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property, which we assume to be community property, regardless of whether Nebraska or Arizona law is applied to the Nebraska enforcement proceedings. Accordingly, denial of Laura's motions to intervene did not deprive her of a substantial right[32] and was therefore not prejudicial error.

V. CONCLUSION

For the reasons discussed, we affirm the judgments of the district court in each of the consolidated appeals.

AFFIRMED.

WRIGHT, J., not participating.

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[32] See *Emery v. Mangiameli*, 218 Neb. 740, 359 N.W.2d 83 (1984).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JULIANNE DUNN HERZOG, RESPONDENT.

805 N.W.2d 632

Filed July 8, 2011. No. S-10-018.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the Nebraska Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
4. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.
5. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension.

Jeffry D. Patterson, Special Counsel for Discipline, for relator.

Julianne Dunn Herzog, pro se.

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

PER CURIAM.

This disciplinary action arose out of guardianship and conservatorship proceedings involving Rosemary Dunn, the mother of the respondent, Julianne Dunn Herzog. For Herzog's conduct in those proceedings, the Counsel for Discipline charged her with violating four sections of the Nebraska Rules of Professional Conduct. After a hearing, the referee determined that Herzog had violated Neb. Ct. R. of Prof. Cond. §§ 3-503.2, 3-504.4, and 3-508.4. The referee recommends that Herzog be disbarred. We find clear and convincing evidence that Herzog violated the rules of professional conduct, and we therefore suspend Herzog from the practice of law for a period of 2 years.

BACKGROUND

This disciplinary action arose out of a longstanding dispute among Herzog and her siblings over guardianship and conservatorship proceedings for their elderly and incapacitated mother, Rosemary. Herzog has disagreed with her siblings about virtually everything related to Rosemary's guardianship and conservatorship, and this is Herzog's third disciplinary action arising out of those proceedings. Before Herzog's first disciplinary action, the county court determined that it was in Rosemary's best interests to appoint Daniel Dunn, Herzog's brother, as Rosemary's guardian, and for Rosemary to live at an assisted living facility in Minneapolis, Minnesota. Daniel was authorized to control visitation and telephone calls in Rosemary's best interests and was to have sole contact with Rosemary's living facility employees. Herzog filed various motions in the guardianship case, claiming to represent Rosemary's interests when in fact she previously had been granted leave to

withdraw. For those actions, a complaint was filed against Herzog with the Counsel for Discipline, and Herzog stipulated to a private reprimand.

In Herzog's second disciplinary action,[1] brought in 2008, the evidence showed that Herzog filed two notices of appeal and a petition for further review on behalf of Rosemary, who was not Herzog's client at the time of the filings. On appeal, we determined that Herzog's actions violated §§ 3-503.2 and 3-508.4(a) and (d). We were most concerned with the fact that Herzog's violations were her second disciplinary action arising out of Rosemary's guardianship and conservatorship proceedings. For her continued unethical behavior, we suspended Herzog from the practice of law for a period of 3 months, following which Herzog was placed on probation for a period of 1 year.

Before our ruling in Herzog's second disciplinary action, on May 22, 2008, we issued a memorandum opinion and judgment on appeal in case No. S-07-781, which was one of Herzog's appeals from a judgment of the county court for Douglas County. In that appeal, Herzog was the interested party and we noted that she did not represent Rosemary's interests. Herzog made numerous assignments of error, which generally related to Rosemary's guardianship and conservatorship proceedings. We found Herzog's arguments to be without merit, with one exception: We determined that the county court erred when it denied, without an evidentiary hearing, Herzog's application to find Rosemary's guardian in contempt or, in the alternative, show cause for removal. Herzog's application had referenced bruising on Rosemary's arms as evidence of possible abuse, indicated that Rosemary had lost weight and had problems with her dental bridge, and alleged that Herzog had been unable to obtain satisfactory information about Rosemary's health from the guardian. Herzog also indicated that there were continued visitation disputes with the guardian. We remanded the cause to the county court, and the current disciplinary charges against Herzog arose out of those proceedings.

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[1] See *State ex rel. Counsel for Dis. v. Herzog*, 277 Neb. 436, 762 N.W.2d 608 (2009).

Upon remand, the county court set a hearing date for July 21, 2008. Before that hearing, Rosemary fell and suffered a hip injury. The guardian informed Herzog that Rosemary might need to be transferred to another assisted living facility after treatment and rehabilitation. On July 18, upon receiving that information, Herzog withdrew her application to find Rosemary's guardian in contempt or, in the alternative, show cause for removal. Though Herzog's application had been withdrawn, the court held the July 21 hearing with respect to the visitation dispute. The court granted Rosemary's guardian absolute discretion with regard to when and where Herzog could exercise her visitation rights with Rosemary. The hearing was continued until November 14.

At the hearing, Herzog's husband revealed on cross-examination that Herzog had registered Douglas County Court documents in Minnesota, where Rosemary resides. The county court, examining copies of those documents, noted that the documents had been filed 3 days before the July 21, 2008, hearing held in Douglas County. The court said it was concerned because the July 21 hearing had addressed the same issues as did the Minnesota filing, but Herzog had not disclosed to the court that she had filed in Minnesota. The court questioned Herzog about her intent in filing the documents in Minnesota and not disclosing such filings at the July 21 hearing. The record reflects that Herzog argued with the court during this inquiry. Herzog stated that she did not know on July 21 that those documents had been filed. Upon further inquiry, Herzog stated:

> Judge, I'm not going to sit here and have you accuse me and then not allow me to answer. I refuse to do that. That's abuse. If you'd like to hear my answer, I will be happy to give it to you, but I will not sit here and be abused first by my brother's lawyer and now by you. If you'd like my answer, I'll give it to you. If you'd like a brief recess so we can all cool down, I'll —
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> . . . — do that too —
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> . . . — but I will not be abused.

The court then instructed Herzog to lower her voice, to which Herzog responded "Well, I will not be abused." After further discussion, Herzog stated that the court was "repeating what [opposing counsel] has put in his pleadings" and then asked the court whether it was asking Herzog "[opposing counsel's] questions or the Court's questions."

Eventually, Herzog explained that upon being informed that Rosemary possibly would be transferred to another assisted care facility in Minnesota, she withdrew her request for a hearing on her application in Douglas County and sent the Douglas County Court documents to her lawyer in Minnesota. Herzog claimed that though the documents were filed in Minnesota on July 18, 2008, she was not aware of that fact until July 25, when she received notification of the filing. Herzog stated that, on August 29, she filed in the Douglas County Court a motion to transfer to Minnesota, because all of the evidence was in Minnesota and because she sought to enforce a visitation order which Rosemary's guardian was allegedly violating. Later, while the court was making a further inquiry, Herzog stated, "Would you like to file a complaint with the Bar Association? Feel free." Herzog also stated, "I don't know what your concern is, Judge, but it, obviously, isn't my mother. Now, I have to take a brief recess."

The guardian, Daniel, later filed a grievance with the Counsel for Discipline. The Counsel for Discipline charged Herzog with violating the Nebraska Rules of Professional Conduct when she (1) failed to inform the Douglas County Court of the filing of court documents from the underlying guardianship case in Minnesota; (2) caused documents to be filed in Minnesota with the intent to embarrass, delay, or burden a third party or that obviously would serve merely to harass or maliciously injure another; and (3) showed disrespect to the court when she engaged in a shouting match during the November 14, 2008, hearing in the county court. The Counsel for Discipline alleged that Herzog's actions violated §§ 3-503.2 (expediting litigation), 3-504.4 (respect for rights of third persons), and 3-508.4 (misconduct), as well as Neb. Ct. R. of Prof. Cond. § 3-503.3 (candor toward tribunal). After a hearing, the referee determined that Herzog had violated §§ 3-503.2, 3-504.4, and

3-508.4, but had not violated § 3-503.3. The referee recommends disbarment.

ASSIGNMENTS OF ERROR

Herzog filed the following summarized exceptions to the referee's report, stating that the referee had (1) considered evidence in the proceeding that involved conduct not charged in the amended formal charges and which was resolved in prior disciplinary proceedings, (2) incorrectly concluded that clear and convincing evidence proved Herzog had filed documents in Minnesota solely for the purpose of harassing or maliciously injuring another, (3) incorrectly concluded that clear and convincing evidence proved Herzog had filed documents in Minnesota with the intent to embarrass or burden a third person, and (4) incorrectly concluded that clear and convincing evidence proved that Herzog's conversation with the county court rose to the level of misconduct prejudicial to the administration of justice.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which we reach a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[2]

[2] Disciplinary charges against an attorney must be established by clear and convincing evidence.[3]

ANALYSIS

As a preliminary matter, though Herzog argues that the referee erred in considering evidence in the proceeding that involved conduct not charged in the amended formal charges and which was resolved in her prior disciplinary action, her argument is without merit due to our standard of review. We review disciplinary proceedings de novo on the record, so

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[2] *State ex rel. Counsel for Dis. v. Herzog, supra* note 1.

[3] *Id.*

whatever the referee might have improperly considered is immaterial to our review.[4] We therefore only consider which, if any, Nebraska Rules of Professional Conduct were violated and the appropriate sanction for any such violation.

Expediting Litigation and Respect for Rights of Third Parties

The Counsel for Discipline charged Herzog with violating §§ 3-503.2 and 3-504.4 for filing court documents in Minnesota. Section 3-503.2 states:

> In the lawyer's representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay litigation or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Section 3-504.4(a) states:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

The documents Herzog filed in Minnesota are an odd assortment, consisting of 44 total pages. They include, among other things, a journal entry from the Douglas County Court finding that Daniel was meeting his obligation to provide permanent guardianship for Rosemary; an order from the Douglas County Court ordering that Rosemary's farm be sold to provide her conservatorship estate with liquidity; Herzog's application in Douglas County to find Daniel in contempt or, in the alternative, show cause for removal; correspondence between Herzog and Daniel regarding Herzog's visitation in regard to Rosemary; correspondence between Herzog and Daniel regarding, among other things, bruising on Rosemary's arms; an order from the Douglas County Court approving the appointment of a conservator, awarding the conservator attorney fees, awarding service fees to the guardian ad litem, dismissing

[4] See *id.*

Herzog's application to find Daniel in contempt or in the alternative show cause for removal, finding that Daniel continued to fulfill his obligation as guardian, granting monthly visitation to Herzog, and withdrawing an earlier mediation requirement; Herzog's notice of appeal from that order; and our mandate in regard to that order.

Herzog contends that she caused the documents to be filed in Minnesota to enforce her right to visitation in Minnesota and, in response to our suggestion in the previous memorandum order and judgment on appeal, that a "visitor" be appointed as an intermediary between Herzog and her family to facilitate Herzog's visits with Rosemary. But as the referee noted, most of the documents Herzog filed have nothing to do with visitation. The documents that do mention visitation recite visits that were scheduled to take place before the filing date of July 18, 2008. In fact, only one document mentioned prospective visits, for July 19 and 20 and August 16 and 17. And none of the documents Herzog caused to be filed requested that the Minnesota court enforce Herzog's right to visitation. Herzog's claim that she filed in Minnesota to enforce her right to visitation is not credible.

Herzog's other explanation—that she filed the documents in response to our suggestion that a visitor be appointed—is also not credible. None of the documents that Herzog filed requested that a visitor be appointed. And, as the referee noted, none of the documents reference our suggestion, and Herzog did not file a copy of our decision. Herzog claims that she intended to file our opinion in Minnesota. Herzog testified that she sent documents to her Minnesota counsel, who chose which documents to actually file. However, neither Herzog nor her counsel provided evidence that Herzog intended to file our prior opinion. And though Herzog's attorney testified that he removed some of the documents from those Herzog provided, neither can remember which documents were removed.

Herzog's explanations for filing in Minnesota are not credible, especially in light of the fact that many of the documents Herzog filed related to Herzog's prior application to find Daniel in contempt or, in the alternative, show cause for his removal as Rosemary's guardian. Herzog withdrew that exact

application from the Douglas County Court prior to July 21, 2008. Herzog explained that she did so because the information on which the application relied was "stale." And though she claimed that her application was "stale," she still caused it to be filed in Minnesota at the same time she withdrew the application in Douglas County Court. Furthermore, Herzog's application, as the referee noted, is not an order to be enforced. It did not illustrate that Herzog was entitled to visitation, nor did it request the appointment of a visitor. And the title page of Herzog's application contained gratuitous photographs of bruising on Rosemary's arms. Though the photographs conceivably could have been entered into evidence at the hearing if supported by sufficient foundation, it was inappropriate for the front page of a court filing. For the foregoing reasons, we determine that there was no legitimate legal purpose for Herzog's Minnesota filing.

As the referee noted, in this disciplinary case, Herzog abused the subpoena process when she subpoenaed Daniel on a week's notice and when she subpoenaed Rosemary, knowing that Rosemary was incapacitated and that Herzog was prevented by court order from entering Rosemary's care facility. Herzog's abuse of the subpoena process, unaccounted-for filing of a "stale" application which contained gratuitous photographs of bruising on Rosemary, inability to articulate a credible legitimate legal purpose for her filing, and the animus between Herzog and Daniel clearly indicate that Herzog's intent in filing the documents in Minnesota could be for no other reason than to harass and embarrass, within the meaning of §§ 3-503.2 and 3-504.4, respectively. We therefore find clear and convincing evidence that Herzog violated §§ 3-503.2 and 3-504.4.

Misconduct

The Counsel for Discipline charged Herzog with violating § 3-508.4 for her confrontation with the Douglas County Court. Section 3-508.4 states:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct knowingly assist or induce another to do so or do so through the acts of another;

. . . .

(d) engage in conduct that is prejudicial to the administration of justice.

We first note that Herzog violated § 3-508.4(a) by virtue of violating §§ 3-503.2 and 3-504.4 as discussed above. We also find that her confrontation with the Douglas County Court was prejudicial to the administration of justice under § 3-508.4(d).

The record reflects that Herzog was generally disrespectful to the court, raised her voice, accused the court of "abusing" her, accused the court of not caring about Rosemary, and accused the court of parroting opposing counsel's pleadings. Though the court interrupted Herzog several times, the majority of those interruptions were to get a satisfactory answer from Herzog as to why she filed Douglas County Court documents in Minnesota and then attended a hearing in the Douglas County Court without disclosing her actions. Herzog's brash conduct, on the whole, indicates a significant lack of respect for the court. As such, we find that Herzog's actions were prejudicial to the administration of justice within the meaning of § 3-508.4(d).

Appropriate Discipline

[3-5] Neb. Ct. R. § 3-304 states 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[.]

. . . .

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

Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[5] This court will consider the attorney's acts both underlying the alleged

[5] *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009).

misconduct and throughout the proceeding.[6] The determination of an appropriate penalty to be imposed also requires the consideration of any aggravating or mitigating factors.[7]

We first consider any mitigating factors. As the referee noted, Herzog's confrontation with the court did not involve obscenity, and to her credit, Herzog requested on multiple occasions that the court grant a recess, even suggesting that such recess would enable everyone to "cool down." And Herzog argues that she was under a great deal of stress at the time of the hearing, claiming emotional, health, and financial problems. We also observe that Herzog's misconduct has also occurred solely in the context of emotionally charged and highly personal matters, which does not excuse her conduct, but does suggest that such misconduct is less likely to occur in the representation of other clients.

We next consider aggravating factors. This proceeding is Herzog's third disciplinary action regarding guardianship and conservatorship proceedings involving Rosemary. In her first disciplinary action, Herzog stipulated that she violated DR 7-102(A)(1), currently codified at § 3-503.2. In Herzog's second disciplinary action, we determined that Herzog had violated §§ 3-503.2 and 3-508.4(a) and (d), and we suspended Herzog from the practice of law for a period of 3 months. In the current action, we find that Herzog violated §§ 3-503.2, 3-504.4, and 3-508.4(a) and (d). Herzog not only has violated our rules on multiple occasions, but she has violated the same rules—§§ 3-503.2 and 3-508.4(a) and (d)—on multiple occasions. And as we noted in Herzog's second disciplinary action, "what we are most concerned with is the fact that these formal charges represent Herzog's second disciplinary action regarding these guardianship proceedings. Even after her previous private reprimand, Herzog continued to engage in unethical behavior in the guardianship proceedings."[8] We note that our opinion in Herzog's second disciplinary action was decided after her

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[6] *Id.*

[7] *Id.*

[8] *State ex rel. Counsel for Discipline v. Herzog, supra* note 1, 277 Neb. at 445, 762 N.W.2d at 615.

actions in the present matter. Nonetheless, repeated acts of misconduct require a significant sanction.[9] Herzog's repeated and obsessive acts of misconduct in Rosemary's guardianship and conservatorship proceedings do not warrant leniency. But, in our opinion, they are not so egregious as to warrant disbarment. We therefore conclude that Herzog should be suspended from the practice of law for a period of 2 years.

CONCLUSION

We find by clear and convincing evidence that Herzog violated §§ 3-503.2, 3-504.4, and 3-508.4(a) and (d). Therefore, it is the judgment of this court that Herzog should be and hereby is suspended from the practice of law for 2 years, effective immediately.

Herzog shall comply with Neb. Ct. R. § 3-316 and, upon failure to do so, shall be subject to punishment for contempt of this court. At the end of the 2-year suspension, Herzog may be reinstated to the practice of law, provided that she has demonstrated her compliance with § 3-316 and further provided that the Counsel for Discipline has not notified this court that Herzog has violated any disciplinary rule during her suspension. Herzog is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

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[9] See *State ex rel. Counsel for Dis. v. Beach*, 272 Neb. 337, 722 N.W.2d 30 (2006).