



## OFFICE OF THE CLERK

**Supreme Court of Wisconsin**

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WI 53701-1688

TELEPHONE (608) 266-1880

FACSIMILE (608) 267-0640

Web Site: [www.wicourts.gov](http://www.wicourts.gov)

February 24, 2021

**To:**

John T. Payette  
William J. Weigel  
Heidi T. Johnson  
Office of Lawyer Regulation  
110 E. Main Street, Suite 315  
Madison, WI 53703

Carl R. Scholz  
627 N. Green Bay Road  
Thiensville, WI 53092

Kim M. Peterson  
W339 N6748 Log House Circle  
Oconomowoc, WI 53066

You are hereby notified that the Court has entered the following order:

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No. 2017AP2530-D

Office of Lawyer Regulation v. Carl Robert Scholz

On November 10, 2020, this court issued a per curiam decision, concluding that Attorney Carl Robert Scholz committed ten counts of professional misconduct and suspending his license to practice law in Wisconsin for a period of two years. In re Disciplinary Proceedings Against Scholz, 2020 WI 84, 394 Wis. 2d 216, 950 N.W.2d 973. The court reserved the question of restitution and, by separate order, directed the Office of Lawyer Regulation (OLR) to file a memorandum addressing restitution, and permitted Attorney Scholz to file a response. The OLR filed its court ordered memorandum on November 24, 2020. Attorney Scholz filed his responsive memorandum on December 9, 2020.

The facts of this matter, as determined by the referee and adopted by this court, are set forth at length in our November opinion. Briefly, in 2017, the OLR filed a ten-count disciplinary complaint relating to Attorney Scholz's representation of A.B. in a civil foreclosure/partition action between A.B. and her former daughter-in-law, K.D., Associated Bank, N.A. vs. Kathryn Brogli, Ozaukee County Circuit Court Case No. 2012CV259. This disciplinary proceeding, including the restitution issue, is closely linked with that civil case. In its disciplinary complaint, the OLR sought restitution in the amount of \$60,975.94 (reflecting disputed funds that Attorney Scholz was to have retained in a trust account), paid either to the Ozaukee County Circuit Court or to opposing counsel's trust account, pending resolution of the circuit court action.

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Following the evidentiary hearing and submission of post-hearing briefs, the referee determined that the OLR clearly and convincingly proved that Attorney Scholz committed all ten counts of misconduct, including conversion of the disputed funds in violation of SCR 20:8.4(c), stating:

In this case, the misconduct Scholz engaged in is serious. Scholz not only improperly converted funds, but he covered up his conduct over the course of several years with several instances of misleading omissions and false representations to the court, opposing counsel, the OLR, [the Special Master] and [the mediator]. While Scholz's conduct might not have harmed his client, *it did harm the opposing party, who lost out on the funds he improperly distributed to himself, and later his client.* (Emphasis added.)

We adopted the referee's findings and conclusions, stating that Attorney Scholz "committed ten counts of misconduct, converted tens of thousands of dollars via a 'loan' of funds that he knew or should have known his client was not entitled to make, ignored court orders, and then systematically misrepresented what he did to hide his misconduct, *resulting in a significant loss to K.D.*" (Emphasis added.)

Because the referee made findings that K.D. was harmed by Attorney Scholz's misconduct, but made no recommendation regarding restitution, we reserved the restitution question and ordered supplemental briefing.

First, the parties agree that some information from the record of the underlying civil case is not in the record of this disciplinary proceeding. The parties also agree that it is appropriate for this court to take judicial notice of the Consolidated Court Automation Programs (CCAP) case details of proceedings that occurred in Associated Bank, N.A. vs. Kathryn Brogli, Ozaukee County Circuit Court Case No. 2012CV259, from October 11, 2018 (the date Attorney Scholz filed a notice of A.B.'s death in the circuit court) through February 6, 2019 (when the circuit court issued a final written order regarding its dismissal of this case). We hereby take judicial notice of those CCAP docket entries as they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Wis. Stat. § 902.01(2)(b). For the same reasons, we also take judicial notice of the circuit court's written order issued on February 6, 2019.

Those docket entries and the circuit court's order disclose that, on October, 11, 2018, Attorney Scholz formally notified the circuit court of A.B.'s death. Meanwhile, the circuit court had commenced its review of evidence relating to the partition of the disputed funds, pursuant to the court of appeals' remand instructions.<sup>1</sup> The circuit court conducted a hearing on October 24,

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<sup>1</sup> Associated Bank, N.A. v. Brogli, 2018 WI App 47, 383 Wis. 2d 756, 917 N.W.2d 37.

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2018, and received exhibits. On January 14, 2019, the circuit court conducted another hearing<sup>2</sup> and, on the record, rendered a "2 part ruling," summarized on the CCAP docket sheet as follows:

#1 No substitution of parties made under 803.10(1)(a) so case against [A.B.] dismissed and if in fact #1 ruling is wrong #2 pursuant to Court of Appeals remand, the Court between 10-24-18 and today's date reviewed the record of the Special Master' (Exhbits [sic]1-34) and determined despite objections, that the distribution of 97% in favor of [K.D.] and 3% in favor of [A.B.] is appropriate.

On February 6, 2019, the court issued a written decision confirming its January 14, 2019 ruling. Here, the circuit court stated in relevant part:

5. Upon the review of the evidence previously submitted and without any other evidence offered on January 14, 2019; the Court finds the Special Master's previous findings and recommendation as to the division of the property at issue in this action, despite co-respondent's Arline's objection appropriate and adopts the Special Masters' findings.
6. The parties interest in said real estate and proceeds from the sale of the real estate are divided as follows: 97% to [K.D.] and 3% to [A.B.]. These findings are adopted in the event the Court has erred in dismissing the action against [A.B.].

With that, we turn to the question of restitution.

The parties disagree as to whether this court should impose restitution.

The OLR recommends that we impose restitution. Consistent with its restitution policy, the OLR recommends that Attorney Scholz should only be responsible for, at most, the \$60,975.94 in disputed funds that he held at one time and failed to hold in trust, as found by the referee and affirmed by this court. The OLR recommends that the court award restitution using the allocation formula identified by the circuit court, 97 percent to K.D. and 3 percent to A.B., such that the OLR recommends that this court order Attorney Scholz to pay restitution to K.D. in the amount of \$59,146.66.

Attorney Scholz opposes imposition of any restitution. Summarized, he argues that: the underlying litigation was dismissed without issuance of any monetary judgment; K.D. failed to appeal the underlying dismissal order, thereby forfeiting her rights; and, it would be improper to presume that his client, A.B., might not have ultimately prevailed in the underlying proceeding. He reasons that the referee's silence regarding restitution might reflect support for him, and should not be construed otherwise. In particular, Attorney Scholz argues that the final order in the

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<sup>2</sup> For reasons not explained in this record, counsel for K.D. arrived at the court on January 14, 2019, shortly after the hearing had concluded.

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underlying civil proceeding does not support the OLR's restitution recommendation. Attorney Scholz interprets the wording of the court's order such that the court's findings regarding the proper allocation were conditional upon an event that did not occur, i.e. a subsequent determination that the court had dismissed the civil case in error.

We determine the appropriate level of discipline given the particular facts of each case and, although we may benefit from the referee's recommendation, our determination is made independent of the referee's recommendation. In re Disciplinary Proceedings Against Widule, 2003 WI 34, ¶44, 261 Wis. 2d 45, 660 N.W.2d 686. When deciding whether to order restitution, we may review the sufficiency of the evidence regarding whether there is an ascertainable amount and determine the appropriate amount of restitution. See In re Disciplinary Proceedings Against Raneda, 2012 WI 42, ¶41, 340 Wis. 2d 273, 811 N.W.2d 412.

Therefore, we may impose restitution notwithstanding the absence of a restitution recommendation, if restitution is supported by the record. Here, we conclude that the record, as supplemented by the events and order in the underlying circuit case of which we have taken judicial notice, clearly support imposition of restitution.

Supreme Court Rule 21.16(2m)(a)1 provides:

An attorney may be may be ordered to do any of the following as restitution under sub. (1m)(em): Pay monetary restitution to the person whose money or property was misappropriated or misapplied in the amount or value of such money or property as found in the disciplinary proceedings.

An underlying judgment is certainly not a prerequisite to a restitution order, and we are not persuaded that K.D.'s decision not to appeal the circuit court's order should deprive her of the right to a restitution award, given the facts of this proceeding. See, e.g., In re Disciplinary Proceedings Against Gende, 2012 WI 107, 344 Wis. 2d 1, 821 N.W.2d 393 (holding that the court may order restitution, notwithstanding the fact that the statute of limitations would preclude the injured party from recovery at the time of the court's disciplinary order).

We specifically reject Attorney Scholz's claim that "If this Court determines that restitution is warranted, it will have effectively decided the outcome of this civil action, ruling in favor of [K.D.] and against [A.B.], now a non-party." While there is admittedly overlap between these cases, they are not synonymous.<sup>3</sup> Our task here is to decide the appropriate discipline to impose

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<sup>3</sup> For one thing, potentially larger sums of money were at issue in the underlying civil proceeding. For example, the Special Master in the underlying civil proceeding had determined that there were amounts paid from the proceeds of the property sale that were A.B.'s obligation (including \$28,034.97 paid to Attorney Scholz for legal fees related to his representation of K.D.'s former husband, D.B. in their divorce). The Special Master had recommended that K.D. be reimbursed for those amounts *before* the remaining disputed funds were allocated on the 97 percent/3 percent basis. These funds were disbursed before Attorney Scholz assumed A.B.'s representation, and are therefore not at issue in this disciplinary proceeding.

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on Attorney Scholz for his egregious misconduct as described in our recent decision. In re Scholz, 2020 WI 84. Our decision to use the allocation formula identified by the circuit court for our restitution award permits us to identify a reasonably ascertainable amount for that restitution. It has no bearing or impact on the underlying case, which has been dismissed. To the extent there remained "many issues that [A.B.] wanted the circuit court to address" we perceive this as a direct result of Attorney Scholz's own professional misconduct. The referee found and we agreed, that by failing to respond to opposing counsel's filings with the Special Master or the Special Master's requests for [A.B.'s] response to opposing counsel's filings prior to the court of appeals' decision, Attorney Scholz violated SCR 20:1.3, as alleged in count seven of the complaint. Id. at ¶¶25, 33. Attorney Scholz may not invoke his own lack of diligence, and the resultant delay, as a shield to deflect discipline. We further remind Attorney Scholz, that the fact that his client was "a consenting participant" in no way excuses his misconduct. Scholz Resp. Br. at 5.

Therefore,

IT IS ORDERED that the court takes judicial notice of the Consolidated Court Automation Programs case details of proceedings that occurred in Associated Bank, N.A. vs. Kathryn Brogli, Ozaukee County Circuit Court Case No. 2012CV259 from October 11, 2018, through February 6, 2019 (electronic copy of docket entries available at <https://wcca.wicourts.gov/caseDetail.html?caseNo=2012CV000259&countyNo=45#records>), as well as the circuit court's written order issued on February 6, 2019 in the same action;

IT IS FURTHER ORDERED that within 60 days of the date of this order Carl Robert Scholz shall pay restitution of \$59,146.66 to K.D.;

IT IS FURTHER ORDERED that payment of restitution is to be completed prior to paying costs to the Office of Lawyer Regulation;

IT IS FURTHER ORDERED compliance with all conditions of this order is required for reinstatement. See SCR 22.29(4)(c).

BRIAN HAGEDORN, J., did not participate.

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Sheila T. Reiff  
Clerk of Supreme Court