immediate context of the crime charged. . . .'"'"'"[3] Because this evidence is relevant, and is not governed by rule 404(2), I would find it admissible.

CASSEL, Judge, joins in this concurrence.

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[3] *Id.*

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. EDWARD L. WINTROUB, RESPONDENT.

800 N.W.2d 269

Filed July 22, 2011. No. S-10-187.

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, a charge must be supported by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
4. ____. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.
5. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
6. ____. For purposes of 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.
7. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original action. Judgment of public reprimand.

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

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

NATURE OF CASE

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Edward L. Wintroub. In the charges, the Counsel for Discipline alleged that respondent violated his oath of office as an attorney licensed to practice law in the State of Nebraska[1] and Neb. Ct. R. of Prof. Cond. §§ 3-501.8 and 3-508.4, in relation to a personal loan by a client to respondent. After a hearing, the referee found that although the loan was repaid, the absence of respondent's signature on the note or any collateral for the loan, combined with inadequate advisement concerning the risks of the loan and the desirability of consulting with outside counsel, constituted violations of respondent's oath of office and §§ 3-501.8 and 3-508.4. The Counsel for Discipline and respondent filed a joint motion for judgment on the pleadings, urging this court to enter a judgment of public reprimand as recommended by the referee. This court granted judgment on the pleadings as to the facts in the formal charges and set the matter of discipline for oral argument.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 28, 1965. At all times relevant to this case, respondent was engaged in the private practice of law with an office located in Douglas County, Nebraska.

On or about November 17, 2005, respondent was retained by Leah Crabb, pursuant to a written fee agreement to represent Crabb regarding a motor vehicle accident. In 2006, her claims were settled. At Crabb's request, some of the resulting funds were held by respondent in a trust account to be disbursed at Crabb's direction. Respondent did not charge Crabb for this service.

In 2007, respondent was suffering financially and unable to obtain credit due to a recent bankruptcy. Respondent asked Crabb for a loan from the trust account in the amount of $29,000, to be paid back within a year, with 10-percent

[1] Neb. Rev. Stat. § 7-104 (Reissue 2007).

interest. Respondent prepared and had Crabb sign the following agreement:

> I Leah Crabb this date loan to Edward Wintroub for One Year to April 17, 2008 the sum of $ 29,000.00 at 10% interest due April 17, 2008. I understand and have been advised by Mr. Wintroub that [I] have the right to speak to and have this explained to me by an attorney if [I] wish and [I] explicitly choose not to do so. [F]urther [I] am not a client of Mr. Wintroub. Mr. Wintroub may repay monies early without penalty if needed by myself.

Respondent did not sign the agreement, nor did he sign any other agreement relating to the loan. Respondent did not give security for the loan. He did not advise Crabb in writing of the desirability of seeking independent legal advice or of the risks of such an unsecured loan. The loan document was signed the same day that respondent proposed it to Crabb.

At the end of a year, respondent had paid Crabb back, including interest due. Respondent did not commingle his moneys with Crabb's. While the original grievance was that respondent had not accounted for all the funds borrowed and later repaid, it was found that respondent did not misappropriate any of the funds loaned to him.

The Counsel for Discipline charged that respondent violated the oath of office and §§ 3-501.8 (conflict of interest) and 3-508.4(a) (misconduct through violation of rules). The Counsel for Discipline noted that in 2008, respondent was given a public reprimand by the Iowa Supreme Court in relation to a loan given respondent by a client for which respondent later obtained a discharge in bankruptcy.[2] The Iowa Supreme Court found that respondent had failed to urge his client to seek outside counsel and had failed to disclose to the client the risks of the unstructured loan transaction. There was no reciprocal action taken in Nebraska on that case.

At a hearing before the referee, respondent testified that he was aware of the Iowa Supreme Court's view of his previous dealings with another client and had attempted, this time, to properly inform his client of the desirability of seeking outside

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[2] *Iowa S.Ct. Attorney Disc. Bd. v. Wintroub*, 745 N.W.2d 469 (Iowa 2008).

counsel before agreeing to lend him money. He observed that, in retrospect, it was "a very clumsy document."

Respondent admitted that Crabb was his client at the time of the transaction and explained that the declaration in the loan document to the contrary was meant to clarify that there was no litigation pending such that she might feel coerced. Respondent submitted several letters from attorneys attesting to his character and fitness as an attorney and to the fact that he has, in the past, provided legal services on a pro bono basis.

In his report, the referee concluded that respondent violated his oath of office and §§ 3-501.8 and 3-508.4(a). The referee, citing *In re Timpone*,[3] stated that because respondent failed to sign a promissory note or give collateral for the loan, the terms of the transaction were not "fair and reasonable" as required by § 3-501.8(a)(1).

The referee also found that respondent failed to fully disclose the terms of the transaction, as required by § 3-501.8(a)(1). The referee noted that the Iowa Supreme Court had explained to respondent that "[f]ull disclosure means the use of active diligence on the part of the attorney to 'fully disclose every relevant fact and circumstance which the client should know to make an intelligent decision concerning the wisdom of entering the agreement.'"[4]

The referee determined, further, that respondent failed to comply with § 3-501.8(a)(2), which requires that the attorney advise the client, in writing, of the desirability of seeking the advice of independent legal counsel and requires that the client be given a reasonable opportunity to seek the advice of independent legal counsel on the transaction.

Finally, the referee found that respondent had violated § 3-501.8(a)(3), because respondent failed to communicate to Crabb the material risks in making a loan without a promissory note and without obtaining some form of collateral to secure repayment of the loan.

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[3] *In re Timpone*, 208 Ill. 2d 371, 804 N.E.2d 560, 281 Ill. Dec. 595 (2004).

[4] *Iowa S.Ct. Attorney Disc. Bd. v. Wintroub, supra* note 2, 745 N.W.2d at 474.

The referee explained that respondent's alleged good faith attempt to comply with the Nebraska Rules of Professional Conduct was not a defense to the violations, but could be considered in determining the severity of the sanction. In any event, the referee did not believe respondent had made a good faith effort to comply with the rules.

The referee found that the prior disciplinary action by the Iowa Supreme Court for a similar violation was an aggravating factor, as well as the fact that respondent has been previously disciplined by our court.[5] The referee considered as mitigating factors that respondent cooperated throughout the course of the disciplinary proceedings and expressed genuine remorse. The referee also considered it mitigating that the client in this case suffered no actual harm and that respondent was generally considered a competent attorney who has provided legal services on a pro bono basis.

The referee recommended that respondent be given a public reprimand and that he be 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). No exceptions have been filed to the report.

ANALYSIS

[1-3] A proceeding to discipline an attorney is a trial de novo on the record.[6] To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.[7] Violation of a disciplinary rule concerning the practice of law is a ground for discipline.[8]

[4] As noted, neither party filed a written exception to the referee's report, and the facts that make up the basis for the report were stipulated to prior to the hearing. We granted the parties' joint motion for judgment on the pleadings as to the referee's

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[5] See *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004).

[6] *State ex rel. Counsel for Dis. v. Nich*, 279 Neb. 533, 780 N.W.2d 638 (2010).

[7] *Id.*

[8] *Id.*

findings of fact. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.[9] Based upon the undisputed findings of fact in the referee's report, we conclude that respondent has violated his oath of office as an attorney and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.8 and 3-508.4(a).

We have stated that the basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[10] 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.

[5-7] We have stated that each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[11] For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding.[12] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

factors.[13] We have considered prior reprimands as aggravators.[14] Further, cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[15]

The evidence in the present case establishes, among other facts, that respondent engaged in a business transaction with a client without fully complying with the requirements set forth in § 3-501.8. As the referee noted, the loan transaction was not secured by a promissory note issued by respondent and no collateral was provided for the loan. This made the loan risky for Crabb and was not a fair and reasonable transaction. Respondent also failed to advise Crabb in writing of the value of seeking outside legal counsel as required in § 3-501.8(a)(2) and did not obtain the consent of his client pursuant to § 3-501.8(a)(3).

As to mitigating factors, respondent cooperated with the Counsel for Discipline during the disciplinary proceedings and was remorseful for his actions. Further, it is significant that Crabb did not suffer an economic injury due to respondent's conduct, because she was reimbursed in full with interest prior to the filing of these proceedings. Numerous letters of support attested to respondent's good character. There was evidence that respondent engaged in pro bono work.

However, there are aggravating factors in this case. Respondent has been disciplined for similar conduct by the Iowa Supreme Court and has previously been disciplined by this court. This indicates cumulative acts of misconduct and suggests a more severe sanction.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Based upon our consideration of the record in this case, we adopt the recommendation of the referee and find that respondent should be and hereby is publicly reprimanded for his misconduct.

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[13] *Id.*

[14] *Id.*

[15] *Id.*

However, we take this opportunity to note that we are cognizant that respondent has received prior discipline by this court and the Iowa Supreme Court. Given this history, we caution that more severe sanctions will be considered in connection with any further disciplinary actions.

CONCLUSION

It is the judgment of this court that respondent should be and hereby is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with §§ 7-114 and 7-115 of the Nebraska Revised Statutes and §§ 3-310(P) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

HEAVICAN, C.J., not participating.

IN RE INTEREST OF JAMYIA M., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. JAMISON M., APPELLEE AND CROSS-APPELLANT, AND SHINAI S., APPELLANT.

800 N.W.2d 259

Filed July 22, 2011. No. S-10-208.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.
3. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.
5. **Final Orders: Appeal and Error.** There are three types of final orders that may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made upon summary application in an action after a judgment is rendered.
6. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.