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lose and much to be gained by letting a different judge examine the parties' motions for summary judgment.

We find it unnecessary and inappropriate in this case to address the underlying merits of the motions. An analysis of whether Judge Murphy's decision was correct could not adequately erase the taint of his bias or the appearance of such bias. Not only for the sake of the parties, but for the public as a whole and its faith in the judicial system, we conclude that the Court of Appeals' judgment must be reversed. We express no implicit or explicit approval of the Court of Appeals' legal conclusions regarding the construction of the permit and contract here in dispute, but hold that the Court of Appeals erred in applying a harmless error analysis to Judge Murphy's failure to recuse himself from the summary judgment hearing.

CONCLUSION

We find the grounds alleged under the Nebraska Code of Judicial Conduct sufficiently serious to warrant vacatur. We reverse, and remand to the Court of Appeals with directions to vacate the judgment below and remand the cause for a new summary judgment hearing before another judge to be appointed by this court.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROBERT J. PIERSON, RESPONDENT.

798 N.W.2d 580

Filed June 3, 2011. No. S-10-304.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the Counsel for Discipline must establish a charge by clear and convincing evidence.
3. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.

4. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
5. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
6. ____. In imposing attorney discipline, the Nebraska Supreme Court evaluates each case in the light of its particular facts and circumstances.
7. ____. In determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
8. ____. When determining appropriate discipline of an attorney, the Nebraska Supreme Court considers aggravating and mitigating factors.
9. ____. In a disciplinary proceeding, an isolated incident not representing a pattern of conduct is considered a mitigating factor.
10. ____. Cooperation during attorney disciplinary proceedings and remorse are relevant mitigating factors.

Original action. Judgment of probation.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

Relator, the Counsel for Discipline of the Nebraska Supreme Court, filed formal charges against respondent, Robert J. Pierson, alleging that he violated his oath of office as an attorney licensed in Nebraska, Neb. Rev. Stat. § 7-104 (Reissue 2007), and the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.15 (safekeeping property) and 3-508.4 (misconduct). The formal charges arose out of the manner in which respondent handled the proceeds resulting from the settlement of his clients' personal injury lawsuit. When respondent initially distributed the settlement funds, State Farm Mutual Automobile Insurance Company (State Farm) did not receive its subrogation interest

from the claim, due to what appeared to be a lost check. State Farm contacted respondent repeatedly. After submitting a grievance to relator, State Farm received its money more than 1 year after the intended distribution.

A hearing was held on the formal charges before a referee. The referee found that respondent violated the Nebraska Rules of Professional Conduct. With respect to discipline, the referee recommended that respondent receive 2 years' probation with monitoring conditions. Relator filed exceptions to the referee's report, asserting that the recommended discipline was too lenient for the misconduct involved. We find that respondent violated the Nebraska Rules of Professional Conduct. However, because we conclude that the recommended discipline is not too lenient, we reject relator's exception with respect to discipline. Accordingly, we order respondent to be placed on 2 years' probation under the conditions outlined below.

STATEMENT OF FACTS

Relator filed formal charges against respondent on March 24, 2010. In the charges, relator alleged that respondent violated his oath of office as an attorney licensed to practice law in the State of Nebraska and §§ 3-501.15 and 3-508.4 of the rules of professional conduct.

The allegations arose out of respondent's settlement of a personal injury lawsuit. Respondent's clients received settlement proceeds, which respondent deposited in his trust account. State Farm had a subrogation interest in the claim. The case was settled in December 2007, and respondent distributed the proceeds of the settlement in February 2008. Respondent testified that he wrote checks to his clients, to his firm for fees, and to State Farm to cover its subrogation interest.

In August 2008, respondent learned from State Farm that it had not received its check in the amount of $4,094.68. When respondent learned that State Farm had not received its check, he called his bank and was erroneously told that the check had cleared. Respondent took no further action concerning this matter.

State Farm indicated that it made multiple unsuccessful attempts to secure payment from respondent. Having exhausted

attempts to secure payment from respondent, State Farm contacted relator. Respondent acknowledged that it took over a year to resolve the matter.

In the course of the investigation, respondent provided his trust account records to relator and relator claims that it determined that numerous times after February 25, 2008, the balance of respondent's trust account fell below $4,094.68, the amount that should have been in his trust account to cover the check to State Farm.

A hearing on the matter was had before a referee, at which hearing evidence was received. Respondent admitted that at times, his trust account balance would not have covered the State Farm check had it cleared. At the hearing, respondent acknowledged his negligence which resulted in a violation of the Nebraska Rules of Professional Conduct. As an explanation for his actions and inappropriately reacting to the fact that State Farm had not received the subrogation proceeds in February 2008, respondent stated that during the period in question, he was experiencing various problems. Respondent stated that he was suffering from health problems and that his fiance had died a few months before the settlement. Respondent indicated that for a year after her death, he "wasn't thinking clearly." Respondent also indicated that he did not have a secretary. Respondent acknowledged that during the period when the check was missing, he "dropped the ball" and should have been involved in counseling.

The referee issued a report on September 8, 2010. In his report, the referee noted that respondent did not have prior disciplinary problems in either Nebraska or Iowa, where respondent is also licensed to practice law. The referee found that respondent had violated §§ 3-501.15 and 3-508.4 of the rules of professional conduct. The referee recommended that respondent be placed on probation for a period of 2 years and that the probation include an audit of respondent's trust account by a certified public accountant at respondent's expense. Such audit would be conducted at the end of each year. Further, if respondent committed any further rule violations, he would be subject to suspension or disbarment.

On September 17, 2010, relator filed exceptions to the referee's report, asserting that the recommended sanction was too lenient. Respondent did not file exceptions.

ANALYSIS

[1-4] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010). To sustain a charge in a disciplinary proceeding against an attorney, the Counsel for Discipline must establish a charge by clear and convincing evidence. *Id.* When no exceptions to the referee's findings of fact are filed, we may consider the referee's findings final and conclusive. *Id*. We have stated that "the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 981-82, 725 N.W.2d 845, 850 (2007).

In this case, neither respondent nor relator takes exception to the referee's findings that he violated the rules of professional conduct; rather, relator takes exception to the referee's recommended discipline, which relator asserts is too lenient. When no exceptions to the findings of fact are filed, we may consider the referee's findings final and conclusive, which we do in the present case. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated §§ 3-501.15 and 3-508.4 of the rules of professional conduct. The record also supports a finding by clear and convincing evidence that respondent violated his oath of office as an attorney, § 7-104, and we find that respondent has violated said oath. Having found violations of the rules of professional conduct, we will limit the remainder of our discussion to the appropriate discipline.

Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or

(3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or

(4) Censure and reprimand by the Court; or

(5) Temporary suspension by the Court; or

(6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.

(B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, Neb. Ct. R. § 3-310(N) of the disciplinary rules.

[5] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Switzer, supra*.

[6,7] In imposing attorney discipline, we evaluate each case in the light of its particular facts and circumstances. *Id.* In determining the proper discipline of an attorney, we consider the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.*

[8] When determining appropriate discipline of an attorney, we consider aggravating and mitigating factors. *Id.*

[9,10] Regarding mitigation, we have stated that an isolated incident not representing a pattern of conduct is considered a mitigating factor. *Id.* Cooperation during attorney disciplinary proceedings and remorse are also relevant mitigating factors. *Id.*

The evidence in the present case establishes, among other facts, that respondent failed to properly maintain his office records and the funds in his trust account. The referee indicated, and we agree, that there are several mitigating factors weighing in respondent's favor, including that respondent has had no prior complaints and was cooperative and responsive throughout the proceedings. Further in favor of mitigation, we note that the exact amount of money which respondent's trust account would have been "out of trust" during the period that State Farm had not been paid was not in evidence, the evidence

did not show willful misconduct, there was no dispute that respondent initially sent a check that was not received, and respondent was dealing with the death of his fiance and health issues at the time of the conduct at issue.

Relator asserts that the referee's recommended discipline of 2 years' probation is too lenient. Upon due consideration of the facts of this case, and giving consideration to the several mitigating factors weighing in respondent's favor, we disagree. Accordingly, we determine that the proper sanction in this case is probation with the conditions outlined below. Repondent's probation shall start on the date this opinion is filed. Respondent is directed to submit a probation plan for approval by this court within 30 days after this opinion is filed. The probation plan shall provide for supervision by an identified monitoring lawyer licensed in the State of Nebraska who shall agree to supervise respondent's office management and compliance with the rules of professional conduct and shall further agree to report any violation of the rules of professional conduct to relator. The monitoring lawyer shall sign a separate declaration reflecting agreement to the foregoing terms, and respondent shall attach such declaration as an exhibit to his probation plan. Respondent's probation shall be completed 2 years after this court approves respondent's probation plan. Further, respondent shall submit compliance reports quarterly to relator. The quarterly reports shall be approved by the monitoring lawyer and shall show compliance with trust account requirements and show that respondent is adhering to practices which demonstrate his periodic review of his trust account balance. Further, respondent must submit to an audit of his trust account by a certified public accountant at his own expense, to be conducted at the end of each year during respondent's term of probation. If respondent commits further violations of the Nebraska Rules of Professional Conduct, he shall be subject to revocation of his probation and the imposition of other discipline as outlined in disciplinary rule § 3-304.

CONCLUSION

The court finds that respondent violated §§ 3-501.15 and 3-508.4 of the rules of professional conduct and his oath as

an attorney, Neb. Rev. Stat. § 7-104. It is the judgment of this court that respondent should be and is hereby placed on probation commencing on the filing of this opinion and that respondent is ordered to submit a probation plan for approval by this court within 30 days of the date of filing of this opinion. The probation plan must show supervision of respondent by a monitoring lawyer licensed in the State of Nebraska on the terms listed previously in this opinion, with compliance reports to be submitted quarterly to relator by respondent and approved by the monitoring lawyer. Respondent's probation shall terminate 2 years after this court approves the submitted probation plan. Further, respondent must submit to an audit of his trust account by a certified public accountant at his own expense, to be conducted at the end of each year during respondent's term of probation. We also direct respondent to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-115(2) (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF PROBATION.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
TERENCE W. NERO, APPELLANT.
798 N.W.2d 597

Filed June 3, 2011. No. S-10-457.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.