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State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. James G. Lisonbee, respondent.

826 N.W.2d 874

Filed March 1, 2013. No. S-12-185.

Original action. Judgment of suspension.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Per Curiam.

INTRODUCTION

Respondent, James G. Lisonbee, was admitted to the practice of law in the State of Nebraska on June 4, 2010. At all relevant times, he was engaged in the private practice of law in Lincoln, Nebraska. Respondent has been on temporary suspension since April 11, 2012. On August 23, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges consisting of three counts against respondent. In the three counts, it was alleged that by his conduct, respondent had violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012); Neb. Ct. R. §§ 3-303(B) and 3-309(E) (rev. 2011) of the disciplinary rules; and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-501.16(a) and (d) (declining or terminating representation), 3-508.1(b) (bar admission and disciplinary matters), and 3-508.4(a) and (d) (misconduct).

On January 2, 2013, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he knowingly chose not to challenge or contest the truth of the matters set forth in the formal charges and waived all proceedings against him in connection therewith in exchange for a judgment of suspension for 3 years and, following reinstatement, 2 years of probation, including monitoring. If accepted, the monitoring shall be by an attorney licensed to practice law in the State of Nebraska and who shall be approved of by the Counsel for Discipline. The monitoring plan shall include, but not be limited to, the following:

During the first 6 months of probation, respondent will meet with and provide the monitor a weekly list of cases for which respondent is currently responsible, which list shall include the date the attorney-client relationship began, the general type of case, the date of last contact with the client, the last type and date of work completed on file (pleading, correspondence, document preparation, discovery, or court hearing), the next type of work and date that work should be completed on the case, any applicable statutes of limitations and their dates, and the financial terms of the relationship (hourly, contingency, et cetera). After the first 6 months through the end of the probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information set forth above; respondent shall reconcile his trust account within 10 days of receipt of the monthly bank statement and provide the monitor with a copy within 5 days; and respondent shall submit a quarterly compliance report with the Counsel for Discipline, demonstrating that respondent is adhering to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of probation. Finally, respondent shall pay all the costs in this case, including the fees and expenses of the monitor, if any.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's request for a 3-year suspension and, following reinstatement, 2 years of probation "appears to be appropriate under the facts of this case and will adequately protect the public."

Upon due consideration, we approve the conditional admission, and we order a 3-year suspension effective immediately and, following reinstatement, 2 years of probation and monitoring.

FACTS

Count I.

With respect to count I, the formal charges state that in late June 2010, an individual referred to as "the first client" filed suit, pro se, in the district court for Lancaster County seeking

to dissolve his marriage. Thereafter, he contacted the Volunteer Lawyers Project at the Nebraska State Bar Association seeking legal counsel for his divorce. The Volunteer Lawyers Project referred him to respondent. He and respondent met, and respondent agreed to represent him. According to the first client, at first, the communication between him and respondent was good. Initially, the first client's wife was difficult to serve with summons; however, she was eventually served in person by the sheriff on July 27, 2010.

As time went on, it became more difficult for the first client to contact respondent. Nothing appears to have happened in the case from the time the first client's wife was served until November 15, 2010, when the district court judge issued a show cause order to respondent advising that the case would be dismissed for lack of prosecution. In response, on December 6, respondent filed a motion for default judgment that failed to comply with the rules of the district court for the Third Judicial District. A week later, on December 14, respondent filed a notice of hearing on a form provided by the clerk of the district court's office advising of a hearing scheduled for December 22.

A hearing was held on December 22, 2010, at which respondent appeared with the first client and the opposing party appeared pro se. Respondent came to the hearing on December 22 unprepared, and the judge continued the hearing so that respondent could prepare. The judge directed that respondent was to schedule the resumption of the hearing.

By February 15, 2011, respondent had not scheduled the conclusion of the hearing, so the judge again issued a show cause order to respondent. On March 9, respondent filed another motion for default judgment, again failing to comply with the local rules because respondent failed to include a notice of hearing and a certificate of service.

A hearing was held on March 30, 2011, at which respondent appeared, but again was unprepared. The judge again continued the hearing, noting, "'Due to incompleteness of evidence presented, hearing continued to be rescheduled by counsel. If case is not resolved within thirty days, it will be dismissed.'"

On April 28, 2011, respondent filed another motion for default judgment, but again, the motion did not comply with the local rules because it failed to contain a notice of hearing and a certificate of service. On May 2, the judge dismissed the case for lack of prosecution, noting:

> "As of the date of this order, no further hearing has been held in this case. (The court notes that, on April 28, the plaintiff again filed a motion for default judgment; however, contrary to Local Rule 3-2(B), no hearing date was secured from the court's staff and, like with the motion filed on March 9, no notice of hearing was filed.)"

Upon dismissal of the case, respondent failed to advise the first client of the dismissal and took no steps to reinstate the case.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rules §§ 3-501.1, 3-501.3, 3-501.4, and 3-508.4(a) and (d).

Count II.

With respect to count II, the formal charges state that sometime prior to January 5, 2011, respondent began representing an individual referred to as "the second client" with regard to a custody and child support matter pending before the district court for Lancaster County. On January 5, the intervenor's counsel filed a motion to compel responses to discovery and sent it to respondent as the second client's counsel. The intervenor's counsel filed additional motions and notices throughout the summer and fall of 2011 and indicated in the certificates of service that copies were sent to respondent.

According to the formal charges, apparently the second client became dissatisfied with the representation being provided by respondent and hired new counsel. On November 7, 2011, the second client, through his new counsel, sent written notice to respondent advising that he was terminating the attorney-client relationship and directed that his file be sent to his new counsel. The new counsel and her staff made repeated

attempts to obtain the file from respondent, but respondent never responded or provided the file to either the second client or his new counsel.

On November 23, 2011, the new counsel filed a grievance against respondent alleging that respondent was withholding the second client's file from the new counsel. The Counsel for Discipline was initially unsuccessful in serving the grievance on respondent, but it was served upon respondent by the sheriff of Lancaster County on January 11, 2012, at respondent's address in Lincoln.

Respondent initially failed to respond to the grievance, but after an application for his temporary suspension was served upon him, he called the Counsel for Discipline on March 6, 2012, and stated that he would forward the second client's file to the new counsel. As of the date of the formal charges, respondent had not delivered the file to either the second client or his new counsel.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rules §§ 3-501.1, 3-501.3, 3-501.4, 3-501.16(a) and (d), and 3-508.4(a) and (d).

Count III.

With respect to count III, the formal charges state that on August 29, 2011, the Counsel for Discipline received a grievance from the first client, generally alleging that respondent incompetently represented him in a custody and child support proceeding and was unprepared for trial. On August 29, a copy of the first client's letter was sent to respondent by certified mail along with a letter from the Counsel for Discipline advising respondent that the Counsel for Discipline was conducting an investigation into the allegations and that respondent should submit an appropriate written response addressing the issues raised in the first client's letter. The letter was sent to respondent's address on Garfield Street in Lincoln, which was respondent's address on file with the Nebraska State Bar Association. The letter was returned by the postal service unclaimed on September 19. The letter was sent

again on September 19, and it was again returned unclaimed on October 11. An attorney with the Counsel for Discipline left his business card in respondent's door on December 13. Approximately a week later, he left another business card under the wiper blade on what was believed to be respondent's car.

On November 23, 2011, the Counsel for Discipline received a grievance letter against respondent from the new counsel, noted in count II, alleging that respondent had refused to return records to the second client that were necessary for the new counsel to complete the second client's representation. The grievance was filed after many unsuccessful attempts by the new counsel to contact respondent by leaving messages on respondent's voice mail.

The Counsel for Discipline sent a copy of this grievance to respondent at an address on Surfside Drive in Lincoln, which address respondent had used in a recent filing in the county court for Lancaster County. A copy of the letter was also sent to respondent's address on Garfield Street. Both letters were returned by the postal service.

On January 11, 2012, copies of the letters from the first client and the second client's new counsel, along with copies of the letters from the Counsel for Discipline, were personally served on respondent at his address on Garfield Street by a deputy from the Lancaster County sheriff's office. Respondent had not submitted responses to either the first client's grievance or the second client's new counsel's grievance by February 6, so a reminder letter was sent to respondent at his address on Garfield Street, further advising him that failure to respond could be a separate ground for discipline. Except for a telephone call from respondent on or about March 6, the Counsel for Discipline has yet to receive a response from respondent to either grievance.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104, disciplinary rules §§ 3-303(B) and 3-309(E), and professional conduct rules §§ 3-508.1(b) and 3-508.4(a) and (d).

ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters set forth in the formal charges. We further determine that by his conduct, respondent violated disciplinary rules §§ 3-303(B) and 3-309(E) and professional conduct rules §§ 3-501.1, 3-501.3, 3-501.4, 3-501.16(a) and (d), 3-508.1(b), and 3-508.4(a) and (d), as well as his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is suspended from the practice of law for a period of 3 years, effective immediately. Should respondent apply for reinstatement, his reinstatement shall be conditioned

upon respondent's being on probation for a period of 2 years, including monitoring, following reinstatement, subject to the terms agreed to by respondent in the conditional admission and outlined above. Respondent shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

KLAUS P. LINDNER, APPELLANT, V. DOUGLAS KINDIG, MAYOR OF THE CITY OF LA VISTA, ET AL., APPELLEES.

826 N.W.2d 868

Filed March 1, 2013. No. S-12-294.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
2. **Limitations of Actions.** Which statute of limitations applies is a question of law.
3. **Judgments: Appeal and Error.** An appellate court reaches a conclusion regarding questions of law independently of the trial court's conclusion.
4. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
5. **Constitutional Law: Appeal and Error.** Generally, a constitutional issue not passed upon by the trial court is not appropriate for consideration on appeal.
6. **Constitutional Law: Limitations of Actions.** A constitutional claim can become time barred just as any other claim can.
7. **Constitutional Law: Statutes: Proof.** A plaintiff can succeed in a facial challenge only by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.
8. **Limitations of Actions.** The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit.
9. ____. The time at which a cause of action accrues will differ depending on the facts of the case.