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no legal basis for rescission, and to allow such a judgment to stand would be untenable. Accordingly, although our reasoning differs in some respects, we affirm the judgment of the Court of Appeals.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DAVID E. CORDING, RESPONDENT.

825 N.W.2d 792

Filed February 1, 2013. No. S-11-870.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **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.
3. **Disciplinary Proceedings.** 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.
4. ____. Any violation of the Nebraska Rules of Professional Conduct constitutes grounds for discipline.
5. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances, and the Nebraska Supreme Court considers the attorney's acts underlying the events of the case and throughout the proceedings.
6. ____. To determine whether and to what extent discipline should be imposed in a lawyer 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.
7. **Disciplinary Proceedings: Attorney and Client.** Among the major considerations in determining whether a lawyer should be disciplined is maintenance of the highest trust and confidence essential to the attorney client relationship.
8. **Disciplinary Proceedings.** The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.

Original action. Judgment of public reprimand.

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

Lyle Joseph Koenig, of Koenig Law Firm, for respondent.

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

PER CURIAM.

INTRODUCTION

Following a bench trial in Lancaster County Court, David E. Cording was found guilty of third degree sexual assault and public indecency. He appealed, and the Lancaster County District Court reversed the conviction for sexual assault but affirmed the conviction for public indecency.

The Counsel for Discipline of the Nebraska Supreme Court brought formal charges based on the underlying incident, which involved respondent's solicitation of an undercover police officer to engage in a sexual act in a public place. The formal charges alleged a violation of respondent's oath of office as provided by Neb. Rev. Stat. § 7-104 (Reissue 2012) and the Nebraska rules governing professional conduct, specifically Neb. Ct. R. of Prof. Cond. § 3-508.4.

A hearing before a court-appointed referee was held on February 7, 2012, and the referee filed his report on April 19, 2012. The referee found by clear and convincing evidence that respondent's conduct violated his oath of office as an attorney and § 3-508.4(b). The referee recommended a public reprimand.

Neither party took exception to the findings and recommendations of the referee. Pursuant to Neb. Ct. R. § 3-310(L), relator moved for judgment on the pleadings. This court sustained the motion as to the facts and ordered the case to proceed to briefing and oral argument limited to the issue of discipline.

FACTS

In his report, the referee found that respondent was admitted to the practice of law in the State of Nebraska on June 25, 1974. His former practice was generally in the areas of real estate, estates, probate, wills, trusts, and some criminal appointments. On occasion, he served as an acting county attorney and as a hearing officer in probation revocation cases.

He was engaged in private practice until March 2010, but has not engaged in the practice of law since that time.

On June 15, 2010, respondent was walking in a park near Lincoln, Nebraska. An undercover police officer was present, watching for illegal sexual activity occurring in the park. The officer saw respondent and thought that respondent had signaled him. The officer began following respondent, and the two began a conversation. During the conversation, the officer indicated that he was voluntarily going with respondent. As they walked deeper into a wooded area of the park, the officer indicated that he was shy and that he had not done anything like this before. The indecent conduct followed.

Respondent's illegal conduct took place in a heavily wooded area of the park. There is nothing in the record to indicate that members of the public were present or that anyone viewed respondent's conduct. Respondent was charged in Lancaster County Court with third degree sexual assault and public indecency. He was found guilty of both counts.

On appeal, the Lancaster County District Court found the evidence failed to establish that the contact between respondent and the officer was not consensual, as required by Neb. Rev. Stat. §§ 28-320(1)(a) (Reissue 2008) and 28-318(8) (Cum. Supp. 2012) for sexual assault. The district court reversed the conviction for third degree sexual assault, but affirmed the conviction for public indecency, which was a Class II misdemeanor.[1]

Respondent had previously been convicted of sexual battery in the district court for Saline County, Kansas, on July 12, 2002, which was a misdemeanor.[2] There is no record that respondent has been disciplined previously or charged with professional misconduct in the State of Nebraska.

On June 6, 2012, this court sustained relator's motion for judgment on the pleadings, limiting judgment to the facts. We ordered the parties to brief the issue of the appropriate discipline.

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[1] Neb. Rev. Stat. § 28-806(2) (Reissue 2008).

[2] Kan. Stat. Ann. § 21-3517(b) (2007) (repealed by 2010 Kan. Laws, ch. 136, § 307).

ASSIGNMENT OF ERROR

Neither party has taken exception to the referee's report of the facts. Neither party alleges any error.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record.[3]

ANALYSIS

[2,3] When no exceptions to the referee's findings of fact are filed, we may consider the referee's findings final and conclusive.[4] Because we granted judgment on the pleadings as to the facts, the only issue before us is the appropriate discipline.[5] 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.[6] The decision to impose discipline depends upon whether the attorney's conduct violated the Nebraska Rules of Professional Conduct.[7]

Pursuant to § 7-104, every attorney admitted to the practice of law in Nebraska takes the following oath: "You do solemnly swear that you will support the Constitution of the United States, and the Constitution of this state, and that you will faithfully discharge the duties of an attorney and counselor, according to the best of your ability." Under § 3-508.4(b), it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The question before us is whether respondent's criminal act of public indecency violated his oath of office and § 3-508.4(b).

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[3] *State ex rel. Counsel for Dis. v. Palik*, 284 Neb. 353, 820 N.W.2d 862 (2012).

[4] § 3-310(L); *State ex rel. Counsel for Dis. v. Pierson*, 281 Neb. 673, 798 N.W.2d 580 (2011).

[5] See *State ex rel. Counsel for Dis. v. Lopez Wilson*, 283 Neb. 616, 811 N.W.2d 673 (2012).

[6] *Palik, supra* note 3.

[7] See Neb. Ct. R. § 3-303.

Neb. Ct. R. § 3-326(A) provides:

> For the purposes of Inquiry of a Complaint or Formal Charges filed as a result of a finding of guilt of a crime, a certified copy of a judgment of conviction constitutes conclusive evidence that the attorney committed the crime, and the sole issue in any such Inquiry should be the nature and extent of the discipline to be imposed.

[4,5] Any violation of the Nebraska Rules of Professional Conduct constitutes grounds for discipline.[8] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances, and this court considers the attorney's acts underlying the events of the case and throughout the proceedings.[9] This case is one of first impression in Nebraska, in that there are no actions for attorney discipline similar to the facts in this case.

In summary, respondent argues that his conduct did not adversely reflect on his fitness as a lawyer because his actions were not undertaken when he was acting in that capacity. Respondent claims that the offense of public indecency was not an offense relevant to the practice of law because it does not involve violence, dishonesty, breach of trust, or serious interference with the administration of justice. He asserts that his actions, at best, would support nothing more than a finding that he touched someone where the touching could be observed by the public. At the time of the incident, there were no other people present and no one was in a position to observe the touching.

Under these circumstances, respondent argues there was no connection between the alleged behavior and his honesty, trustworthiness, and fitness as an attorney. There were two isolated instances, years apart, in different states. At the hearing before the referee, respondent testified that he was not conducting any legal work and that he was not doing anything

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[8] See, *id.*; *State ex rel. Counsel for Dis. v. Ellis*, 283 Neb. 329, 808 N.W.2d 634 (2012).

[9] See *State ex rel. Counsel for Dis. v. Beltzer*, 284 Neb. 28, 815 N.W.2d 862 (2012). See, also, *Lopez Wilson, supra* note 5.

which would suggest he was a lawyer. He asserted that a lawyer is not subject to disciplinary action simply because he has committed a criminal act; the act itself must reflect adversely on the lawyer's honesty, trustworthiness, and fitness.

The referee concluded that the evidence was clear and convincing that on June 15, 2010, respondent engaged in lewd conduct in a public park where the conduct could have been viewed by the public. The referee found by clear and convincing evidence that this criminal act reflected adversely on respondent's fitness as a lawyer in other respects. He also concluded that the record showed by clear and convincing evidence that respondent violated his oath of office as an attorney as provided by § 7-104.

We agree with the referee's determination that the record shows by clear and convincing evidence that respondent's conduct violated his oath of office and § 3-508.4(b). Respondent's conviction of public indecency adversely reflects on his fitness as a lawyer.

[6] The remaining issue is the nature and extent of the discipline to be imposed.[10] Neb. Ct. R. § 3-304 provides:

> (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.

This court has recognized six factors that should be considered when determining the appropriate discipline: (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

[10] See § 3-326(A).

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.[11]

Nature of Conduct.

The referee found that the actions of respondent in a public park were far below the conduct that the Nebraska Supreme Court and the public should expect from an attorney licensed to practice law in the State of Nebraska. We agree.

The referee concluded that respondent's conviction for sexual battery in Kansas 10 years before the hearing should not be considered in determining whether respondent violated § 3-508.4(b) because his conduct was not governed by the Nebraska Rules of Professional Conduct. At the time of the Kansas conviction, respondent's conduct was governed by the Code of Professional Responsibility. In the formal charges, relator did not allege that respondent had violated the Code of Professional Responsibility and no violation of the Code of Professional Responsibility was at issue. We agree with the referee's conclusion.

Need to Deter Others and Protect Public.

[7] This disciplinary action should serve as a warning to all members of the Nebraska bar that this court will not ignore or acquiesce in public conduct of this nature. Clearly, there is a need to preserve the public trust and confidence in members of the bar. "Among the major considerations in determining whether a lawyer should be disciplined is maintenance of the highest trust and confidence essential to the attorney-client relationship. As a profession, the bar continuously strives to build and safeguard such trust and confidence . . . ."[12] Public indecency by an attorney does not promote trust and confidence.

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[11] *Beltzer, supra* note 9.

[12] *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 143, 352 N.W.2d 875, 878 (1984).

Attitude of Offender.

Respondent admitted that he was charged with third degree sexual assault and public indecency but claimed he was not guilty of the crimes charged. This indicates that respondent has not taken full responsibility for his conduct. However, respondent has been fully cooperative with the Counsel for Discipline and appears to be sincerely remorseful.

Present or Future Fitness to Practice Law.

The referee found that respondent's misconduct reflected adversely upon his fitness to practice law in other respects. We agree. However, there were many letters in support of respondent which describe him as a person of integrity, a person of high character, very truthful, honorable, bright, skilled, conscientious, and hardworking, who provided excellent representation for his clients and served his clients and his community well. Respondent's contributions to his community include being past district governor of the Lions Club, an active member of the Rotary Club, and a church organist for over 40 years.

We also consider the propriety of a sanction with reference to the sanctions imposed in prior similar cases.[13] Since we have no prior cases in Nebraska with the same or similar circumstances, we look to other states.

In *State ex rel. Oklahoma Bar Ass'n v. Wilburn*,[14] the Oklahoma Bar Association filed a complaint against a licensed attorney pursuant to the rules governing disciplinary proceedings. The bar alleged that the attorney was initially charged with two counts of felony sexual battery for willfully and intentionally touching the body of a woman over the age of 16 years in a lewd and lascivious manner without her consent. There were two female victims. Both were employed as security guards at the Tulsa County Courthouse at the time of the incidents. The attorney had slapped one victim on the

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[13] See *Beltzer, supra* note 9.

[14] *State ex rel. Oklahoma Bar Ass'n v. Wilburn*, 142 P.3d 420 (Okla. 2006).

buttocks. He slapped the other victim on the buttocks as well, and also pressed his body against the buttocks of one of the victims. Both charges were subsequently amended to the misdemeanor of outraging public decency, to which the attorney pled guilty.

Rule 8.4 of the Oklahoma Rules of Professional Conduct provides: "'It is professional misconduct for a lawyer to: . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.'"[15] Rule 1.3 of the Rules Governing Disciplinary Proceedings provides for "'discipline for acts contrary to prescribed standards of conduct.'"[16]

In *Wilburn*, the Professional Responsibility Tribunal recommended a private reprimand. Contrary to the recommendation of the tribunal, the Oklahoma Supreme Court found that a public censure was the appropriate discipline. The public censure was not imposed to punish the attorney. The court had previously considered proper discipline for lawyers accused of sexually inappropriate conduct with clients and nonclients. The court concluded it must also consider the deterrent effect upon both the offending respondent and other lawyers contemplating similar conduct. It concluded that the public censure was necessary and served to protect the public and advise other members of the bar that inappropriate touching and sexually suggestive gestures and remarks would not be tolerated, regardless of whether they seemed harmless, solicited, or consensual.

Unlike respondent, the attorney's conduct in *Wilburn* occurred in a public courthouse while he was acting in his capacity as a lawyer. Nevertheless, the need exists to advise the public and members of the bar that public conduct such as respondent's will not be tolerated by this court.

In *State ex rel. Oklahoma Bar Ass'n v. Garrett*,[17] there were two incidents involving two nonclient female victims. Both

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[15] *Id.* at 421 n.2.

[16] *Id.*

[17] *State ex rel. Oklahoma Bar Ass'n v. Garrett*, 127 P.3d 600 (Okla. 2005).

situations involved inappropriate touching. Two felonies were charged and later reduced to misdemeanors, to which the attorney pled guilty. The court ordered a public censure and a year's probation with conditions.

In *State ex rel. Oklahoma Bar Ass'n v. Murdock*,[18] the Oklahoma Bar Association filed a complaint based on conduct that also resulted in a criminal charge. In the criminal case, the attorney entered a plea admitting that, if believed by a jury, the evidence would be sufficient to convict him of the misdemeanor of "Outraging Public Decency."[19] In issuing a public reprimand, the court stated that the "primary goals in imposing discipline for attorney misconduct are: preservation of public trust and confidence in the Bar by strict enforcement of the profession's integrity; protection of the public and the courts; and deterrence of like behavior by other members of the Bar."[20] The court stated that "[e]ven when the subject attorney does not need such deterrent to prevent continued misconduct, this Court's interest in explaining its expectations of professional legal practice may necessitate a more public form of discipline than that offered by private reprimand."[21]

[8] The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.[22] In the case at bar, the referee found as mitigating factors respondent's good standing with the bar and in the community, his service to the community and his clients, his cooperation with the Counsel for Discipline, his present and future fitness for the practice of law as shown by letters written on his behalf, and the fact that no client was injured. The length of time that has passed between his conviction in Kansas and the current case was considered

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[18] *State ex rel. Oklahoma Bar Ass'n v. Murdock*, 236 P.3d 107 (Okla. 2010).

[19] *Id.* at 110.

[20] *Id.* at 113, citing *State ex rel. Okl. Bar Ass'n v. Caldwell*, 880 P.2d 349 (Okla. 1994).

[21] *Murdock, supra* note 18, 236 P.3d at 113, citing *State ex rel. Okla. Bar Ass'n v. Erickson*, 29 P.3d 550 (Okla. 2001).

[22] *Beltzer, supra* note 9.

as a mitigating factor. We agree that these mitigating factors are present, and we note that respondent appears to be sincerely remorseful.

In recommending that respondent be disciplined by public reprimand, the referee noted this was a case of first impression in Nebraska, but that it appeared that acts of public indecency in other jurisdictions typically resulted in public reprimands in the absence of other aggravating factors. The referee concluded that even if respondent did not need such a deterrent to prevent continued misconduct, this court's interest in explaining its expectation of professional legal practice necessitated a more public form of discipline than a private reprimand. We have looked to attorney discipline cases in other jurisdictions, and we agree with the referee's conclusion.

Private Versus Public Reprimand.

Respondent argues that he should receive no more than a private reprimand.

In *State ex rel. Counsel for Dis. v. Murphy*,[23] we considered a motion for reciprocal discipline against an attorney. In examining § 3-304, which provides what discipline may be considered for attorney misconduct, we stated that we could not enter a judgment of private reprimand. Section 3-304 permits a private reprimand by a committee on inquiry or a disciplinary review board. If a private reprimand is not issued and formal charges are filed, this court must impose *at least* a public reprimand if it imposes discipline.

CONCLUSION

For the reasons set forth above, we conclude that a public reprimand must be imposed in order to deter other members of the bar from engaging in such public misconduct and to maintain the reputation of the bar as a whole.

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 Neb. Rev. Stat.

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[23] *State ex rel. Counsel for Dis. v. Murphy*, 283 Neb. 982, 814 N.W.2d 107 (2012).

§§ 7-114 and 7-115 (Reissue 2012) 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 PUBLIC REPRIMAND.

BROOK VALLEY LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, AND BROOK VALLEY II, LTD, A NEBRASKA LIMITED PARTNERSHIP, APPELLEES, V. MUTUAL OF OMAHA BANK, FORMERLY KNOWN AS NEBRASKA STATE BANK OF OMAHA, A STATE BANKING INSTITUTION, AND OMAHA FINANCIAL HOLDINGS, INC., A NEBRASKA CORPORATION, SUCCESSOR TO MIDLANDS FINANCIAL SERVICES, INC., A NEBRASKA CORPORATION, APPELLANTS.

825 N.W.2d 779

Filed February 1, 2013. No. S-12-039.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, which an appellate court will not disturb on appeal unless clearly wrong. And an appellate court does not reweigh the evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party.
2. **Prejudgment Interest: Appeal and Error.** An appellate court reviews de novo whether a court should award prejudgment interest.
3. **Conversion: Property.** Conversion lies only for serious interference with possessory interests in personal property, not real property.
4. **Conversion: Words and Phrases.** Conversion is any unauthorized or wrongful act of dominion exerted over another's property which deprives the owner of his property permanently or for an indefinite period of time.
5. **Contracts: Ratification: Words and Phrases.** Ratification is the acceptance of a previously unauthorized contract.
6. **Ratification: Agents.** Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction.
7. ____: ____. Retention of benefits secured by an agent's unauthorized act with knowledge of the source of such benefits and the means by which they were obtained is a ratification of the agent's act.
8. **Ratification.** Whether there has been a ratification is ultimately and ordinarily a question of fact.
9. **Ratification: Pleadings: Proof.** Because ratification is an affirmative defense, the burden of proving ratification rests on the party who pleaded it.