required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.[49] We conclude that there was a reasonable controversy with respect to both Koch's liability and the amount of potential damages, and accordingly, the district court did not err in refusing to award prejudgment interest under § 45-103.02.

## V. CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

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[49] *Id.*

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# STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM L. SWITZER, JR., RESPONDENT.

790 N.W.2d 433

Filed November 12, 2010. No. S-09-1095.

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, the Counsel for Discipline must establish a charge by clear and convincing evidence.
3. **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.
4. **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.
5. ____. 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.
6. ____. In imposing attorney discipline, the Nebraska Supreme Court evaluates each case in the light of its particular facts and circumstances.

7. ____. 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.
8. ____. When determining appropriate discipline of an attorney, the Nebraska Supreme Court considers aggravating and mitigating factors.
9. ____. Because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions.
10. ____. In a disciplinary proceeding, an isolated incident not representing a pattern of conduct is considered a mitigating factor.
11. ____. Cooperation during attorney disciplinary proceedings and remorse are relevant mitigating factors.
12. ____. In a disciplinary proceeding, it is necessary to consider the discipline that the Nebraska Supreme Court has imposed in cases presenting similar circumstances.
13. **Disciplinary Proceedings: Proof.** To establish depression as a mitigating factor in a proceeding to discipline an attorney, the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct. These are questions of fact.
14. **Disciplinary Proceedings.** When depression is established as a mitigating factor, it does not automatically result in a less severe punishment.
15. ____. In a disciplinary proceeding, failure to comply with Neb. Ct. R. § 3-316 places one in contempt of court and constitutes an aggravating circumstance.

Original action. Judgment of disbarment.

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

Michael D. McClellan, of Gast & McClellan, for respondent.

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

PER CURIAM.

In 2008, we suspended William L. Switzer, Jr., from the practice of law for 18 months for violating the professional rules and his oath of office.[1] Switzer, however, did not comply with our decision. He agreed to represent new and existing clients

[1] *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008).

and took fees from new clients. The Counsel for Discipline soon filed formal charges against Switzer for his conduct after his suspension. Switzer does not deny the charges; instead, he argues that his depression should mitigate any discipline we impose. We conclude that even if his depression is mitigation, it is not sufficient mitigation considering Switzer's history and conduct. We disbar Switzer.

## BACKGROUND

Switzer was admitted to the bar in 1987. He has been disciplined before. The first instance occurred in 1994, when he was reprimanded for neglecting a client's dental malpractice case and misrepresenting the progress of the case to the client. Switzer told his client that he had filed the lawsuit when he had not. He also said that he had talked to the dentist about potential settlements when he had not done so. He was privately reprimanded for violations of Canon 1, DR 1-102(A)(1) and (6), and Canon 6, DR 6-101(A), of the former Code of Professional Responsibility. In 1999, Switzer was again in trouble. He failed to timely withdraw his appearance in a case after the client had discharged him. This violated DR 1-102(A)(1) and Canon 2, DR 2-110(B)(4), of the Code of Professional Responsibility, and he was privately reprimanded.

The events leading up to the present matter began in 2005. They were the subject of our opinion in *State ex rel. Counsel for Dis. v. Switzer*.[2] Switzer had been retained by two clients to draft and file the necessary paperwork to have the clients named as their mother's coguardians and coconservators. Shortly after they retained Switzer, another party was named guardian and conservator. Switzer was aware of this but failed to name the party when he filed an ex parte emergency action to have his clients named as coguardians and coconservators. When this omission was discovered, the clients' appointment was terminated. Switzer failed to timely notify his clients of their termination. He was also evasive when the clients called to speak to him—in one instance, leaving the client on hold for an hour.

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[2] *Id.*

The clients wrote to Switzer to terminate the attorney-client relationship. They requested an accounting of services rendered, which he never gave. The clients then hired new counsel, who requested the file. Switzer never complied.

The clients then contacted the Counsel for Discipline, who in turn contacted Switzer. In his communications with the Counsel for Discipline, Switzer often failed to respond "'properly and adequately.'"[3] At one point, Switzer attempted to mislead the Counsel for Discipline by fabricating a letter.

We concluded that Switzer's conduct violated several rules of professional conduct and his oath of office. The referee suggested a 1-year suspension, but we rejected that suggestion and instead imposed an 18-month suspension that began immediately on June 13, 2008. The federal courts suspended Switzer shortly thereafter.

The current charges against Switzer stem from his conduct after his suspension. In count I, the Counsel for Discipline alleges that Switzer continued to represent a client after his suspension. He told the client in September 2008—during his suspension—that he would file a bankruptcy petition. Switzer failed to inform his clients that his license had been suspended. When Switzer was served with the grievance, he failed to file an answer within the required period. The Counsel for Discipline charged Switzer with violating his oath of office as an attorney, Neb. Ct. R. § 3-309(E), and the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.3, 3-501.4, 3-505.5, and 3-508.4.

Count II alleges similar facts with different clients, namely that during Switzer's suspension, he said he would file a bankruptcy petition for his clients. He failed to communicate with his clients. Count II is different from count I in that it alleges that Switzer accepted fees during his suspension. Switzer again failed to answer the grievance filed regarding this incident. Switzer did refund the fees to the clients after the grievances were filed. The Counsel for Discipline alleges that these acts violated Switzer's oath of office, § 3-309(E), and the following provisions of the Nebraska Rules of Professional Conduct:

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[3] *Id.* at 886, 750 N.W.2d at 685.

§§ 3-501.3, 3-501.4, and 3-508.4, and Neb. Ct. R. of Prof. Cond. § 3-501.15.

Count III again alleges similar facts. It alleges that Switzer took fees and agreed to file a bankruptcy petition for a client during his suspension but did not tell the client that he was suspended. And he again failed to communicate with the client regarding the bankruptcy petition. When the client found out about Switzer's suspension, he placed a stop order on the checks he had written to Switzer. This cost the client $90. The Nebraska State Bar Association's client assistance fund reimbursed the client for these costs, and Switzer later reimbursed the client assistance fund. But he again failed to respond to the grievance filed against him. The Counsel for Discipline claims that Switzer's conduct violated his oath of office, § 3-309(E), and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.3, 3-501.4, 3-505.5, and 3-508.4.

Count IV alleges that Switzer was hired to represent a client in a divorce proceeding during his suspension and that he received a fee. Switzer failed to tell the client that his license had been suspended and failed to return telephone calls to keep the client informed. When the client learned of Switzer's suspension, he asked the client assistance fund to reimburse his fees, which it did. Switzer later reimbursed the fund for the fees. Like all the other counts in this proceeding, when served with the initial grievance, Switzer failed to respond. The Counsel for Discipline alleges that by these acts and omissions, Switzer violated his oath of office as an attorney, § 3-309(E), and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.3, 3-501.4, 3-501.15, 3-505.5, and 3-508.4.

In June 2010, a referee issued a report and recommendation. The referee found by clear and convincing evidence that Switzer had violated his oath of office and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.3, 3-501.4, 3-505.5, and 3-508.4.

In determining what discipline to recommend, the referee stated that "[t]his case tests the boundaries of the interplay between mitigation and punishment in lawyer discipline cases."

The referee stated that there is no doubt Switzer committed the violations, but there is also no doubt that Switzer suffers from severe depression. The referee noted that a prior suspension was not enough to stop Switzer's misconduct. He also expressed doubt that further treatment for depression would reduce the risk of further misconduct. The referee said that "[a]t some point, mitigation must yield to considerations of protection of the public." The referee, while acknowledging the difficulties that Switzer has suffered and will continue to suffer, ultimately recommended disbarment.

As noted previously, Switzer does not deny the material allegations of the charges against him. Instead, he argues that because his depression is a mitigating factor, we should temper any discipline by suspending him, instead of disbarring him.

## ASSIGNMENTS OF ERROR

The Counsel for Discipline does not take exceptions to the referee's report. Switzer, however, has made four. They relate to (1) the referee's finding that treatment for Switzer's major depressive disorder and general anxiety disorder would not substantially reduce the risk of further misconduct; (2) the referee's recommendation of disbarment, which Switzer claims is too severe; (3) the referee's viewing the proceeding as an issue of punishment; and (4) the referee's finding that Switzer has been receiving treatment for his condition since 1993.

## STANDARD OF REVIEW

[1-3] A proceeding to discipline an attorney is a trial de novo on the record.[4] To sustain a charge in a disciplinary proceeding against an attorney, the Counsel for Discipline must establish a charge by clear and convincing evidence.[5] When no exceptions to the referee's findings of fact are filed, we may consider the referee's findings final and conclusive.[6]

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[4] *State ex rel. Counsel for Dis. v. Gilner, ante* p. 82, 783 N.W.2d 790 (2010); *State ex rel. Counsel for Dis. v. Bouda*, 278 Neb. 380, 770 N.W.2d 648 (2009).

[5] See *Gilner, supra* note 4.

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

## ANALYSIS

[4] 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.[7] Switzer does not deny the allegations and concedes that discipline should be imposed. Because he does not take exceptions to the referee's findings that he violated the rules, we may consider such findings final and conclusive, which we do.[8] Thus, we limit our discussion to what is the appropriate discipline.

[5] 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.[9]

[6,7] In imposing attorney discipline, we evaluate each case in the light of its particular facts and circumstances.[10] And in determining the proper discipline of an attorney, we consider the attorney's acts both underlying the events of the case and throughout the proceeding.[11]

[8,9] When determining appropriate discipline, we consider aggravating and mitigating factors.[12] We have considered prior reprimands as aggravators.[13] Because cumulative acts of

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[7] See, *Gilner, supra* note 4; *Nich, supra* note 6; *Bouda, supra* note 4; *State ex rel. Counsel for Dis. v. Sipple*, 265 Neb. 890, 660 N.W.2d 502 (2003).

[8] See, *Gilner, supra* note 4; *Nich, supra* note 6.

[9] *Gilner, supra* note 4; *Bouda, supra* note 4; *State ex rel. Counsel for Dis. v. Koenig*, 278 Neb. 204, 769 N.W.2d 378 (2009); *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009).

[10] See, *Gilner, supra* note 4; *Nich, supra* note 6; *Bouda, supra* note 4; *Koenig, supra* note 9.

[11] *Id.*

[12] See, *Nich, supra* note 6; *Koenig, supra* note 9; *Wintroub, supra* note 9; *State ex rel. Counsel for Dis. v. Swan*, 277 Neb. 728, 764 N.W.2d 641 (2009).

[13] *Nich, supra* note 6.

attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions.[14] We have previously said "cumulative acts of misconduct can, and often do, lead to disbarment."[15]

[10,11] Regarding mitigation, we have stated that an isolated incident not representing a pattern of conduct is considered a mitigating factor.[16] Cooperation during disciplinary proceedings is also a mitigating factor.[17] Finally, we have stated that remorse is also a relevant mitigating factor.[18]

[12] We have also said that it is necessary to consider the discipline that we imposed in cases presenting similar circumstances.[19] And we have previously disciplined attorneys who continued to practice after being suspended. In *State ex rel. Counsel for Dis. v. Carbullido*,[20] there were allegations that the attorney had engaged in the unauthorized practice of law after we suspended her license. She was also convicted of several driving under the influence offenses and driving with a suspended license. We disbarred the attorney. In *State ex rel. NSBA v. Thierstein*,[21] we disciplined an attorney who continued to practice law after being suspended. We disbarred him. We also disbarred an attorney who continued to practice with his suspended license in *State ex rel. NSBA v. Frank*.[22]

Switzer's primary argument is that we should consider his depression as a mitigating factor and that because of this, we

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[14] See, *id.*; *Wintroub, supra* note 9.

[15] *State ex rel. Counsel for Dis. v. Carbullido*, 278 Neb. 721, 725-26, 773 N.W.2d 141, 145 (2009).

[16] See *Swan, supra* note 12.

[17] See *id.*

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

[19] See, *Swan, supra* note 12; *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006).

[20] *Carbullido, supra* note 15.

[21] *State ex rel. NSBA v. Thierstein*, 218 Neb. 603, 357 N.W.2d 442 (1984).

[22] *State ex rel. NSBA v. Frank*, 219 Neb. 271, 363 N.W.2d 139 (1985).

should not disbar him. It is true that in *State ex rel. Counsel for Dis. v. Thompson*,[23] we found that depression is a mitigating factor and suspended Gary Thompson. Thompson faced three formal charges, the allegations of which he admitted. The first involved his failure to conduct discovery in a suit in federal court, which resulted in the dismissal of the suit. Despite this dismissal, Thompson continued to tell his client that the case was progressing normally. In the second charge, it was also alleged that Thompson misrepresented progress in a lawsuit to a client. In addition, Thompson was also neglectful in failing to answer several letters and telephone calls from the client. The third charge again alleged that Thompson was neglectful in pursuing the claims of his client.

[13] As mentioned, Thompson did not contest the allegations in the charges. He did, however, allege depression as a mitigating factor. We noted that Thompson's "serious ethical breaches . . . would ordinarily result in a severe sanction."[24] But we also recognized that mitigating factors are a necessary consideration. We put forward a test to establish depression as a mitigating factor. To satisfy the test, "the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct."[25] We noted that these elements were questions of fact. And we have applied this test in other cases.[26]

Here, the referee considered the *Thompson* test. The referee found that Switzer met the first two elements of the test. Regarding the third element, the referee stated that he could not conclude with any degree of confidence whether

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[23] *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

[24] *Id.* at 840, 652 N.W.2d at 599.

[25] *Id.* at 841, 652 N.W.2d at 600.

[26] *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005); *Wintroub, supra* note 18; *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003).

treatment would substantially reduce the likelihood of future misconduct. Switzer takes exception to this finding by the referee.

[14] We do not believe it is necessary to parse the testimony to determine the likelihood of further misconduct. Even if Switzer can satisfy the *Thompson* test, his depression is just one mitigating factor. We balance it with other mitigating factors as well as aggravating factors. In short, when the *Thompson* test is satisfied, it does not automatically result in a less severe punishment.

[15] We now consider the aggravating and mitigating factors. As for aggravating factors, we note that Switzer has been reprimanded twice and suspended once for his misconduct. As mentioned previously, cumulative acts of misconduct justify harsher sanctions than isolated incidents. We also note that Switzer was initially uncooperative with the disciplinary proceedings; he failed to respond to any of the grievances that were filed against him. We have previously held that failure to cooperate can be an aggravating factor.[27] Further, we note that Switzer failed to comply with Neb. Ct. R. § 3-316 after his suspension. We have previously said that "[f]ailure to comply with [§ 3-316] places one in contempt of court and constitutes an aggravating circumstance."[28]

Regarding mitigation, we accept, for the sake of argument, that Switzer's depression meets the *Thompson* test. We also note Switzer does seem remorseful and does appear to have a sincere hope to improve his condition.

And it is true that we stated in *Thompson* that "[i]n cases involving depression as a mitigating factor, a period of mandatory suspension coupled with terms of reinstatement will often be appropriate."[29] Yet, this was not intended to imply that suspension will be given whenever depression is present as a mitigating factor. Depression may be sufficient mitigation to reduce

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[27] *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005).

[28] *Id.* at 482, 704 N.W.2d at 226.

[29] *Thompson, supra* note 23, 264 Neb. at 843, 652 N.W.2d at 602.

a punishment in many cases. But as the referee said, "[a]t some point, mitigation must yield to considerations of protection of the public." We have passed that point.

In sum, we cannot ignore that Switzer disobeyed a direct order of this court. We previously suspended Switzer, but he continued to practice, flouting our previous ruling. A suspension order is a command, not a suggestion. The offenses admitted are serious, and the need to deter others from this type of conduct weighs heavily. If attorneys ignore our suspension orders without consequence, it undermines the authority of this court. We determine that the only appropriate discipline is disbarment.

## CONCLUSION

We adopt the referee's recommendation. We find that Switzer violated his oath of office and several rules governing attorneys. It is the judgment of this court that Switzer should be disbarred from the practice of law.

JUDGMENT OF DISBARMENT.

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# FREEDOM FINANCIAL GROUP, INC., ET AL., APPELLANTS, V. JANICE M. WOOLLEY, INDIVIDUALLY, ET AL., APPELLEES.

792 N.W.2d 134

Filed November 12, 2010. No. S-09-1302.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Corporations: Actions: Parties.** As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.