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Recent Developments in Ethics & Disciplinary Actions

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The office of Counsel for Discipline of the Nebraska Supreme Court investigates and prosecutes attorneys who engage in unethical conduct. We have statewide jurisdiction over more than 7,000 attorneys licensed in Nebraska. In addition to prosecuting attorneys we also provide attorneys with advice on ethics questions. We prefer helping lawyers avoid ethical violations. We give CLE presentations and provide other guidance where we can.

Counsel for Discipline does not have authority or jurisdiction over non-lawyers, including CPAs, Insurance Brokers, Bank Trust Officers, and other professionals engaged in estate planning. However, if any of those individuals also happen to be licensed lawyers, we have jurisdiction.

The majority of our investigations arise from grievances filed against attorneys by clients – current and past. Grievances are also filed by other attorneys, judges, and members of the public who believe a lawyer has engaged in unethical conduct.

When we receive a grievance, we must first decide if there really is an ethics violation alleged. Sometimes the complainant is simply upset that his spouse's attorney in a divorce case treated him harshly. If there is no evidence or allegation of a violation of the Rules of Professional Conduct, we must dismissed the grievance summarily. However, if there is some indication that the lawyer may have engaged in unethical conduct, we will initiate a preliminary inquiry. If the grievance and attached documents show what appears to be a violation of a rule, then we open a formal investigation.

Ultimately, our duty is to investigate the allegations. The burden is on our office to prove allegations of misconduct by clear and convincing evidence. This is a high standard which we take seriously. We do not want to jeopardize a lawyer's livelihood on flimsy allegations. However, if a lawyer has engaged in unethical conduct it is up to the Nebraska Supreme Court to

determine the appropriate sanction. The lawyer may receive a Public Reprimand, be suspended for a period of months or years, or be disbarred.

Most of the grievances we receive allege that the lawyer neglected the client's case. Generally, the client is upset that the lawyer is not responding to phone calls, emails, and text messages. Or that the lawyer is not keeping the client informed about the status of his case. You can imagine that most of these grievances arise from family law cases and criminal defense cases.

On occasion clients complain that their attorney is not getting their will or estate plan done as quickly as they expected. We also get a number of complaints that a lawyer is dragging his feet in completing a probate matter. In some cases it is alleged that the lawyer made false statements to cover up his incompetence and mistakes. These are the cases we will review today.

We'll start with the case of ***State ex rel. Counsel for Dis. v. Stuart B. Mills,*** **267 Neb. 57, 671 N.W.2d 765 (2003)** Two-year Suspension

Mills had represented a middle-aged couple engaged in farming and livestock production. The husband unexpectedly died and had no will. The couple had adult children. Mills was representing the wife in her husband's estate. Unfortunately, Mills was unfamiliar with all the taxation issues involved and failed to associate with an experienced attorney. This multi-million dollar estate was subject to significant estate taxes. Mills gave inaccurate advice regarding renunciations as a way to reduce federal estate taxes. He failed to file necessary documents in a timely manner. Mills back-dated documents and falsely notarized signatures. When questioned by an IRS examiner, he made false statements. He then told his client and her adult children to lie to the IRS investigator if contacted. The client became concerned and contacted another, more experienced, estate practice lawyer. That lawyer quickly saw the problems Mills had created and took steps to unwind somethings and work with the IRS to resolve others. That lawyer filed a grievance against Mills with Counsel for Discipline.

Mills had practiced for 30 years without prior disciplinary problems. He had handled many estate cases over the years, but he didn't know what to do with the facts presented to him. He thought his overriding responsibility was to help his client avoid estate taxes; however, he was willing to act dishonestly. Fortunately his client was unwilling to follow his lead.

Mills had to admit most of the factual allegations because there was a substantial paper trial. Nevertheless, he and his attorney argued that because he was motivated by trying to help his client, he should not receive a severe sanction. After a disciplinary trial, the Referee recommended a 5-month suspension. I objected to the sanction as too lenient. The Court suspended Mills for 2 years.

While the disciplinary case was pending, Mills was facing felony charges in federal court. He pled to a felony and was placed on probation. When he sought reinstatement after the 2-year suspension, I objected based on the conviction. The Nebraska Supreme Court said I was too late and did not delay Mills' reinstatement.

One lesson from this case is: clients should have up to date estate plans and a will. I don't know if Mills had ever spoken to the clients about doing estate planning, but it would have made a big difference. Another, more important lesson, is that lawyers should recognize when they are in over their heads on a matter and affiliate with an attorney who knows what he or she is doing. Mills had years of experience so he thought he could wing it. His errors were costly to the client and very costly to him. The most important lesson to learn from this case is: Don't lie to the IRS and don't backdate and falsify signatures.

***State ex rel. Counsel for Dis. v. Roger R. Holthaus,* 268 Neb. 313, 686 N.W.2d 570 (2004)**
Six-month Suspension by Admission

Holthaus neglected his responsibilities as the attorney for the personal representative of a probate estate. The estate was valued at $307,741, of which the residual beneficiary, Holy Name Church of Omaha, was to receive all but $30,000. The assets of the estate were relatively liquid. The estate was opened on July 1, 1996; however, the first distribution to the Church was not made until February 2, 1998. Holthaus' neglect consisted of failing to file pleadings in a timely manner in the probate case, not filing tax returns, not communicating with the residual beneficiary, and not properly handling estate assets. As a result of Holthaus' failure to properly handle the probate proceedings, the residual beneficiary, Holy Name Church, filed a petition to surcharge the personal representative and Holthaus, which resulted in a judgment against Holthaus and the personal representative in the total sum of $22,901.56. Holthaus paid the entire judgment.

Holthaus offered a Conditional Admission in exchange for a six-month suspension of his license, which the Court accepted.

State ex rel. Counsel for Dis. v. Douglas D. Palik, 284 Neb. 353, 820 N.W.2d 862 (2012)
1 year suspension. 1 year probation.

Palik served as attorney for the PR of an estate. He neglected estate matters and did not know how to properly handle a particular distribution. Palik lied to a distributee for over a year about a $60,000 distribution. Palik went so far as to provide false UPS tracking numbers regarding a distribution check allegedly sent to the beneficiary. As a result of Palik's incompetence and neglect, the PR personally paid the distribution, but without interest. Palik

informed the Court that he would make restitution to the PR and to the distributee. The Court suspended Palik for one year to be followed by 1 year of probation. Palik was ordered to make the restitution payments.

Palik was later disbarred for commingling his personal funds with his client funds in his client trust account and mismanaging client funds in 3 different estates.See, **State ex rel. Counsel for Dis. v. Douglas D. Palik, 287 Neb. 527, 842 N.W.2d 798 (2014)**

State ex rel. Counsel for Dis. v. Rodney A. Halstead, 298 Neb. 149, 902 N.W.2d 701 (2017)
1 Year Suspension. 1 Year Probation.

In August 2009, Halstead was appointed permanent guardian of an incapacitated adult (the ward). He was required to file annual reports on the condition of the ward and, among other items, list the ward's current address and indicate how many times and on what dates he saw the ward in the past year. Halstead filed these mandatory reports with the county court for 6 consecutive years, 2010 through 2015.

However, each report contained information which Halstead knew to be false. In annual reports filed in 2010 and 2011, Halstead handwrote virtually identical responses: "I have seen [the ward] about once a month [and] check via phone more often." Then, in 2012, his typical response changed and he handwrote, "I have been kept updated mostly by telephone." Halstead handwrote this same response in his 2013 and 2014 report. Finally, in his 2015 report, Halstead replied in shorthand and handwrote, "updated by telephone." In fact, Halstead had not visited the ward or spoken to anyone at the ward's assisted living facility since 2009. If he had, he would have learned that the ward had moved out of the assisted living facility in 2011. Halstead learned of the ward's actual whereabouts only after a court-appointed visitor found the ward at another address and reported Halstead's neglect to the court.

Formal Charges

On August 15, 2016, Counsel for Discipline filed formal charges against Halstead, alleging that he violated his oath of office as an attorney and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (Competence), 3-501.3 (Diligence), 3-501.4(a)(2) (Communication with client), 3-503.3(a)(1) (Candor toward a tribunal) and (a)(3) (False evidence), and 3-508.4(a) and (c) (dishonest conduct). Halstead admitted to these allegations in his answer. The Court sustained Counsel for Discipline's motion for judgment on the pleadings limited to the facts. The Court then appointed a referee for the taking of evidence limited to the appropriate discipline.

In determining the appropriate sanction for Halstead's offense, the Court emphasized the serious nature of the offense and the fact that it was repeated year after year with no explanation suggesting that Halstead is indifferent to the special duties he owes the court as an officer of the

legal system. The Court also opined that neglect of these responsibilities compromises the integrity of the legal profession and the public interest which it serves.

The Court recognized that Halstead fully cooperated with the Counsel for Discipline, had practiced for many years, and had no previous disciplinary history. Nevertheless, the Court found that the duty of candor to the tribunal lies at the heart of an attorney's role as an officer of the court. And for Halstead, this was no slip of the tongue. His falsehoods were made in writing and were repeated from year to year.

The Court suspended Halstead from the practice of law for a period of 1 year. Before applying for reinstatement, Halstead must complete continuing legal education credits in legal ethics and office management. After the period of suspension, he may apply for reinstatement upon a showing of his fitness to practice law and compliance with all requirements. Upon reinstatement, Halstead shall be subject to a 1-year probation, during which time he shall not accept guardianship or conservatorship appointments.

Unfortunately, Mr. Halstead engaged in additional unethical conduct for which he was disbarred. S**tate ex rel. Counsel for Dis. v. Rodney A. Halstead, 300 Neb. 69, 912 N.W.2d 240 (2018).** While the first Halstead case was proceeding, information came to the attention of Counsel for Discipline that Halstead had a conflict of interest with multiple clients when he entered into a business relationship with them without proper protections for the clients, that he converted client funds before completing any work for a client, and that he failed to refund the unearned portion of the client funds when his representation was terminated. Halstead voluntarily surrendered his license and was disbarred. The Supreme Court opinion does not provide the underlying facts as set forth in the Formal Charges filed against Halstead.

In Count I it was alleged Halstead provided legal services to clients applying for Medicaid. Part of his services included assisting the clients with a spend-down of assets by converting resources to income to create a payment device for a gift, purportedly pursuant to the Deficit Reduction Act of 2005. Specifically, Halstead had clients transfer money to him personally on the assurances that he would place the money in a bank account solely in his name and issue the client a Promissory Note for repayment in installments without bearing interest. There was no separate business agreement with those clients.

Between 2015 and 2016, at least three separate clients were found to be ineligible for Medicaid due to the Promissory Note executed by Halstead. The loans were determined to be a "legal fiction designed to convert countable Medicaid resources into income".

Halstead was charged with entering into a business relationship with clients without a written advisement to seek the advice of independent legal counsel on the transaction or written informed consent of the client, thus creating a conflict of interest in violation of § 3-501.8(a) of the Nebraska Rules of Professional Conduct.

In Count II it was alleged that on December 23, 2016, Halstead went to the home of J.H., a terminally ill woman in hospice, to discuss transfer upon death documents regarding her home. During that meeting, J.H. agreed to have Halstead prepare a trust, for which Halstead charged J.H. $4300. J.H. wrote a check to Halstead that day for the full amount of $4300.

On December 23, 2016, J.H. signed an Estate Planning Engagement Agreement with Halstead. The Agreement provided that 50% of the fee was due upfront, with the remainder due upon the completion of the customized estate planning services. Halstead failed to provide a copy of the written agreement to J.H. for her records. On December 23, 2016, Halstead deposited the $4300 check from J.H. into his general operating account, not a trust account.

On approximately December 24, 2016, and again December 26-27, 2016, J.H. tried to reach Halstead to cancel the transaction, as she realized she already had a will that addressed her estate plan except for her home. Her calls were not returned.

Halstead claimed that on December 30, 2016, J.H. had left a message at his office, telling him to not do any more work until he had spoken to her. Halstead claimed that J.H. spoke to his paralegal later in the day and asked about the completion of the documents he was preparing. Halstead claims that J.H. was told that the documents were not completed for her signature yet.

On December 31, 2016, S.K., daughter of J.H., left messages at Halstead's office to report that her mother did not need a trust and requested a refund of her mother's money. On January 2, 2017, S.K. emailed Halstead, requesting that he stop all transactions and again requesting a refund. S.K. reiterated that her mother had attempted to contact Halstead on December 24, December 26 and December 27, 2016, and that S.K. had left her messages for Halstead over the weekend as well.

On January 3, 2017, Halstead sent an email to S.K. stating "You insisted that your mother wanted to stop everything I was doing for her. I told you that I would refund the full $4300 back to her as soon as I could. Your mother's original papers are going out in the mail today back to your mother." On January 5, 2017, J.H. received her documents back from Halstead that she had provided him, including her home deed and divorce decree. J.H. did not receive any documents drafted by Halstead.

On January 6, 2017, Halstead called J.H. to confirm that she did not want the trust and that she wanted the transaction cancelled. J.H. confirmed such, and Halstead agreed to refund her money. On approximately January 24 or 25, 2017, J.H. spoke to Halstead on the phone, inquiring regarding her refund. Halstead referenced the grievance filed with Counsel for Discipline and then claimed that her refund would now take 4 or more months due to the filed grievance. Halstead claimed that during the phone call he told J.H. that because of S.K.'s grievances to Counsel for Discipline and the Attorney General's Office, he did not "believe that I should pay her any money until the formal processes were concluded and then I would decide".

On February 17, 2017, Halstead informed Counsel for Discipline that he had not reimbursed J.H. because he was advised by his attorney "that there is an appearance of impropriety to pay back more than what was not yet earned, as it could appear like a payoff to withdraw a complaint."

On February 17, 2017, the Respondent told Counsel for Discipline that he had a flat fee contract with J.H. and was entitled to deposit the fees in his general account. Additionally, Halstead claimed that he had drafted all of the estate plan documents for J.H. on or about December 28, 2016, and that they were ready for signing. Halstead claimed that he had not completed the assistance of the funding of the assets and the settlement of the trust and inheritance tax after death, but since J.H. had negotiated a lower fee, he believes that he "substantially completed the work for which she had contracted and I was ready and willing to have her sign the documents and complete the other work as well".

On February 21, 2017, Counsel for Discipline requested a screen shot of the Halstead's computer history to show the creation of the documents on December 28, 2016, as he had claimed. On February 23, 2017, Halstead provided a screen shot, showing a "Date modified of 2/7/17", but no other data regarding the creation of the documents.

On March 2, 2017, S.K. reported that at no time in her or her mother's conversations with Halstead did he ever say that the work was completed after December 28, 2016, or provide them the documents. It was after December 28, 2016, that Halstead told S.K. and J.H. that he would refund the $4300.

Halstead was charged with converting client funds to himself before any work was completed for the client and then failed to refund the unearned portion of the client funds when his representation was terminated in violation of §§ 3-501.5(a), 3-501.15(a)(c)&(e), and § 3-501.16(d) of the Nebraska Rules of Professional Conduct.

Faced with these allegations, Halstead voluntarily surrendered his license.

State ex rel. Counsel for Dis. v. Michael Kozlik, 307 Neb. 339, ___ N.W.2d ___ (2020)
1 Year Suspension. 1 Year Probation.

Kozlik's license was revoked in Iowa because he misappropriated funds from his uncle's estate. This is an example of an attorney playing loose with the rules because the funds belonged to a relative and he thought no one would ever make an inquiry.

Kozlik was licensed in Nebraska in 1979 and in Iowa in 2000. A large part of his practice included estates and probate. Kozlik had a very close relationship with his Aunt and Uncle, Frances and Duane, who lived in Iowa. They had no children of their own. When Duane

died in 2015, Kozlik was appointed administrator of Duane's estate. Frances was the sole beneficiary. Kozlik was 62 at the time.

Six months after Duane's estate was opened, Kozlik began to write checks from the estate's bank account to himself. Over the next 2 years Kozlik wrote a total of 12 checks on the estate's account made payable to himself in the total amount of $39,350, although he repaid the account $9,700 before his misconduct was discovered. Thus, for just shy of $30,000 Kozlik lost his license to practice law in Iowa at the age of 67.

Under Iowa law, no payments may be made to an administrator without prior court approval. In addition, administrator fees are capped by statute, and in Duane's estate the cap was $9,263.37. Kozlik's misappropriation came to light when Aunt Frances died in April 2018. Duane's estate had not been closed and it was necessary to get the final accounting from Duane's estate so it could be passed to Frances' estate. When Kozlik eventually produced the documents they showed that he had made unauthorized withdrawals from Duane's estate. Kozlik claimed that he had earned the fees and was unaware that he needed court approval before paying himself. He admitted his error and repaid Duane's estate within 2 weeks.

In the Iowa disciplinary matter, Kozlik was charged with committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer. He was also charged with engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. At the disciplinary hearing Kozlik admitted that he violated the disciplinary rules but not the ones charged. The Commission found that Kozlik did engage in conduct involving dishonesty, but not a criminal act. The Commission recommended a Public Reprimand. The Disciplinary Board appealed asserting that Kozlik should be suspended.

The Iowa Supreme Court found that Kozlik engaged in dishonest conduct, and found that Kozlik committed a criminal act. The Court stated that a lawyer need not be charged or convicted of a crime in order to be found in violation of the rule. The Court did not accept Kozlik's excuse that he wasn't aware that he needed Court approval before he could pay himself fees from Duane's estate. The Court detailed Kozlik's years of experience of handling estates in Iowa. Nor did the Court accept Kozlik's testimony that he had eventually earned the funds even if he withdrew them prior to earning them.

In the Nebraska reciprocal discipline case, Kozlik asked the Nebraska Supreme Court to impose no discipline or, at most, a public reprimand. The Court quickly determined that reciprocal discipline was appropriate and disbarred Kozlik on September 25, 2020.

State ex rel. Counsel for Dis. v. Paul E. Galter, 305 Neb. 108, ___ N.W.2d ___ (2020)
Disbarment. Vol. Sur.

Paul Galter was licensed to practice law in Nebraska in June 1953; one year before I was born. This is a sad case because I met Paul early in my practice of law in Lincoln in 1983. He was well known and respected throughout the city. Paul even represented several lawyers facing ethics charges and did an excellent job resolving the cases to his clients' benefit. I was surprised that he continued to practice law well beyond the time when most lawyers his age had retired. He loved the practice of law and loved helping his clients.

Unfortunately, Paul Galter had a gambling problem. He liked to bet on horse racing at the off-track simulcast facility in Lincoln. He was there most every afternoon.

For many years, Paul served as the Trustee of a trust which generated several thousands of dollars annually, the net proceeds of which were to be paid to a local hospital. Over the years, Paul paid himself trustee fees between $1,800 and $7,000 per year. However, in 2018 he paid himself $17,163 and in 2019 - $24,334. He made these payments in 11 round dollar amounts of $1,000 or $2,000 during the months of January and February 2019. When confronted, Paul had no explanation other than he thought he had earned those fees.

At age 90, Paul had no retirement and no equity in his home. He couldn't afford to repay the trust any of the funds he had taken. I convinced Paul it was better to voluntarily surrender his license and accept an order of disbarment.

State ex rel. Counsel for Dis. v. Nancy G. Waldron, 307 Neb. 343, ___ N.W.2d ___ (2020)
Disbarment

Waldron was admitted to practice law in September 1984, one year after I was admitted. She was 25 years old. At the end of her career she was serving as the York County Public Defender. She was allowed to have a private practice also.

For years Waldron had served as attorney for 2 elderly sisters, one of which was institutionalized due to Alzheimer's. The sisters owned a farm consisting of 285 acres in Fillmore County. This farm generated annual income of about $60,000. Waldron had been managing the farm for the sisters for years. She had authority to write checks on the farm account, including paying herself attorney fees.

In 2012 Waldron paid herself fees of $9,000; however, in 2013 she paid herself fees of $29,000. There was nothing for her to do differently for the trust from one year to the next. In 2014 she paid herself fees of $33,000 and in 2015 - $31,000. In 2016 she paid herself only $17,000, but in 2017 she received $58,000 in fees.

The Bank which held the account for the sisters became concerned about high attorney fees and contacted Counsel for Discipline. In her response, Waldron claimed that she earned

such high fees because she was battling the Keystone Pipeline on behalf of the 285 acre farm. She provided a billing statement showing that she attended hearings at the Capitol and at other locations around the state. Unfortunately, on those same dates, Ms. Waldron was in court in York representing her Public Defender clients. She claimed to have written briefs regarding the pipeline, but could not produce any such briefs.

Waldron was charged with criminal theft. Based on those charges the Nebraska Supreme Court entered an order of temporary suspension. As a result, Waldron lost her job as York County Public Defender. Thereafter, Waldron entered a plea to attempted theft by unlawful taking. At age 60 she was convicted and sentenced to 5 years of probation. She was ordered to pay $57,000 in restitution. After sentencing, Waldron voluntarily surrendered her license and the Court disbarred her on September 25, 2020.

While Mrs. Waldron was under investigation regarding her theft from the elderly sisters, her husband Dale was convicted of a Class IV felony for stealing thousands of dollars of building supplies from his employer, a lumber yard.

State ex rel. Counsel for Dis. v. Gary R. Pearson, 310 Neb. 256 , ___ N.W.2d ___ (2021)
18-month suspension

The Court issued its decision on October 1, 2021, with a very limited statement of facts as follows. Pearson practiced law since 1976, including handling estate matters. The violations arise from Pearson charging and collecting excessive fees in several estate matters over a 2-year period and, in at least one instance, making false statements in court pleadings and to Counsel for Discipline related to the excessive fees. He also improperly maintained his trust account. Most facts are not in dispute in this case and were stipulated by Pearson and Counsel for Discipline at trial, or acknowledged in Pearson's testimony.

Pearson was charged with, and the Court found, that with respect to the four charges, Pearson had breached the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.1 (competence), 3-501.5(a) (charging unreasonable fee), 3-501.15 (safekeeping funds), 3-503.3(a)(1) (candor toward tribunal); 3-508.1(a) (false statements in disciplinary matters), and 3-508.4(a) and (c) (dishonesty).

Because Pearson did not contest the findings and recommended sanction submitted by the Referee, the Court's opinion does not provide much detail. In fact, there were four counts in the Amended Formal Charges. Count I related to the estate of David Wysong. David and Sally Wysong had done substantial estate planning with an attorney prior to his Sally's death in 2000. Separate trusts were created whereby the surviving spouse would receive the life benefit of the trust with the remainder to their 5 adult children. When Sally died, an inheritance tax

determination was made regarding David's life estate in the trust and the remainder interest to the children. Life expectancy calculations were made for David and a State Inheritance Tax was assessed against the remainder interest of the children, which David paid. David was named first successor trustee of Sally's trust. Although he was entitled to the interest and principal of Sally's trust, he did not use any of the funds so that all growth of the trust would flow to the 5 children.

David Wysong was meticulous in his record keeping and planning. Just months before his death on October 27, 2018, at age 84, David produced a statement of all his assets including account numbers and balances. This was one of the most organized estates one can imagine.

In June 2018, David contacted Pearson to draft a new, simple will, to reflect his current desires. Although there is no explanation available, David agreed to designate Pearson as his Personal Representative (PR) and allowed Pearson to include a clause directing the PR to hire Pearson as attorney for the PR. Nevertheless, as organized as David's affairs were, the probate of his estate should have been a simple and inexpensive endeavor.

At the time of David's death, his daughter Jody became the successor trustee of Sally's trust valued at around $500,000. The 5 children were equal beneficiaries. Sally's trust was held at a bank in liquid assets. Jody also became the successor trustee of David's trust valued at $925,325, held in liquid funds at a bank. The 5 children were equal beneficiaries. In addition to the liquid assets in David's trust, his house, valued at $158,000, was also owned by the trust. David's probate estate consisted of two bank accounts, a car, personal property and loans made to family members for a total of $100,268. David's non-probate assets totaled $1,252,000.

Without informing the 5 children, Pearson paid himself $64,000 in attorney fees and PR fees based on 3 ½% of a gross estate which included Sally's trust of $500,000. When the children finally learned what Pearson had done, he immediately returned $50,000 to the estate.

Pearson was charged with collecting an unreasonable fee, lack of competence, lack of candor to the court, and dishonesty.

In Count II regarding the estate of Gary Truax, there was only one beneficiary of the estate valued at $268,000; the Alzheimer's Foundation of New York. Pearson had prepared the will in which he was named as PR and directed to hire himself as attorney. Pearson charged an attorney fee of 5% ($13,317) and a PR fee of 5% ($13,317) for combined fees of $26,634, or 10% of a very simple estate.

In Count III relates to the estates of Janis Jaunzemis and Valda Jaunzemis, brother and sister. Pearson collected $10,000 as an attorney fee in Janis' estate valued at $50,000, or 20% of that estate. He collected a fee of 4.4% of Valda's estate valued at $680,000. Neither estate was

complicated because the PR did most of the work. The beneficiaries of Valda's estate were 4 Latvian charities.

In Count IV, Pearson was charged with violating the trust account rules because he maintained a slush fund or cushion of $2,000 of his money in his client trust account.

The Court suspended Pearson for 18 months.

General Provisions of the Rules of Professional Conduct

§ 3-501.7. Conflict of interest; current clients.

(a) Except as provided in paragraph (b), **a lawyer shall not represent a client if the representation involves a concurrent conflict of interest**. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

COMMENT

[27] **For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present**. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest **or arranging a property distribution in settlement of an estate.** The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost,

complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

[31] **As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit**.

See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

. . . .

In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

Florida Ethics Opinion 95-4 (1997)

A husband and wife consulted an attorney for estate planning. The husband separately told the lawyer that he wished to provide for a beneficiary who was unknown to the wife. The ethics committee advised that the attorney could not reveal this information to the wife, but instead must withdraw from the joint representation.

§ 3-501.8. Conflict of interest; current clients; specific rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

COMMENT

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. **In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit**, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

***State ex rel. Counsel for Dis. v. Tedd Huston,* S-01-1408 (January 16, 2002)**

Voluntary Surrender – Disbarment No published opinion

Huston was named as a co-defendant in a lawsuit brought by the heirs of Gladys Christensen, Huston's former client. The District Court found that Huston's client, George Haynes, defrauded Gladys out of her farm property and that Huston failed to protect his client, Gladys. In addition, Huston received a $10,000 "gift" from Gladys approximately one year before her death. The District Court set aside the gift because Huston failed to advise Gladys to seek independent legal advice about the gift. Huston was ordered to repay the $10,000 plus interest. See, *Lee M. Allen, Personal Representative of the Estate of Gladys I. Christensen v. George C. Haynes, et al.*, District Court of Custer County, Nebraska, Case No. CI98-76.

In 2001, Huston was suspended for six-months for charging an excessive fee in an estate and not being truthful in his responses during the disciplinary investigation. See, *State ex rel. NSBA v. Tedd C. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001). In light of that prior disciplinary suspension, Huston voluntarily surrendered his license in this second case.

§ 3-501.14. Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

I. WHO DOES THE ATTORNEY REPRESENT, THE PERSONAL REPRESENTATIVE OR THE ESTATE?

It should be well settled in Nebraska that the attorney is hired by the Personal Representative to represent the Personal Representative in the administration of the estate. This was clearly set out in *In Re Estate of Wagner*, 222 Neb. 699, 386 N.W.2d 448 (1986).

> "Attorneys represent people. There is no such position known as 'attorney of an estate.' When an attorney is employed to render services in securing the probate of a will or settling an estate, he acts as attorney for the personal representative and not for the estate. . . . Neb. Rev. State. §30-2476(21) (Reissue 1979) empowers the personal representative to employ an attorney to assist in the performance of the administrative duties of the representative."

222 Neb. at 702.

Nevertheless, even the most careful wordsmiths occasionally write that attorneys represent estates.

> "Schmidt retained Tomek as attorney for the estate."

Gravel v. Schmidt, 247 Neb. 404, 406, 527 N.W.2d 199 (1995).

> "In *Gravel v. Schmidt, supra*, the plaintiff, Tim Gravel, was promised by William Tomek, an attorney representing Gravel's deceased father's estate, that he would inherit somewhere between $50,000 and $100,000 upon final settlement of the estate."

Bauermeister v. McReynolds, 253 Neb. 554, 566, 571 N.W.2d 79 (1997).

II. A LAWYER'S DUTY TO NOTIFY COURT OF IMPROPRIETIES.

Two informal advisory opinions address the duty of an attorney to notify the court when the attorney discovers improprieties. In the first case the attorney represented the beneficiary of an estate in which a distribution was soon to be made. In the course of his representation, the lawyer discovered that the personal representative and his lawyer had mistakenly computed the value of the intestate shares of the beneficiaries to the benefit of some and detriment of others. When the attorney informed his client that the computation was incorrect and overstated the client's share by $10,000 the client suggested that the matter not be brought to anyone's attention since no one else was contesting the values.

The attorney's question to the Advisory Committee was whether he should bring the matter to the attention of the court or whether he was ethically prohibited from doing so. The advisory opinion first notes the attorney's duty to the court under Neb. Rev. Stat. §§ 7-105 and 7-106. The opinion concludes by stating that pursuant to Disciplinary Rule 7-102(B)(1) and DR 1-102(A), the attorney must call upon his client to rectify the mistake. If the client refuses to comply or is for any reason unable to report the correct information to the personal representative and to the court, then the attorney is required to disclose this mistake to both the personal representative and the court to prevent the court from being deceived and the beneficiaries of the estate from being deprived of their rightful distributive shares.

In the second case, the attorney represented the personal representative of an estate in which certain real estate was sold at a price represented to the attorney by the personal representative. This price was then used as the basis for the valuation of the assets and in determining that no inheritance tax was due. After the estate was closed the PR passed away and the attorney become aware by a third party that the PR may have been dishonest regarding the price she received from the sale of the real estate. The attorney's question to the Advisory Committee was whether he had a duty to disclose a possible fraud by the PR to the court and to the beneficiaries of the estate or whether this information must be kept confidential. The opinion of the Committee was that pursuant to DR 7-102(B), the attorney must disclose to the court and the beneficiaries of the estate that the personal representative did not report the full sale price of the real estate during the probate proceedings.

III. ROBIN HOOD OF KNOX COUNTY

A 1987 case illustrates what can happen when an attorney fails to provide the Probate Court with correct information. Attorney Frank Roubicek had a good probate practice in Knox County. As part of his standard procedure, he would increase the inheritance tax due to the county to the point that it eliminated the Nebraska estate tax. The net tax owed by the estate was the same; however, Knox County received substantially more than it was entitled to and the State received substantially less. When this practice was brought to light, Mr. Roubicek claimed that he was not to blame because the County Attorney had signed off on the Inheritance Tax

Worksheet and the Judge had signed the Order regarding the taxes due and they each had independent responsibilities to make sure the amounts were correct. The Nebraska Supreme Court did not accept this defense and suspended Mr. Roubicek for two years. *State Ex Rel. NSBA v. Roubicek*, 225 Neb 509, 406 N.W.2d 509 (1987). Mr. Roubicek's attempt to intimidate a County Attorney who challenged this practice did not set well with the Court. Nor did the Court give much weight to his argument that he should not be disciplined because the County Attorney who went along with this practice received only a private reprimand from the local Committee on Inquiry.

IV. DOES THE ATTORNEY-CLIENT RELATIONSHIP SURVIVE DEATH OF THE CLIENT?

It is well accepted that an attorney's obligation to preserve client confidences survives the death of the client. Section 27-503 (3) of the Nebraska Revised Statutes directs that the personal representative of a deceased client may claim the attorney-client privilege. However, in a recent informal advisory opinion it was determined that a valid waiver of the attorney-client privilege and a consent to the disclosure of confidential information obtained in the course of an attorney-client relationship can be made by the personal representative of the estate of the deceased client.

V. BUT I EARNED THOSE FEES!

A 1996 case from the Nebraska Court of Appeals warns that an attorney who represents the personal representative while having a conflict of interest may not be entitled to his fees. *In Re Estate of Watson,* 5 Neb. App. 184, 557 N.W.2d 38 (1996). In this case the law firm had represented the decedent, Clara Watson, prior to her death, and represented another party who had entered into a land transaction with Ms. Watson. This land transaction became a disputed issue after Clara's death. The law firm represented the personal representative of Clara's estate and performed valuable services to the estate. However, the firm did have a conflict of interest and ultimately withdrew from representing the personal representative. The firm later filed a claim for attorney's fees based upon the value of those services to the estate. The county court agreed that there was a conflict of interest but nevertheless, allowed the fees because the services performed by the attorneys did benefit the estate.

On appeal the question addressed by the Court of Appeals was whether an attorney who performs services despite a conflict of interest may receive compensation for such services, and if it makes a difference that the services were of benefit to the estate. The Court of Appeals concluded that any attorney services performed by the firm were inconsistent with the requirements of professional responsibility and cannot be compensated. The fact that there may have been benefit to the estate is insufficient to justify payment for services rendered at a time when counsel should not have been representing the client. "[A]n attorney who has a conflict of

interest of which he or she knew, or should plainly have known, may not receive attorney fees for legal services rendered to a client after acquiring such knowledge." 5 Neb. App. at 193.

VI. MAY A LAWYER ACT AS WITNESS TO A WILL DRAFTED BY THE LAWYER?

Although it is proper for a lawyer, when requested to do so by the testator, to witness his will or, after his death, to testify as a subscribing witness thereto, it is ethically improper for the lawyer to represent, in litigation, a party either as a proponent of such will or in a contest involving this or any other will purportedly executed by the identical testator. Advisory Opinion 69-2.

Disciplinary Rule 5-101 (B) (1) & (2) provides:

> (B) A lawyer shall not accept employment in contemplated or pending litigation if he or she knows or it is obvious that the lawyer or a lawyer in his or her firm ought to be called as a witness, except that the lawyer may undertake the employment and the lawyer or a lawyer in his or her firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

However, Advisory Opinion 74-9, allows for a lawyer to continue to represent the personal representative in the probate proceedings even though the attorney will be called as a witness in the will construction case so long as in that litigated portion of the proceedings the personal representative is represented by separate counsel.

VII. MAY THE LAWYER FOR THE PERSONAL REPRESENTATIVE BUY ESTATE ASSETS AT PUBLIC AUCTION?

A very reasonable question involving the purchase of estate assets was put to the Advisory Committee and its opinion is found as Formal Opinion No. 80-5. The attorney asked if it would be proper for him to bid at public auction on real estate being sold by the personal representative when the PR is represented by one of his partners. The opinion acknowledges that §30-2474 of the Nebraska Probate Code provides that any sale to the attorney for the PR "is voidable by any person interested in the estate except one who has consented after fair disclosure, unless: (1) the will or a contract entered into by the decedent expressly authorized the transaction; or (2) the transaction is approved by the court after notice to interested persons." Nevertheless, citing Canon 5 "A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client," and DR 9-101 "Avoiding Even The Appearance Of Impropriety," the Committee felt that the attorney should not purchase estate assets.

"The fact, however, that the legislature has seen fit to exonerate a violation of the self-dealing prohibition under certain circumstances does not necessarily make ethical what would otherwise be unethical. The Code of Professional Responsibility as adopted by the Nebraska Supreme Court and presently in effect is what governs the conduct of Nebraska lawyers, and in the opinion of this Committee, the Code does not permit the attorney for the Personal Representative of an estate or any member of his firm to purchase estate assets from the personal representative either at public or private sale."
Advisory Opinion 80-5

VIII. MAY AN ATTORNEY BE PAID FOR SERVICES AS PERSONAL REPRESENTATIVE AND AS LAWYER IN THE SAME ESTATE?

Often a client will ask his or her attorney to serve as personal representative of his or her estate. This is not inappropriate, and the attorney may be nominated as PR in the will. When the time comes, the attorney is appointed as personal representative and wishes to use his services or the services of his law firm to represent the personal representative. Advisory Opinion 81-5 states that where an attorney is the personal representative of a decedent's estate, and the attorney's law firm renders legal services to the PR, the firm may be compensated for the legal services, and the PR may be compensated for his services as PR, provided that the combined compensation is not excessive for the services rendered.

IX. THE CASE OF THE VANISHING CLIENT.

What should a lawyer do when he or she is holding funds in trust for a client and the client can no longer be found? Advisory Opinion 93-3 states that an attorney who is holding funds in trust for a client who cannot be located, should distribute those funds according to state law, after waiting the statutorily prescribed amount of time. The Uniform Disposition of Unclaimed Property Act, Neb. Rev. Stat. §§69-1301 to 69-1329, sets forth the procedure for disposing of unclaimed property. The attorney should make sure that he or she has taken appropriate measures to attempt to locate the missing client.

X. CLOSED FILES.

One of the most frequently asked questions is "How long must I retain closed files and how should I dispose of them?" An attorney does not have a duty to preserve permanently all of his or her files. Mounting and substantial storage costs can raise the cost of legal services, and the public interest is not served by unnecessary and avoidable cost increases. Clients and former clients, on the other hand, have a right to expect that valuable information in their lawyer's files, not otherwise available to them, will not be carelessly destroyed. In Advisory Opinion No. 88-3,

the Committee provides some guidelines to assist attorneys in making the decision as to the retention or destruction of client files.

1. The file may include original documents or other property furnished by or on behalf of the client, the return of which might reasonably be expected by the client. Before destroying such documents or property, the client should be asked whether he wants delivery of them. Alternatively, the lawyer may simply deliver such documents to the client with appropriate advice regarding factors which the client should consider in determining which items to preserve. Where unable to contact the client, the lawyer should be guided by the foreseeable need for the documents in determining whether to destroy them.

2. An attorney must use care not to destroy or discard information that he knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which a statute of limitations has not expired.

3. An attorney must consider the reasonable expectations of the client for the preservation of files.

4. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their relevance and materiality to matters that can be expected to arise in the future.

5. Disposition of client files must be made in such a manner as to protect fully the confidentiality of the contents.

Advisory Opinion 88-3 concludes:

> "It is not possible to state a definite time as to when closed client files may be destroyed. The retention or destruction of client files is primarily a matter of good judgment, weighing the client's interests and expectations in the retention of file materials, the reasonably expected future usefulness of the file contents, the careful preservation of confidentiality, and the availability of storage space."

It should also be noted that an attorney should retain indefinitely accurate and complete records of all receipts and disbursements of trust funds.