

195

Case No. S-04-0875

IN THE SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA *ex rel.*
COUNSEL FOR DISCIPLINE OF THE
NEBRASKA SUPREME COURT,

Relator,

vs.

JOHN M. GILROY,

Respondent.

ORIGINAL PROCEEDING

REPLY BRIEF OF RELATOR

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TABLE OF CONTENTS

OBJECTION TO RESPONDENT’S STATEMENT OF FACTS 1
RESPONDENT FAILED TO PRODUCE ANY EVIDENCE IN MITIGATION .. 1
RESPONDENT’S RECOMMENDED SANCTION IS UNTENABLE 2
CONCLUSION 2

TABLE OF AUTHORITIES

Cases

State ex rel. NSBA v. Gilroy, 240 Neb. 578, 483 N.W.2d 135 (1992). 2
State ex rel. NSBA v. Miller, 258 Neb. 181, 602 N.W.2d 486 (1999). 2

Court Rules

Neb. S. Ct. Rules of Practice and Procedure 9 D g 1

OBJECTION TO RESPONDENT'S STATEMENT OF FACTS

Formal charges were filed against respondent on July 29, 2004, and respondent was personally served on August 5, 2004. Respondent failed to file an answer within 30 days so on September 8, 2004, relator filed a motion for judgment on the pleadings which the court sustained on September 15, 2004. The court directed the parties to submit briefs and argument limited to the issue of the appropriate sanction.

The only evidence before the court is the undisputed facts set forth in the formal charges. Respondent chose not to file an answer to the charges, thus no hearing was held before a referee where additional factual information could be presented. Consequently, respondent is limited the facts admitted in the formal charges and cannot add allegations of additional facts by mere argument. There is no record from which such allegations of facts can be gleaned. Therefore, relator urges the court to disregard all statements made in respondent's brief beginning at page 6 wherein respondent attempts to insert additional information before the court. See, *Neb. S. Ct. Rules of Practice and Procedure 9 D g*. "Each and every recitation of fact, whether in the statement of facts or elsewhere in the brief, shall be annotated to the record in the manner set for the in part C of this rule;"

RESPONDENT FAILED TO PRODUCE ANY EVIDENCE IN MITIGATION

Because respondent chose not to file an answer to the formal charges and thereby waived a hearing before a referee, there is no evidence of mitigation before the court. In determining the sanction to be imposed, the court should not entertain respondent's suggested factors in mitigation because no evidence was presented to which respondent can sight in support of his arguments.

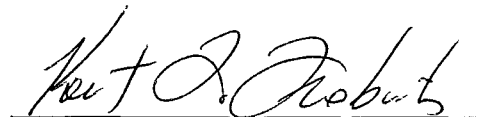
RESPONDENT'S RECOMMENDED SANCTION IS UNTENABLE

Respondent requests a public reprimand or in the alternative a 30-day suspension of his license to practice law. Respondent utterly failed to address the undisputed fact that he misappropriated his client's funds as set forth in paragraphs 20 through 23 of the formal charges. Similarly, respondent failed to address the fact that in 1992 he was suspended for one year for not maintaining client funds in his trust account. See, *State ex rel. NSBA v. Gilroy*, 240 Neb. 578, 483 N.W.2d 135 (1992). The court has repeatedly held that multiple acts of attorney misconduct are deserving of more serious sanctions. See, and *State ex rel. NSBA v. Miller*, 258 Neb. 181, 602 N.W.2d 486 (1999).

CONCLUSION

Respondent's license to practice law should be suspended for a period of not less than one year.

Respectfully submitted this 21 day of January 2005.



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