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

808 N.W.2d 342

Filed October 21, 2011. No. S-10-811.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that 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.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. ____. The Nebraska Supreme Court has inherent authority to regulate the conduct of attorneys admitted to the practice of law in the State of Nebraska.
5. ____. The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.
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. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.
8. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.
9. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
10. **Disciplinary Proceedings: Words and Phrases.** In the context of attorney discipline proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.
11. **Disciplinary Proceedings.** Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.

12. ____. The fact that the client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.
13. **Disciplinary Proceedings: Presumptions.** Mitigating factors overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary.

Original action. Judgment of disbarment.

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

James Walter Crampton for respondent.

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

PER CURIAM.

On August 20, 2010, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against attorney John M. Carter, alleging Carter violated the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.15(a) and 3-508.4. Carter filed an answer admitting certain allegations in the formal charges but denying others. This court appointed a referee. After conducting an evidentiary hearing, the referee determined Carter violated §§ 3-501.15(a) and 3-508.4(a) and (c). Because the violations involved misappropriation of client funds and the referee found no extraordinary mitigating circumstances, he recommended disbarment. Carter 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.

I. FACTS

Carter graduated from law school in December 2006 and was admitted to practice law in Nebraska and Iowa in 2007. He maintained law offices in Omaha, Nebraska, and Council Bluffs, Iowa. He maintained trust accounts at Wells Fargo Bank (Wells Fargo) in Omaha for his Nebraska practice and at TierOne Bank (TierOne) in Council Bluffs for his Iowa practice.

In September 2008, Carter was retained by sisters Norma Noland and Clifettia Rose, who resided in Omaha and were the daughters of Anna Charles. Charles resided in a nursing home, and her conservator proposed to sell her Omaha home in order to meet expenses. Noland and Rose retained Carter to oppose the sale. Carter was paid $200 by Noland and Rose at the time of his retention. A written agreement dated September 17, 2008, stated Carter would be paid a fee at an hourly rate of $165. The signatures of Carter, Noland, and Rose appear on the agreement, although Noland testified that she did not recall signing it.

The sale of the house did not occur. According to Noland, this was because the conservator received funds from the sale of property in Texas which made it unnecessary to sell the Omaha property. Carter testified that the sale of the house was prevented through his legal efforts on behalf of Noland and Rose.

Upon Charles' death, which apparently occurred sometime in late 2008 or early 2009, Carter assisted Noland in preparing documents in connection with her appointment as the personal representative of Charles' estate. That appointment occurred on February 11, 2009. Carter testified that he also performed various other legal acts on Noland's behalf between September 2008 and December 2009.

On February 20, 2009, Carter deposited a check from Charles' former conservator in the amount of $7,334.61 into the Wells Fargo trust account. Whether Carter received the check from the conservator or from Noland is disputed, but there is no dispute that the check represented funds belonging to the Charles estate which were to be distributed equally to Noland and Rose under Charles' will.

On March 17, 2009, Carter withdrew $1,800 from the Wells Fargo trust account, which he later characterized as a fee earned in his representation of Noland and Rose. On April 3, Carter withdrew an additional $4,500 from the trust account, which he later characterized as an additional fee earned in his representation of Noland and Rose. Noland and Rose denied that they authorized any fee payment from the funds held in Carter's trust account. Carter admits that aside from the original hourly

fee agreement, there was no written authorization for the fee payments from Noland, Rose, or the probate court. But he testified that Noland and Rose verbally authorized the payment of fees from the trust account. As a result of the two withdrawals totaling $6,300, the balance in Carter's Wells Fargo trust account fell below $7,334.61 on 12 days between February 27 and June 22, 2009.

During the summer of 2009, Noland and Rose began demanding that Carter distribute the funds received from the conservatorship, and Noland contacted the Counsel for Discipline regarding his failure to do so. In a meeting with Noland and Rose, Carter agreed to distribute $3,300 to each of them. Carter knew that the funds in his trust account were insufficient and intended to make these distributions from his own funds, but he did not inform Noland or Rose of this fact. In a letter dated September 14, 2009, written in response to Noland's complaint, Carter advised the Counsel for Discipline that the Charles estate would be closed by the end of the month and that at that time, he would make separate distributions of $3,300 each to Noland and Rose.

In late September or early October 2009, Carter received a check payable to another client in the amount of $43,350. Carter testified that on October 12, 2009, he deposited this check plus $6,600 in cash in the trust account he maintained at TierOne in Council Bluffs. He testified that the cash was from his own funds and that he had intended to use it to make the agreed-upon distributions to Noland and Rose. According to Carter, he did not fill out a deposit slip or obtain a receipt for the cash, because the bank's computer was down at the time of his deposit. Records from TierOne reflect a deposit of $43,350 into Carter's trust account on that date. On October 22, Carter wrote separate checks to Noland and Rose in the amount of $3,300 each on the TierOne trust account. The checks were dishonored and returned because of insufficient funds on deposit. Carter initially thought he had made an accounting error, but he later realized that the cash deposit had not been recorded by the bank. Carter immediately reported the dishonored checks to the Counsel for Discipline. In December 2009, Carter's lawyer sent replacement checks drawn on certified funds remitted by

Carter in the amount of $3,300 each to Noland and Rose, who acknowledged receipt.

Carter testified he had presented Noland and Rose with a statement showing the work he had done on their behalf. Noland and Rose testified that they never received any statement or accounting from Carter. During the investigation which preceded the filing of formal charges, Carter provided the Counsel for Discipline with two statements covering the period of September 17, 2008, through December 30, 2009. The first statement, dated December 30, 2009, reflects that Carter performed 12.6 hours of work, for which he charged a total fee of $2,359. This represents an average hourly rate of $187.22, which is higher than the agreed hourly rate of $165 set forth in the retainer agreement. The second statement bears a date of April 22, 2009, but includes entries for work done after that date and reflects a total billing of $6,959.50, from September 17, 2008, through December 30, 2009. Carter testified that the dates were odd because after the disciplinary complaint was made, he added items he had not yet billed to a statement that was already started.

Carter contends that an error on the part of TierOne with respect to his deposit on October 12, 2009, resulted in the dishonor of the initial checks written to Noland and Rose. At the hearing before the referee, a former employee of Wells Fargo, appearing as a witness on Carter's behalf, testified that there were irregularities on the TierOne statement which may have been attributable to a teller's error in transposing numbers. Carter testified that he had a pending lawsuit against TierOne and its successor in interest regarding the claimed error.

II. REPORT OF REFEREE

Based upon the testimony of Noland and Rose and inconsistencies in the evidence relied upon by Carter, the referee rejected Carter's contention that Noland and Rose had verbally authorized a payment of $6,300 in fees from the trust account. The referee found that the testimony of Carter's witness regarding the claimed error on the part of TierOne was not credible and that there was no evidence of any bank error or, as alternatively claimed by Carter, that someone at the bank stole the $6,600 which he had intended to deposit.

The referee found by clear and convincing evidence that Carter deposited $7,334.61 into his trust account and then withdrew $6,300 without authorization from his clients. The referee noted:

> The conclusion is inescapable that [Carter] paid himself fees before they were earned, attempted to conceal the withdrawal by repaying the money and characterizing it as a "distribution" from the estate, and, when that ruse failed, created after-the-fact billing statements to make it appear he had fully earned the money before it was withdrawn. From April 2009 until December 2009, the $6,300.00 was in [Carter's] possession or converted to his personal use and unaccounted for.

Based upon this finding, the referee determined that Carter had violated §§ 3-501.15(a) and 3-508.4(a) and (c).

On the issue of the appropriate sanction, the referee cited our case law indicating that absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment, even if the client did not suffer any financial loss. The referee concluded that although Carter had no prior record of disciplinary violations and had cooperated with the investigation by the Counsel for Discipline, there were no extraordinary mitigating circumstances which would overcome the presumption of disbarment for misappropriation or commingling of client funds. Accordingly, the referee recommended disbarment.

During the hearing, the referee overruled Carter's objection that he lacked jurisdiction because the TierOne trust account was located in Iowa. This jurisdictional issue is not discussed in the referee's report.

III. ASSIGNMENTS OF ERROR

Carter filed the following summarized exceptions to the referee's report, contending the referee (1) erroneously concluded he had not cooperated and accepted responsibility; (2) incorrectly found the sale of Charles' house was unnecessary due to the conservator's receipt of money from the sale of the property in Texas; (3) erroneously determined his explanation for withdrawing the $6,300 from the trust account was "not credible"; and (4) erroneously overruled his objection to

jurisdiction, based on the fact that the TierOne trust account was situated in Iowa.

IV. STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which we reach a conclusion independent of the findings of the referee; provided, however, that 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.[1]

V. ANALYSIS

[2,3] Disciplinary charges against an attorney must be established by clear and convincing evidence.[2] The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[3]

1. Jurisdiction

[4] Before reaching the merits, we address Carter's contention that we lack jurisdiction over this disciplinary proceeding because the trust account from which the dishonored checks to Noland and Rose were issued was located in Iowa. The referee overruled Carter's jurisdictional objection, and we conclude that he did not err in doing so. This court has inherent authority to regulate the conduct of attorneys admitted to the practice of law in the State of Nebraska,[4] and every attorney admitted to practice in Nebraska is subject to the exclusive disciplinary jurisdiction of this court. It is the conduct of a Nebraska lawyer in the representation of Nebraska residents which is before us in this case. Carter is charged with misappropriating client

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[1] *State ex rel. Counsel for Dis. v. Herzog*, 281 Neb. 816, 805 N.W.2d 632 (2011).

[2] *Id.*

[3] *State ex rel. Counsel for Dis. v. Tarvin,* 279 Neb. 399, 777 N.W.2d 841 (2010); *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

[4] *State ex rel. NSBA v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995).

funds deposited in a trust account in Nebraska. The fact that he subsequently utilized another trust account in an Iowa bank in an attempt to repay the funds does not defeat our disciplinary jurisdiction.

2. Grounds for Discipline

Carter is alleged to have violated his oath of office as an attorney and §§ 3-501.15 and 3-508.4 of the Nebraska Rules of Professional Conduct.

Section 3-501.15 (safekeeping property) provides in part:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation.

Section 3-508.4 (misconduct) provides in part:

> 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;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

In his brief, Carter "admits to violating his oath of office and the Nebraska Court Rules of Professional Conduct."[5] Accordingly, we agree with the conclusion of the referee that there is clear and convincing evidence that Carter has violated §§ 3-501.15(a) and 3-508.4(a) and (c). We shall consider Carter's exceptions to various factual findings by the

[5] Brief for respondent at 7.

referee in the context of determining the appropriate disciplinary sanction.

3. Sanction

(a) Exceptions to Factual Findings

(i) Sale of Texas Property

Carter takes exception to the referee's finding with respect to a sale of property in Texas and its relationship to preventing the sale of Charles' Omaha home by her conservator. The referee found: "The house was not sold. . . . It is unclear exactly how the sale of the house was avoided. . . . Noland testified that the conservatorship received money from the sale of property in Texas, which allowed the conservator to pay . . . Charles' debts thereby making a sale of the house unnecessary." This is an accurate summary of Noland's testimony, and it is clear from the context that the referee did not make any specific finding as to whether Noland's account was correct. Carter asserts that it was incorrect, but does not point to any evidence in the record specifically refuting Noland's testimony on this point. He also challenges the relevance of this evidence. We agree with the referee's finding that "[i]t is unclear exactly how the sale of the house was avoided."

(ii) Documentation of Claimed Fees

Carter takes exception to the referee's characterization of a document that he prepared during the investigation of the disciplinary charges as an "after-the-fact accounting" for fees. This document reflects the deposit in the amount of $7,334.61, representing the conservatorship funds paid to the Charles estate, and the subsequent withdrawals of $1,800 and $4,500, which Carter claimed were earned fees. Carter testified he reconstructed this from bank records in an attempt to satisfy a request from the Counsel for Discipline. We accept it as such, and we do not regard the fact that this document was admittedly reconstructed by Carter as evidence of deception on his part.

But the referee correctly noted that the amounts of the claimed fees reflected on this document were inconsistent with billing statements subsequently produced by Carter. The billing

statements were also inconsistent with each other, and one of the statements contained entries which Carter admitted he made after the purported date of the statement. From this and other evidence in the record, the referee determined Carter's explanation that he withdrew $6,300 from the trust account to pay himself fees which Noland and Rose authorized was "not credible." After a thorough review of all the evidence concerning Carter's explanations for the trust account withdrawals, the referee concluded Carter "paid himself fees before they were earned, attempted to conceal the withdrawal by repaying the money and characterizing it as a 'distribution' from the estate, and, when that ruse failed, created after-the-fact billing statements to make it appear he had fully earned the money before it was withdrawn." This conclusion is supported by clear and convincing evidence.

(iii) Cooperation and Acceptance of Responsibility

Carter assigns and argues that the referee erred in finding that "[Carter] did not cooperate or accept responsibility,"[6] but he does not direct us to a specific portion of the record reflecting such finding. The referee stated in his report, "Relator has stipulated that [Carter] was fully cooperative with his office during his investigation of the grievance, except for the fact that he changed his explanation for why the clients' funds were not in his trust account. . . . And [Carter's] attitude was cooperative and agreeable during the hearing." Based upon our de novo review, we determine that this finding is fully supported by the record.

(b) Determination of Appropriate Sanction

[5-9] The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.[7] To determine whether and to what extent

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[6] *Id.* at 9.

[7] *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009); *State ex rel. NSBA v. Hogan*, 272 Neb. 19, 717 N.W.2d 470 (2006).

discipline should be imposed in a lawyer 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.[8] For purposes of determining the proper discipline of an attorney, we will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.[9] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.[10] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[11] In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[12]

[10-13] In the context of attorney discipline proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.[13] This latter form of misappropriation clearly occurred here. We have consistently held that absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically

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[8] *State ex rel. Counsel for Dis. v. Thew*, 281 Neb. 171, 794 N.W.2d 412 (2011); *State ex rel. Counsel for Dis. v. Hutchinson*, 280 Neb. 158, 784 N.W.2d 893 (2010).

[9] *Herzog, supra* note 1; *Orr, supra* note 7.

[10] *State ex rel. Counsel for Dis. v. Samuelson*, 280 Neb. 125, 783 N.W.2d 779 (2010).

[11] *State ex rel. Counsel for Dis. v. Beach*, 272 Neb. 337, 722 N.W.2d 30 (2006); *State ex rel. Counsel for Dis. v. Widtfeldt*, 271 Neb. 851, 716 N.W.2d 68 (2006).

[12] *Id.*

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

disbarment.[14] The fact that the client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.[15] Mitigating factors overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary.[16]

The Counsel for Discipline argues that mitigating circumstances were insufficient in this case to overcome the presumption of disbarment. Carter concedes that his trust account fell below the required balance on several occasions and that discipline should be imposed, but he argues for a lesser sanction to include a suspension followed by a period of probation.

We agree with the referee that the mitigating factors in this case include the absence of a prior disciplinary record, no pattern of misconduct over an extended period of time, and Carter's generally cooperative dealings with the Counsel for Discipline. But on the other side of the balance, we cannot ignore the fact that misappropriation of client funds occurred. And, like the referee, we are troubled by Carter's conflicting and inconsistent explanations for his actions during the course of the disciplinary investigation.

In his initial correspondence with the Counsel for Discipline in September 2009, Carter stated that as the attorney for the Charles estate, he would be making a final distribution to Noland and Rose in the amount of $3,300 each by the end of the month. That could not have been true, because by that date, Carter had already withdrawn most of the estate funds from his trust account. Carter's letter did not mention that fact or assert any entitlement to the funds as payment for legal fees. Several months later, one of Carter's attorneys informed the Counsel for Discipline that Carter retained estate funds in the amount of $6,600 in the Wells Fargo trust account from February 2009 until June or July 2009, when he withdrew the funds in order to make payment to Noland and Rose. That statement conflicts

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[14] *Samuelson, supra* note 10; *Jones, supra* note 13.

[15] *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000).

[16] *Id.*

with Carter's reconstructed records that show he withdrew $6,300 of the estate funds from his trust account by April 2009. It further conflicts with Carter's testimony that by the summer of 2009, the money which he agreed to pay to Noland and Rose was no longer in his trust account, but was to come from his own funds. At the hearing before the referee, Carter claimed for the first time that the entire $6,300 he withdrew from the trust account was payment for fees he earned in representing Noland and Rose. But as noted above, he produced conflicting and contradictory documentation which did not support this claim.

Misappropriation alone is presumptive grounds for disbarment, but here it is aggravated by an apparent attempt to conceal what had occurred from the clients and from the Counsel for Discipline. Viewed in its entirety, Carter's conduct indicates a lack of concern for the protection of the public, the profession, and the administration of justice.[17] On this record, we cannot conclude that there are extraordinary mitigating circumstances which would justify departure from the general rule that a lawyer's misappropriation of client funds should result in disbarment. Upon due consideration, we conclude that disbarment is the appropriate sanction.

VI. CONCLUSION

It is therefore the judgment of this court that Carter be disbarred from the practice of law in the State of Nebraska, effective immediately. Carter is directed to comply with Neb. Ct. R. § 3-316, and upon failure to do so, Carter shall be subject to punishment for contempt of this court. Carter is 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 has been entered by this court.

JUDGMENT OF DISBARMENT.

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[17] See *State ex rel. Counsel for Dis. v. Smith*, 275 Neb. 230, 745 N.W.2d 891 (2008).