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State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Douglas D. Palik, respondent.

820 N.W.2d 862

Filed September 21, 2012. No. S-11-257.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
3. ____. Under Neb. Ct. R. § 3-304, the Nebraska Supreme Court may impose one or more of the following disciplines: (1) disbarment; (2) suspension; (3) probation in lieu of or subsequent to suspension, on such terms as the court may designate; or (4) censure and reprimand.
4. ____. 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.
5. ____. In imposing attorney discipline, the Nebraska Supreme Court evaluates each case in light of its particular facts and circumstances.
6. ____. 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.
7. ____. When determining appropriate discipline, the Nebraska Supreme Court considers aggravating and mitigating factors.
8. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and justify more serious sanctions.

Original action. Judgment of suspension.

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

Douglas D. Palik, pro se.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

Per Curiam.

The Counsel for Discipline of the Nebraska Supreme Court (the Relator) filed formal charges against Douglas D. Palik, an attorney licensed since 1984. The Relator alleged that Palik

had lied to the son of a distributee of a will to cover up Palik's procrastination and incompetence in his administration of the estate. The referee recommended that Palik be suspended for 1 year with a 1-year probationary term to follow upon reinstatement. The Relator filed exceptions to the referee's report and argues that this sanction is too lenient. Palik's behavior and the mitigating factors presented convince us that the referee's recommended sanctions are appropriate, provided that Palik makes good on his proffered restitution to both his client and the distributee's son. Assuming that such restitution will be made, we impose a 1-year suspension upon Palik, to be followed by a 1-year term of probation.

BACKGROUND

The Relator's formal charges alleged that Palik violated his oath of office as an attorney[1] and the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-504.1 (truthfulness in statements to others), and 3-508.4 (misconduct). Palik admitted to the underlying facts and the violations. The referee found that Palik had violated his oath of office and the professional rules.

Palik has not taken any exceptions to the referee's report. And if no exceptions are taken to the referee's findings of fact, we may consider them final and conclusive.[2] Accordingly, in our presentation of the facts, we draw heavily from the referee's findings of fact.

On March 6, 2007, Blanche Thompson passed away, leaving an estate of $1.7 million. Her will named William Olson as personal representative. Olson hired Palik to assist him in administering the estate, and on May 22, Palik filed a petition for formal probate. On May 23, 2008, over a year later, the county court judge ordered Palik to file an inventory for the estate. Palik filed the inventory on June 25. Along with the

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

[2] *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010); Neb. Ct. R. § 3-310(L).

inventory, he also filed a petition for the determination of an inheritance tax and a tax worksheet.

Under Blanche's will, Mary Jane Thompson was to receive $60,000. On about November 9, 2007, Olson gave Palik a check to send to Mary Jane, who lived in Texas. Inexplicably, Palik did not mail this check until June 25, 2008. And he did not tell Olson that he had not sent the check. In fact, the previously mentioned tax worksheet, filed on June 25, stated that Mary Jane had received the money from the estate, which was not true at that time.

At some point after Mary Jane received her check, Palik received a call from Mary Jane's son, Jerome Thompson. Jerome told Palik that Mary Jane, who was elderly, wished to renounce her share so that the $60,000 would pass directly to Jerome. Accordingly, Palik prepared a renunciation document and sent it to Mary Jane. Mary Jane signed the document and returned it to Palik, along with the $60,000 check. Palik, however, did not tell Olson about Mary Jane's wish to renounce her inheritance or the return of the check. Furthermore, Palik seemingly failed to realize that to be effective, Mary Jane had to renounce her share within 9 months of "the date on which the transfer creating the interest in [Mary Jane was] made."[3] Mary Jane and Jerome did not receive the check until over a year after Blanche had died and the will had been admitted to probate, so Mary Jane's renunciation was ineffective.

Nevertheless, on November 20, 2009, Palik told Jerome in an e-mail that he would be sending the new check and provided a tracking number. Palik told Jerome he would contact him on November 23 to ensure that the check had arrived. On November 24, Jerome sent an e-mail to Palik informing him that the check had not arrived and that the carrier could not verify the tracking number that Palik had provided.

The next day, Palik sent Jerome another e-mail. He said that he had just talked to that the carrier and the carrier would call him back regarding the check. Palik told Jerome he would call him back on November 28, 2009. Palik apparently did not call.

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[3] See Neb. Rev. Stat. § 30-2352(b) (Reissue 2008).

On December 3, 2009, Palik e-mailed Jerome, told him that he could pick up the check on the following day, and again provided Jerome with a tracking number. The check did not arrive. On January 13, 2010, Palik again e-mailed Jerome and told him that the carrier would pick up the check on January 14 and that he would have it on January 15. Palik again provided a tracking number.

On January 15, 2010, Palik e-mailed Jerome and told him that the carrier had failed to pick up the package but that he was taking it to the carrier himself. He stated that Jerome would receive the check on January 18. On January 19, Jerome e-mailed Palik and told him that he had not received the check and that the tracking number Palik had provided was invalid.

This routine continued. From February 15 through April 20, 2010, Palik repeatedly e-mailed Jerome with statements promising delivery of the check. On April 30, Palik again provided Jerome with yet another routing number and a delivery date of May 4. On May 25 and again on June 16, Jerome e-mailed Palik to tell him that the check had not arrived and to ask for details. On June 18, Palik responded that he had been out of the office for personal reasons and would call Jerome on June 21. On June 21, Palik e-mailed Jerome. He stated that he would call the next day with a new tracking number. On June 22, Palik e-mailed Jerome to tell him the check would be picked up on June 24 and delivered on June 25. The check never arrived.

Obviously, all of Palik's claims that "the check is in the mail" were lies. The tracking numbers for the nonexistent packages were fabrications by Palik. In fact, Palik had never told Olson that Mary Jane wished to renounce her inheritance and never told Olson of the need to issue a new check to Jerome.

Because the $60,000 that was due to Mary Jane, and later to Jerome, was never given to them, it remained in the estate's bank account. When Olson distributed this account to the residuary beneficiaries of the will, this $60,000 went to them, instead of Jerome.

On November 15, 2010, Jerome filed a grievance with the Relator regarding Palik's failure to deliver the check. Palik responded by telling the Relator that the $60,000 had apparently been distributed to the residuary beneficiaries but that he would meet with Olson. While he did twice meet with Olson, he did not tell Olson about Mary Jane's renunciation, the need to issue a check to Jerome, or Jerome's grievance.

The Relator eventually contacted Olson. Olson told the Relator that Palik had not told him about Mary Jane's renunciation or about Jerome's grievance. Olson said that because Palik had not told him that Mary Jane had not cashed the check, he had distributed her $60,000 to the residuary beneficiaries over a year before. In January 2011, Olson sent $60,000 of his own money to Jerome to cover Jerome's share.

On January 10, 2011, the Relator sent Palik a letter requesting an explanation regarding Jerome's grievance and to provide documents regarding Blanche's estate. Palik did not respond. On February 16, the Relator sent Palik the formal charges. As we have mentioned, Palik admitted them in their entirety.

At the hearing before the referee, Palik was remorseful. Palik, however, neither offered excuses nor explained his behavior. He provided no evidence of mitigating factors to the referee.

An aggravating factor, however, was established. This is not Palik's first run-in with disciplinary authorities. In 2004, Palik received a private reprimand. The reprimand stemmed from a guilty plea to a misdemeanor assault charge that arose from a domestic incident between Palik, his then-wife, and his son.

After a hearing, the referee issued his report. The referee recommended that we suspend Palik for 1 year and then, upon reinstatement, that he be subject to a 1-year term of probation that will include monitoring by a licensed attorney.

At oral argument, we learned that Palik, who was still the attorney of record for Olson and the estate, had not formally closed the estate or reimbursed Olson for the $60,000 that Olson paid to Jerome out of his own pocket. Following oral

argument, however, we granted Palik leave to supplement the record with such evidence, along with any other evidence demonstrating mitigating circumstances. Palik submitted evidence that he had closed the estate, that he had entered into agreements with Olson and Jerome to pay them restitution, and that there were personal circumstances which helped explain (and mitigated) his deceitful and unprofessional behavior.

ASSIGNMENT OF ERROR

The Relator asks that we reject the referee's recommendation of a 1-year suspension and instead impose a 2-year suspension.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record.[4]

ANALYSIS

[2] The basic issues in a disciplinary proceeding against an attorney are whether we should impose discipline and, if so, the appropriate discipline under the circumstances.[5] Palik has admitted to violating the rules and admits that some discipline should be imposed. So we consider only what sanction to impose.

[3] Under Neb. Ct. R. § 3-304, we may impose one or more of the following disciplines: (1) disbarment; (2) suspension; (3) probation in lieu of or subsequent to suspension, on such terms as we may designate; or (4) censure and reprimand.[6]

[4] 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.[7]

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[4] *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012).

[5] *Id.*

[6] See *id.*

[7] *Id.*

[5,6] In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances.[8] And we consider the attorney's acts both underlying the events of the case and throughout the proceeding.[9]

[7,8] When determining appropriate discipline, we consider aggravating and mitigating factors.[10] Cumulative acts of attorney misconduct are distinguishable from isolated incidents and justify more serious sanctions.[11] At this point, we note Palik's prior reprimand is an aggravating factor.

Palik's procrastination and foot-dragging occurred before he had sent the check to Mary Jane, and it continued in his dealings with Jerome. A comment to our rules of professional conduct aptly sums up the problem:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions . . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.[12]

Here, Palik's procrastination prevented Mary Jane from renouncing her share. Even more disturbing though is the months of deceit that he engaged in with Jerome. Time after time, he lied to Jerome, going so far as to fabricate tracking numbers for fictitious packages. Palik's lies were deliberate attempts to mislead Jerome. By the time Palik's smokescreen had cleared, it was too late; there was no money left in the estate to give to Jerome. So Olson paid Jerome $60,000 out of his own pocket.

There is no doubt that Palik utterly failed as an attorney, and such failure is worthy of punishment. But while Palik's actions were egregious violations of his duties as an attorney, Palik has

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[8] *Id.*

[9] See *id.*

[10] *Id.*

[11] See *id.*

[12] § 3-501.3, comment 3.

since done his best to make amends, although belatedly. Palik has also explained that he was beset with personal difficulty during the relevant time, which, while not an excuse, does offer some explanation for his actions.

Palik has entered into an agreement with Olson to repay with interest the money that Olson paid out of his own pocket to cover Jerome's share. Palik has also entered into an agreement to pay interest to Jerome for the delay in receiving Jerome's share of the estate. And Palik has expressed, we believe, genuine remorse for his conduct and has taken responsibility for his actions. These are all mitigating factors in Palik's favor.[13] We note that Palik has informally closed the estate and removed himself as the attorney of record.

Furthermore, Palik has offered as mitigating factors a number of personal problems which occurred when his misconduct took place. Palik suffered from health problems, as did his wife and mother. Palik's stepfather served Palik's mother with divorce papers, for whom Palik had previously drawn up a prenuptial agreement. This caused some conflict in the family. Palik fought with his ex-wife about planning and paying for their children's weddings, and he had strained relationships with his sons to the point where they now rarely speak. We consider these personal problems to be mitigating factors in Palik's favor.[14]

Balancing Palik's unprofessional behavior with his mitigating circumstances leads us to conclude that the referee's recommended punishment is appropriate. We therefore impose the following disciplines: (1) Palik is suspended for 1 year from the practice of law; (2) before Palik may be readmitted, he must present this court with proof that he has fulfilled his agreements with Olson and Jerome; and (3) upon readmission,

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[13] See, e.g., *Switzer, supra* note 2; *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004); *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003); *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001).

[14] See, e.g., *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000); *State ex rel. NSBA v. Simmons*, 259 Neb. 120, 608 N.W.2d 174 (2000).

Palik will be subject to a 1-year probationary term during which he will be supervised by an attorney to be selected by the Relator. In addition, Palik is to comply with Neb. Ct. R. § 3-316 and is subject to contempt of this court if he does not. Further, Palik is to pay the costs of this action in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

JAVIS ARVELL JONES, APPELLANT, V.
VALENE M. JONES, APPELLEE.

821 N.W.2d 211

Filed September 21, 2012. No. S-11-668.

1. **Actions: Dismissal and Nonsuit.** Dismissal of a civil action for lack of prosecution is addressed to the discretion of a trial court, whose ruling, in the absence of an abuse of discretion, will be upheld on appeal.
2. **Courts: Dismissal and Nonsuit.** A district court has discretionary power to dismiss a case for want of prosecution, and such dismissal is also within the court's inherent power.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Courts: Dismissal and Nonsuit.** The power to dismiss for want of prosecution is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the trial courts.
5. **Public Officers and Employees: Prisoners: Courts.** Prison officials must ensure that inmates have adequate, effective, and meaningful access to the courts.
6. **Constitutional Law: Trial: Prisoners.** Prison inmates have no constitutional right to be released from prison so that they may be present in person at the trial of a civil court action.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and PIRTLE, Judges, on appeal thereto from the District Court for Douglas County, W. MARK ASHFORD, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Javis Arvell Jones, pro se.