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VI. CONCLUSION

We reverse the judgment and remand the cause for a new trial on the limited issue of the extent to which Markel's conduct prevented D&S from complying with the repair/replace condition to replacement cost coverage under the policy. Also to be tried on remand is the amount of the actual cash value of the loss in the event D&S is not excused from the condition precedent to replacement cost coverage.

REVERSED AND REMANDED FOR A NEW TRIAL.

MILLER-LERMAN, J., not participating.

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

815 N.W.2d 862

Filed June 29, 2012. No. S-11-688.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. 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.
3. ____. 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.
4. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the alleged misconduct and throughout the proceeding.
5. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.
6. ____. 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.
7. **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.

8. **Disciplinary Proceedings.** Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.
9. ____. 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.

Original action. Judgment of suspension.

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

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for respondent.

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

PER CURIAM.

In August 2011, the Counsel for Discipline, relator, filed formal charges against John E. Beltzer, respondent. The charges alleged that respondent violated his oath of office as an attorney and the following provisions of Nebraska's Code of Professional Responsibility: Canon 1, DR 1-102(A) (misconduct), and Canon 9, DR 9-102(A) and (B) (preserving identity of funds and property of client). Respondent filed an answer admitting the facts alleged in the formal charges, and relator moved for judgment on the pleadings. The case is before us to determine the proper sanction.

FACTS

Respondent was admitted to the practice of law in Nebraska in 1983 and at all relevant times was engaged in private practice in Lincoln, Nebraska. In January 2004, respondent settled a personal injury case for a client. When the settlement check came in, respondent disbursed most of it to the client and to medical providers but, with the agreement of the client, kept $2,000 in his trust account to pay subsequent medical bills.

In December 2004, the client asked for the remainder of the money. Respondent admits that at that time, there were insufficient funds in his trust account to pay her because he had transferred funds from the trust account to his operating account in October 2004 to make payroll and cover operating costs. On

the day the client requested the money, the funds were replaced in the trust account and the client paid the balance.

After relator moved for judgment on the pleadings, respondent requested and was given leave to supplement the record with mitigation evidence. This evidence included letters or affidavits from 10 different individuals, all attesting that respondent has an excellent character and an extensive history of both assisting animals and offering shelter and financial assistance to individuals in need. Respondent also submitted his own affidavit. He explained that at the time he transferred the money from his trust account to his operating account, he was in the process of negotiating other settlements and expected to receive funds from them within the next weeks, which funds he knew he could use to replace the money moved from the trust account. Respondent stated that he knew what he did was wrong and that he regretted the poor decision he made in 2004. Nevertheless, respondent stated that he felt he remained qualified and fit to continue to practice law. The record shows that no prior disciplinary action has been taken against respondent.

ASSIGNMENT OF ERROR

The only issue on appeal is the appropriate sanction to be imposed.

STANDARD OF REVIEW

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

ANALYSIS

Grounds for Discipline

The Counsel for Discipline alleged respondent violated his oath of office as an attorney and DR 1-102 and DR 9-102 of Nebraska's Code of Professional Responsibility. DR 1-102 is entitled "Misconduct" and provides that a lawyer shall not "[v]iolate a Disciplinary Rule" or "[e]ngage in conduct

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[1] *State ex rel. Counsel for Dis. v. Lopez Wilson*, 283 Neb. 616, 811 N.W.2d 673 (2012); *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012).

involving dishonesty, fraud, deceit, or misrepresentation." DR 9-102 is entitled "Preserving Identity of Funds and Property of a Client" and provides:

> (A) All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein . . . .
>
> (B) A lawyer shall . . . [p]romptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

In his answer, respondent admitted all of the facts alleged in the formal charges. We find these facts constitute clear and convincing evidence that respondent violated DR 1-102 and DR 9-102.

SANCTION

[2-6] 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.[2] To determine whether and to what extent 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.[3] For purposes of determining the proper discipline of an attorney, we will consider the attorney's acts both underlying the

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[2] *State ex rel. Counsel for Dis. v. Carter*, 282 Neb. 596, 808 N.W.2d 342 (2011); *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009).

[3] *Carter, supra* note 2; *State ex rel. Counsel for Dis. v. Thew*, 281 Neb. 171, 794 N.W.2d 412 (2011).

alleged misconduct and throughout the proceeding.[4] The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.[5] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[6] In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[7]

[7-9] 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.[8] This latter form of misappropriation clearly occurred here. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.[9] 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.[10]

Here, respondent concedes that he improperly managed his trust account and that discipline should be imposed. He argues for a sanction of a suspension followed by a period of probation. We find that the mitigating factors in this case include the absence of a prior disciplinary record, the isolated nature of the incident, respondent's extremely cooperative dealings with

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

[5] *State ex rel. Counsel for Dis. v. Hutchinson*, 280 Neb. 158, 784 N.W.2d 893 (2010); *State ex rel. Counsel for Dis. v. Tarvin*, 279 Neb. 399, 777 N.W.2d 841 (2010).

[6] *Carter, supra* note 2; *State ex rel. Counsel for Dis. v. Beach*, 272 Neb. 337, 722 N.W.2d 30 (2006).

[7] *Id.*

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

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

[10] *Carter, supra* note 2.

the Counsel for Discipline, and the numerous letters in support of respondent's overall character. We note that respondent made no attempt to conceal what had occurred from the Counsel for Discipline during its investigation[11] and that he accepts full responsibility for his egregious error in judgment. There is no indication in the record that respondent has been out of trust or has committed any other disciplinary infraction in the years since the incident which is the subject of this proceeding. Viewed in its entirety, respondent's conduct does not indicate the degree of lack of concern for the protection of the public, the profession, or the administration of justice that would warrant disbarment.[12]

Nevertheless, we cannot ignore that misappropriation is a very serious offense. We therefore order that respondent be suspended from the practice of law for a period of 1 year.

CONCLUSION

Respondent is hereby suspended from the practice of law in the State of Nebraska for a period of 1 year, effective 30 days after the filing of this opinion. Respondent shall demonstrate compliance with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Furthermore, respondent 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, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

STEPHAN, J., participating on briefs.

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[11] Compare *id*.

[12] Compare *id*.