Randal's parental rights to Ryder. We also conclude that Randal is an unfit parent and that terminating Randal's parental rights to Ryder was in Ryder's best interests. We affirm the judgment of the juvenile court.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN P. ELLIS, RESPONDENT.

808 N.W.2d 634

Filed February 24, 2012. No. S-10-986.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Appeal and Error.** In an attorney discipline case, the Nebraska Supreme Court reaches its conclusion independent of the findings of the referee. However, 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.
3. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** In attorney discipline cases, the basic issues are whether discipline should be imposed and, if so, the type of discipline under the circumstances.
5. ____. The Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances and considers the attorney's acts both underlying the events of the case and throughout the proceeding.
6. ____. In determining the appropriate sanction in an attorney disciplinary proceeding, the Nebraska Supreme Court considers the discipline imposed in similar circumstances.
7. ____. In evaluating attorney discipline cases, the Nebraska Supreme Court considers aggravating and mitigating circumstances.
8. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original action. Judgment of disbarment.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

James C. Morrow, of Morrow, Willnauer, Klosterman & Church, L.L.C., and, on brief, Kurt D. Maahs for respondent.

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

PER CURIAM.

NATURE OF CASE

The Counsel for Discipline filed formal charges against John P. Ellis, alleging he violated his oath of office as an attorney, Neb. Rev. Stat. 7-104 (Reissue 2007), and several of the Nebraska Rules of Professional Conduct. Ellis filed an answer admitting certain factual allegations but denying he violated the rules of professional conduct. This court appointed a referee. After holding an evidentiary hearing, the referee determined Ellis had violated Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence); 3-501.4(a)(1) through (4) and (b) (communications); 3-501.15(d) and (e) (safekeeping property); 3-501.16(d) (declining or terminating representation); and 3-508.4(a), (c), and (d) (misconduct); and his oath of office as an attorney. Based on the seriousness of the offenses and given Ellis' similar past behavior for which he had been previously disciplined, the referee recommended disbarment. Ellis filed exceptions to the referee's report. Upon our independent review of the record, we conclude that the violations occurred and that the proper sanction is disbarment.

FACTS

Ellis was admitted to the practice of law in Nebraska in 1982. In 2003, he entered a conditional admission to charges filed by the Counsel for Discipline. Those charges alleged that due to Ellis' neglect, a client's case was dismissed. Ellis subsequently misled the client regarding the status of that case and gave false information to the Counsel for Discipline's office during the following investigation. We accepted Ellis' conditional admission and suspended him for 1 year. *State ex rel. Special Counsel for Dis. v. Ellis*, 265 Neb. 788, 659 N.W.2d 829 (2003). Ellis was reinstated in 2004.

At all relevant times, Ellis was engaged in the private practice of law in Omaha under the jurisdiction of the Committee on Inquiry of the Second Disciplinary District, which determined reasonable grounds existed to discipline Ellis. Accordingly,

formal charges were filed. Given Ellis' answer, we appointed a referee.

With respect to the current case, the referee found facts substantially as described below. Following our de novo review of the record, we determine there is clear and convincing evidence in the record to support these facts. In 2006, Stephen and Cindy Fuller met with Ellis to talk about collecting damages as a result of personal injuries Stephen Fuller (Fuller) suffered in 2004. Ellis was hired on a one-third contingency fee contract and presented a claim to an insurance company, which denied liability. Before proceeding with the case, Ellis required a $1,000 deposit. Fuller made the deposit, and in May 2007, the funds were placed in Ellis' trust account. In June 2007, Ellis filed suit in the district court for Douglas County, and discovery began.

Around March 10, 2008, the district court sent a notice to Ellis stating that Fuller's suit would be dismissed in 30 days for lack of prosecution. Ellis did not send Fuller a copy of this notice of impending dismissal. The statute of limitations ran on Fuller's claim in February 2008. Fuller's case was dismissed with prejudice on April 10, 2008. Ellis claimed he told the Fullers about the notice of impending dismissal on March 24, 2008, when he met with them to discuss their upcoming depositions. The referee did not find this testimony credible. Ellis also claimed he sent a letter to Fuller on March 28 about the impending dismissal. The referee found that Ellis falsely claimed this letter had been sent and, on the contrary, that the evidence showed the letter "was created by [Ellis] to mislead and deceive [the] Counsel for Discipline in the investigation of this matter." These findings by the referee are supported by the record.

The March 28, 2008, letter was not sent by certified mail. It included the statement, "If I do not hear back from you, I will assume you agree [that your case would not likely be successful] and understand that the matter will be dismissed." The file copy of the March 28 letter resembled "a copy of a copy." The letter did not discuss reinstatement of the case or mention the expired statute of limitations. The referee did not find it credible that the March 28 letter would include so

little about the consequences of dismissal and the difficulty of reinstatement.

Ellis' firm uses "Worldox," a document management system which assigns numbers sequentially to documents. The March 28, 2008, letter was allegedly numbered 60119, while a March 26 letter was numbered 60201. Two copies of the letter in two exhibits in the case bore no document number.

In connection with the investigation of Fuller's grievance, the Assistant Counsel for Discipline met Ellis at Ellis' office on May 3, 2010, and asked for the March 28, 2008, letter. The letter was not found in the computer system. A search for the document numbered 60119 retrieved a letter dated March 20, 2008, to a different client. A hard copy of the March 20 letter could not be found. Ellis claimed he gave the March 20 letter directly to the client; the referee determined that it was more likely the letter was used to recreate an obsolete letterhead.

Fuller stated he never received the March 28, 2008, letter and was never told of the notice of impending dismissal or the actual dismissal of his case. Unaware of the April 2008 dismissal, the Fullers continued to contact Ellis about the case through the rest of 2008 and 2009. These contacts support Fuller's claim he did not know his case had been dismissed. Although, as the referee noted, Fuller did not have a good memory for dates, he could recall facts in sequence and was able to refresh his memory from several exhibits. The referee found that Fuller was credible and that the March 28 letter was fabricated.

On July 3, 2008, Ellis sent Fuller a letter about locating a possible witness. In 2009, Ellis met Fuller and the witness, despite Ellis' apparent knowledge that the case probably could not be reinstated 1½ years after it had been dismissed. This witness did not add to Fuller's case. Fuller called Ellis multiple times from October through December 2009 and left messages for Ellis.

On January 8, 2010, Fuller looked at his case file at the Douglas County District Court and learned his case had been dismissed in 2008. Fuller attempted to contact Ellis, but his calls were not returned. Fuller filed a grievance on January 12, 2010.

The remainder of Fuller's $1,000 payment was not returned until May 2010, over 2 years after the case was dismissed and only after the grievance had been filed. Ellis' employer ordered the refund. However, the referee determined that it was unclear that the failure to refund the money was due to an attempt to mislead Fuller or due to a lack of review processes at the firm for the rare case of an advance payment on a contingency fee contract.

The referee determined that Ellis did not tell Fuller his case was subject to dismissal and, once dismissed, could be reinstated only at the district court's discretion. The referee also determined that Ellis failed to advise Fuller that if the case was not reinstated, it could not be refiled, because the statute of limitations had run. The referee determined that Ellis did not explain the matter to Fuller such that Fuller could make informed decisions regarding dismissal or take action to avoid dismissal or reinstate the case. The referee determined that although Ellis had a duty to properly account for client funds, the refund was not made until well after the case was dismissed. The referee described Ellis' conduct as involving "dishonesty, fraud, deceit and misrepresentation" as well as "prejudic[e] to the administration of justice." Upon our de novo review, we find these determinations are supported by the record.

The referee determined Ellis violated Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence); 3-501.4(a)(1) through (4) and (b) (communications); 3-501.15(d) and (e) (safekeeping property); 3-501.16(d) (declining or terminating representation); and 3-508.4(a), (c), and (d) (misconduct); and his oath of office as an attorney. The referee recommended disbarment. Ellis filed exceptions to the referee's report.

ASSIGNMENTS OF ERROR

Ellis assigns, renumbered, restated, and consolidated, that the referee erred when he (1) found Ellis did not tell the Fullers about the impending dismissal notice or dismissal order, tell them of the probability that the lawsuit could not be reinstated once it was dismissed, or explain the matter to the extent reasonably necessary to allow Fuller to make an informed decision regarding dismissal; (2) found Ellis created the March 28,

2008, letter to mislead and deceive the Counsel for Discipline; (3) found Ellis did not take diligent action to avoid dismissal or reinstate the case or communicate with Fuller to get informed consent; (4) found Ellis violated the Nebraska Rules of Professional Conduct and his oath of office as an attorney; (5) allowed or considered evidence relating to Ellis' prior conduct and disciplinary action; and (6) determined disbarment was an appropriate sanction.

STANDARDS OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Thew*, 281 Neb. 171, 794 N.W.2d 412 (2011). We reach our conclusion independent of the findings of the referee. *State ex rel. Counsel for Dis. v. Carter*, 282 Neb. 596, 808 N.W.2d 342 (2011). However, 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. *Id.*

ANALYSIS

[3-5] Violation of a disciplinary rule concerning the practice of law is a ground for discipline, *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009), and disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Herzog*, 281 Neb. 816, 805 N.W.2d 632 (2011). In attorney discipline cases, the basic issues are whether discipline should be imposed and, if so, the type of discipline under the circumstances. *Thew, supra*. We evaluate each attorney discipline case in light of its particular facts and circumstances, *id.*, and consider the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Samuelson*, 280 Neb. 125, 783 N.W.2d 779 (2010).

The goal of attorney disciplinary proceedings is not as much punishment as determination of whether it is in the public interest to allow an attorney to keep practicing law. See *Orr, supra*. We consider six factors in determining whether and to what extent discipline should be imposed: (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. *Thew, supra*.

The referee determined and we agree that Ellis violated the following provisions of the Nebraska Rules of Professional Conduct:

> § 3-501.3. Diligence.
>
> A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> . . . .
>
> § 3-501.4. Communications.
>
> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) [and] promptly comply with reasonable requests for information[.]
>
> . . . .
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> . . . .
>
> § 3-501.15. Safekeeping property.
>
> . . . .
>
> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

. . . .

§ 3-501.16. Declining or terminating representation.

. . . .

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

. . . .

§ 3-508.4. Misconduct.

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;

. . . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.

Several facts are clearly established by the record: Ellis represented Fuller. Ellis never sent Fuller a copy of the impending dismissal notice. The case was dismissed for failure to prosecute. Ellis never attempted to reinstate the case.

The evidence also shows that rather than telling his client the case was dismissed, Ellis strung Fuller along for nearly 2 years. The case was dismissed in April 2008. In July 2008, Ellis sent Fuller a letter asking that he look for a potential witness. That letter mentioned nothing about the dismissal which had occurred. Ellis never sent the Fullers a letter telling them the case was dismissed. Ellis was often nonresponsive to requests for information on the case. Ellis acted as if the case was active and it was important to talk to the witness. Well after the case had been dismissed, Ellis met with Fuller and the witness in his office in 2009.

Throughout these proceedings, Ellis claims he told the Fullers about the impending dismissal notice on March 24, 2008, and claims that the March 28 letter is genuine. The referee believed the Fullers' version of events and determined the March 28 letter was a fabrication. The referee's determination about the relative credibility of the Fullers and Ellis was sound and consistent with the evidence. Having reviewed the record de novo, we agree with the referee that the March 28 letter was a fabrication.

We also note the referee found that the remainder of Fuller's advance payment was not returned to him until May 2010, over 2 years after the case had been dismissed. Ellis failed in his responsibility to oversee those funds regardless of whether he intentionally withheld the funds to lead the Fullers to believe the case was still active or simply did not have appropriate procedures in place to account for those funds.

We agree with the referee that there is clear and convincing evidence that Ellis violated Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence); 3-501.4(a)(1) through (4) and (b) (communications); 3-501.15(d) and (e) (safekeeping property); 3-501.16(d) (declining or terminating representation); and 3-508.4(a), (c), and (d) (misconduct); and his oath of office as an attorney. We determine that Ellis committed the acts alleged

in the formal charges without consideration of his prior discipline. Accordingly, we need not address Ellis' assigned error that the referee impermissibly considered his prior discipline in connection with his analysis of whether Ellis violated the rules of professional conduct. However, Ellis' prior disciplinary case is relevant in determining the appropriate sanction.

[6] In determining the appropriate sanction, we consider the discipline imposed in similar circumstances. See *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010). We have previously disbarred attorneys who neglected their client's cases, failed to respond to the Counsel for Discipline, and were previously disciplined for similar conduct. For example, we disbarred an attorney who neglected a client's case and court schedules, did not cooperate with the Counsel for Discipline in a separate case, and had received a previous prior reprimand for similar conduct. *State ex rel. Counsel for Dis. v. Hart*, 270 Neb. 768, 708 N.W.2d 606 (2005). Neglect of client cases and failure to cooperate with the Counsel for Discipline are grounds for disbarment. *State ex rel. Counsel for Dis. v. Coe*, 271 Neb. 319, 710 N.W.2d 863 (2006). We disbarred an attorney who neglected his clients' cases—in one instance, causing a client's claim to be time barred—and did not communicate with his clients. See *id.* We noted that "a pattern of neglect reveals a particular need for a strong sanction to deter others from similar misconduct, to maintain the reputation of the bar as a whole, and to protect the public." *Id.* at 322, 710 N.W.2d at 866.

In this case, Ellis' neglect cost Fuller the opportunity to pursue his claim, regardless of whether that claim would have succeeded. Ellis compounded this error by stringing his client along for nearly 2 years and attempting to deceive the Counsel for Discipline. Ellis' actions warrant a strong sanction such as disbarment for the protection of the public and preservation of the bar's reputation. See *Hart, supra*.

[7] In evaluating attorney discipline cases, we consider aggravating and mitigating circumstances. See *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007). Ellis asserts that he cooperated with the Counsel for Discipline

and that such cooperation should serve as a mitigating factor. See *Switzer, supra*. However, Ellis' purported cooperation was tainted by fabricating evidence intended to deceive the Counsel for Discipline and bolster his chosen defense. Ellis also raises a lack of prejudice to Fuller as a mitigating factor. The referee noted that, without regard to prejudice, Fuller should have had the opportunity to pursue his claim further than Ellis' actions permitted. We agree with the referee's analysis and find Ellis' asserted mitigating factors to be entitled to little weight.

[8] Ellis also argues that any prior offense is remote in time and should not be considered in imposing discipline. An isolated instance of misconduct can be a mitigating factor. *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010). However, the referee did not find Ellis' previous disciplinary offense remote in time, and we agree with the referee that Ellis' previous suspension is an aggravating factor. See *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009). Ellis previously neglected a client's case, misled the client as to the case's status, made false statements to the Counsel for Discipline to cover up his negligence, entered a conditional admission, and was suspended for 1 year. *State ex rel. Special Counsel for Dis. v. Ellis*, 265 Neb. 788, 659 N.W.2d 829 (2003). His conduct in this case is similar. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions, *State ex rel. Counsel for Dis. v. Thew*, 281 Neb. 171, 794 N.W.2d 412 (2011), including disbarment. See *Switzer, supra*. We believe that Ellis' acts caused his client harm, see *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005), to the extent it denied Fuller the ability to pursue his claim. By fabricating the March 28, 2008, letter, Ellis interfered in a discipline investigation, thus meriting a severe sanction. See *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008). The referee found dishonesty, fraud, deceit, and misrepresentation, and upon our review of the record, we find these determinations are established by the record. Upon due consideration, we conclude that disbarment is the appropriate sanction.

CONCLUSION

We find that Ellis should be and hereby is disbarred from the practice of law in Nebraska, effective immediately. Ellis is hereby ordered to comply with all terms of Neb. Ct. R. § 3-316 forthwith and shall be subject to punishment for contempt of this court upon failure to do so. Ellis is also 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 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

ALISHA C., APPELLEE, V.
JEREMY C., APPELLANT.
808 N.W.2d 875

Filed February 24, 2012. No. S-11-233.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.
2. **Parent and Child: Paternity: Presumptions: Evidence.** Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born during wedlock is presumed, and this presumption may be rebutted only by clear, satisfactory, and convincing evidence.
3. **Jurisdiction: Divorce: Paternity: Child Support.** The district court has jurisdiction to determine whether the husband is the biological father of a child to be supported as a result of a dissolution decree.
4. **Divorce: Paternity: Child Support.** Even if paternity is not directly placed in issue or litigated by the parties to a dissolution proceeding, any dissolution decree which orders child support implicitly makes a final determination of paternity.
5. **Divorce: Paternity: Child Support: Res Judicata.** A dissolution decree that orders child support is res judicata on the issue of paternity.
6. **Divorce: Modification of Decree: Paternity: Evidence: Res Judicata.** Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father.
7. **Statutes.** Statutes relating to the same subject are in pari materia and should be construed together.
8. ____. A statute is not to be read as if open to construction as a matter of course.
9. ____. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.