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sentence. Therefore, his trial and appellate counsel were not ineffective.

Pittman has failed to establish that trial and appellate counsel were ineffective in failing to raise at sentencing or on direct appeal that Pittman should have been sentenced for attempted kidnapping as a Class III felony. The court properly denied Pittman's postconviction claim of ineffective assistance of counsel.

CONCLUSION

We reverse the Court of Appeals' decision, which reversed the sentence and remanded the cause to the trial court for resentencing, and remand the cause to the Court of Appeals with directions to affirm the postconviction court's decision denying Pittman's claims for relief.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN and CASSEL, JJ., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. TERRI L. CRAWFORD, RESPONDENT.

827 N.W.2d 214

Filed March 1, 2013. No. S-11-626.

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 evidence is in conflict on a material issue of fact, the 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: Attorneys at Law.** A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.
3. ____: ____. The license to practice law is granted on the implied understanding that the attorney's conduct will be proper and that the attorney will abstain from practices that discredit the attorney, the profession, and the courts.
4. ____: ____. Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney in his or her professional capacity which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment.

5. ____: ____. When a complainant has made allegations of attorney misconduct, the Counsel for Discipline is required to make an initial determination of whether the allegations warrant formal investigation.
6. **Rules of the Supreme Court: Disciplinary Proceedings: Notice.** The disciplinary rules do not contemplate that an attorney must be notified of every allegation of misconduct which the Counsel for Discipline ultimately determines to be without potential merit.
7. **Rules of the Supreme Court: Disciplinary Proceedings.** The disciplinary rules do not require a formal grievance as a threshold requirement for the power to investigate allegations of misconduct or to audit attorney trust accounts.
8. ____: ____. The disciplinary rules do not limit the Counsel for Discipline's powers of investigation to the allegations stated in a grievance.
9. **Disciplinary Proceedings.** It is the formal charges, not the grievance, that limit the scope of misconduct which an attorney may properly be disciplined for.
10. **Disciplinary Proceedings: Due Process: Notice.** Due process in attorney disciplinary proceedings requires that the attorney be given notice of the proceeding and an opportunity to defend at a hearing, and that the proceeding be essentially fair.
11. **Constitutional Law: Disciplinary Proceedings: Discrimination: Proof.** The general rule is that unless there is proof that a particular disciplinary prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections.
12. ____: ____: ____: ____. In order to support a defense of selective or discriminatory prosecution, the attorney must show not only that others similarly situated have not been prosecuted, but that the selection of the defendant for prosecution has been invidious or in bad faith, based upon considerations such as race, religion, or the desire to prevent the exercise of his or her constitutional rights.
13. **Disciplinary Proceedings: Attorneys at Law.** Whatever attorneys believe is motivating opposing counsel, a judge, or the Counsel for Discipline, attorneys are nevertheless expected to maintain the level of decorum which the profession demands and to act in accordance with their duties.
14. **Disciplinary Proceedings.** An attorney's failure to respond to inquiries and request for information from the office of the Counsel for Discipline is considered to be a grave matter and a threat to the credibility of attorney disciplinary proceedings.
15. ____. The disciplinary process as a whole must function effectively in order for the public to have confidence in the integrity of the profession and to be protected from unscrupulous acts.
16. ____. Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline indicate disrespect for the Nebraska Supreme Court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.
17. ____. The Counsel for Discipline should not be forced to threaten an attorney with the suspension of his or her license in order to get the attorney to respond to requests for information.

18. ____. A failure to make timely responses to inquiries of the Counsel for Discipline violates ethical canons and disciplinary rules which prohibit conduct prejudicial to the administration of justice.
19. **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.
20. **Attorney Fees: Words and Phrases.** Advance fees are payments made by a client for the performance of legal services and belong to the client until earned by the attorney.
21. **Attorneys at Law.** The license to practice law in this state is a continuing proclamation by the Nebraska Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and as an officer of the court.
22. ____. It is the duty of every recipient of the conditional privilege to practice law to conduct himself or herself at all times, both professionally and personally, in conformity with the standards imposed upon members as conditions for that privilege.
23. **Disciplinary Proceedings.** Misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts.
24. ____. Misappropriation by an attorney violates basic notions of honesty and endangers public confidence in the legal profession.
25. ____. Misappropriation as the result of a serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing.
26. ____. A lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds.
27. ____. 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.
28. ____. Absent mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or commingling of client funds.

Original action. Judgment of disbarment.

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

Christopher M. Ferdico, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., and Sheri Long Cotton, of Law Offices of Sheri Long Cotton, P.C., L.L.O., for respondent.

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

PER CURIAM.

I. NATURE OF CASE

The respondent appeals from the report and recommendation of the referee in an attorney disciplinary action. The referee recommended disbarment for violations of Neb. Ct. R. of Prof. Cond. §§ 3-501.5(f) (failure to provide detailed accounting for fees when requested), 3-501.15(a) and (c) (failure to deposit unearned fees into trust account and withdraw only as earned), and 3-508.4(c) and (d) (dishonesty, fraud, deceit, or misrepresentation and conduct prejudicial to administration of justice), and for violating the respondent's oath of office. The facts were strongly contested, and the respondent argues there was not clear and convincing evidence of the misconduct. The respondent also asserts that her due process rights were violated throughout the disciplinary proceedings and that such violations warrant a new hearing.

II. BACKGROUND

The respondent, Terri L. Crawford, was admitted to the practice of law in the State of Nebraska on April 23, 2001. Before going to law school, Crawford worked as a paralegal. She became a sole practitioner shortly after passing the bar. She predominantly practices in the areas of juvenile law and criminal defense.

Crawford maintained one trust account at Bank of the West. She maintained a personal savings account at Centris Federal Credit Union (Centris).

In September 2009, Crawford entered into an agreement to represent Nathan Cheatams. Cheatams was arrested in September 2009 in relation to a shooting that prior July. He was charged with nine felonies. A public defender was appointed for Cheatams, but Cheatams decided to hire Crawford as private counsel. On September 26, Cheatams signed a fee agreement with Crawford.

The September 26, 2009, agreement stated that Crawford would charge $150 per hour and that Cheatams would pay a $2,500 retainer. The agreement stated that "[d]uring the progression of legal services your account will be monitored and additional retainers and / or monthly installment payments may

be required in the event the initial retainer is exhausted or if the nature of your case changes." A trial retainer would be required if it appeared the case would be proceeding to trial. The agreement provided that after the initial retainer has been exhausted, "any monthly installment due will commence on the first of the month." The agreement further stated, "You will receive detailed monthly statements which will reflect all work performed on your case."

Cheatams' mother, Seleka Nolan, paid the retainer of $2,500 on September 24, 2009, and paid an additional $6,500 on January 5, 2010. Sometime around July 2010, still before Cheatams' trial, a dispute arose between Cheatams, Nolan, and Crawford regarding fees. Crawford withdrew as counsel when Nolan refused to pay her any further. Thereafter, Cheatams was represented by a public defender. Crawford refused to give the public defender the entirety of Cheatams' file, claiming confidentiality of her work product. Cheatams and the public defender now agree that this failure to forward Cheatams' file did not ultimately prejudice Cheatams' case.

1. Grievance

Nolan and Cheatams complained to Counsel for Discipline. Prior to the filing of a grievance against Crawford, written correspondence and telephone conversations between Cheatams, Nolan, and Counsel for Discipline took place. Those communications are the source of some dispute and will be set forth in more detail in our analysis below.

The grievance, signed by both Nolan and Cheatams, generally alleged that Crawford was neglectful in her representation of Cheatams, that she refused to provide an accounting of her time as requested, and that she had demanded payments beyond the agreed-upon amount. Counsel for Discipline sent the grievance to Crawford and proceeded with a formal investigation. The details of that investigation will be set forth in our analysis.

2. Formal Charges

Counsel for Discipline's investigation led to an audit of Crawford's trust account. As a result of the audit and

Crawford's responses during the course of the investigation, Counsel for Discipline determined that Crawford had misappropriated $3,500 of client funds. Counsel for Discipline also determined that Crawford had failed to cooperate with the investigation.

After the matter was reviewed by the Committee on Inquiry, Counsel for Discipline filed formal charges against Crawford. In count I, Counsel for Discipline charged that Crawford violated § 3-501.15(a) and (c) when she failed to deposit into her client trust account an unearned $3,500 from the $6,500 advance fee payment by Nolan. Counsel for Discipline also charged that Crawford violated § 3-501.5(f) by failing to provide an accounting of her services in sufficient detail to apprise the client of the nature of the work performed. Counsel for Discipline charged that Crawford violated § 3-508.4(c) by engaging in dishonesty, fraud, deceit, and misrepresentation in her communications with Counsel for Discipline during the investigation. Counsel for Discipline charged that Crawford violated § 3-508.4(d) by failing to timely respond to inquiries from Counsel for Discipline. Finally, Counsel for Discipline charged that Crawford violated Neb. Ct. R. of Prof. Cond. § 3-501.16(d) when she failed to surrender all papers and property to which Cheatams was entitled to Cheatams' subsequent counsel after her withdrawal. Counsel for Discipline charged that Crawford violated her oath of office through these same acts.

In count II, Counsel for Discipline charged that Crawford violated § 3-501.15 by routinely depositing her personal funds into her client trust account and withdrawing said funds as her personal and business needs required. Counsel for Discipline also charged that Crawford violated § 3-508.4 by refusing to provide Counsel for Discipline with the requested copies of all trust account checks issued during the time period specified and for refusing to identify the payee of each trust account check.

3. Report and Recommendation

The referee found by clear and convincing evidence that Crawford (1) failed to provide Nolan or Cheatams detailed

monthly statements reflecting work performed by Crawford on behalf of Cheatams, (2) failed to provide Cheatams' public defender with all of the contents of Cheatams' file upon exiting representation, (3) failed to cooperate with Counsel for Discipline's office in regard to the investigation of her representation of Cheatams and her handling of trust account funds in regard to Cheatams, and (4) failed to deposit in her trust account the $3,500 advance fee payment given to her by Nolan as part of a $6,500 cashier's check.

The referee concluded that through these acts, Crawford violated §§ 3-501.5(f), 3-501.15(a) and (c), and 3-508.4(c) and (d). The referee also found that Crawford violated her oath of office. The referee did not find that Crawford violated § 3-501.16(d), as alleged in the charges, because the referee considered Crawford's failure to turn over all materials in Cheatams' file to the public defender to be the result of an honest misunderstanding of her ethical obligations.

The referee recommended that Crawford be disbarred, noting that our court has been severe in regard to discipline when it comes to misappropriation of client funds. Furthermore, Crawford's untruthfulness "weigh[ed] heavily against her."

III. ASSIGNMENTS OF ERROR

Crawford assigns that the referee erred in (1) finding that Counsel for Discipline has met his burden of proof by clear and convincing evidence; (2) overruling Crawford's motion for mistrial when Counsel for Discipline withheld material allegations and evidence that significantly prejudiced her defense; (3) overruling Crawford's motion to recuse Counsel for Discipline based upon the fact that he knew or should have known from the inception of this matter that he was a necessary witness in the case; (4) finding that Crawford failed to provide an adequate explanation for her conduct, thus impermissibly shifting the burden of proof to Crawford in violation of court rules; (5) failing to find that Counsel for Discipline's failure to provide the relevant grievances until the time of trial violated Crawford's rights of due process; (6) finding that Crawford failed to cooperate with Counsel for Discipline; (7) finding that there was clear and convincing evidence that Crawford

was not truthful; and (8) finding that the conduct of Crawford rises to the level of disbarment.

IV. STANDARD OF REVIEW

[1] 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 evidence is in conflict on a material issue of fact, the 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.[1]

V. ANALYSIS

[2-4] A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.[2] The license to practice law is granted on the implied understanding that the attorney's conduct will be proper and that the attorney will abstain from practices that discredit the attorney, the profession, and the courts.[3] Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney in his or her professional capacity which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment.[4] Violation of those standards, which are set forth in the disciplinary rules, must be established by clear and convincing evidence.[5] Since Counsel for Discipline does not take exception with the referee's findings, we will examine only those violations ultimately found by the referee.

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[1] *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004).

[2] Neb. Ct. R., ch. 3, art. 3, Preface.

[3] See, e.g., *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991); *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980).

[4] *Id.*

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

1. Failure to Cooperate

The evidence relating to the charges of failing to cooperate is central to all of the issues presented in this appeal. Therefore, we will address the evidence pertaining to that charge first. Upon our de novo review, we find that Crawford was antagonistic, evasive, and untruthful throughout the investigation and the disciplinary hearing. While Crawford's failure to cooperate and dishonesty will be apparent in our examination of the evidence relating to all the charges of misconduct, we find sufficient for now an examination of the investigatory correspondence between Counsel for Discipline and Crawford. Based on this evidence, we agree with the referee that Crawford showed "not only a reluctance to cooperate, but belligerence and a pattern of stalling."

Crawford's first written response to the grievance was appropriate, albeit incomplete. Crawford explained that the retainer was never intended to cover the entire case and that she never negotiated a flat fee. Apparently referring to the hearing where Crawford withdrew as counsel, Crawford stated she provided Cheatams with "a detailed itemization and accounting, which we discussed." Cheatams was purportedly unable to keep the papers, however, "because he was detained and cuffed at the hearing and not allowed to take additional documentation from his attorney." Crawford attached an aggregate billing statement reflecting $11,250 in fees and a sum of $9,000 in fees paid. Crawford itemized that the $9,000 was paid in one installment of $2,500 and another of $6,500.

On October 20, 2010, Counsel for Discipline requested an explanation regarding the billing fractions shown in Crawford's aggregate billing, photocopies of the monthly statements Crawford provided to Cheatams, an exact date for each entry of the aggregate billing statement (if not shown in the monthly statements), and a complete copy of Crawford's office file regarding her representation of Cheatams.

Counsel for Discipline also requested evidence that Crawford deposited the $2,500 money order and the $6,500 cashier's check from Nolan into her client trust account. Counsel for Discipline asked for evidence of all subsequent withdrawals made by Crawford of those funds from her trust account. If

Crawford did not deposit any of those funds in a trust account, Counsel for Discipline requested an explanation as to why not. Counsel for Discipline requested that Crawford provide all this information by November 1, 2010.

Crawford continuously evaded Counsel for Discipline's request for evidence that the advance fee payments by Nolan were properly deposited into her trust account and withdrawn only as earned. On November 1, 2010, Crawford sent Counsel for Discipline a fax requesting additional time "to receive information from my financial institution."

She did not provide those bank statements until December 1, 2010. At the disciplinary hearing, Crawford explained that she could simply walk into a bank branch and ask for the documentation Counsel for Discipline had requested. The bank, depending on how busy the employees were, could process her request immediately while she waited or the bank could process it later and have her pick it up. Crawford's testimony is unclear as to which of these two things occurred with respect to the bank statements. Her testimony is likewise unclear as to when she requested financial information from her bank.

On November 2, 2010, Counsel for Discipline expressed to Crawford that he was "concerned that you were not able to respond to my specific questions within 10 days as I requested." Counsel for Discipline explained that copies of monthly bank statements, with the requested transactions circled by Crawford, would be sufficient to satisfy his request. Counsel for Discipline obviously believed that Crawford would have these statements easily accessible pursuant to her duty under § 3-501.15(a) to preserve "[c]omplete records" of trust account funds for "5 years after termination of the representation." The comment to that rule specifies that a "lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice." Nevertheless, Counsel for Discipline directed that if Crawford was waiting for bank records for whatever reason, she should answer all other questions, identify exactly which questions she could not answer without bank records, and identify what bank records she would need to answer the questions. Counsel for

Discipline asked that Crawford provide the requested information by November 8.

On November 8, 2010, Counsel for Discipline received a letter from Crawford. Crawford did not provide the requested bank records or other documentation regarding Nolan's advance fee payments. Neither did Crawford identify what bank records were needed in order to provide the requested documentation. Crawford instead wrote, "[A]ll funds collected from a client or on his/her behalf are always deposited into my client trust account."

In the November 8, 2010, letter, Crawford did explain the billing fractions listed in her aggregate billing. Crawford admitted that she had not provided copies of monthly billing statements to Cheatams. She explained that this was "[d]ue to the fact that . . . Cheatams[']s circumstances surrounding his case were unique, in that he remained incarcerated, and the confidential nature of the billing statements, his billing would not have been mailed to Douglas County Corrections." She stated that per their agreement, Crawford instead had "face-to-face discussions, at least monthly, regarding all work performed on his behalf and he was given a detailed explanation of the work, accordingly." Crawford wrote that Cheatams' file was still being copied.

On November 9, 2010, Counsel for Discipline wrote to Crawford and reiterated his concern that Crawford was unable to promptly supply the requested information. Counsel for Discipline stated he was "surprised" that Crawford did not have her trust account records "readily available." Counsel for Discipline stated that Crawford "should be able to immediately provide all requested information regarding [her] trust account."

Counsel for Discipline wrote that regardless of whether the monthly itemized statements were given to Cheatams, he wished to see copies of the statements Crawford had discussed with Cheatams during their alleged monthly visits. If such statements did not exist, Counsel for Discipline asked that Crawford provide more detail in the aggregate statement provided to him. Specifically, Counsel for Discipline requested exact dates, a more detailed statement of the content of the

telephone call or other activity listed, telephone records showing each call, and the name of the telephone service provider and account number.

Counsel for Discipline also reiterated his concern that Crawford was unable to timely provide a copy of Cheatams' file. Counsel for Discipline stated that "[a]ny further delay in providing a copy of the file will be considered as a failure to cooperate with this investigation."

Crawford responded on November 11, 2010: "When I stated that I did not have financial records readily available, that only meant that such records from over a year ago are in storage and not in my office." Crawford explained that she thought it would be "more expeditious to make the request of my financial institution rather than waste precious time digging in boxes."

Later, in her deposition and at the disciplinary hearing, Crawford clarified that "in storage . . . not in [her] office" meant that the boxes were in one of the other rooms of her office suite and not in her personal office. But Crawford thought it would have been more time consuming to go through the boxes, because they contained 8 years of bank statements from approximately five bank accounts. Since Crawford had only one trust account, we surmise that Crawford filed not only her trust account statements in those boxes, but also the bank statements from other personal and business accounts.

Time was passing despite Crawford's apparent belief that obtaining the records from her bank was more expeditious. As of November 11, 2010, Crawford still had not provided the requested documentation regarding Nolan's advance fee payments.

Crawford stated that she was in the process of requesting telephone records. But she reiterated that she would never be able to provide the more detailed billing statement as requested by Counsel for Discipline. She said it was not her practice to provide more detail at the time billing is created and had no way to recreate such a billing statement without speculation. Crawford added: "I do not believe (or at least I have not been informed), that . . . Cheatams is disputing

that I have performed the legal services for which he has been billed."

Crawford explained that, as a sole practitioner, she had still not been able to copy Cheatams' "large file." Crawford explained that her office copier could not accommodate the volume and that she had taken the file to a copy service center to copy it and that it "will arrive under separate cover." Crawford asserted that "this should not be construed as any failure on my part to cooperate with this investigation." The record shows that Crawford's file on Cheatams consisted of 164 pages and was less than 1 inch thick.

By November 29, 2010, Counsel for Discipline had received Cheatams' file, but had still not received the documentation regarding the proper handling of Nolan's advance fee payments. In a letter to Crawford, Counsel for Discipline pointed out several items in the aggregate billing statement that did not appear to correspond to anything provided in the file. Counsel for Discipline reiterated that Crawford was required to provide an itemized billing statement which identified the date for each entry made. Counsel for Discipline pointed out that Crawford's fee agreement stated that she was working hourly and that she would provide detailed monthly statements reflecting all work performed on the case.

Counsel for Discipline made it clear that he was becoming suspect of Crawford's continued inability to provide the requested trust account information. Despite this suspicion, Counsel for Discipline was still not fully auditing Crawford's trust account. Counsel for Discipline was requesting only trust account statements and records indicating that the two advance fee payments by Nolan had been properly deposited into Crawford's trust account and properly withdrawn only as earned. In his November 29, 2010, letter, Counsel for Discipline requested, for the fourth time, this documentation.

Since Crawford had written that the original trust account statements were "in storage," Counsel for Discipline suggested that Crawford obtain an immediate printout or get the information from Crawford's bank online. Counsel for Discipline requested, in boldface type, that Crawford provide this documentation "**immediately**." Crawford later explained that she

did not try to get the requested information online, as had been suggested in Counsel for Discipline's letter, because she did not "trust [the bank's] process."

Crawford responded on December 1, 2010, finally providing some incomplete documentation of the advance fee deposits. Crawford provided bank statements for September 2009 and February 2010. But she did not provide a trust account statement for January 2010, the month Nolan gave Crawford the cashier's check for $6,500.

The September 2009 statement reflected a deposit of $2,500 on September 28 into Crawford's trust account at Bank of the West. The February 2010 trust account statement, however, did not show a deposit directly corresponding to the $6,500 advance fee payment. It instead reflected a single deposit of $13,121 and four checks written on the account totaling $10,600.

Crawford did not circle and identify the transactions as requested by Counsel for Discipline or otherwise provide the information requested concerning withdrawals on those funds only as earned. Because no other monthly bank records were provided, Counsel for Discipline still had no way of knowing when or if those funds were withdrawn.

Crawford attached a copy of the deposited $2,500 money order from Nolan. Crawford also attached the deposit slip for the $2,500 money order into her trust account.

But the $6,500 cashier's check was different. Crawford stated that the $6,500 payment had "required additional research, which is why there was a delay in responding to your request on this matter." Crawford explained that the $6,500 was part of the $13,121 deposit in February 2010 which was reflected in the February bank statement. Crawford explained that because a portion of the $6,500 had already been earned by the time she received the cashier's check from Nolan, she negotiated the cashier's check at Centris, where she kept her personal savings account. Crawford said she deposited the $3,000 earned amount of the advance fee payment into her savings account. Crawford took the remaining unearned $3,500 in cash with the intention of depositing it into her trust account. Apparently, Crawford had never

withdrawn any earned amounts from the $2,500 advance fee payment.

Crawford explained that 5 weeks after negotiating the $6,500 cashier's check at Centris, she took the $3,500 cash to Bank of the West and deposited it with other funds into her trust account as part of the $13,121 total deposit. Crawford did not explain why there was a 5-week delay in depositing the $3,500 into her trust account.

As with the $2,500 money order, Crawford provided a copy of the negotiated $6,500 cashier's check showing a bank stamp at the time of the deposit. But Crawford did not provide a deposit slip for the $13,121 deposit. Such deposit slip would have demonstrated that the $3,500 was indeed part of that $13,121 deposit.

Crawford provided a statement from her savings account at Centris showing a balance of 8 cents at the beginning of January 2010, a $3,000 deposit on January 8, and an ending balance on January 31 of $3,000.08—apparently to demonstrate that she did not deposit the entirety of the $6,500 cashier's check into her checking account.

Crawford wrote to Counsel for Discipline that she looked forward to prompt resolution of the investigation. Based on the fact that her aggregate billing showed a total fee of $11,250, Crawford also wrote that she looked forward to the final payment of the fees owed to her.

Far from resolving the investigation, it was after Crawford's December 1, 2010, letter that Counsel for Discipline expanded his investigation. On December 14, Counsel for Discipline wrote: "You have not responded to all the requests made in my letters of October 20, November 2, November 9, and November 29. Please do so immediately." Counsel for Discipline then explained that he was auditing Crawford's trust account with respect to the advance fee payments made by Nolan.

Pursuant to the audit, Counsel for Discipline requested each monthly trust account statement from September 1, 2009, to the present. Counsel for Discipline reiterated that Crawford needed to identify when any trust fund payments were withdrawn. Counsel for Discipline asked Crawford where the

$3,500 was from January 8 to February 11, 2010. And Counsel for Discipline asked that Crawford provide evidence that the $3,500 cash was part of the $13,121 deposit into the trust account on February 11. Counsel for Discipline observed that Crawford had provided no deposit slip for the $13,121 deposit, whereas she had provided a deposit slip for the $2,500 deposit. Counsel for Discipline requested that Crawford provide a deposit slip for the $13,121 deposit. In addition, Counsel for Discipline asked that Crawford identify the owners of the other $9,621 and their respective amounts.

Counsel for Discipline received a response from Crawford on December 29, 2010. Crawford wrote a list of her withdrawals from the retainer payments as: $3,000 in January 2010 and $1,000 each in March, in May, on June 3, and on June 10. The monthly trust fund statements were enclosed. As for the 5-week delay in depositing the cash, Crawford stated that any "[f]unds not immediately deposited were in safekeeping in my office safe, separate and apart from my own property or any other client's property." Crawford further explained that "[u]nfortunately, many evenings I do not leave my office until well after the bank lobby closes and I do not use the drive-through to make such deposits. As stated the funds were properly safeguarded, kept separate as required, and deposited accordingly."

Crawford attempted to respond to various questions about her billing in Cheatams' case, attaching additional notes found in a computer file. However, she again stated that she could not produce a daily itemization as Counsel for Discipline had requested. Crawford opined that such billing was not required by the Nebraska Rules of Professional Conduct. Crawford further commented that her clients had always considered the detail of her billing acceptable.

Crawford closed her letter by questioning the scope of Counsel for Discipline's investigation. She observed that "[i]n the past when a client has filed a 'grievance' I have not been questioned on how much time it takes me to accomplish a particular task." Crawford stated that the original complaint focused on an allegation of neglect and "[c]learly there has been no neglect of [Cheatams'] case." Crawford wrote,

"Somehow this inquiry has taken a turn in another direction, which is of concern."

Crawford once again failed to provide the deposit slip or any other evidence that the $13,121 deposit actually included the unearned $3,500 of Nolan's advance fee payment. Crawford did not address the reason for this failure.

On January 18, 2011, Counsel for Discipline explained that under Neb. Ct. R. § 3-906, he had the power to audit trust accounts at any time, and that he was doing so as part of his investigation of the grievance filed by Nolan and Cheatams. Counsel for Discipline opined that "[o]n any given day, a lawyer should be able to account for all funds held in trust for each client," and that "[m]ost attorneys maintain a trust account log or record for each client for whom funds are deposited into the trust account."

Counsel for Discipline asked whether Crawford maintained such a log, and if so, he asked that she provide a copy. In order to make it easier for Crawford, Counsel for Discipline provided a list of deposits and withdrawals evidenced from the audit being conducted and asked that Crawford fill in client/payee information for those transactions. Counsel for Discipline asked that this information be provided by February 2, 2011.

Instead of providing the requested information, on January 31, 2011, Crawford sent Counsel for Discipline what could be described as a letter of protest. Crawford outlined all the documentation and information she had previously provided and stated that in her opinion, much of that information had "no bearing on the grievance." Crawford stated that she found Counsel for Discipline's reference in his letter to "[m]ost attorneys" maintaining a trust account log was "at best . . . condescending." Crawford believed that she had provided information "in excess of what is necessary to make a finding that there is no merit to the grievance" and that the new request for all trust account information "disturbs me on many levels."

Crawford further wrote that Counsel for Discipline's request for client/payee information relating to her trust account was "offensive, immaterial, unreasonable[,] unduly cumbersome,

and has no bearing on the grievance filed by . . . Cheatams and . . . Nolan." Finally, Crawford commented: "It certainly makes one wonder if there is other motivation for such a request under such circumstances. My question would be why is this information being requested? Is this an inquiry regarding a disgruntled client or has it turned into something else?" Crawford concluded, "I have fully cooperated in this inquiry and provided all the necessary information that relates directly to . . . Cheatams and my representation on his case. If anything else is required please let me know, so that this matter can come to a conclusion."

Thus, Crawford still did not provide the requested deposit slip or any other evidence that the $3,500 cash representing Nolan's unearned advance payment was part of the February deposit of $13,121 into her trust account.

On February 4, 2011, Counsel for Discipline wrote to Crawford and attempted to clarify that he did not intend to be condescending and that Crawford was not being "picked on." But Counsel for Discipline repeated his previous requests for documentation. Counsel for Discipline specifically repeated his request for evidence that the $3,500 of unearned funds was part of the $13,121 deposit, as Crawford claimed.

Crawford did not respond until February 16, 2011. She telephoned Counsel for Discipline asking for additional time to produce the requested information. According to Counsel for Discipline, Crawford did not provide the requested information by the agreed-upon extended deadline. Crawford disputes that a certain date was discussed for the extension of the deadline.

In any event, having heard no further from Crawford, on March 15, 2011, Counsel for Discipline sent Crawford another letter. Counsel for Discipline gave Crawford 7 days to produce documentation proving that the $3,500 in cash was deposited into her trust account on February 11, 2010, as part of the total deposit of $13,121. Counsel for Discipline stated that if such specific information was not received by that deadline, Counsel for Discipline would seek temporary suspension of Crawford's license to practice law.

After the March 15, 2011, letter in which Counsel for Discipline threatened Crawford with imminent temporary suspension, Crawford's story about what happened to the $3,500 changed. On March 24, Counsel for Discipline received a letter from Crawford explaining that she had just discovered she had been wrong about the $3,500 being part of the February 11, 2010, deposit of $13,121.

Crawford explained that after her telephone request for additional time, she discovered the $3,500 retainer still in her office safe. According to Crawford, it had been there all along. It had been over 1 year since the $6,500 cashier's check was cashed. Crawford wrote:

> As I originally stated to you in a previous correspondence there were several deposits combined as one for the February, 2010 deposit. As it has been my practice in the past, (though no longer) these deposits were safely kept in my office safe until I could make such deposit. It appears, that only the checks were deposited and not the cash, I must have gotten distracted and grabbed only one of the envelopes instead of both. After this discovery, my recollection was that I completed the deposit slips separately for checks and cash and placed them in separate envelopes(in order to keep separate client separate). Recently, I removed all contents from my safe including important legal papers, copies of executed Will, and title documents, final arrangement documents and business documents. Underneath several manila envelopes, I located the cash, still in the envelope with the deposit slip, having never been deposited. You can imagine my shock and dismay (and I must say embarrassment) when I made this discovery. I must have only deposited the "check" envelope and not the "cash" envelope when I made the deposit.

Crawford believed "the major issue which caused this problem for me is the lack of guidance and guidelines on maintaining an attorney trust account." Crawford claimed that she had never noticed any "discrepancies" in her trust account balance because she had been depositing her earned court appointment fees into her trust account. For that same reason, Crawford

asserted that no "client funds" were affected by this error of unknowingly keeping the $3,500 unearned advance fee in her safe.

Crawford explained that "until recently," she had no reason to go back and check that the $3,500 was indeed deposited into the trust account.

Crawford attached some of the client/payee information which Counsel for Discipline had requested. To explain the delay in providing that information, Crawford said that the requested trust fund information was normally kept in each client's file. Thus, Crawford had to go through each one of her files to gather the information, which she explained was a "daunting task." Crawford sent separate lists of trust account deposits and withdrawals from September 1, 2009, to November 30, 2010, for five different clients and for numerous Douglas County appointments. She also sent copies of various checks and deposit slips.

A contemporaneously produced deposit slip reflected that $3,500 cash was deposited into Crawford's trust account on February 25, 2011. Crawford did not use the original deposit slip which she had said she had prepared when she placed the cash in a manila envelope a year before.

Crawford did not at first explain why she had not immediately reported the discovery of the $3,500 to Counsel for Discipline and had waited instead to inform Counsel for Discipline a month later in the letter received on March 24, 2011. In her deposition, Crawford said that the delay in informing Counsel for Discipline was because "we did not have that type of a relationship where I could pick up the phone and explain to you over the phone exactly what happened. I thought it would be best for me to make sure that I documented each of those steps in a letter."

On March 28, 2011, Counsel for Discipline responded that he still needed the payee information for each check written on Crawford's trust account from September 1, 2009, through November 30, 2010. Counsel for Discipline provided a form for Crawford to fill in the payee information for various transactions. Counsel for Discipline also asked for more detail

about certain cash withdrawals reflected in Crawford's trust account records.

In light of the new information contained in Crawford's recent letter, Counsel for Discipline wrote Crawford that he was extending the audit of Crawford's trust account to December 2010 through March 2011. Counsel for Discipline asked for the requested information by April 4, 2011.

Crawford failed to supply all the requested audit information. Instead, on April 7, 2011, Counsel for Discipline received another protest letter. Crawford objected to Counsel for Discipline's new requests as being overly intrusive. Crawford stated that any withdrawals were her own funds and were mostly in cash. She stated that she could not and would not account for how they were spent. Crawford noted that "laws of discrimination and civil liberties" would not allow such an inquiry by an employer. Crawford also opined that although this may not have been the most "prudent" approach, there was nothing in the disciplinary rules prohibiting her from depositing earned funds into her trust account.

Crawford commented that Counsel for Discipline, "having been fully appraised [sic] of the circumstances on the Cheatams['] grievance, ha[d] chosen to parlay the Cheatams resolved facts into some other unsolicited, unwarranted and unnecessary inquiry into other unrelated matters." Crawford again wrote that Counsel for Discipline's request "deeply disturbs me on many levels." She considered the request a random and arbitrary audit which, "[o]n its face, . . . gives the appearance that Counsel for Discipline, after being provided with documentation to address the initial grievance, is now on a 'fishing' expedition to see if there can be a 'discovery' of other matters that were not of concern to this or any client." Crawford "respectfully decline[d]" to provide Counsel for Discipline with the information, stating that "in addition to being irrelevant to the inquiry, [it] is privileged and constitutionally protected."

Attached to this letter, Crawford provided Counsel for Discipline with the monthly trust fund statements for December 2010 and January and February 2011. But she did not fill in

the form provided by Counsel for Discipline for the payee information, nor did she otherwise provide such information. That was the end of Crawford's written correspondence with Counsel for Discipline.

The record speaks for itself. Crawford continuously failed to respond to Counsel for Discipline's clear requests for documentation, and she failed to provide clear answers to Counsel for Discipline's questions during the investigation. Notably, Counsel for Discipline did not receive the requested documentation regarding deposit of the $3,500 until he threatened Crawford with imminent suspension. Crawford's correspondence evidences that she alternately evaded Counsel for Discipline's inquiries and attacked Counsel for Discipline for pursuing the investigation at all. Crawford failed to cooperate with the investigation.

Crawford argues, however, that the charges of failure to cooperate are punishment for "having the audacity to ask questions and inquire as to the relevance of [Counsel for Discipline's] investigation."[6] She argues that the root of her confusion and questioning attitude was Counsel for Discipline's failure to disclose other "grievances" from Nolan and Cheatams, consisting of the communications between the office of the Counsel for Discipline, Nolan, and Cheatams that led up to the grievance letter sent to Crawford. Notably, these "grievances" raised an "accounting issue,"[7] while the grievance letter she received did not. Crawford claims these undisclosed "grievances" were the true basis of the investigation and charges against her. In addition, Crawford asserts that the investigation and prosecution were permeated with racial bias, "although perhaps subconscious."[8] She raises these arguments to conclude both that her level of cooperation was reasonable under the circumstances and that due process demands a new disciplinary hearing. For the foregoing reasons, we find these arguments lack merit.

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[6] Brief for respondent at 12.

[7] *Id.* at 22.

[8] *Id.* at 24.

Crawford's undisclosed "grievances" arguments stem from a series of communications between Counsel for Discipline, Nolan, and Cheatams leading up to the formal grievance letter sent to Crawford. Counsel for Discipline first received a telephone call from Nolan on July 16, 2010, stating that Crawford was refusing to continue to represent Cheatams unless she paid additional funds. Nolan apparently told Counsel for Discipline at this time that she had paid Crawford $9,000, but that Crawford was acknowledging receipt of only $5,000. According to Counsel for Discipline, he called Crawford to discuss that and other allegations. And, according to Counsel for Discipline, Crawford told Counsel for Discipline over the telephone that she had received only $5,000 from Nolan. Crawford denies this conversation took place.

Counsel for Discipline then wrote to Nolan explaining that if she would like to file a grievance, she would need to write a letter detailing the allegations and providing any documentation she might have. Counsel for Discipline noted in this letter that he had spoken to Crawford about Nolan's concerns and that Crawford had told Counsel for Discipline that Nolan had paid her only $5,000. According to Nolan's testimony at the disciplinary hearing—the source of Crawford's belated discovery of the alleged undisclosed "grievances"—Counsel for Discipline told Nolan that if Nolan could provide documentation of the $9,000 payment, then, based on the fact that Crawford said she had received only $5,000, "'I would really have to investigate, because that would mean I caught her in an out lie, and we don't like that.'" Crawford emphasizes this statement as evidence of Counsel for Discipline's undisclosed bias against her.

Nolan accordingly faxed a handwritten letter to Counsel for Discipline outlining her allegations of misconduct. Nolan was recovering from a stroke, and the letter was difficult to read. The letter alleged that Crawford had agreed her representation would cost no more than $10,000 total and that Crawford had demanded money in excess of that amount in order to continue her representation of Cheatams. Nolan also alleged that Crawford had failed to provide billing statements as requested, that she had forgotten a court date, and that she visited

Cheatams only once during the course of a year. Nolan sent Counsel for Discipline copies of a money order in the amount of $2,500, dated September 24, 2009, negotiated at Bank of the West, and a cashier's check in the amount of $6,500, dated January 5, 2010, negotiated at Centris.

After receipt of the handwritten letter, Counsel for Discipline spoke with Nolan on the telephone in more detail about her allegations. They agreed that Counsel for Discipline would type a letter on Nolan's behalf and that he would send it to her for review and approval. Counsel for Discipline has explained that it is the practice of the office of the Counsel for Discipline to assist complainants with any difficulties they may have writing a grievance letter. Counsel for Discipline did so, typing up the allegations of Nolan's handwritten letter.

The first typed version of the allegations added Nolan's complaint that after paying the $2,500, she had negotiated a final payment of $6,500 which Crawford had agreed would get them through trial, and that Crawford subsequently demanded money in excess of this agreed-upon fee. In other words, Nolan was alleging that they had renegotiated the total cost for Crawford's representation through the end of trial at $9,000 and that Crawford, after receiving this amount, demanded more money in order to continue representation. That typed version did not contain the allegation that Crawford failed to acknowledge receipt of the total $9,000 in payments already made by Nolan.

Counsel for Discipline sent the typed letter to Nolan. Nolan returned it to Counsel for Discipline with the handwritten addition that Crawford had allegedly told Counsel for Discipline in a telephone conversation that she had received only $5,000 in payments.

However, Counsel for Discipline sent the original typed letter, without Nolan's handwritten additions, back to Nolan, explaining that Cheatams, as the client, should also review the letter and sign it. Cheatams did so, and this time, Cheatams, not Nolan, made handwritten additions to the letter. Cheatams did not make any significant changes. Most notably, Cheatams did not add the allegation concerning Crawford's failure to acknowledge receipt of the entire $9,000. This typed letter with

Cheatams' handwritten additions was the only grievance sent to Crawford.

Crawford first argues that the written communications represent "grievances," as defined by the disciplinary rules. Therefore, under those rules, Crawford claims she had a right to be notified of them. Neb. Ct. R. § 3-308(B) states, "The Counsel for Discipline shall . . . (2) Notify a member in writing that he or she is the subject of a Grievance and furnish the member a copy [of the grievance] within fifteen days of receipt of the Grievance."

A grievance is defined as follows:

> Any written statement made by any person alleging conduct on the part of a member which appears, in the judgment of the Counsel for Discipline, to have merit, and, if true, would constitute a violation of the member's oath, the Nebraska Rules of Professional Conduct, or these rules; allegations of misconduct not appearing in the judgment of the Counsel for Discipline to have merit are not deemed a Grievance under these rules.[9]

Crawford focuses on the "[a]ny written statement" portion of this definition.

Crawford ignores that part of the definition which qualifies a grievance as only that written statement which appears, "in the judgment of the Counsel for Discipline, to have merit." In other words, the "Grievance" referred to in § 3-308(B) is only that draft which the office of the Counsel for Discipline determines meritorious and which it directs its employees to pursue. Communications preliminary to that determination are simply "allegations of misconduct."[10]

[5] Thus, § 3-309(D) further states:

> *If* it appears to the Counsel for Discipline that allegations of misconduct may have merit and, if true, would constitute grounds for discipline, he or she shall notify the member against whom the allegations are directed that the member is the subject of a Grievance, and within fifteen days of its receipt furnish the member a copy thereof by

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[9] Neb. Ct. R., ch. 3, art. 3, Definitions.

[10] See Neb. Ct. R. § 3-309(C) (rev. 2011).

> certified mail, return receipt requested, at the member's last known address.

(Emphasis supplied.) When a complainant has made allegations of attorney misconduct, Counsel for Discipline is required to make an initial determination of whether the allegations warrant formal investigation.[11] In making this determination, Counsel for Discipline may make such preliminary inquiry regarding the underlying facts as deemed appropriate.[12]

[6] The disciplinary rules do not contemplate multiple "grievances" stemming from the same complainant as to the same representation of the same client. Nor do the rules contemplate that an attorney must be notified of every allegation of misconduct that Counsel for Discipline ultimately determines to be without potential merit. Counsel for Discipline approved only one written statement containing allegations of misconduct. That was the only grievance against Crawford. We are not persuaded by Crawford's assertion that there were several "grievances" in this case which the office of the Counsel for Discipline failed to supply to her.

Next, Crawford asserts that the scope of the investigation and the disciplinary charges against her must be limited to the scope of the grievance letter she received. In particular, Crawford asserts that the audit of her trust account was somehow improper because it had nothing to do with the charges made in the grievance, which were neglect and breach of the fee agreement.

Crawford cites to no law that would specifically support this contention. She instead relies on vague notions of due process and asserts that "[t]he rules establish that the basis for the investigation is the delivered grievance."[13]

But § 3-308(B) states, "The Counsel for Discipline shall . . . (1) Review, investigate, or refer for investigation all matters of alleged misconduct called to his or her attention *by Grievance or otherwise*." (Emphasis supplied.) Furthermore, § 3-906 of the disciplinary rules specifically gives Counsel for Discipline

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[11] *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999).

[12] *Id.*

[13] Brief for respondent at 22.

the broad power "to audit *at any time any trust account* required by [the court] rules." (Emphasis supplied.)

[7] Attorneys licensed to practice law in the State of Nebraska agree to operate under the supervision of the office of the Counsel for Discipline. Trust accounts, in particular, are always open to review. The disciplinary rules do not require a formal grievance as a threshold requirement for this power to investigate allegations of misconduct or to audit attorney trust accounts.

[8,9] The rules certainly do not limit Counsel for Discipline's powers of investigation to the allegations stated in a grievance. In *State ex rel. Special Counsel for Dis. v. Fellman*,[14] for instance, we explicitly noted that the violation which we found—mishandling a retainer—was not the basis for the client's complaint and was only discovered during Counsel for Discipline's own investigation of the matter. Nevertheless, that allegation was subsequently made part of the formal charges.[15] It is the formal charges, not the grievance, that limit the scope of misconduct an attorney may properly be disciplined for.

The disciplinary rules provide that if, upon conclusion of any investigation, Counsel for Discipline determines there are reasonable grounds for discipline, he or she shall reduce the grievance to a complaint specifying with particularity the facts which constitute the basis thereof and the grounds for discipline which appear to have been violated.[16] That complaint is to be forwarded to the attorney against whom it is made and to the Committee on Inquiry to determine whether there are reasonable grounds for discipline and whether a public interest would be served by filing a formal charge.[17]

We have described a hearing before the Committee on Inquiry as the equivalent of a probable cause hearing.[18] That was done in this case, and the Committee on Inquiry found

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[14] *State ex rel. Special Counsel for Dis. v. Fellman, supra* note 1.

[15] *Id.*

[16] § 3-309(G).

[17] § 3-309(H).

[18] See *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989).

reasonable grounds for discipline. The complaint against Crawford alleged that she misappropriated funds based on facts which have nothing to do with the allegation that Crawford failed to acknowledge receipt of the total $9,000 in payments made by Nolan.

Counsel for Discipline then filed the formal charges against Crawford and served those charges on her in advance of the disciplinary hearing. The formal charges alleged the facts showing misappropriation based upon the disappearance of the $3,500. Suffice it to say that those facts did not involve the allegation that Crawford failed to acknowledge receipt of $9,000 in payments. The referee ultimately determined Crawford misappropriated funds based on the facts alleged in the formal charges. There was no finding of misconduct based on the failure to acknowledge full receipt of Nolan's payments.

[10] Due process in attorney disciplinary proceedings requires that the attorney be given notice of the proceeding and an opportunity to defend at a hearing, and that the proceeding be essentially fair.[19] The "adjudication" must be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time.[20] Because neither the formal charges nor the findings of the referee were based on the long-since discarded allegation that Crawford failed to acknowledge the entirety of Nolan's payments, Crawford's due process rights were not violated by the failure to disclose that allegation.

Crawford argues that, at the very least, the "concealment" of the correspondence preliminary to the grievance gave rise to "legitimate confusion" on Crawford's part during the course

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[19] See, e.g., *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); *State ex rel. Oklahoma Bar Ass'n v. Haave*, 290 P.3d 747 (Okla. 2012); *Flamenco v. Independent Refuse Service*, 130 Conn. App. 280, 22 A.3d 671 (2011); *Attorney Grievance v. Coppola*, 419 Md. 370, 19 A.3d 431 (2011); *In re Discipline of Russell*, 797 N.W.2d 77 (S.D. 2011). See, also, Annot., 86 A.L.R.4th 1071 (1991); 7 Am. Jur. 2d *Attorneys at Law* § 105 (2007).

[20] *State ex rel. NSBA v. Dineen*, 235 Neb. 363, 365, 455 N.W.2d 178, 180 (1990).

of the investigation.[21] This confusion, Crawford asserts, was "exploited"[22] into additional charges of "non-cooperation."[23] Crawford further points out that but for the concealment of the pregrievance correspondence, there never would have been an audit of her trust account.

We fail to see the legal significance of any "but for" arguments. Undisclosed allegations motivating an inquiry do not somehow void the investigation and consequent evidence that lead to a formal complaint and charges.

And we find no merit to Crawford's argument that she was justifiably confused and that there was consequently an unfair impression that she was being uncooperative. Crawford insists that the entirety of the investigation and her attitude during that investigation were tainted by the nondisclosure of this "accounting issue."[24] As concerns any "accounting issue," Counsel for Discipline's initial requests were quite limited. Counsel for Discipline requested proof that the $9,000 in advance fees was properly deposited in a trust account and properly withdrawn when earned. This was a routine request and, as already discussed, was within the proper scope of Counsel for Discipline's authority. Whatever her confusion, Crawford was unjustified in believing that she did not have to promptly provide this information upon Counsel for Discipline's clear request.

The record reflects that it was not until months of delay and Crawford's apparent inability to produce simple documentation showing the proper handling of Nolan's two advance payments that Counsel for Discipline decided to more fully audit Crawford's trust account. Whatever "accounting issue" was the subject of the initial allegations of misconduct, Crawford's failure to provide routine trust fund documentation during the course of the investigation raised entirely different accounting issues. And Counsel for Discipline was candid throughout the investigation as to his concerns and

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[21] Brief for respondent at 22.

[22] *Id.* at 23.

[23] *Id.* at 22.

[24] *Id.*

how those concerns had been raised. Crawford's evasion and attitude throughout the investigation were not justified by any confusion.

Crawford next asserts that her recalcitrant communications with Counsel for Discipline reflected a reasonable belief that the investigation was the result of racial or other impermissible bias against her. Crawford relatedly argues that the entire investigatory and disciplinary process was contaminated with racial bias. Crawford asserts that due process demands a new disciplinary hearing with a special prosecutor to substitute for the Counsel for Discipline who prosecuted this case. Because we find no evidence of impermissible bias, we find no merit to these arguments.

The discretion of the office of the Counsel for Discipline and of the Committee on Inquiry is informed by considerations in the disciplinary rules, the rules of professional conduct, relevant case law, and other practical factors peculiar to each case.[25] We have said that these factors and guidelines afford sufficient legal guidance to obviate the danger of arbitrary or discriminatory enforcement.[26]

[11,12] The general rule is that unless there is proof that a particular disciplinary prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections.[27] In order to support a defense of selective or discriminatory prosecution, the attorney must show not only that others similarly situated have not been prosecuted, but that the selection of the defendant for prosecution has been invidious or in bad faith, based upon considerations such as race, religion, or the desire to prevent the exercise of his or her constitutional rights.[28]

As proof of bad faith prosecution here, Crawford first points to the failure to disclose the correspondence preliminary to

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[25] See *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004).

[26] *Id.*

[27] See *id.*

[28] See *id.*

the grievance. For the reasons already discussed, the undisclosed allegation that Crawford failed to acknowledge receipt of the full $9,000 in client funds was never deemed by the office of the Counsel for Discipline to have likely merit. Regardless, there was no obligation to disclose the allegation. Therefore, such nondisclosure does not indicate impermissible bias against Crawford.

Crawford next argues that the record reflects a "deeply held level of distrust"[29] by Counsel for Discipline throughout the process. She concludes that such distrust is contrary to the objectivity that due process demands. While we agree that the record reflects some distrust, we disagree that it raises the specter of impermissible bias. Due process does not demand that Counsel for Discipline "trust" the attorneys under investigation. If prosecutors' distrust of the persons being prosecuted were contrary to due process, then we cannot imagine how the adversary system would function.

Crawford presents the affidavit of Dr. Omowale Akintunde to prove this distrust stemmed from impermissible racial animus. Akintunde is a tenured associate professor of Black studies at the University of Nebraska at Omaha. Akintunde averred that he had examined the exchanges between Counsel for Discipline and Crawford and that he had also examined other disciplinary cases occurring around the same time as the investigation of Crawford. Akintunde concluded that the disciplinary process pertaining to Crawford "was entrenched with unrecognized and unacknowledged racial bias." Akintunde explained that Counsel for Discipline had demonstrated "improper motive" and "microagression," which Akintunde defined as the "subtle, stunning, often automatic verbal (and non-verbal) exchanges which are 'put downs' of blacks by offenders." To illustrate his conclusions, Akintunde points to Counsel for Discipline's "aggressive, threatening and intended intimidation in statements and comments throughout his correspondence with [Crawford] and exchange during the deposition i.e. threats of 'suspension' and the 'most attorneys' language."

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[29] Brief for respondent at 24.

In our de novo review of the record, we find that the statements made by Counsel for Discipline fail to reveal any racial bias. Counsel for Discipline is charged with the task of supervising attorneys, compelling information from them during an investigation, and pursuing formal charges where appropriate. Many of the targeted attorneys perceive this as aggressive and otherwise threatening. The more uncooperative the attorney under investigation, the more Counsel for Discipline may be forced to "threaten" that attorney to get the necessary information. Counsel for Discipline's threat of suspension was a credible and reasonable threat given Crawford's failure to respond to clear requests which, as a licensed attorney, she was obligated to comply with.

We also fail to see how Counsel for Discipline's comment referring to "[m]ost attorneys" indicates racial animus. It is our belief and hope that most attorneys indeed handle their trust accounts with the care that Counsel for Discipline expected of Crawford. We expect, and the office of the Counsel for Discipline ought to also expect, that all licensed attorneys live up to the same standards set forth by our rules of professional conduct.

In her brief, Crawford further points to an exchange during her deposition as "evidence of the subconscious perceptions outlined by . . . Akintunde."[30] Toward the end of the deposition, when Counsel for Discipline attempted to explain his investigation of Crawford as a normal part of the responsibility of his office to maintain the sanctity of attorney trust accounts, Crawford said, "What I don't understand is why it appears to be very aggressive when it comes to black attorneys in Nebraska." Counsel for Discipline responded:

> Q. Prior to today, . . . had you [Crawford] and I ever met?
>
> A. I have never met you.
>
> Q. How did I know that you were African-American or black, or however you want to identify yourself?
>
> A. How did you know that?
>
> Q. How do you know I knew that?

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[30] *Id.* at 29.

> [Counsel for Crawford]: Objection, argumentative, form and foundation. If you would like to ask her a relevant question, I have no objection to that, but you're asking — you're testifying here now.
>
> [Counsel for Discipline]: I am asking her why she's calling me a racist.

According to Crawford, "[f]or [Counsel for Discipline] to internalize that comment [by Crawford discussing her 'honestly held perception that black attorneys are treated differently in Nebraska'] and act so harshly to it as a specific affront on him, is evidence of the subconscious perceptions outlined by . . . Akintunde."[31]

In our view of the record, Crawford asked Counsel for Discipline why the office of the Counsel for Discipline was so aggressive against "black" attorneys. This was, in essence, a charge of racism. Counsel for Discipline responded to this charge. We observe from the record that Counsel for Discipline was at that moment already palpably frustrated with Crawford's continuous refusal to clearly answer Counsel for Discipline's questions. Long discourses took place over topics such as the wording of the fee agreement or the size of manila envelopes. Rarely would Crawford simply affirm or deny an allegation or answer a question with a "yes" or "no." Counsel for Discipline could have kept his emotions more in check, but we do not see subconscious "internaliz[ation]" demonstrating Counsel for Discipline was racially biased. In any event, such psychological inferences would not satisfy Crawford's burden of proof. Crawford has failed to demonstrate that Counsel for Discipline's pursuit of the disciplinary investigation or his conduct during the investigation was racially motivated or the product of any other impermissible bias.

[13] Crawford may have genuinely felt Counsel for Discipline was motivated by racial animus or some other personal vendetta against her. Crawford presented evidence of a previous grievance and how she felt that Counsel for Discipline was out to "'get [her].'" Crawford also testified that "we, those who look like me, don't feel like disciplinary counsel is our

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[31] *Id.*

friend, and more of a foe." But Crawford's perceptions do not justify her failure to cooperate in this case. Attorneys licensed to practice law in this state ought to be deferential to the office of the Counsel for Discipline in its essential role of monitoring the integrity of the profession. Furthermore, whatever attorneys believe is motivating opposing counsel, a judge, or Counsel for Discipline, attorneys are expected to maintain the level of decorum that the profession demands and to act in accordance with their duties.

[14,15] We have repeatedly emphasized how important it is for an attorney to respond to inquiries and requests for information from Counsel for Discipline.[32] We have held that an attorney's failure to respond to inquiries and request for information from the office of the Counsel for Discipline is considered to be a grave matter and a threat to the credibility of attorney disciplinary proceedings.[33] The disciplinary process as a whole must function effectively in order for the public to have confidence in the integrity of the profession and to be protected from unscrupulous acts.[34]

[16-18] Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from Counsel for Discipline indicate disrespect for this court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.[35] Counsel for Discipline should not be forced to threaten an attorney with the suspension of his or her license in order to get the attorney to respond to requests for information.[36] A

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[32] See, e.g., *State ex rel. Counsel for Dis. v. Smith*, 278 Neb. 899, 775 N.W.2d 192 (2009); *State ex rel. Counsel for Dis. v. Carbullido*, 278 Neb. 721, 773 N.W.2d 141 (2009); *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

[33] See, e.g., *State ex rel. Counsel for Dis. v. Hutchinson*, 280 Neb. 158, 784 N.W.2d 893 (2010); *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008).

[34] *State ex rel. Counsel for Dis. v. James, supra* note 25.

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

[36] *State ex rel. Counsel for Dis. v. James, supra* note 25.

failure to make timely responses to inquiries of Counsel for Discipline violates ethical canons and disciplinary rules which prohibit conduct prejudicial to the administration of justice.[37] We find that Crawford violated § 3-508.4(c) and (d) (dishonesty, fraud, deceit, or misrepresentation and conduct prejudicial to administration of justice) and violated her oath of office throughout the course of the investigation.

But before moving on to address the other findings of misconduct, we address some remaining procedural objections. These objections also stem from the undisclosed allegation that Crawford failed to acknowledge payment of the full $9,000 in payments from Nolan. Crawford asserts that she was prejudiced by Counsel for Discipline's failure to appoint special counsel and to inform her of the previously discussed $9,000/$5,000 allegation, because Counsel for Discipline should have been a witness at the disciplinary hearing. According to Crawford, Counsel for Discipline knew or should have known that "as the only person with first-hand knowledge of this alleged conversation [about the failure to acknowledge full receipt of Nolan's payments], he would be subject to being called as a witness, being confronted and being cross-examined."[38] Crawford also asserts that the failure to disclose the correspondence preliminary to the grievance was a discovery violation.

As a quasi-judicial proceeding, attorney disciplinary proceedings do not entitle their participants to pretrial discovery as a constitutional right—although refusal to grant a discovery request may, in certain circumstances, so prejudice the party as to amount to a denial of due process.[39] Parties derive rights to discovery from statutes or court rules.[40] Crawford did not submit any discovery requests to Counsel for Discipline. Crawford

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[37] *Id.*

[38] Brief for respondent at 21-22.

[39] See, *In the Matter of Tobin*, 417 Mass. 81, 628 N.E.2d 1268 (1994); *In re Herndon*, 596 A.2d 592 (D.C. 1991); *In re Wireman*, 270 Ind. 344, 367 N.E.2d 1368 (1977).

[40] See *In the Matter of Tobin, supra* note 39.

does not point out what statute or rules were allegedly violated in this case, other than the "grievances" argument we have already discussed. Preliminary correspondence is the unavoidable consequence of the fact that Counsel for Discipline is required to both investigate and prosecute attorney misconduct. And technicalities cannot be invoked to defeat charges where there is evidence showing that the conduct alleged against the attorney is ethically wrong.[41] The referee denied a motion for continuance and for mistrial. But the referee did grant Crawford's request that the record remain open for 14 days while Crawford reviewed the entire investigatory file which Counsel for Discipline provided to her. Because of the negligible evidentiary value of the undisclosed documents and of any examination of Counsel for Discipline as a witness to the discarded $9,000/$5,000 allegation, we find no merit to these procedural objections.

2. Underlying Charges

Finally, we turn to the remaining charges of misconduct. We find clear and convincing evidence of Crawford's failure to provide a monthly accounting as agreed to, of misappropriating client funds, and of lying in order to cover up the misconduct. As Crawford points out, the evidence is largely circumstantial, disputed, and complicated. We find the evidence nonetheless clear and convincing.

(a) Billing Cheatams

We begin with the relatively simple matter of the billing. We find by clear and convincing evidence that Crawford failed to provide Nolan or Cheatams with detailed monthly statements reflecting work performed, contrary to her agreement and their repeated demands.

Crawford testified that the fee agreement providing for the detailed monthly statements was just a standard form she used. It was part of the alleged verbal agreement to never leave any documents at Douglas County Correctional Center. Crawford explained that sometimes jailers raid the jail cell

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[41] *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990).

of the inmates and that inmates can then forcibly take papers from other inmates. Crawford testified in her deposition and at trial that she met with Cheatams at least monthly at the jail and showed him a handwritten billing, which she discussed with him and which showed the work done and how much of the retainer had been spent. She explained that she did not send a copy of the billing to Nolan because Nolan was not her client.

Nolan, however, testified that Crawford had agreed to send Nolan detailed monthly billing statements, with Cheatams' permission, which he gave. Nolan testified that she repeatedly left messages asking Crawford to send billing statements that would show what they owed. Nolan testified that she directed Cheatams to also ask Crawford about the billing statements whenever he saw Crawford. When Nolan was able to speak to Crawford on the telephone and ask for the billing statements, Crawford would tell her, "'Oh, that's no problem. That's the least of our worries. We got a real thing that we're trying to get done. But you'll get that.'"

Cheatams similarly testified that he asked for billing statements but that Crawford did not provide him or Nolan with such statements. Cheatams explained:

> She told me that she couldn't give it to my mom [Nolan] because [she] wasn't her client, so I would have to need it or want it, so — and that's — But she said that she didn't want to give it to me because she didn't know about, like, I guess, inmates stealing, you know, other — stealing paperwork or however. But I had paperwork there, so, you know, I figured that wasn't the reason. I just figured that she was just lack of time or she just, you know, just was doing it on her own.

Cheatams testified that the first time Crawford went over any billing statement or discussed money with him at all was when Crawford told him the $2,500 "was down" and that they "needed to come up with some more money" because they were going to trial. The only other time he saw a billing statement was at the withdrawal hearing.

Cheatams' visitation history from September 24, 2009, to January 27, 2011, showed only three visits from Crawford on

February 17, March 15, and June 28, 2010. In addition, there were court hearings on October 21 and November 30, 2009, in which Crawford was present.

Section 3-501.5(f) (fees) states:

> Upon reasonable and timely request by the client, a lawyer shall provide, without charge, an accounting for fees and costs claimed or previously collected. Such an accounting shall include at least the following information:
>
> (1) Itemization of all hourly charges, costs, interest assessments, and past due balances.
>
> (2) For hourly rate charges, a description of the services performed and a notation of the person who performed those services. The description shall be of sufficient detail to generally apprise the client of the nature of the work performed.

While certainly there were irreconcilable versions of the facts, in disciplinary proceedings, findings made by the referee are given special consideration on matters that are in irreconcilable conflict.[42] 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.[43] We find clear and convincing evidence that Crawford violated § 3-501.5.

(b) Misappropriation and Lying

We also find clear and convincing evidence that Crawford misappropriated $3,500 in client funds. Indisputably, Crawford took $3,500 in unearned client funds in cash into her possession. Indisputably, that cash was not deposited into the trust account, and Crawford knew or should have known it was not properly deposited for at least 5 weeks. Then, according to Crawford, through further negligence, she thought the cash had already been deposited and left the money in her safe undiscovered for a year. She looked in her safe for the cash only after repeated requests by Counsel for Discipline for proof of the deposit and a threat of temporary suspension prompted further investigation.

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[42] *State ex rel. Nebraska State Bar Association v. Walsh, supra* note 3.

[43] *State ex rel. Special Counsel for Dis. v. Fellman, supra* note 1.

Even accepting Crawford's version of events, this is a serious violation of § 3-501.15, which mandates that client funds "shall be kept in a separate account" and that a "lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."[44] Under the disciplinary rules, keeping unearned fees in an office safe is not safekeeping of client funds. Crawford admits to this "mishandling" of client funds, but not "misappropriation."

[19,20] 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.[45] Advance fees are payments made by a client for the performance of legal services and belong to the client until earned by the attorney.[46]

Crawford argues that under the standard of clear and convincing proof to which we hold disciplinary violations, we cannot disbelieve her testimony that the $3,500 cash was sitting unused in a client safe for more than a year. She points out that there was no affirmative evidence to the contrary. According to Crawford, there is no "objective evidence" or "inferences strong enough" for Counsel for Discipline to sustain his burden of proof that she lied.[47] By demanding that she prove her explanation was credible, Crawford claims Counsel for Discipline impermissibly shifted to her the burden of proof.

We conclude that once it was established that the unearned funds were cashed out and not deposited in a trust account as the rules require, the burden properly shifted to Crawford to explain where those funds were. And we agree with the referee that Crawford's explanation was unsatisfactory.

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[44] § 3-501.15(a) and (c).

[45] *State ex rel. Counsel for Dis. v. Beltzer*, 284 Neb. 28, 815 N.W.2d 862 (2012).

[46] *State ex rel. Special Counsel for Dis. v. Fellman, supra* note 1.

[47] Brief for respondent at 18.

Crawford could not explain why she negotiated the $6,500 cashier's check in her personal savings account at Centris and withdrew the $3,500 unearned client funds in cash to deposit in the trust account later. Counsel for Discipline pointed out that Crawford could have negotiated the check at Bank of the West, depositing the advance fee cashier's check directly into her trust account, and could have then withdrawn the $3,000 earned amount as cash or through writing a check from her trust account. Crawford testified at the disciplinary hearing, "I think I could have done either. . . . And I don't think it mattered which I did. . . . I didn't have any particular reason for choosing one over the other."

Crawford likewise could give no particular reason why she took the unearned $3,500 out in cash rather than asking for a cashier's check or other more traceable and secure form. According to Crawford, she took the $3,500 cash back to her office that same day. According to Crawford, it was her intention to get to the bank and deposit the cash in her trust account "as soon as it was practical for me to do so."

A branch office of Bank of the West was located approximately 1½ blocks from Crawford's law office in downtown Omaha. Crawford gave no explanation as to why she did not immediately pass by the Bank of the West on her way to her office. She testified that she went back to her office the same day she negotiated the $6,500 cashier's check.

Crawford testified at her deposition that when she arrived at her office from the bank, she placed the envelope of $3,500 cash inside a larger manila envelope with a trust account deposit slip that she had prepared from her book of deposit slips. Crawford testified in her deposition that she had a book of trust account checks, four to a page, with stubs, in her desk drawer. When asked whether there was anything else in the manila envelope with the cash, Crawford replied that, no, she "wouldn't have put anything else in that manila envelope with that cash."

Crawford testified that she placed the manila envelope in a safe located under her desk. The safe was not very large. Crawford explained that the height of the safe was such that the 2-inch deposition transcript would not have fit inside. The

width was such that a letter-sized envelope could fit in the safe. Crawford described that the safe opened up from the front. There was no shelf inside the safe or any other type of divider. Crawford stated that when she put the manila envelope containing the $3,500 into the safe, there were other items already in the safe. Crawford testified that she laid the envelope on top of those items.

Crawford could not say when she might have opened the safe between January 8 and February 10, 2010, or if she did at all, but she admitted that whenever she next opened the safe, the manila envelope containing the $3,500 would have been the first thing visible on the pile. Whenever that occurred, Crawford claims she did not notice it.

Crawford claims that, for a while, she simply forgot about the $3,500 cash. When asked how that could have occurred, Crawford explained:

> I can tell you in retrospect. After I put it inside of [the] safe I made a mental note to myself that this task had been accomplished, so there was really nothing that was drawing my attention to it, although I knew I had done that. There was nothing that was drawing my attention to it.

Sometime after February 10, 2010, Crawford put another manila envelope into the safe. That envelope contained two checks to be deposited into her trust account. One check was a $9,000 bond refund check that a client had assigned to Crawford, dated February 10, 2010. The other check was a $4,121 personal injury settlement, dated February 5, 2010. The February 5 check was made out to both Crawford and the client, so her client had to endorse it before it could be deposited in the trust account.

Crawford explained that she placed the two checks together into the manila envelope whenever she had them both in her possession. The fact that the other check was dated February 10, 2010, would indicate it would not have been before that date.

The next day, on February 11, 2010, when Crawford reached into her safe again to remove that second manila envelope and deposit those checks, she purportedly became cognizant of the

$3,500 of unearned funds cashed from Nolan's cashier's check. And, having forgotten about the carefully prepared separate envelope, Crawford thought the $3,500 cash was inside the envelope with the two checks. We note that this explanation is not entirely consistent with a previous explanation in her letter received on March 24, 2011, that she "must have" just grabbed one of the envelopes instead of both.

On February 11, 2010, at 6:17 p.m., Crawford took the manila envelope with the two checks to a grocery store branch of Bank of the West on West Fort Street. Crawford testified that at Bank of the West, she handed the teller the manila envelope and directed the teller to deposit the contents. She claims she never discovered during this transaction that she was wrong in her purported belief that the $3,500 was inside that envelope with the two checks. Crawford explained, "Because of my relationship with the bank, I could on occasion, and sometimes many occasions, go in and hand them either cash, checks, envelope, whatever the case may be, and indicate to them which account I needed it to go into." Crawford explained that when she handed the teller the envelope, "in my mind," the envelope contained one check and the $3,500 cash.

When Counsel for Discipline asked whether Crawford checked the February 11, 2010, deposit slip at the time of the deposit, to make sure it accurately reflected the total amount she had intended to deposit that day, she indicated that she only checked to confirm a total deposit amount of $13,121. When asked why she would have thought that the $3,500 was in that manila envelope and part of the February 11 deposit, Crawford said, "Because I knew there were two deposits in there, and in my mind the two deposits meant checks and cash."

Because Crawford was already sure "in [her] mind" that the $13,121 included the $3,500, she only requested verification that a $13,121 deposit had been made—despite Counsel for Discipline's repeated requests for an itemized deposit slip. Only after the March 15, 2011, letter from Counsel for Discipline, threatening Crawford with temporary suspension of her license to practice law, did Crawford go to her bank to ask them "to

check before and after to look for exactly what happened with this deposit."

Crawford testified that after discovering that the $3,500 was not part of that $13,121 deposit, she decided to look in her safe. According to Crawford, she found the cash just as she had left it—in the manila envelope with the original trust fund deposit slip she had filled out on January 8, 2010.

Crawford testified in her deposition that she took the $3,500 cash to Bank of the West within a day or two of discovering it in her safe. She deposited it into her trust account, even though it would have been earned funds by that time. She thought it "prudent" to do so, "since there was an inquiry." But Crawford did not use the old deposit slip she had originally dated and placed in the manila envelope with the cash, and she did not keep track of where that old deposit slip went after the discovery of the envelope in her safe. Crawford explained why Bank of the West would not have accepted the original deposit slip. But Crawford was unclear as to whether she had asked the bank to utilize the old deposit slip—and the bank refused to do so—or whether she had determined that she could not use it and never tried to.

By the time Counsel for Discipline learned of these alleged events and asked to see the safe, a month had passed and the safe was gone. Crawford explained that she had given her safe away, because she "didn't want this type of incident to occur in my office again."

Crawford originally told Counsel for Discipline that the safe was "in Minnesota." After Counsel for Discipline subpoenaed more specific information, Crawford's brother came forward with an affidavit in which he averred that Crawford had given him the safe in late February 2011, while he was visiting Omaha from his home in Minnesota. He averred that the last time he saw the safe was sometime in March 2011. He stated that the safe "was left in my unlocked vehicle and my guess is it was stolen."

At the disciplinary hearing, Crawford testified that although she could not locate the original deposit slip, she had recently found its carbon. The carbon was hidden behind her desk

drawer. Crawford explained that rather than tearing out only the original deposit slip and leaving the carbon copy in the deposit slip book, she "must have" torn both the original and the carbon out when she wrote the deposit slip. Then she must have put both the deposit-slip book and the loose carbon back in her desk drawer. She stated that the carbon must have subsequently fallen behind her desk drawer.

Crawford offered into evidence a carbon copy of a deposit slip for $3,500 cash dated January 8, 2010. The referee found that the carbon is "nearly pristine, showing no sign of being bent, folded, or marred in any fashion." We agree with that assessment.

Counsel for Discipline presented evidence that the same day Crawford deposited the $3,500 into her trust account, Crawford had negotiated an $8,380.20 check through her personal savings account. She had deposited only $2,380.20 and had taken the remainder in cash. At the disciplinary hearing, Crawford provided documentation that $1,500 of that $6,000 in cash was deposited into another checking account. She then testified as to where the remaining cash had been spent. Crawford testified that it was not unusual for her to transact most of her business in cash.

We agree with the referee that this is a convoluted story. We observe that the story has morphed throughout the course of Counsel for Discipline's investigation to meet the questions being raised. There being no credible explanation as to what happened to the $3,500 in client funds, we conclude that it was misappropriated. Crawford violated § 3-501.15(a) and (c) (failure to deposit unearned fees into trust account and withdraw only as earned), and her oath of office. In addition, the evidence is clear and convincing that Crawford has lied throughout the investigation, before the referee, and to this court, about the whereabouts of the $3,500. Because she intentionally evaded inquiry and lied about it, she violated § 3-508.4(c) and (d), and her oath of office.

3. Disbarment and Proportionality

[21,22] We conclude that disbarment is the proper discipline for Crawford's cumulative acts of misconduct. The license to

practice law in this state is a continuing proclamation by this court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and as an officer of the court. It is the duty of every recipient of the conditional privilege to practice law to conduct himself or herself at all times, both professionally and personally, in conformity with the standards imposed upon members as conditions for that privilege.[48]

[23-25] Misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts.[49] Misappropriation by an attorney violates basic notions of honesty and endangers public confidence in the legal profession.[50] Misappropriation, as the result of a serious, inexcusable violation of a duty to oversee entrusted funds, is deemed willful, even in the absence of improper intent or deliberate wrongdoing.[51]

[26,27] Thus, misappropriation of client funds, including paying oneself a retainer before earning it, typically results in disbarment.[52] And a lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds.[53] The fact that the client did not suffer any financial loss also does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.[54]

[28] Absent mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or

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[48] Neb. Ct. R. § 3-303(A).

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

[50] See *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991).

[51] *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004); *State ex rel. NSBA v. Veith, supra* note 50.

[52] See *State ex rel. Counsel for Dis. v. Jones, supra* note 49.

[53] *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997).

[54] *State ex rel. Counsel for Dis. v. Beltzer, supra* note 45. See, also, *State ex rel. Counsel for Dis. v. Carter*, 282 Neb. 596, 808 N.W.2d 342 (2011).

commingling of client funds.[55] In fact, we have observed that, generally, an attorney who has misappropriated client funds will be disbarred absent "extraordinary" mitigating factors.[56]

Examples of extraordinary mitigating factors include *State ex rel. Counsel for Dis. v. Davis*.[57] In *Davis*, we suspended, but did not disbar, an attorney who had used her attorney trust account as both a business account and a personal checking account and had failed to promptly deliver trust account funds to a client's health care provider.[58] As mitigating factors, she had cooperated with Counsel for Discipline; was seeking treatment for depression, anxiety, and alcoholism; and had entered into a monitoring contract with the Nebraska Lawyers Assistance Program. She had no aggravating factors.

In *State ex rel. Counsel for Dis. v. Beltzer*,[59] we likewise only suspended the attorney for misappropriation, noting the attorney's "extremely cooperative dealings with the Counsel for Discipline," the staggering number of letters submitted in the attorney's support, and the fact that the attorney had "made no attempt to conceal what had occurred from the Counsel for Discipline during its investigation and that he accepted full responsibility for his egregious error in judgment."

Crawford submitted several letters in support of her qualifications as a lawyer and her good character. A juvenile court

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[55] See *State ex rel. Counsel for Dis. v. Beltzer, supra* note 45. See, also, *State ex rel. Counsel for Dis. v. Carter, supra* note 54; *State ex rel. Counsel for Dis. v. Samuelson*, 280 Neb. 125, 783 N.W.2d 779 (2010).

[56] *State ex rel. Counsel for Dis. v. Carter, supra* note 54, 282 Neb. at 607, 808 N.W.2d at 351.

[57] *State ex rel. Counsel for Dis. v. Davis*, 276 Neb. 158, 760 N.W.2d 928 (2008).

[58] *Id.*

[59] *State ex rel. Counsel for Dis. v. Beltzer, supra* note 45, 284 Neb. at 32-33, 815 N.W.2d at 867. See, also, e.g., *State ex rel. Counsel for Dis. v. Gase*, 283 Neb. 479, 811 N.W.2d 169 (2012); *State ex rel. Counsel for Dis. v. Lindmeier*, 280 Neb. 620, 788 N.W.2d 555 (2010); *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006); *State ex rel. Counsel for Dis. v. Monjarez*, 267 Neb. 980, 679 N.W.2d 226 (2004); *State ex rel. Counsel for Dis. v. Wintroub, supra* note 51; *State ex rel. Special Counsel for Dis. v. Fellman, supra* note 1.

judge was very complimentary of Crawford's zealous representation of her clients and commitment to her community. The director of transportation for the Omaha Public Schools wrote about Crawford as an advocate and community leader who, among other things, often spoke to high school students about their legal rights, the importance of planning for their futures, and their career aspirations. Akintunde wrote of Crawford's service to the community and her qualifications as legal counsel, as a professor in the Department of Black Studies at the University of Nebraska at Omaha, and as a personal friend whose friendship has "meant as much to me as any human bond I have ever formed."

But, in and of themselves, this handful of letters of support are not extraordinary mitigating factors. And, unfortunately, we are presented with several aggravating factors in this case. Crawford has not taken full responsibility for her actions. She has not cooperated with Counsel for Discipline. She has made repeated attempts, through dishonesty, to conceal her misconduct.

This court does not look kindly upon acts which call into question an attorney's honesty and trustworthiness. The essential eligibility requirements for admission to the practice of law in Nebraska include "[t]he ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations."[60] With or without misappropriation, acts of dishonesty can result in disbarment.[61]

The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[62] In *State ex rel. NSBA v. Howze*,[63] we disbarred an attorney who similarly misappropriated client funds and failed to cooperate with Counsel for Discipline. The attorney had retained

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[60] § 3-103(A).

[61] See, e.g., *State ex. rel. Counsel for Dis. v. Beach*, 272 Neb. 337, 722 N.W.2d 30 (2006); *State ex rel. Counsel for Dis. v. Swanson*, 267 Neb. 540, 675 N.W.2d 674 (2004).

[62] *Id.*

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

approximately $300 of settlement funds to pay a medical bill and did not pay the bill until a complaint was filed with Counsel for Discipline. At that time, he paid the bill with a cashier's check instead of a trust account check. For another client, that attorney had delayed paying approximately $2,000 in medical bills out of client funds retained for the purpose, until a complaint was filed. During the investigation, despite Counsel for Discipline's repeated requests, the attorney failed to provide an explanation regarding that client's funds or any trust account records. The mitigating factors were not significant.[64]

In *State ex rel. Counsel for Dis. v. Rasmussen*,[65] we disbarred an attorney who waited several months to return the $300 unearned portion of a retainer to one client and paid himself another client's retainer of $3,000 before he had earned it. The attorney also, like Crawford, failed to provide those clients with monthly itemized statements as the written fee agreements provided for, eventually providing only a cumulative statement. The attorney gave delayed and incomplete responses to Counsel for Discipline's requests for information during the course of investigation. The attorney originally testified at the disciplinary hearing that the $3,000 was for fees he had earned working for another client. But when he was confronted with evidence that those other fees had already been withdrawn in a separate transaction, the attorney claimed he simply did not remember why he had withdrawn the $3,000. We observed that the confusion over the $3,000 was compounded by the attorney's mismanagement of his trust account. But that was no excuse. The attorney also was neglectful in his handling of two clients. In disbarring the attorney, we noted that the attorney had "failed to demonstrate any sincere regret for his behavior."[66]

Despite such cases, Crawford suggests that disbarment in this case would be indicative of racial bias by this court.

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[64] See *id.*

[65] *State ex. rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003).

[66] *Id.* at 113, 662 N.W.2d at 566.

She argues that some similar cases involving nonminorities resulted in more lenient sanctions. We do not note in our disciplinary opinions the race of the attorney under discipline, because that is not relevant. As discussed above, disbarment is frequently the sanction in any case involving misappropriation of client funds, failure to cooperate with Counsel for Discipline, and lying during a disciplinary investigation. This is true regardless of an attorney's gender, race, ethnicity, or religion. Comparing Crawford's conduct to other attorneys disciplined by this court, we conclude that disbarment is the appropriate sanction.

VI. CONCLUSION

It is the judgment of this court that Crawford should be and hereby is disbarred from the practice of law in the State of Nebraska, effective immediately. Crawford is directed to comply with Neb. Ct. R. § 3-316, and upon failure to do so, she shall be subject to punishment for contempt of this court. Crawford is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. § 3-323(B). We overrule the miscellaneous motions made by Crawford's attorney at oral arguments.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
AUTUMN EAGLE BULL, APPELLANT.
827 N.W.2d 466

Filed March 1, 2013. No. S-11-1072.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential