ct over fee dispute and in Fed D.Ct. in connection with manner in which she represented self and client in Court
- ▶ In fee dispute, lawyer retained on hourly basis over \$20,000 mechanics lien on his house. Billed him \$60,000.
- ▶ Client paid and went to Fee Arb Committee which awarded 25% refund.
- ▶ Lawyer paid \$1,000 before suspended on unrelated matter

Barnhill, continued

- ▶ Non payment because it might appear she was practicing law?
- ▶ Later promises to pay next week or month not fulfilled
- ▶ Client got new lawyer who made 2 week demand for payment

Barnhill, continued

- ▶ **She responded by promising to pay in exchange for global release including complaints to the Board;**
- ▶ Also threatened to sue client for continuing conduct?
- ▶ Client not paid and sued.
- ▶ Lawyer counterclaimed saying she paid in full and also sued clients new lawyer.

Barnhill, continued

- ▶ Bench trial. Court found lawyer “not credible in the least” and awarded judgment, fees and sanctions
- ▶ Sanction of \$5,000 for not paying undisputed debt and filing baseless counterclaims
- ▶ Fed Ct: lawyer filed Negligence case ; late filing experts, did not respond to discovery despite 2 orders to compel; summary judgment entered, court sanctioned plaintiff and lawyer personally; made several false statements at hearing on sanctions.

Barnhill, continued

- ▶ Fees of \$30k for litigating discovery disputes and \$20k sanction because entire suit frivolous
- ▶ Lawyers response to Board claimed she paid client the fee rebate and said the complaint would be dismissed on MSJ in her favor.
- ▶ Board charged her with making frivolous claims, false statements to court, false statements to third persons and to disciplinary board, engaging in dishonesty, deceit, etc and conduct prejudicial to of Admin Justice

Barnhill, continued

- ▶ Commission found nearly all charges established and recommended indefinite suspension of not less than 6 months
- ▶ Lawyer then appealed but then decided to pursue appeal “signaling “ her desire to retire from the practice.
- ▶ No affidavit to consent to disbarment was filed and court considered Commission decision.

Barnhill, continued

- ▶ First, because court cases were not tried on fraud standard no **preclusive effect** but court found substantial evidence supported both final orders.
- ▶ Court upheld Commission findings and then some. Found false statements to opposing counsel can violate R32:4.1(a).

Barnhill, continued

- ▶ Despite previous serious similar misconduct the Court ordered a suspension of 6 months seemingly weighing the communications about retirement as a consideration against revocation.

State Public Defender v. Iowa District Court , 10-21-16

- ▶ Not a disciplinary case but involves ethical rules
- ▶ 9:00 AM Local public defender appointed on juvenile case and 2:00 hearing set on detention
- ▶ 10:07 Defender filed motion to withdraw for conflict
- ▶ At hearing, Court granted motion but irritated about need to have hearing w/ 24 hrs and no other lawyer there to represent juvenile. Appointed State Pub Def

Public Defender, continued

- Local defender was representing other juveniles involved in same matter.
- Court later assessed State Defender with costs of travel for judge, police and prosecutor to travel to the court
- Court said local and state defender violated ethical rules by not arranging alternate defense counsel in time for hearing

Public Defender, continued

- ▶ Chapter 13B, Iowa Code and Code Prof Responsibility 32:1.16
- ▶ State Def filed Certiorari
- ▶ Court sustained writ; district court erred: no authority to tax and
- ▶ Neither Local nor State Defender “failed to mitigate effects of withdrawal”

Public Defender, continued

- ▶ Court’s responsibility to appoint successor counsel, not the appointed lawyer
- ▶ Taxing costs to State Defender without notice was violation of due process

Board v David Morse, 11-10-16

- ▶ Commission recommended Public Reprimand
- ▶ Court issued 30 days suspension
- ▶ Client home builder contested Mech Liens
- ▶ Written retainer had provision to offset fees against any monies in lawyer's possession
- ▶ Client refused settlement and lost at trial
- ▶ Judgment contained math error; clients chose appeal

Morse, continued

- ▶ Lawyer asked for \$1750 retainer and pay transcript costs
- ▶ Client agreed but still owed \$2851 for trial fees
- ▶ Lawyer filed appeal 8-8 and paid filing fee
- ▶ Client only paid part of fee but not transcript

Morse, continued

- ▶ Appeal said arrangement made with Ct. Rptr
- ▶ But no contact made w/ reporter
- ▶ 8/30 client said problems prevented it from paying fees
- ▶ Promise to pay 9-10 but never happened

Morse, continued

- ▶ 12-5 Court gave notice that transcript overdue; Ct. Rptr notified court of no request
- ▶ Lawyer promptly wrote Ct. Rptr who requested \$1400 before beginning which would take 40 days
- ▶ On 12-6 Lawyer wrote client that it owed \$1400 for transcript
- ▶ Court ordered Ct. Rptr be paid w/i 10 days

Morse, continued

- ▶ 12-12 Lawyer wrote client again saying he would not advance fee and to send check payable to Ct Rptr
- ▶ 12-26 Lawyer wrote client again
- ▶ Client responded about difficulties but promised payments
- ▶ 1-4-13 Lawyer got \$1400 and \$500 checks both payable to lawyer.

Morse, continued

- ▶ Wrote Ct. Rptr that check was forthcoming; but it went into trust account did not ask for more time for transcript
- ▶ 1-10 Appellee moved to dismiss appeal
- ▶ 1-14 Bank notified lawyer that \$500 check INSF
- ▶ 1-18 Lawyer filed Resistance to Motion /Dismiss saying client had not paid costs AND ACCKNOWLEDGED RECEIPT OF CHECK BUT PAYABLE TO HIM AND DEPOSITED TO TRUST

Morse, continued

- ▶ Also told court of one of checks being NSF
- ▶ And asked for time to get replacement counsel on appeal
- ▶ Same day Notified client
- ▶ Client wrote about \$1400 status
- ▶ Lawyer wrote her it was payable to him and got deposited. Waiting to see if it bounced like \$500

Morse, continued

- ▶ 1-26 Client promised to get Cashiers check to cover 500 and fees by 2-4 and 2-11.
- ▶ 2-4 came and went No money
- ▶ 1-31 check cut by bank but lawyer never mailed to ct rptr
- ▶ 2-8 client paid \$1000 which lawyer deposited but
- ▶ 2-12 wrote client that he would not proceed with appeal

Morse, continued

- ▶ 2-21 Court dismissed appeal
- ▶ 2-27 lawyer told partner to endorse \$1400 and deposit for fees
- ▶ 3-7 client demanded refund of \$1400
- ▶ Lawyer refused until fees of \$1725 paid
- ▶ Client mad because \$1400 could have been paid to Ct. rpt in January before appeal dismissed

Morse, continued

- ▶ Lawyer advised he was exercising right to off set
- ▶ Client asked lawyer to apply \$1400 to pay against judgment
- ▶ Client asked lawyer to apply \$1400 to pay against judgment
- ▶ Lawyer did assist with paperwork to satisfy judgment
- ▶ Client complained to Board

Morse, continued

- ▶ **Commission found violations for no due diligence, not safeguarding property and interference with Admin Justice**
- ▶ Court : Upheld findings of violations. Lawyer knew that \$1400 was to pay transcript and time to determine it cleared bank
- ▶ **Express agreement to use \$1400 for Special purpose trumped fee agreement for offset fees**

Morse, continued

- ▶ Non payment caused dismissal appeal
- ▶ When dispute arose over monies in trust, could not take from trust until resolution attained
- ▶ Prior private reprimands and long time in practice aggravating
- ▶ Service to the bar and community were mitigating

Morse, continued

- ▶ Concurring opinions and dissent
- ▶ Legal stealing vs illegal stealing (colorable claim)
- ▶ Revocation apparently in play.
- ▶ Concurrence objected that the case was not charged or tried as such so no discipline.
- ▶ **Dissent viewed actions as stealing and would have used standards in Model Rules for measuring sanction for conversion of funds which would require more than 30 day suspension.**

Board v. Kristy Arzberger, 11-10-16

- ▶ Lawyer incorrectly advised executor of will about ordinary fees (\$220 plus 2% of everything over \$5000) and extraordinary fees.
- ▶ Defended will contest with decedent's girlfriend
- ▶ Lawyer identified herself as possible witness and kept working on case even though another lawyer hired to defend (Ct Apprvd)
- ▶ Lawyer testified at trial; other lawyer conducted hearing; successful defense

Arzberger, continued

- ▶ Fee affidavits not filed
- ▶ Executor billed and paid part of fees for both lawyers.
- ▶ Lawyer's bill included \$2654 for fees after new lawyer hired.
- ▶ Executor expressed surprise at bills as he did not get a hourly rate from lawyer or amount of time spent by second lawyer
- ▶ **Executor wanted to compromise bills but lawyer reluctant and told him court approved bills**

Arzberger, continued

- ▶ Extended communications about both extraordinary and ordinary fees (she asked him to pay straight percentage and included some non probate assets).
- ▶ Despite requests Lawyer never advised executor of need for court approval of extra fees.
- ▶ **Paper work to close estate included statement that executor waived hearing on fees.**
- ▶ Estate closed with her extra fees not paid.

Arzberger, continued

- ▶ Lawyer contd to seek payment of extra fees and got paid
- ▶ BUT Executor filed complaint with Board
- ▶ Grievance Complaint filed:
- ▶ Stipulations on facts and that lawyer refund extraordinary fees or get court approval.

Arzberger, continued

- ▶ Hearing on other issues: Lawyer testified that she thought application was made for court approval on extraordinary fees but could not find the copies of documents
- ▶ **Findings: not credible and intentionally did not respond to executors requests for a way to resolve dispute over amount of fees**
- ▶ Fees charged were unreasonable as did not comply with Iowa Code and client not informed

Arzberger, continued

- ▶ Court agreed with Commission that Lawyer not credible on numerous aspects of case, said charges were broad enough to encompass all findings but approved 30 day suspension

Board v Karen Taylor, 11-10-16

- ▶ Lawyer failed to file state and federal income tax returns for 10 yrs (2003-2013)
- ▶ Divorced in 2010; Decree required they each filed separate returns. Not done before 2014.
- ▶ **2014 Lawyer told ex she was considering seeking modification** of child custody order because he was allowing her relationship with children to deteriorate.
- ▶ **Next day his girlfriend reported** lawyer to Board for non filing of tax returns

Taylor, continued

- ▶ Lawyer stipulated to facts
- ▶ Knowingly failed to file returns despite substantial income. Was criminal acts
- ▶ By hearing she had filed returns and was negotiating schedule for payment of taxes owing.
- ▶ Under both old rules and current rules, non filing of required returns reflects adversely on honesty, trustworthiness and fitness.

Taylor, continued

- ▶ No criminal charges or convictions necessary to sustain disciplinary complaint
- ▶ Failure to file done knowingly also is fraud, deceit, or misrep
- ▶ Sanction: Commission recommended 30 days suspension;
- ▶ Court: range in non filing cases in Reprimand to 3 year suspension.

Taylor, continued

- ▶ Historically non filing implicated false statements on Client Security Questionnaire
- ▶ Court: knowing nature of offense requires more than 30 days;
- ▶ Board asked for 18 month suspensions;

Taylor, continued

- ▶ Court ordered 6 months suspension and show proof of complying with tax payment schedule
- ▶ Mitigating no client harm, did not file because did not have funds to pay at the time, dysfunctional marriage.
- ▶ Aggravating: prior discipline for neglect

Board v Pederson, 11-10-16

- ▶ Commission recd 3 mos suspension for numerous violations by sole practitioner in child custody and probate cases
- ▶ **In probate**, she took 2nd half of fee without court approval and it was wrong amount .
- ▶ Contacted beneficiaries who were represented and asked them to waive hearing on report.
- ▶ Court removed her and executor and ordered repayment of \$29,000 fees; No money to repay.

Pederson, continued

- ▶ Borrowed money from executor (client) without written agreement or independent counsel
- ▶ **Custody case**: deposited retainer for flat fee case in general account.
- ▶ Filed for and got TRO but then let case sit for a year.
- ▶ Client thought case was completed and closed. Lawyer claimed only agreed to get TRO/no more

Pederson, continued

- ▶ Court: Improper communication with represented beneficiaries established;
- ▶ Loan was doing business with client even though the executor was removed before loan made. (Improper influence over former client) Not informed consent
- ▶ Taking 2nd half of fee from trust and in wrong amount violated rules

Pederson, continued

- ▶ **Custody case: Flat fee has to go into trust and taken out as earned.**
- ▶ Client never informed in writing that lawyer was only to represent for LIMITED purpose of getting TRO. Can only **Limit Scope of Representation if reasonable and client consents in writing. She could not prove client consented.**
- ▶ Lawyer never responded to client's new lawyer re getting the file

Pederson, continued

- ▶ Court: 60 days suspension warranted because of previous similar misconduct.
- ▶ Justice Wiggins dissented because ABA objective standards for sanctions not used

Board v. Brian Green, 12-16-16

- ▶ Lawyer agreed to create LLC for 2 clients with himself as a third owner.
- ▶ Company would provide management services to another business (GMS) and lawyer to split fees with 2 other LLC owners
- ▶ However, LLC was set up as him and wife as owners.
- ▶ Prep of contract with GMS for \$27500 a month

Green, continued

- ▶ For 7-8 months lawyer performed the services and kept all but a few thousand dollars paid to 2 other owners.
- ▶ Other owners were requesting documents and distributions from the business they thought they owned part.
- ▶ GMS notified all three “owners” of termination for breach by reason of not performance and misuse of GMS funds

Green, continued

- ▶ Clients sued Green and took \$600k default judgment as he had left Iowa
- ▶ Board filed with Commission; Green did not deny but offered to surrender law license
- ▶ Commission deemed Complaint claims of deceit, fraud, etc admitted and recommended license revocation.

Green, continued

- ▶ While judgment by default does not trigger issue preclusion by rule, the failure to deny is an admission to show scienter and establishes all allegations.
- ▶ Criminal conviction not necessary to show criminal acts
- ▶ Fraud and misrep **AXIOMATIC** with revocation.