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consistently with an exception for alcohol used in flavorings, the Act unambiguously required the Commission to define any beverage containing more than an insignificant amount of distilled alcohol used for flavoring as a "spirit" and to tax it accordingly.

AFFIRMED.

GERRARD, J., not participating in the decision.
WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PAUL W. SEYLER, RESPONDENT.

809 N.W.2d 766

Filed March 2, 2012. No. S-11-252.

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 discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
3. ____. Neb. Ct. R. § 3-304 provides that attorney misconduct shall be grounds for disbarment, suspension, probation in lieu of or subsequent to suspension, censure and reprimand, or temporary suspension by the court, or private reprimand by the Committee on Inquiry or Disciplinary Review Board.
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. ____. 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.
6. ____. With respect to the imposition of attorney discipline in an individual case, the Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances.
7. ____. In an attorney disciplinary proceeding, it is necessary to consider the discipline that the Nebraska Supreme Court has imposed in cases presenting similar circumstances.

Original action. Judgment of suspension.

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

Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for respondent.

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

PER CURIAM.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Paul W. Seyler. After a formal hearing, the referee found that Seyler had violated various provisions of the Nebraska Rules of Professional Conduct and his oath of office as an attorney. The referee recommended a public reprimand. The Counsel for Discipline filed exceptions to the referee's recommendation and asks this court to suspend Seyler from the practice of law.

BACKGROUND

Seyler was admitted to the practice of law in 1997. Between 1997 and 2004, he worked as a staff attorney, vice president of operations, or marketing officer for various life insurance companies. Beginning in 2004 and continuing to the time of the hearing, Seyler was working as the director of operations for a life insurance brokerage. Seyler also practiced law in an office-sharing arrangement with two other attorneys, beginning in 2003. Most of his legal work was in the area of estate planning. Seyler testified that he handled one breach of contract case, but that it was ultimately dismissed and did not go to trial. Before September 2006, Seyler had never represented a client with a personal injury claim. He admitted that he had little litigation experience.

In September 2006, Seyler agreed to represent Tonja Peterson-Wendt and Jason Wendt in a personal injury action. Peterson-Wendt asked Seyler to represent her because she was working with an insurance adjuster and had been having trouble resolving a claim arising from a traffic accident.

Seyler filed a complaint on behalf of Peterson-Wendt and Wendt on July 28, 2008, after researching examples and

looking at form books. Seyler stated that his original impression was that Peterson-Wendt wanted her attorney to talk to the insurance adjuster to try to settle the case and avoid going to court.

The complaint named Charles Wilkinson as the defendant. Wilkinson's attorney, Stephen Ahl, filed an answer on Wilkinson's behalf on August 21, 2008, and served initial discovery requests on Seyler that same day. Seyler did not timely respond to the discovery requests, and Ahl wrote Seyler on November 7 and December 1, asking about the status of the overdue responses. When no response was received, Ahl filed a motion to compel answers to discovery, and a hearing was scheduled for December 29. During this time, Seyler did not send copies of Ahl's discovery requests to his clients, nor did he inform his clients of the motion to compel.

Seyler failed to attend the hearing on the motion to compel on December 29, 2008, and on December 31, the court issued an order directing Seyler's clients to produce discovery responses within 14 days. The order indicated that Seyler's clients could be barred from introducing evidence if they did not comply. On January 7, 2009, Seyler informed his clients of the need to respond to discovery requests, but he did not provide them with a copy of the order. Seyler sent his discovery answers to Ahl on January 14.

On June 12, 2009, Ahl served a second set of discovery requests on Seyler, who failed to respond. Ahl sent a followup letter to Seyler on July 23, requesting the overdue responses. Seyler did not respond to the letter, and Ahl filed a motion to compel answers on August 11. The hearing on the motion to compel was set for September 4. Seyler did not file a response to the discovery requests, nor did he attend the hearing or request a continuance.

The district court entered an order sustaining Ahl's motion to compel discovery and ordered Peterson-Wendt and Wendt to produce the discovery responses within 10 days. The court warned that failure to comply could result in being barred from introducing evidence. Seyler received a copy of the order, but did not send a copy to his clients or inform them of the order's contents. Seyler also failed to comply with the order.

Ahl filed a motion for sanctions against Peterson-Wendt and Wendt on September 28, 2009. Ahl requested that the court preclude the introduction of evidence regarding loss of income from Peterson-Wendt's cosmetics business. A hearing on the motion for sanctions was set for October 9. Seyler once again failed to inform his clients about the motion and hearing and failed to attend the hearing.

The district court entered an order precluding introduction of evidence of Peterson-Wendt's loss of income, diminution of earning capacity, or financial losses of any type. Seyler did not send a copy of the sanction order to his clients. At no point did Peterson-Wendt tell Seyler that she would limit or forgo her claim for lost income. Peterson-Wendt testified that Seyler told her the claim for lost income had been thrown out by the court because it was baseless.

Eventually, Seyler took Peterson-Wendt's claim to mediation and settled for $30,000, even though her Medicare costs were in excess of that amount. The settlement was not apportioned as part of the agreement, and Peterson-Wendt now has another attorney assisting her in sorting out Medicare subrogation claims and liens. Seyler did not bill Peterson-Wendt from the beginning of his representation in September 2006 through the mediation in 2010. He ultimately waived his attorney fees and out-of-pocket expenses.

During the hearing before the referee on the disciplinary charges, Seyler could offer no explanation for his failure to attend the hearings and failure to comply with discovery requests, except to state that he did not read the documents closely enough, did not schedule the case properly, and was not diligent enough in keeping on top of the case.

The Counsel for Discipline filed formal charges against Seyler, alleging that his actions constituted violations of his oath of office as an attorney under Neb. Rev. Stat. § 7-104 (Reissue 2007) and the following provisions of the Nebraska Rules of Professional Conduct:

> § 3-501.1. Competence.
>
> A lawyer shall provide competent representation to a client. Competent representation requires the legal

knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation.

. . . .

§ 3-501.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

. . . .

§ 3-501.4. Communications.

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) [and] promptly comply with reasonable requests for information[.]

. . . .

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

. . . .

§ 3-508.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct[,] knowingly assist or induce another to do so or do so through the acts of another;

. . . .

(d) engage in conduct that is prejudicial to the administration of justice.

The referee found clear and convincing evidence that Seyler violated Neb. Ct. R. of Prof. Cond. §§ 3-501.1, 3-501.3, 3-501.4, and 3-508.4, as well as his oath of office, by failing to competently represent Peterson-Wendt, failing to act with reasonable diligence, failing to properly communicate with Peterson-Wendt, and engaging in conduct prejudicial to the administration of justice. The referee recommended Seyler be

issued a public reprimand. Both Seyler and the Counsel for Discipline took exception to the referee's report.

ASSIGNMENTS OF ERROR

The Counsel for Discipline contends that the referee's recommended sanction of a public reprimand is too lenient and that Seyler should be suspended from the practice of law for no less than 90 days.

ANALYSIS

[1-3] A proceeding to discipline an attorney is a trial de novo on the record.[1] The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[2] Neb. Ct. R. § 3-304 provides that the following may be considered as discipline for attorney misconduct:

> (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.

Seyler does not contest that the specific misconduct alleged in the formal charges supports the referee's finding that Seyler violated his duties of competence, diligence, and communications. Thus, the issue before us is the appropriate discipline to be imposed.

[4-6] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, this court considers the following factors: (1) the nature of the

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[1] *State ex rel. Counsel for Dis. v. Bouda*, 278 Neb. 380, 770 N.W.2d 648 (2009).

[2] *State ex rel. Counsel for Dis. v. Wintroub*, 281 Neb. 957, 800 N.W.2d 269 (2011).

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.[3] 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.[4] With respect to the imposition of attorney discipline in an individual case, we evaluate each attorney discipline case in light of its particular facts and circumstances.[5]

The referee relied on *State ex rel. Counsel for Dis. v. Orr*[6] to recommend that the appropriate discipline for attorney incompetence, without other misconduct, is a public reprimand. The Counsel for Discipline argues that the appropriate discipline in this case is not limited by *Orr*, because Seyler was found to have violated rules in addition to the rule regarding competence. Specifically, Seyler was also found to have failed to act with reasonable diligence and promptness in representing his clients (§ 3-501.3), failed to reasonably communicate with his clients (§ 3-501.4), and engaged in conduct that was prejudicial to the administration of justice (§ 3-508.4(d)). In contrast, the attorney in *Orr* was found only to have violated the rule regarding competence.

In *Orr*, the attorney was asked to assist two clients in franchising a business.[7] The attorney had limited experience in the field of franchising law. Over a period of several years, the clients used documents prepared by the attorney which did not conform to requirements of the Federal Trade Commission. The franchising of the business was virtually ended as a result of the legal difficulties arising from the attorney's representation.

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[3] *Bouda, supra* note 1.

[4] *Wintroub, supra* note 2.

[5] *Bouda, supra* note 1.

[6] *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009).

[7] *Id.*

Formal charges were brought against the attorney, alleging that he provided incompetent representation. The referee found the attorney in violation of the disciplinary rules and recommended a public reprimand. We accepted the recommendation and issued a public reprimand.[8]

In *Orr*, this court expressed concern about an attorney attempting a legal procedure without ascertaining the law governing that procedure.[9] We found it inexcusable that the attorney, who had practiced law for 40 years, did little or no research into state or federal franchising law until long after he received notice of a problem with the franchising documents. "We take this opportunity to caution general practitioners against taking on cases in areas of law with which they have no experience, unless they are prepared to do the necessary research to become competent in such areas or associate with an attorney who is competent in such areas."[10] This court stated, "We have found no support in the case law for a suspension for incompetence without other misconduct, such as dishonesty."[11] Seyler urges this court to impose the same discipline as that imposed in *Orr* because both cases involve an attorney's competence. The Counsel for Discipline seeks additional discipline in the form of suspension.

[7] As noted above, in attorney discipline cases, we evaluate each case in light of its particular facts and circumstances.[12] However, we have also said that it is necessary to consider the discipline imposed in cases presenting similar circumstances.[13]

In a matter involving an attorney who represented competing interests and mishandled a real estate case, this court

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[8] *Id.*

[9] *Id.*

[10] *Id.* at 110, 759 N.W.2d at 709.

[11] *Id.* at 109, 759 N.W.2d at 708.

[12] *Bouda, supra* note 1.

[13] *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010).

imposed a 90-day suspension.[14] The attorney misrepresented the status of estate proceedings and the legal status of real property, engaged in multiple employments which involved different interests, and neglected legal proceedings. We found that the attorney's actions violated several disciplinary rules as well as his oath of office as an attorney. Mitigating factors included his cooperation during the disciplinary proceeding, his continuing commitment to the legal profession and the community, and the lack of evidence of any harm to the clients. Factors weighing against the attorney included his lack of willingness to take responsibility for his conduct and a prior reprimand.[15]

We also imposed a 90-day suspension in a case in which an attorney who practiced insurance defense left employment with a law firm and retained three files he believed warranted settlement.[16] When one of the cases he believed should be settled was set for trial, the attorney failed to inform his client about the trial and never contacted anyone at the insurance company about the need to settle the suit. The attorney did not file a motion to continue, he was not prepared to go to trial, and he did not have the authority to settle the case. The attorney continued as though he had authority to settle, and he made multiple false statements to opposing counsel and the court.[17]

A 90-day suspension was imposed in a case in which the attorney had a conflict and failed to obtain informed consent from his client or the opposing client.[18] A custodial father hired the attorney to seek a modification in a custody agreement so that he could move his children out of the state. In addition to failing to properly address the conflict, the attorney failed to prepare and file a witness list, which led the court to refuse to allow the client to take his children out of state. The

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[14] *State ex rel. Counsel for Dis. v. Koenig*, 264 Neb. 474, 647 N.W.2d 653 (2002).

[15] *Id.*

[16] *Bouda, supra* note 1.

[17] *Id.*

[18] *State ex rel. Counsel for Dis. v. Sellers*, 280 Neb. 488, 786 N.W.2d 685 (2010).

attorney was found to have violated Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-501.7 (conflict of interest), 3-501.10 (imputation of conflicts of interest), and 3-508.4 (misconduct).[19]

An attorney who accepted representation of a medical malpractice case although he had little experience in handling such actions was suspended from the practice of law for 4 months.[20] The attorney accepted payments from the client and obtained medical records, but he did little other work on the case. The attorney eventually notified the client that he was ending his representation, but he did so without ever having filed a lawsuit, advising the client as to the statute of limitations, or helping her secure another attorney. Although the attorney eventually repaid the client her advance payments for costs, he failed to deposit one of her payments into his attorney trust account.[21]

A 30-day suspension was ordered for an attorney who was retained to help an organization obtain nonprofit corporation status, even though he primarily practiced in the areas of domestic relations and criminal law.[22] The attorney failed to complete the matter and failed to notify the organization that he was unable to do so. He closed his office and moved out of state without informing the organization. He repaid some of the fee and expenses the organization had paid him, but not until after formal disciplinary charges had been filed against him.[23]

We have also issued a public reprimand, rather than imposing a suspension, in a case involving the failure to adequately pursue a legal matter.[24] The attorney was retained to represent

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[19] *Id.*

[20] *State ex rel. Counsel for Dis. v. Muia*, 266 Neb. 970, 670 N.W.2d 635 (2003).

[21] *Id.*

[22] *State ex rel. Counsel for Dis. v. Barnes*, 275 Neb. 914, 750 N.W.2d 668 (2008).

[23] *Id.*

[24] *State ex rel. Counsel for Dis. v. Hart*, 265 Neb. 649, 658 N.W.2d 632 (2003).

a client in an employment discrimination case, but he failed to contact relevant agencies about her claims, failed to discuss her claims with her former employer or coworkers, failed to review documents, failed to conduct research, and failed to advise the client of any statute of limitations issues. In issuing the public reprimand, this court noted that the misconduct was an isolated matter and that the attorney had cooperated with the disciplinary proceeding.[25]

In addition to a public reprimand, this court imposed an 18-month period of probation for an attorney who drafted a settlement agreement in a dissolution action, but then neglected the case.[26] The client had repeatedly attempted to contact the attorney for several months and eventually terminated the attorney-client relationship. We ordered that the attorney be monitored by an attorney during the probationary period.[27]

We imposed the same discipline—public reprimand and 18-month probation—in a case in which the attorney unduly delayed completing legal matters in the representation of two separate clients.[28] The attorney also failed to deposit a retainer in her attorney trust account. In a second case, the same attorney was given a public reprimand and ordered to serve a 12-month period of probation to run consecutively to the previous probationary period.[29] The charges in the second case were similar to the first, although they involved distinct clients. The events in both cases occurred during the same timeframe and occurred before discipline was imposed in the first case.[30]

We consider a number of factors in determining the appropriate discipline to impose. Seyler's misconduct arose from his failure to litigate a personal injury claim of Peterson-Wendt.

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[25] *Id.*

[26] *State ex rel. Counsel for Dis. v. Kleveland*, 270 Neb. 52, 703 N.W.2d 244 (2005).

[27] *Id.*

[28] *State ex rel. Counsel for Dis. v. Waggoner*, 267 Neb. 583, 675 N.W.2d 686 (2004).

[29] *State ex rel. Counsel for Dis. v. Waggoner*, 268 Neb. 895, 689 N.W.2d 316 (2004).

[30] *Id.*

From the time Seyler was hired to the date of mediation 4 years later, Seyler's only action was to file a complaint. He then failed on several occasions to respond to discovery requests from opposing counsel. He failed to attend hearings and offered no explanation, except to state that he was not diligent enough.

Seyler failed to inform his clients about the status of the case, including the order imposing sanctions. Seyler did not explain to his clients the reason they could not present evidence of lost profits. As the referee determined, Seyler had little to no experience in litigating a personal injury claim and seemed to have no understanding of the proof that was necessary to demonstrate that Peterson-Wendt had lost profits from her business. There was also evidence that at least at the time of the hearing before the referee, Seyler's incompetence had resulted in Peterson-Wendt's inability to recover the full amount of her medical bills. Seyler offered no explanation for his failure to appear at court hearings.

We also take into consideration any aggravating and mitigating factors. As to mitigating factors, we find that Seyler has had no prior disciplinary complaints. He did not charge Peterson-Wendt for his services and worked, without charge, with her and new counsel during the mediation. Seyler cooperated with the Counsel for Discipline. He expressed remorse and stated that he wished he had handled the case to achieve a better outcome. Seyler offered two letters of support as character references. Both letters support his good standing in the community. Seyler stated that he would no longer accept any cases for which he is not qualified.

As aggravating factors, we note that although Seyler expressed some remorse, he seemed unwilling to accept full responsibility for his actions. He did not immediately address the problem, continuing to ignore discovery requests and to intimate to Peterson-Wendt that the case was proceeding in a positive manner. Seyler did not explain to his client the reason she was not allowed to present evidence of lost profits. According to Peterson-Wendt's testimony, Seyler told her that the lost profits claim had been thrown out because it was baseless. Seyler did not tell Peterson-Wendt about the sanction

imposed by the trial court. Based on Seyler's mishandling of the case, Peterson-Wendt was precluded from offering any evidence of lost profits or other economic damages, and the settlement did not cover her medical bills.

Seyler argues that the facts of his case are similar to those in *Orr*[31] and that he should receive only a public reprimand. We disagree. In *Orr*, the attorney was found to have provided incompetent representation in attempting to handle a franchising agreement. In the case at bar, Seyler was found by the referee to have provided incompetent representation in attempting to handle a personal injury claim. Seyler's incompetence may have resulted in a financial loss to his client because he did not understand the importance of proving damages. Seyler's failures in responding to discovery requests and failing to attend hearings had an impact on the opposing party, his counsel, and the court.

Seyler admitted that he never informed the court he did not plan to attend the hearings and that he never requested a continuance. The misconduct in *Orr* impacted the attorney's clients, as did Seyler's actions. But his failure to attend hearings and to notify the court of his intent not to attend also resulted in court resources being expended unnecessarily.

Seyler continued to misrepresent the progress of the case, failed to inform his client about the sanctions, and apparently did not competently handle the mediation. He agreed to accept a personal injury case, even though he had no experience in that area of law. Seyler did not file a complaint until 2 years after he accepted the case. He admitted that he drafted the complaint after looking at form books and other examples, but he did not consult with any other attorneys who had experience with similar types of cases.

In addition, the referee found, and Seyler did not dispute, that Seyler violated his duty of diligence, that he violated his responsibility to communicate with his client, and that he engaged in misconduct. Thus, Seyler violated several rules of professional conduct, while in *Orr*, the attorney was found to have violated only one rule.

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[31] *Orr, supra* note 6.

We find that a public reprimand is too lenient given the facts and circumstances of this case. We therefore impose a 30-day suspension from the practice of law.

CONCLUSION

Based upon our consideration of the record in this case, this court finds that Seyler has violated §§ 3-501.1, 3-501.3, 3-501.4, and 3-508.40 and his oath of office as an attorney. We order that Seyler should be and hereby is suspended from the practice of law for a period of 30 days, effective immediately. Seyler shall comply with Neb. Ct. R. § 3-316 and, upon failure to do so, shall be subject to a punishment for contempt of this court.

At the end of the 30-day suspension period, Seyler shall be automatically reinstated to the practice of law, provided that he has demonstrated his compliance with § 3-316 and further provided that the Counsel for Discipline has not notified this court that Seyler has violated any disciplinary rule during his suspension. We also direct Seyler 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(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. SERVIO DIAZ, APPELLANT.

808 N.W.2d 891

Filed March 2, 2012. No. S-11-254.

1. **Judgments: Proof: Appeal and Error.** One seeking a writ of error coram nobis has the burden to prove entitlement to such relief.
2. **Judgments: Appeal and Error.** The findings of the district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless they are clearly erroneous.
3. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
4. **Judgments: Constitutional Law: Legislature: Appeal and Error.** The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49-101