STATE OF MINNESOTA

IN SUPREME COURT

A16-1282

Original Jurisdiction

Per Curiam
Concurring in part and dissenting in part, McKeig, J.
Took no part, Lillehaug, Hudson, and Chutich, JJ.
Dietzen, Christopher J., Acting Justice*

In re Petition for Disciplinary Action
against Michelle Lowney MacDonald,
a Minnesota Attorney, Registration
No. 0182370.

Filed: January 17, 2018
Office of Appellate Courts

Susan M. Humiston, Director, Office of Lawyers Professional Responsibility, Saint Paul, Minnesota, for petitioner.

Paul Engh, Minneapolis, Minnesota, for respondent attorney.

S Y L L A B U S

1. An attorney's good-faith reliance on her client's representations is not an absolute defense to attorney discipline, nor does the First Amendment immunize an attorney's false statements impugning the integrity of a judge.

2. A 60-day suspension, followed by 2 years of supervised probation, is the appropriate discipline for an attorney who failed to competently represent a client; made false statements about the integrity of a judge with reckless disregard for the truth;

* Appointed pursuant to Minn. Const. art. VI, § 10, and Minn. Stat. § 2.724, subds. 2–3 (2016).

improperly used subpoenas; knowingly disobeyed a court rule and failed to follow a scheduling order; and engaged in disruptive courtroom conduct, including behavior resulting in her arrest.

O P I N I O N

PER CURIAM.

The Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action against respondent Michelle Lowney MacDonald alleging various acts of professional misconduct. After MacDonald responded to the allegations, we appointed a referee, who held a hearing and determined that MacDonald's conduct violated numerous provisions of the Minnesota Rules of Professional Conduct. The referee recommended that we impose a 60-day suspension followed by 2 years of probation, and that we require MacDonald to undergo a mental-health evaluation. We conclude that the referee's findings and conclusions are not clearly erroneous and that a 60-day suspension followed by 2 years of supervised probation is the appropriate discipline for MacDonald's misconduct. We decline, however, to impose a mental-health evaluation as a condition of MacDonald's probation.

FACTS

MacDonald was admitted to practice law in Minnesota in 1987. Her primary area of practice is family law. Her only prior discipline was a private admonition in 2012 for trust-account violations and failing to cooperate with the Director's investigation. Before addressing MacDonald's specific arguments, we first summarize the referee's findings of fact and conclusions of law.

MacDonald began representing S.G. in 2013, as her fourth attorney of record, in a family-law matter. Among her first actions, MacDonald filed a motion challenging the constitutionality of Minnesota's family-law statutes in response to one of the court's orders. MacDonald's motion relied exclusively on S.G.'s rendition of the facts—specifically, that the order was the result of an *ex parte* communication between the district judge and opposing counsel. It turns out, however, that the district court entered the order by mutual agreement of the parties' attorneys. Indeed, S.G.'s attorney at the time even drafted the order. The court denied MacDonald's motion and explained that it was predicated upon an inaccurate factual assumption.

As the matter advanced toward trial, MacDonald directed an associate to subpoena S.G.'s three prior attorneys to produce their bills and appear at trial because she believed that their testimony was necessary to lay the foundation for a request for attorney fees. MacDonald never contacted the attorneys, however, to ask whether the bills could be provided without a subpoena, nor did she contact opposing counsel to determine if a stipulation could be reached. Opposing counsel later testified that she would not have stipulated to the amount of the bills.

S.G.'s former attorneys moved to quash the subpoenas. The court granted their motions, concluding that MacDonald failed to take reasonable steps to avoid placing an undue burden on the attorneys. *See* Minn. R. Civ. P. 45.03(a) ("A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena."). MacDonald was personally sanctioned in the amount of $6,202.50 for her conduct. *See* Minn. R. Civ.

P. 45.03(d) (providing for "reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents").

MacDonald appealed the order, but the court of appeals affirmed, reasoning that MacDonald could have established the amount of attorney fees using alternative means, such as having her client testify to the amount of fees she personally paid to her attorneys. The referee concluded that MacDonald's use of the subpoenas violated Minn. R. Prof. Conduct 3.1,[1] 3.4(c),[2] 4.4(a),[3] and 8.4(d).[4]

During the hearing on the motions to quash, MacDonald interrupted the judge several times. When the judge told her that she was being disruptive, prompting him to call a deputy forward, she replied, "[t]he rules are that an attorney can't talk in court?" MacDonald also interrupted the judge dozens of times during other hearings in the case. The referee concluded that MacDonald's disruptive conduct during these hearings violated Minn. R. Prof. Conduct 3.5(h).[5]

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[1] "A lawyer shall not bring . . . a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous . . . ." Minn. R. Prof. Conduct 3.1.

[2] "A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists . . . ." Minn. R. Prof. Conduct 3.4(c).

[3] "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." Minn. R. Prof. Conduct 4.4(a).

[4] "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice . . . ." Minn. R. Prof. Conduct 8.4(d).

[5] "A lawyer shall not engage in conduct intended to disrupt a tribunal." Minn. R. Prof. Conduct 3.5(h).

On the day that S.G.'s trial was set to begin, MacDonald filed a civil-rights lawsuit in federal court on S.G.'s behalf against the district judge personally, not in his official capacity. MacDonald then moved for the judge's recusal from the case based on the pending federal lawsuit against him. The judge denied the motion, at which point MacDonald stated, "[a]nd you are telling me that you can be impartial in this trial, which you haven't done since day one." The referee found that this statement violated Minn. R. Prof. Conduct 8.2(a)[6] and 8.4(d), because it was made with reckless disregard for the truth.

Because she had expected the judge to recuse, MacDonald admitted that she was "not ready to proceed" with the trial. She called only one witness, referred to the proceeding as a "pretend trial," and interrupted the court at least half a dozen times. The referee concluded that her lack of preparation violated Minn. R. Prof. Conduct 1.1,[7] and that her repeated interruptions violated Minn. R. Prof. Conduct 3.5(h).

Before the official start of the second day of trial, but after the judge had briefly taken the bench, MacDonald approached the court reporter and accused her of inaccurately recording the prior day's testimony. MacDonald announced that, if the court reporter was unwilling to accurately record the events at trial, she would do so herself. MacDonald then began taking pictures of the courtroom. Court deputies approached MacDonald and

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[6] "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." Minn. R. Prof. Conduct 8.2(a).

[7] "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Minn. R. Prof. Conduct 1.1.

reminded her that she knew not to take pictures in the courtroom. *See* Minn. Gen. R. Prac. 4.01 ("[N]o pictures . . . shall be taken in any courtroom . . . *during a trial* . . . ." (emphasis added)); Order Regarding Cameras and Other Recording Equipment in Court Facilities (Dakota Cty. Dist. Ct. July 1, 2005) (providing, in a standing district-court order adopted "pursuant to Rule 4 of the General Rules of Practice," that "[n]o pictures . . . shall be taken in *any* courtroom . . . ." (emphasis added)).

Later that morning, during a recess, the deputies again approached MacDonald and advised her that she would receive a contempt citation for taking photographs in the courtroom. MacDonald initially cooperated with the deputies by accompanying them to a holding area to complete the necessary paperwork, but thereafter refused to give the deputies her full legal name, date of birth, and address. When asked for her name, for example, she replied, "[y]ou know my name."[8] The deputies tried for approximately 15 minutes to obtain basic biographical information for the citation, but MacDonald refused to cooperate. Eventually, the deputies placed her in custody.[9]

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[8] MacDonald's full legal name is Michelle Lowney MacDonald Shimota. Professionally, however, she uses the name Michelle Lowney MacDonald.

[9] Despite MacDonald's failure to cooperate, the deputies eventually were able to issue the contempt citation and a separate citation for obstruction of legal process. MacDonald spent 30 hours in jail for the offenses. The failure to release MacDonald after issuing the two misdemeanor citations violated Minn. R. Crim. P. 6, but the judge on the criminal case concluded that the detention "was justified by [MacDonald's] actions." *See id.* (requiring a peace officer who issues a citation and acts without a warrant to "release the defendant" unless one of three conditions is present). The prosecutor decided not to charge her with obstruction of legal process, and the district court dismissed the contempt-of-court citation. MacDonald's underlying conduct, not the criminal charges, is the basis for our decision today.

The deputies asked MacDonald to remove her jewelry, glasses, and shoes, and to submit to a pat-down search. The deputies then placed MacDonald in a holding cell. When the time came for her to return to the courtroom, MacDonald refused to stand up or walk to the courtroom on her own. The deputies therefore placed her in a wheelchair and handcuffed her hands to a belt that they had secured around her waist to bring her to the courtroom. Video footage of the incident shows that the deputies attempted to return MacDonald's shoes, but she refused to put them on.

While MacDonald was in custody, S.G. retrieved MacDonald's files, including her trial materials, and left the courthouse. Once MacDonald returned to the courtroom, the judge reminded her that she had an obligation to her client and repeatedly inquired about how she wished to proceed, including offering her numerous chances to contact her client and retrieve her files. Each time, MacDonald refused to respond or otherwise seek an accommodation. Her involvement in the remainder of the trial was minimal. In fact, MacDonald agrees that she did not competently represent her client, but she testified at the disciplinary hearing that her inadequate representation was due solely to her illegal arrest. She maintains that there was "nothing [she] could say or do" to correct the situation and that she "didn't do anything wrong."

The referee found that MacDonald's actions, both before and after her arrest, were an effort to produce a mistrial or support an appeal in S.G.'s case, or to gather evidence for the federal lawsuit against the judge. The referee concluded that MacDonald's conduct violated Minn. R. Prof. Conduct 1.1, 3.4(c), 3.5(h), and 8.4(d). The referee also concluded that MacDonald's separate failure to perfect an appeal in S.G.'s case, by neglecting to serve

the notice of appeal on the guardian ad litem in a timely fashion, violated Minn. R. Prof. Conduct 1.1.

MacDonald subsequently amended the complaint in the federal lawsuit to include the facts surrounding the photo-and-arrest incident. The complaint alleged that the judge had retaliated against S.G. and MacDonald, compromised the Minnesota Court Information System (MNCIS), "usurped" case files with the assistance of opposing counsel, signed documents that he knew were false, and acted without jurisdiction or legal authorization. The federal district court dismissed all of the claims in the complaint, describing them as "futile" and noting that "nothing in the record supports the[m]." When asked at the disciplinary hearing about the basis for her allegations, MacDonald responded, "[t]he record speaks for itself." The referee concluded that MacDonald violated Minn. R. Prof. Conduct 3.1, 8.2(a), and 8.4(d) by making recklessly false allegations against the judge that no reasonable attorney would have made based on the evidence available.

In addition to filing a federal lawsuit against the district judge in S.G.'s case, MacDonald wrote a letter to the Board on Judicial Standards complaining about the judge's behavior and asserting that he had acted unethically during S.G.'s trial. In total, she wrote four letters to the Board, each impugning the judge's integrity and repeating the allegations from the federal lawsuit. She sent copies of these letters to numerous elected officials and made similar remarks in letters to other attorneys. The referee concluded that MacDonald's statements were false, made with reckless disregard for the truth, and violated Minn. R. Prof. Conduct 8.2(a) and 8.4(d).

Although the petition for disciplinary action focused primarily on MacDonald's

representation of S.G., it also alleged that MacDonald acted unethically in her representation of J.D. in a separate lawsuit. MacDonald, who was J.D.'s third attorney of record, defied the court's scheduling order by submitting trial exhibits 11 days late and failing to file proposed findings of fact and conclusions of law. MacDonald has admitted that she did not fully comply with the court's scheduling order.

The district court scheduled J.D.'s trial for only 2 days, but due in part to MacDonald's lack of preparation, the trial lasted 9 days, which was, as the court stated, "virtually unheard of in this kind of case." During the trial itself, MacDonald repeatedly interrupted the judge, who ordered MacDonald to discontinue her disruptive behavior. Based in part on MacDonald's "disorganization, noncompliance with scheduling orders . . . and poor trial preparation," the court ordered J.D. to personally pay $20,000 in conduct-based attorney fees. At the disciplinary hearing, MacDonald blamed J.D. for her lack of preparation and failure to comply with the scheduling order.

The referee concluded that MacDonald "knew or should have known she was responsible for . . . compliance with court scheduling orders" and that her failure to follow the scheduling order violated Minn. R. Prof. Conduct 3.4(c) and 8.4(d). The referee further concluded that MacDonald's recurring disruptions violated Rule 3.5(h).

Following a 2-day disciplinary hearing, which included the presentation of evidence and testimony, the referee determined that the Director had proven by clear and convincing evidence that MacDonald's conduct violated Minn. R. Prof. Conduct 1.1, 3.1, 3.4(c), 3.5(h), 4.4(a), 8.2(a), and 8.4(d). The referee recommended a 60-day suspension followed by 2 years of probation, including a requirement that MacDonald undergo a mental-health

evaluation as a condition of her probation.

ANALYSIS

Because MacDonald ordered a transcript of the attorney-discipline proceedings, "the referee's findings of fact and conclusions of law are not binding." *In re Glasser*, 831 N.W.2d 644, 646 (Minn. 2013). Nonetheless, we give them "great deference" and "will uphold them if they have evidentiary support in the record and are not clearly erroneous." *In re Paul*, 809 N.W.2d 693, 702 (Minn. 2012); s*ee also In re Aitken*, 787 N.W.2d 152, 158 (Minn. 2010) (providing that we "review the interpretation of the MRPC de novo," but "review the application of the MRPC to the facts of the case for clear error"). The referee's findings and conclusions are clearly erroneous only "when they leave us with the definite and firm conviction that a mistake has been made." *Glasser*, 831 N.W.2d at 646 (citation omitted) (internal quotation marks omitted).

I.

MacDonald first challenges the referee's factual findings, primarily because she believes that the referee omitted critical facts. Among the facts excluded, according to MacDonald, is that her client had no billing records to provide, making her decision to subpoena S.G.'s past attorneys reasonable, and that opposing counsel in the S.G. matter was also late to court several times. Because nothing in the record, other than MacDonald's testimony, supports these allegedly omitted facts, there is no clear error in the referee's findings. *See In re Grigsby*, 764 N.W.2d 54, 60–61 (Minn. 2009) (holding that it was not clear error for the referee to "fail[] to make the requested findings" in part because there was "no documentation in the record"). Moreover, neither fact, even if true, undermines

the referee's findings that MacDonald herself was late to court and acted unreasonably in failing to explore other options before pursuing the subpoenas.

MacDonald further challenges the referee's findings surrounding her arrest and detention, again arguing that the referee missed crucial facts, not the least of which was that the deputies illegally arrested her and that her predicament left her powerless to remedy the situation. Again, we disagree. The record supports the referee's finding that the deputies would not have arrested MacDonald if she had provided basic biographical information, such as her name, date of birth, and address, as they had repeatedly requested. The video of the incident, the trial transcript, and the testimony of the two deputies provide ample support for the referee's findings surrounding the photo-and-arrest incident. Furthermore, even if the eventual arrest were illegal, MacDonald had a choice about whether to cooperate or escalate the situation. She elected to make things worse by refusing to cooperate with the deputies in even the most perfunctory way, which supports the referee's overarching finding that, had she provided the requested information to the deputies, "she would [have been] allowed to return to the courtroom."

Finally, MacDonald challenges numerous findings that simply restate the actual words that she used during S.G.'s trial and the disciplinary hearing. MacDonald fails to explain why she believes these findings are erroneous. Even so, we reject MacDonald's challenges because we have no reason to doubt the accuracy of the official transcripts relied upon by the referee in making these findings. Likewise, the referee did not clearly err in summarizing the allegations from MacDonald's federal lawsuit because there is ample "evidentiary support in the record" for each finding, including from the amended complaint

and the federal district court's order dismissing MacDonald's lawsuit. *Paul*, 809 N.W.2d at 702. Accordingly, even if there is some contrary evidence in the record on some of these points, in light of the record as a whole, we cannot conclude that the referee's findings were clearly erroneous.

II.

Having upheld the referee's findings, we now turn to MacDonald's challenges to the referee's conclusions of law. MacDonald challenges nearly every conclusion of law. She specifically challenges the referee's conclusion that she violated both Minn. Gen. R. Prac. 4.01 and a standing district-court order by taking photographs in the courtroom. She also raises two general defenses, good-faith reliance and free-speech immunity, which she says excuse her false statements and filings.

A.

MacDonald's first legal challenge is to the validity of the Dakota County standing order prohibiting anyone, including attorneys, from taking pictures "in any courtroom." Order Regarding Cameras and Other Recording Equipment in Court Facilities (Dakota Cty. Dist. Ct. July 1, 2005). Unlike the General Rule of Practice that bans anyone from taking photographs "during a trial," Minn. Gen. R. Prac. 4.01, the standing order is broader and appears to ban an individual from taking photographs at any time. According to MacDonald, these two rules conflict, and based on our authority to regulate practice within the district courts, the conflicting standing order must yield to the statewide General Rule of Practice.

The conflict that MacDonald identifies does not exist, either as a factual or legal

matter. Rather than picking one rule over the other, as MacDonald now argues, the referee applied both rules and concluded that "[t]he Director has proven by clear and convincing evidence that [MacDonald's] conduct in taking pictures in violation of Court rule *and* District Court Order violated Rule 3.4(c) (MRPC) and Rule 8.4(d) (MRPC)." (Emphasis added.) Factually, therefore, the referee's conclusion does not suggest that the local standing order preempts a statewide general rule of practice.

Legally, moreover, leaving aside whether it is appropriate to have a local standing order that addresses the same subject as a General Rule of Practice, there is no actual conflict between the two rules. One rule, General Rule of Practice 4.01, prohibits taking photographs "in any courtroom . . . during a trial" and the other, the Dakota County standing order, expands a situational prohibition into one of across-the-board applicability. Neither rule, however, affirmatively *allowed* MacDonald to take photographs in the courtroom, which is the only way that MacDonald could have established an actual conflict between the two rules. Accordingly, because it is undisputed that MacDonald took photographs in the courtroom, we conclude that the referee did not err in concluding that MacDonald's conduct violated the Dakota County standing order.[10]

B.

MacDonald's second legal challenge, the first of her two general defenses, is her theory that she was "permitted to believe" and "act upon" her client's representations in

[10] We need not reach the issue of whether MacDonald's conduct also violated Minn. Gen. R. Prac. 4.01, which would require us to decide the meaning of the phrase "during a trial." It is sufficient that MacDonald violated the local standing order, and it would make no difference if her conduct also violated another rule.

good faith, even if they turned out not to be true. To be sure, an attorney "has an obligation to present the client's case with persuasive force" and "is usually not required to have personal knowledge of matters asserted" in "pleadings and other documents prepared for litigation." Minn. R. Prof. Conduct 3.3, cmts. 1, 3.

But neither of the aforementioned principles was inconsistent with MacDonald's duty to "provide competent representation," including her obligation to employ the "knowledge, skill, thoroughness, and preparation" that was "reasonably necessary." Minn. R. Prof. Conduct 1.1. Nor did they conflict with her duty to ensure that "the allegations and other factual contentions [in her litigation documents] ha[d] evidentiary support." Minn. R. Civ. P. 11.02(c). In fact, contrary to MacDonald's position, the Minnesota Rules of Professional Conduct specifically recognize an attorney's obligation to exercise reasonable care before making claims during the course of litigation, emphasizing that competency "includes inquiry into . . . the factual and legal elements of the problem" and that lawyers need to "inform themselves about the facts of their clients' positions." Minn. R. Prof. Conduct 1.1 cmt. 5; Minn. R. Prof. Conduct 3.1 cmt. 2.

MacDonald's claim that "she was entitled to believe her client" without performing any investigation into her client's story is therefore untenable under the circumstances. The record establishes that MacDonald had access to records and information that would have undermined the accuracy of S.G.'s account. Yet MacDonald did not use the "sources and . . . information" available to her to verify what S.G. had told her. *In re File No. 17139*, 720 N.W.2d 807, 814 (Minn. 2006). The referee was accordingly entitled to conclude, despite MacDonald's claims of good faith, that a reasonable attorney would not have made

serious allegations against a district judge without first verifying her client's account. *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990); *see also In re Nathan*, 671 N.W.2d 578, 585 (Minn. 2003) ("[T]he standard for judging statements [under Minn. R. Prof. Conduct 8.2] is an objective one.").

C.

MacDonald's final legal challenge, and the second of her general defenses, is that the First Amendment absolutely immunizes her criticisms of the district judge, including her decision to file the federal lawsuit and to write letters disparaging him to the Board on Judicial Standards and to other attorneys and public officials. To the extent that MacDonald claims that she had an absolute right to criticize the judge, even in the absence of a reasonable investigation or sufficient evidence in support of her allegations, MacDonald is wrong.

As an officer of the court, an attorney does not have an absolute right to make false and disparaging remarks about judges or other attorneys. Rather, attorneys are subject to a modified version of the constitutional standard for defamation claims. The standard, adapted from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applies a version of the actual-malice standard from defamation cases, but modifies it to ask what a "reasonable attorney . . . would do in the same or similar circumstances."[11] *Graham*, 453 N.W.2d at

[11] MacDonald suggests that our standard from *Graham* is no longer good law in light of two Supreme Court decisions, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), and *Snyder v. Phelps*, 562 U.S. 443 (2011). But neither of these cases involved a challenge to an ethical rule like Minn. R. Prof. Conduct 8.2(a). And to the extent that MacDonald relies on *In re Yegman*, a Ninth Circuit case, *Yegman* actually supports the *Graham* standard. Specifically, *Yegman* recognizes that an "objective standard" applies to whether

321–22, 321 n.6. Our modified standard provides adequate protection for attorney speech but also preserves our ability to discipline attorneys who make baseless allegations against judges or other attorneys during the course of litigation. *See id.* at 321–22.

Applying the modified actual-malice test from *Graham*, we agree with the referee that MacDonald is not entitled to First Amendment protection for her statements because no reasonable attorney in MacDonald's shoes would have made such serious allegations about a judge's integrity and impartiality without substantiating evidence. Our conclusion applies equally to her allegations in the federal lawsuit, in her complaints to the Board on Judicial Standards, and in her correspondence to other attorneys and public officials. As we have held, when "an attorney abuses" her First Amendment rights, "she is subject to discipline." *Id.* at 321.

III.

We now turn to the appropriate discipline. The referee recommended that we impose a 60-day suspension followed by 2 years of probation, including requiring MacDonald to undergo a mental-health evaluation and comply with its recommendations as a condition of her probation. MacDonald maintains that her misconduct does not warrant any discipline, and the Director, for her part, requests that we suspend MacDonald for 90 days. "Although we place great weight on the referee's recommended discipline, we retain ultimate responsibility for determining the appropriate sanction." *In re Rebeau*,

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an attorney may be disciplined for recklessly false statements about "the qualifications, integrity, or record of a judge." 55 F.3d 1430, 1437–38 (9th Cir. 1995).

787 N.W.2d 168, 173 (Minn. 2010).[12]

The purpose of attorney discipline "is not to punish the attorney, but rather to protect the public [and] the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys." *In re Fairbairn*, 802 N.W.2d 734, 742 (Minn. 2011) (citation omitted) (internal quotation marks omitted). We consider four factors in determining the appropriate discipline: "(1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violations; (3) the harm to the public; and (4) the harm to the legal profession." *In re Nelson*, 733 N.W.2d 458, 463 (Minn. 2007). Beyond those four factors, we consider the discipline imposed in similar cases and any aggravating or mitigating circumstances that may exist. *In re Tigue*, 900 N.W.2d 424, 431 (Minn. 2017).

A.

We first address the four factors, beginning with the nature of MacDonald's misconduct. Some of MacDonald's misconduct—such as making false statements about a judge with reckless disregard for the truth, both in pleadings and elsewhere—involves dishonesty, which "is significant misconduct." *In re Nwaneri*, 896 N.W.2d 518, 525 (Minn. 2017); *accord In re Nett*, 839 N.W.2d 716, 722 (Minn. 2013) (stating that an

[12] The referee concluded that MacDonald's improper pursuit of subpoenas and failure to perfect her client's appeal violated the Rules of Professional Conduct, but it is unclear whether the referee considered either type of misconduct in making a recommendation on the appropriate discipline. Regardless, we consider all misconduct in determining the appropriate discipline and we will do so here, including MacDonald's misuse of subpoenas and failure to perfect an appeal. *See In re Overboe*, 867 N.W.2d 482, 488 (Minn. 2015) (providing that "[w]e consider [respondent's] misconduct as a whole").

attorney's misconduct, which included making false statements about members of the judiciary, "warrants a serious disciplinary sanction"). Her other misconduct—including repeatedly disrupting court proceedings and taking photographs in violation of a court rule—oversteps the "bounds of proper professional behavior," which require attorneys to "comply with court rules and orders, develop a courteous and civil rapport . . . and maintain respect for the bench." *In re Torgerson*, 870 N.W.2d 602, 614 (Minn. 2015) (citation omitted) (internal quotation marks omitted); *see also In re Getty*, 401 N.W.2d 668, 671 (Minn. 1987) (stating that discipline was "mandated" for an attorney who was "rude, loud and disrespectful" and needed to "learn to show more restraint and more respect for the judicial system even while disagreeing strongly with it or its decisions").

Cumulatively, MacDonald's misconduct was committed over the course of more than a year, eliminating the possibility that her violations were merely a "brief lapse in judgment or a single, isolated incident." *Nwaneri*, 896 N.W.2d at 525 (citation omitted) (internal quotation marks omitted). Her misconduct was far-reaching and varying, from making recklessly false statements about a judge to failing to competently represent a client. *See Torgerson*, 870 N.W.2d at 615 (discussing the "length and variety" of the misconduct). As the Director points out, MacDonald "violated seven ethics rules through multiple acts in the course of two matters." Because MacDonald committed "multiple disciplinary rule violations" over more than one matter, the cumulative weight of her misconduct warrants "severe discipline even when a single act standing alone would not have warranted such discipline." *Nelson*, 733 N.W.2d at 464 (citation omitted) (internal quotation marks omitted).

The final two factors—harm to the public and to the legal profession—require us to "consider the number of clients harmed and . . . their injuries." *Nwaneri*, 896 N.W.2d at 526. Here, MacDonald harmed two clients through incompetent legal representation, both through her failure to perfect an appeal in one of the cases and her lack of preparation for trial in both cases. *See In re Saltzstein*, 896 N.W.2d 864, 872 (Minn. 2017) (discussing clients who lost their appeals based on attorney errors).

Despite these facts, MacDonald's position is that she has not harmed the public, claiming that her clients were satisfied with her performance and that neither filed a malpractice action or ethical complaint against her. Yet, in addition to the harm her clients actually suffered, regardless of their level of satisfaction, MacDonald fails to recognize that "making false statements to a court harms [both] the public and the legal profession" in and of itself. *Nwaneri*, 896 N.W.2d at 526. So too does baselessly attacking the integrity of a judge and repeatedly disrupting court proceedings, the latter of which "prolong[s] and delay[s] proceedings and caus[es] needless expenditure of judicial . . . resources." *Nett*, 839 N.W.2d at 722 (citation omitted) (internal quotation marks omitted); *In re Jensen*, 468 N.W.2d 541, 546 (Minn. 1991) ("An attorney does not advance the client's cause . . . by making unfounded allegations about [a] judge[] . . . ."). In sum, MacDonald's "unprofessional actions and demeanor reflect adversely on the bar, and [were] destructive of public confidence in the legal profession." *Torgerson*, 870 N.W.2d at 616.

B.

We must also consider any aggravating and mitigating factors. The referee found four aggravating factors and no mitigating factors. We review the referee's application of

law to the facts, including any findings on aggravating and mitigating factors, for clear error. *In re Fett*, 790 N.W.2d 840, 847 (Minn. 2010).

First, the referee found that MacDonald's legal experience was an aggravating factor. She has practiced law since 1987, a career that has spanned over 30 years. We agree that "[c]ommitting misconduct despite this substantial experience is an aggravating factor." *Tigue*, 900 N.W.2d at 432.

Second, the referee found three additional aggravating factors based on MacDonald's (1) decision to blame others rather than accept responsibility for her actions; (2) her "lack of insight into how her acts affected others"; and (3) her "continual inability to acknowledge facts found by the courts." To be sure, MacDonald testified at her disciplinary hearing that she was "sorry for whatever [she] did." Nevertheless, there is adequate support in the record that, even if MacDonald expressed remorse at her hearing, she continues to lack insight into how her misconduct has affected others, including the courts and her clients. Accordingly, we conclude that MacDonald's lack of remorse, lack of insight, and blaming of others are aggravating. Due to the substantial overlap among these factors, however, they give rise to only a single aggravating factor, not three.[13] *See In re Ulanowski*, 800 N.W.2d 785, 803–04 (Minn. 2011) (considering the "[f]ailure to acknowledge wrongfulness or express remorse," as well as "shift[ing] the blame . . . onto others," to be only one aggravating factor).

[13] Even if the dissent were correct that lack of insight, absence of remorse, and projecting blame on others are three separate aggravating factors, despite the substantial overlap in the referee's description of these factors, our determination of the appropriate discipline would not change.

On the issue of mitigation, MacDonald challenges the referee's failure to find any mitigating factors. MacDonald believes she should receive two, one for her limited disciplinary history and the other for her pro-bono work. As to her disciplinary history, MacDonald has received only a single private admonition over the course of her career for unrelated misconduct. Nevertheless, we have repeatedly held that "an attorney's lack of prior disciplinary history is not a mitigating factor, but instead constitutes the absence of an aggravating factor." *Fairbairn*, 802 N.W.2d at 746.

The other factor MacDonald identifies is her pro-bono work, which she describes as "extensive" and culminated in her receipt of the Northstar Lawyers pro-bono award on several occasions. It is true that we have recognized that "extensive pro bono or civil work" *might* constitute mitigation. *In re Wylde*, 454 N.W.2d 423, 426 n.5 (Minn. 1990). But here, despite claiming that she handled S.G.'s case without charging a fee, she does not dispute the fact that she has an attorney lien against S.G. for $193,190.05. This fact, in addition to the qualitative judgment required of the referee when determining whether pro-bono work is adequately extensive to deserve mitigation, leads us to conclude that the referee did not clearly err in concluding that MacDonald is not entitled to mitigation for her pro-bono work. *See In re Albrecht*, 779 N.W.2d 530, 539 (Minn. 2010).

C.

Finally, we examine similar cases to ensure the imposition of consistent discipline, *Tigue*, 900 N.W.2d at 431, even though we impose discipline on a case-by-case basis, *In re Walsh*, 872 N.W.2d 741, 749 (Minn. 2015) (indicating that we "tailor the sanction to the specific facts of each case"). No case involves the same circumstances and constellation

of misconduct as MacDonald's case, to be sure, but some cases are instructive on the disciplinary options available to us here.

In *Torgerson*, perhaps the most analogous case to this one, we disciplined an attorney for "ma[king] false statements, disobey[ing] a court order, [and] act[ing] belligerently toward a judge and court staff," among other misconduct. 870 N.W.2d at 605. Like MacDonald, Torgerson "filed various pleadings . . . alleging the judge was biased," which contained statements that were false or made with reckless disregard for their truth. *Id.* at 606. Torgerson also shouted at court employees and "interrupted [a] judge multiple times" during a hearing. *Id.* at 608. Finally, like MacDonald, Torgerson had "substantial experience" practicing law and "fail[ed] to recognize the wrongfulness of her actions." *Id.* at 613. Although the referee recommended a public reprimand, we imposed a 60-day suspension. *Id.* at 606, 616.

In *Graham*, another case bearing some similarities to this one, an attorney pursued "groundless and frivolous" allegations and repeatedly accused a judge of conspiring against his clients. 453 N.W.2d at 315, 324–25. As in this case, the attorney made these statements with reckless disregard for the truth and had an "attitude" that suggested he "believe[d] in a conspiracy against him and preferred to find fault with others [rather] than himself." *Id.* at 325. Although *Graham* did not include some additional misconduct committed by MacDonald, such as violating court rules, repeatedly disrupting court proceedings, and failing to represent a client competently, we imposed a 60-day suspension. *Id.*

Weighing the nature and extent of MacDonald's misconduct together with the aggravating factors present here, we conclude that a 60-day suspension followed by 2 years

of supervised probation is the appropriate sanction. We are confident that a suspension of this length is consistent with our precedent and will adequately protect the public in light of the conditions attached to MacDonald's probation.

Although we have decided to place additional conditions on MacDonald during her probation, we do not accept one condition proposed by the referee. The referee recommended, and the Director agrees, that we order MacDonald to undergo a mental-health evaluation and follow all of its recommendations as a condition of her probation. Not only is there limited precedent for imposing such a condition when the attorney has not placed her mental health at issue in the disciplinary proceeding, but the referee here has made no factual findings that support it. *See In re Fuller*, 621 N.W.2d 460, 470 (Minn. 2001) (concluding that the attorney's "possible psychological problem," which was "not acknowledged" by the attorney, "need[ed] to be addressed in the sanction"); *cf. In re Hanson*, 592 N.W.2d 130, 130–31 (Minn. 1999) (requiring the attorney to "affirmatively show that she is psychologically fit to practice law" after "the referee found that . . . [the attorney] ha[d] been treated for clinical depression and addiction to gambling"). Under these circumstances, we decline to require a mental-health evaluation as a condition of MacDonald's probation.

Accordingly, we order that:

1. Respondent Michelle Lowney MacDonald is suspended from the practice of law for a minimum of 60 days, effective 14 days from the date of this opinion.

2. Respondent shall comply with Rule 26, Rules on Lawyers Professional Responsibility (RLPR) (requiring notice of suspension to clients, opposing counsel, and

tribunals), and shall pay $900 in costs under Rule 24(a), RLPR.

3. Respondent shall be eligible for reinstatement to the practice of law following the expiration of the suspension period provided that, not less than 15 days before the end of the suspension period, respondent files with the Clerk of the Appellate Courts and serves upon the Director an affidavit establishing that she is current in continuing-legal-education requirements; has complied with Rules 24 and 26, RLPR; will be practicing law in accordance with the requirements of paragraph 5(c) below upon reinstatement; and has complied with any other conditions for reinstatement imposed by the court.

4. Within 1 year of the date of this opinion, respondent shall file with the Clerk of the Appellate Courts and serve upon the Director proof of her successful completion of the written examination required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility. Failure to timely file the required documentation shall result in automatic resuspension, as provided in Rule 18(e)(3), RLPR.

5. Upon reinstatement to the practice of law, respondent shall be placed on supervised probation for 2 years, subject to the following conditions:

(a) Respondent shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation. Respondent shall promptly respond to the Director's correspondence by the due date. Respondent shall provide the Director with a current mailing address and shall immediately notify the Director of any change of address. Respondent shall cooperate with the Director's investigation of any allegations of unprofessional conduct that may come to the Director's attention. Upon the Director's request, respondent shall provide authorization for release of information and documentation to verify compliance with the terms of this probation.

(b) Respondent shall abide by the Minnesota Rules of Professional Conduct.

(c) Respondent shall not engage in the solo practice of law, but shall work in a setting where she is in daily contact with, and under the direct supervision of, another Minnesota licensed attorney. The attorney who directly supervises respondent's work must co-sign all pleadings, briefs, and other court documents that respondent files. This attorney may not be an associate who works for respondent's law firm. Any attorney or law firm with whom she practices shall be informed of the terms of this probation.

(d) In addition to the supervision provided by the attorney referenced in paragraph (c), respondent shall be supervised by a licensed Minnesota attorney, appointed by the Director, to monitor her compliance with the terms of this probation ("probation supervisor"). Respondent shall give the Director the names of four attorneys who have agreed to be nominated as respondent's probation supervisor within 2 weeks of the date of this opinion. If, after diligent effort, respondent is unable to locate a probation supervisor acceptable to the Director, the Director shall appoint a probation supervisor. Until such probation supervisor has signed a consent to supervise, respondent shall, on the first day of each month, provide the Director with an inventory of client files as described in paragraph (e) below. Respondent shall make active client files available to the Director upon request.

(e) Respondent shall cooperate fully with the probation supervisor and the Director's efforts to monitor her compliance with this probation. Respondent shall contact the probation supervisor and schedule a minimum of one in-person meeting per calendar quarter. Respondent shall provide the probation supervisor with an inventory of all active client files by the first day of each month during the probation. With respect to each active file, respondent shall disclose the client name, type of representation, date opened, most recent activity, next anticipated action, and anticipated closing date. Respondent's probation supervisor shall file written reports with the Director quarterly or at such more frequent intervals as the Director may reasonably request.

(f) Respondent shall initiate and maintain procedures that ensure thorough inquiry into, and verification of, factual allegations in pleadings and court filings. Respondent shall also initiate and maintain procedures to ensure timely appeals, including service on all required entities. Within 30 days of the date of this opinion, respondent shall provide the Director and the probation supervisor, if any, with a detailed written plan outlining such procedures.

(g) Respondent shall take 15 credits in continuing-legal-education coursework in the areas of civil-trial and appellate practice, with at least one course emphasizing

each of the following: trial preparation and courtroom decorum.

LILLEHAUG, HUDSON, and CHUTICH, JJ., took no part in the consideration or decision of this case.

C O N C U R R E N C E & D I S S E N T

MCKEIG, Justice (concurring in part, dissenting in part).

We impose discipline for attorney misconduct "to protect the public, to protect the judicial system, and to deter future misconduct." *In re Rebeau*, 787 N.W.2d 168, 173 (Minn. 2010). We have said that "[t]he public interest is and must be the paramount consideration" and that our "primary duty . . . must be protection of the public." *In re Hanson*, 103 N.W.2d 863, 864 (Minn. 1960). The court concludes that a 60-day suspension is adequate to protect the public, the profession, and the administration of justice in this case. I disagree. I conclude that our duty to the public and the administration of justice requires a 6-month suspension, along with a petition for reinstatement, as opposed to an application for reinstatement by affidavit. *See* Rule 18, Rules on Lawyers Professional Responsibility (RLPR). I would also require respondent Michelle MacDonald to undergo a mental-health evaluation. *Cf. In re Jellinger*, 728 N.W.2d 917, 922–23 (Minn. 2007) (recognizing that to further the goals of "protect[ing] the public, the courts, and the legal profession," we must sometimes impose "rigorous" conditions on reinstatement). Therefore, I respectfully dissent.

ANALYSIS

I concur with the court's conclusions in Parts I and II that the referee's findings and conclusions were not clearly erroneous. I disagree, however, with the court's decision in Part III to impose only a 60-day suspension and 2 years of probation without requiring a mental-health evaluation.

I.

There are four underlying bases for my conclusion that more severe discipline is warranted here: (1) the facts establish that MacDonald engaged in an extensive pattern of making false statements and pursuing frivolous claims, disrupting court proceedings, and disregarding court rules and orders—misconduct that, in other instances, would result in a lengthy suspension; (2) MacDonald's misconduct is far more serious than that in *Torgerson* or *Graham*, where we imposed 60-day suspensions; (3) MacDonald's misconduct has caused serious harm; and (4) multiple aggravating factors are present. Taking these considerations together, it is clear that a 60-day suspension is inadequate.

A.

In calculating the appropriate discipline, I first look to the nature of MacDonald's misconduct and the suspensions we have previously imposed for similar misconduct. *See In re Tigue*, 900 N.W.2d 424, 431 (Minn. 2017). I also look to the cumulative nature of MacDonald's misconduct, which includes multiple, repeated rule violations. *See id.* When viewed in this comprehensive light, I can only conclude that a sanction more severe than a 60-day suspension, together with a mental-health evaluation, is necessary to fulfill our duty to protect the public.

MacDonald violated at least seven separate Rules of Professional Conduct over the course of two different client matters. But the number of violations alone does not adequately reflect the seriousness of her misconduct. MacDonald's conduct can be grouped into three broad categories: (1) making false statements about the integrity of a judge and pursuing frivolous claims; (2) disrupting court proceedings; and (3) disregarding

court rules and orders.

First, MacDonald filed a federal lawsuit against the district judge on behalf of her client S.G., seeking injunctive relief and damages in excess of $55 million for alleged constitutional violations, false imprisonment, battery, and other tort claims. The federal court concluded that these allegations lacked support in the record and were "futile" under the "well-settled" doctrine of judicial immunity. The federal lawsuit contained false statements concerning the integrity of the judge that MacDonald made in reckless disregard for their truth. MacDonald also repeatedly made similar false statements concerning the integrity of the district judge in reckless disregard for their truth, both in state court proceedings and in multiple letters to the Board on Judicial Standards (BJS).

"[G]enerally, making false statements is serious misconduct" that warrants "severe discipline." *In re Grigsby*, 815 N.W.2d 836, 845 (Minn. 2012). The seriousness of an attorney's false representations is exacerbated when multiple false statements are made in multiple proceedings before multiple courts. *See In re Houge*, 764 N.W.2d 328, 337–38 (Minn. 2009). This type of misconduct has previously resulted in a 3-month suspension. *See, e.g.*, *In re Tieso*, 396 N.W.2d 32, 33–34 (Minn. 1986) (suspending an attorney for filing a single lawsuit that was "groundless," "frivolous, [and] vexatious"). When attorneys have "use[d] convoluted, frivolous pleadings . . . to delay litigation," we have imposed even lengthier suspensions. *In re Murrin*, 821 N.W.2d 195, 208, 210 (Minn. 2012) (suspending an attorney for 6 months for filing frivolous lawsuits that "required three courts and nearly 50 defendants to . . . wade through thousands of pages").

Second, on multiple occasions in two separate matters, MacDonald engaged in

disruptive conduct that was prejudicial to the administration of justice, including persistently interrupting the court, disrupting proceedings during the photo-and-arrest incident, and being unprepared for two trials. These efforts not only delayed the administration of justice, resulting in unnecessarily prolonged proceedings, but in the S.G. matter, they also appear to have been a cover for MacDonald's inadequate preparation for a scheduled trial. Indeed, MacDonald herself conceded that she was not prepared for the start of trial in the S.G. matter. *See In re Waite*, 782 N.W.2d 820, 827 (Minn. 2010) (noting that competent representation requires "the skills and thoroughness 'reasonably necessary for the representation' " (quoting Minn. R. Prof. Conduct 1.1)). In *In re Torgerson*, we suspended an attorney for 60 days for similar behavior. *See* 870 N.W.2d 602, 605, 608, 610, 616 (Minn. 2015) (describing how Torgerson had, among other things, "interrupted the judge multiple times," "acted belligerently toward a judge and court staff," and disobeyed a judge's instructions to remain near the courthouse during jury deliberations and then defiantly refused the judge's request to return).

Third, MacDonald abused the subpoena process in the S.G. matter and violated the scheduling order in the J.D. case. Although we have never specifically disciplined an attorney for abusing subpoenas, we have suspended attorneys for disobeying similar discovery rules and court orders. *See, e.g.*, *In re Walsh*, 872 N.W.2d 741, 743–44 (Minn. 2015) (suspending an attorney for 6 months for failing to timely serve an affidavit of expert review and a response to a motion, among other documents, and "repeatedly fail[ing] to comply with deadlines in the court's scheduling order," among other misconduct); *In re Paul*, 809 N.W.2d 693, 697–99, 706 (Minn. 2012) (concluding a 4-month suspension was

warranted for an attorney who failed to file necessary appellate documents and abused the civil rules on intervention); *In re O'Brien*, 809 N.W.2d 463–65, 467 (Minn. 2012) (suspending an attorney for 90 days for failing to timely file an appellate brief, failing to conduct discovery, and violating the disciplinary referee's scheduling order); *In re Brehmer*, 620 N.W.2d 554, 557, 562 (Minn. 2001) (imposing a 1-year suspension on an attorney who, among other things, "failed to provide discovery responses," "did not comply with the district court's orders regarding deadlines for providing witness and exhibit lists," and "was not prepared for trial").

Each of these violations is independently deserving of significant discipline. *See In re Sigler*, 512 N.W.2d 899, 901 (Minn. 1994) ("Based on our cases, each of respondent's violations taken alone would warrant discipline . . . ."). Given the sheer number of these separate violations, and that MacDonald repeatedly engaged in several of the violations, a 60-day suspension is inadequate and inconsistent with our precedent. I also recognize that we consider each discipline case individually, but "we strive for consistency" in our decisions. *In re Rooney*, 709 N.W.2d 263, 268 (Minn. 2006). A 60-day suspension introduces inconsistency into our precedent.

The appropriate discipline based on the cumulative impact of MacDonald's multiple violations is a suspension of 6 months. Our case law demonstrates that this is well within the range of suspensions for similar misconduct. *See, e.g.*, *In re Selmer*, 866 N.W.2d 893, 894 (Minn. 2015) (suspending an attorney for 12 months for "a pattern of harassing and frivolous litigation" and a failure to "abide by court orders," among other misconduct); *In re Jensen*, 542 N.W.2d 627, 628, 633–34 (Minn. 1996) (concluding an 18-month

suspension was warranted for an attorney who violated procedural rules and court orders, pursued harassing and frivolous claims, made misrepresentations in court, and "contributed to . . . protracted litigation [that] resulted in a drain on judicial resources," although the referee had recommended only a public reprimand); *In re Williams*, 414 N.W.2d 394, 395, 397–98 (Minn. 1987) (imposing a 6-month suspension on an attorney whose repeated misbehavior included "continually interrupting" others and engaging in "tactics" intended to "provoke" others and "obfuscate the record," which was prejudicial to the administration of justice).

B.

The majority relies on two cases—*In re Torgerson*, 870 N.W.2d 602 (Minn. 2015), and *In re Graham*, 453 N.W.2d 313 (Minn. 1990)—to support its conclusion that a 60-day suspension is appropriate. I agree that there is some similarity between MacDonald's misconduct and the misconduct of the attorneys in these cases. MacDonald's misconduct, however, is more extensive than the misconduct in each of these cases. As a result, *Torgerson* and *Graham* actually demonstrate that a 60-day suspension is an inadequate sanction.

In *Torgerson*, we suspended an attorney for 60 days for "ma[king] false statements" about other attorneys, "disobey[ing] a court order, [and] act[ing] belligerently toward a judge and court staff." 870 N.W.2d at 605–08. Torgerson "filed various pleadings . . . alleging that the judge was biased," which contained statements that were made with reckless disregard for their truth, and "interrupted the judge multiple times" during an omnibus hearing. *Id.* at 606, 608–09, 611.

Although MacDonald committed the same types of misconduct as Torgerson, MacDonald committed additional misconduct that Torgerson did not commit. Unlike Torgerson, MacDonald filed a frivolous lawsuit against the district judge, and MacDonald incompetently represented S.G. in both the district court and at the court of appeals. Both Torgerson and MacDonald made false statements concerning the integrity of a judge, but MacDonald made such statements in three different forums—state court, federal court, and before the Board on Judicial Standards—whereas Torgerson only made them in state court. *Id.* at 606. Finally, MacDonald's disruptive behavior was more extensive than Torgerson's. Torgerson failed to follow a judge's instructions by not returning to court after a jury had finished deliberating, and she interrupted a judge at one hearing in another matter. *See id.* at 606, 608. MacDonald interrupted the court in the S.G. and J.D. matters during many court proceedings, she disrupted the trial in the S.G. matter through the photo-and-arrest incident, and her disruptive conduct in the J.D. matter was partially responsible for a trial that should have taken 2 days lasting for 9 days.

In *Graham*, we suspended an attorney for 60 days for pursuing "groundless and frivolous" allegations that accused a judge, a magistrate judge, and two attorneys of conspiring against him and his clients. 453 N.W.2d at 315, 324–25. Graham made these false statements with reckless disregard for their truth. *Id.* at 324. But even the court acknowledges that "*Graham* did not include some additional misconduct committed by MacDonald, such as violating court rules, repeatedly disrupting court proceedings, and failing to represent a client competently." Although *Torgerson* and *Graham* are helpful because there is some similarity to the misconduct MacDonald committed, MacDonald

should receive a longer suspension because she committed more misconduct than these lawyers.

C.

The significant harm that MacDonald's misconduct has caused lends further support for the lengthier suspension that I propose. *See In re Nelson*, 733 N.W.2d 458, 463 (Minn. 2007) (stating that two of the factors that we consider when determining the appropriate discipline are "the harm to the public, and . . . the harm to the legal profession"). Like the court, I am troubled by respondent's inability to distinguish fact from fiction, and by her pattern of brazenly alleging falsehoods as facts. MacDonald's conduct in making false statements about the district judge in court motions, pleadings, BJS complaints, and legal correspondence demonstrates a pervasive disregard for truth. Neither the public nor the profession benefits when attorneys make baseless accusations about allegedly biased judges and "pretend trials."

The integrity of the judicial system depends on the public's belief that judges are fair, and false accusations of biased judges erode that public trust. *See Wiedemann v. Wiedemann*, 36 N.W.2d 810, 812 (Minn. 1949) (stating that "it is of transcendent importance to the litigants and the public generally that there should not be the slightest suspicion as to [a judge's] fairness and integrity" (emphasis omitted) (citation omitted) (internal quotation marks omitted)). The integrity of our judicial system also depends on the integrity of lawyers. *In re Schmidt*, 402 N.W.2d 544, 548 (Minn. 1987). Thus, "[w]e should not hesitate to impose severe discipline when a lawyer demonstrates a lack of truthfulness and candor to . . . the judicial system." *In re LaChapelle*, 491 N.W.2d 17, 21

(Minn. 1992). As the Director recently argued before the court in another disciplinary matter, "without honesty, one can't be a lawyer."

I am also concerned by MacDonald's disrespectful and unprofessional behavior.[1] The following remarks provide a window into MacDonald's inability to give judicial officers, and in turn the judicial system, the respect and decorum required:

> "The rules are that an attorney can't talk in court?"
> "And you are telling me that you can be impartial in this trial, which you haven't done since day one[?]"
> "Do you want the evidence or not?"

See In re Michael, 836 N.W.2d 753, 765 (Minn. 2013) (disciplining an attorney for a "flippant rhetorical question" directed at a judge, which was "unprofessional and disrespectful"); *see also In re Getty*, 401 N.W.2d 668, 671 (Minn. 1987) ("[T]here is a line that should not be crossed and respondent has crossed it."). As we have previously

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[1] I take this opportunity to note additional unprofessional behavior that was not considered by the referee or the court: MacDonald's criminal convictions for obstructing the legal process and third-degree test refusal. MacDonald was convicted of obstructing legal process for repeatedly refusing to get out of her car during a traffic stop. *See State v. Shimota*, 875 N.W.2d 363, 364–65 (Minn. App. 2016) (affirming convictions), *rev. denied* (Minn. Apr. 27, 2016). After being told she was under arrest, she continued to "resist[] the officers' effort by grabbing the shift knob, the steering wheel, and [an officer's] wrist." *Id.* The officers had to "pr[y] [her] free" and forcibly remove her from her car. *Id.* at 365. The referee did not consider MacDonald's criminal history because the Director's petition for disciplinary action did not allege any misconduct based on these convictions.

A lawyer is prohibited from "commit[ing] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Minn. R. Prof. Conduct 8.4(b). And an attorney's criminal conviction is "conclusive evidence that the lawyer committed the conduct for which the lawyer was convicted." Rule 19(a), RLPR. I recognize that MacDonald's criminal convictions are not before us and thus are not to be considered in her discipline. But I question why this criminal conduct was not included in the petition for discipline when it arguably is further evidence of MacDonald's obstructionist conduct.

explained, attorneys must demonstrate "restraint and . . . respect for the judicial system even while disagreeing strongly with it or its decisions." *Getty*, 401 N.W.2d at 671 (indicating discipline was "mandated" for an attorney who was "rude, loud and disrespectful"); *see also Williams*, 414 N.W.2d at 397 ("To be vigorous . . . does not mean to be disruptively argumentative; . . . to be zealous is not to be uncivil."). We perhaps said it best in *In re Pinotti*, 585 N.W.2d 55, 63 (Minn. 1998):

> While we are fully aware of a lawyer's responsibility to aggressively represent his or her clients' interest, respondent's conduct here far exceeds the limits of professional representation, despite the numerous warnings of lower tribunals and heavy sanctions imposed. . . . [R]espondent marched relentlessly onward . . . to the great detriment of [her] clients and in total disregard of the waste of judicial resources.

MacDonald's lack of respect and decorum caused a separate and significant harm: a drain on judicial resources and a detriment to the administration of justice. *See In re Letourneau*, 792 N.W.2d 444, 453 (Minn. 2011) (discussing how an attorney's misconduct "needlessly increased the burden on a heavily loaded and underfunded court system"). For example, the J.D. trial that was scheduled for 2 days took upwards of 9 days due, in part, to MacDonald's lack of preparation. The district court judge noted that such a long trial was "virtually unheard of." During the photo-and-arrest incident in the S.G. trial, the judge noted that her behavior appeared "orchestrated" to delay the proceedings.

But these delays do not take into account the costs to MacDonald's clients, opposing counsel, and opposing parties—both in terms of time and money. *See Murrin*, 821 N.W.2d at 208 (discussing how failing to follow court rules and orders "cause[s] harm to the public"); *In re Ulanowski*, 800 N.W.2d 785, 801 (Minn. 2011) (addressing how frivolous

claims took a toll on public confidence in the legal system and caused financial harm to opposing parties). MacDonald's obstructionist behavior has undoubtedly delayed resolution for families in crisis, including both MacDonald's own clients and other litigants waiting for their day in court. We fail to adequately protect the public by imposing discipline that does not fully account for the significant harms caused by MacDonald's misconduct.

D.

An analysis of the aggravating and mitigating factors provides further support for my proposed discipline. Although the court concludes that two aggravating factors are present, I count four aggravating factors. I agree with the court that MacDonald's significant legal experience is an aggravating factor and that her disciplinary history is neither aggravating nor mitigating.[2]

The court counts respondent's lack of remorse, lack of insight, and blaming of others as a single aggravating factor.[3] Yet our case law suggests that these are three independent

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[2] MacDonald's disciplinary history includes a private admonition in 2012 for failing to deposit client settlement funds into her firm's trust account; failing to maintain adequate and correct trust-account books and records; and failing to cooperate with the Director's investigation, in violation of Minn. R. Prof. Conduct 1.15(a), 1.15(c)(3), 1.15(c)(4), 1.16(d), 5.3(c)(2), and 8.1(b), and Rule 25, RLPR. The referee concluded that this disciplinary history was neither an aggravating nor mitigating factor, in part because the rule violations were unrelated to the misconduct in this case.

[3] There is certainly some overlap between these factors, *see In re Kalla*, 811 N.W.2d 576, 583 (Minn. 2012) ("This attempt to deflect blame highlights Kalla's lack of remorse and insight into his own conduct."), and at times we have suggested that these are three sides of the same coin, *see Ulanowski*, 800 N.W.2d at 803–04 (counting the "[f]ailure to acknowledge wrongfulness or express remorse," which included the blaming of others, as a single aggravating factor); *In re Gherity*, 673 N.W.2d 474, 480 (Minn. 2004) (citing *In*

aggravating factors. *See Michael*, 836 N.W.2d at 760 (stating that respondent's "lack of remorse and failure to recognize and take responsibility for her conduct are aggravating factors"); *In re Wentzel*, 711 N.W.2d 516, 522 (Minn. 2006) (considering respondent's lack of "insight into the moral and ethical nature of his acts" to be one aggravating factor). Simply put, not understanding the wrongfulness of one's conduct is different from not being sorry for it. And it is further distinct from blaming others for one's conduct instead of taking responsibility. *Cf. In re Aitken*, 787 N.W.2d 152, 163 (Minn. 2010) (distinguishing between "express[ing] remorse for the consequences of [the] misconduct" and expressing "remorse for [the] actual misconduct"). I would therefore not give respondent the benefit of lumping these three factors into one.

MacDonald claims that her pro bono services to S.G. and J.D. should be a mitigating factor. In reality, she has an attorney lien against one of these "pro bono" clients in the amount of $193,190.05. She insists that this lien is "symbolic." But there is nothing symbolic about a recorded lien. Like the court, I conclude that MacDonald's pro bono services do not qualify as a mitigating factor. If it were to be considered at all, it would be an aggravating factor, *see Ulanowski*, 800 N.W.2d at 802 ("Making misrepresentations can be considered an aggravating factor."), but because the Director does not allege this is an aggravating factor, I do not consider it at all, *see In re Matson*, 889 N.W.2d 17, 24–25 (Minn. 2017).

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re Kaszynski, 620 N.W.2d 708 (Minn. 2001), for the proposition that "the refusal to acknowledge the wrongful nature of one's actions and instead portraying oneself as a victim and repeatedly casting blame on others was [one] aggravating factor").

Finally, I cannot help but note the contrast between the "slap on the wrist" respondent receives today and the devastating consequences of disbarment that we readily impose for even small amounts of misappropriation of client funds. *In re Fredin*, 552 N.W.2d 23, 25 (Minn. 1996) (Page, J., dissenting) (objecting to a 60-day suspension followed by 2 years of supervised probation, which was "a mere slap on the wrist" and inadequate to protect the public); *see, e.g.*, *In re Rodriguez*, 783 N.W.2d 170, 170–71 (Minn. 2010) (order) (Anderson, Paul H., J., dissenting) (noting that this court had disbarred an attorney who misappropriated $650 and was "deeply remorseful and committed to recovery from his addictions"). I recognize that there are no sentencing guidelines for attorney discipline, and that many disciplinary cases require us to compare apples to oranges. But the disparity between disbarring an attorney for one financial indiscretion, versus only suspending respondent for 60 days for her varied and harmful misconduct, is unsettling. It is even more unsettling when I consider the significant financial toll of MacDonald's misconduct on her clients, opposing parties and counsel, and the courts. As evidenced by her six-figure lien against S.G., the $6,202.50 sanction to compensate the subpoenaed attorneys, the $20,000 sanction against J.D. for conduct-based attorney fees, and the needlessly time-consuming motion work and trials in the S.G. and J.D. cases, her misconduct comes at a high cost.

II.

In addition to suspension and probation, I believe that a mental-health evaluation is warranted. The referee recommended a mental-health evaluation, and we "afford 'great weight' to the referee's recommendation." *In re Rambow*, 874 N.W.2d 773, 778 (Minn.

2016) (quoting *In re Harrigan*, 841 N.W.2d 624, 628 (Minn. 2014)). It is particularly appropriate to defer to the referee on matters like a respondent's demeanor and mental state. *See Pinotti*, 585 N.W.2d at 62.

I recognize that "neither the referee nor this court is qualified to arrive at a diagnosis or prognosis concerning the respondent's mental health." *In re Davis*, 264 N.W.2d 371, 373 (Minn. 1978). It is therefore unknown "[w]hether respondent is in need of" mental-health services. *Id.* It is clear, however, that the referee acknowledged her own limitations and deferred to a mental-health professional on this matter. I would do the same.

We have recognized that mental-health conditions may have a causal relationship with attorney misconduct. *See, e.g.*, *In re Clark*, 834 N.W.2d 186, 187–88 (Minn. 2013) (recognizing that mental-health issues may impact an attorney's "life, her cognitive abilities, and her emotional state," which in turn may affect the attorney's ability to competently represent clients). If it is proper for us to require a disciplined attorney to continue existing mental-health treatment and complete therapy programs recommended by treating therapists—and it is—I do not see anything improper about requiring a mental-health evaluation under these circumstances. *See, e.g.*, *In re Fischer*, 901 N.W.2d 155, 156 (Minn. 2017) (order).[4] If anything, requiring an evaluation is less onerous or invasive than

[4] Imposing a mental-health evaluation as a condition of respondent's probation presents no due-process concerns. *See Gherity*, 673 N.W.2d at 478 (Minn. 2004) ("We have held that an attorney has a right to know the nature of the charges filed against him but we have never suggested that he has a due process right to know the exact discipline . . . ."). The disciplinary petition here requests "appropriate discipline," and Rule 15(a), RLPR, specifically states that the disposition may include "probationary status . . . with such conditions as this Court may specify." *See also id.* at 479 (holding that "even if [the disciplinary petition] does not specifically state" that the Director is seeking

requiring treatment. Like the court in *In re Fuller*, 621 N.W.2d 460, 470 (Minn. 2001), I "see no reason not to consider a [potential] psychological problem in determining the appropriate sanction."[5] *See also id.* (noting that addressing the potential mental-health condition would help the respondent "competently and diligently serve his clients," such that his "possible psychological problem need[ed] to be addressed in the sanction").

Though it is unclear "[w]hether respondent is in need of" mental-health services, it is clear that she "would be well advised to consider it." *Davis*, 264 N.W.2d at 373. I would therefore adopt the referee's recommendation to include a mental-health evaluation as a condition of her probation, and further condition her reinstatement on "provid[ing] adequate psychological or other medical evidence establishing that [she] has no . . . psychological problems that would prevent [her] from practicing law competently, diligently, and within the rules of conduct for attorneys." *In re Levenstein*, 438 N.W.2d 665, 669 (Minn. 1989).

CONCLUSION

Today, the court hesitates to impose sufficient discipline, and it does so at the expense of protecting the public. Although MacDonald portrays herself as a victim, the true victim in all of this is the public. I respectfully disagree with the court's decision to

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disbarment, "the attorney's due process rights are not violated when the Director's petition states that 'appropriate discipline' is requested and our rules of professional responsibility specifically include disbarment as a discipline where appropriate").

[5] The court notes that there is "limited precedent" for imposing a mental-health evaluation "when the attorney has not placed her mental health at issue" and the referee "made no factual findings" to support this recommendation. But limited precedent is precedent, nonetheless.

suspend MacDonald for a mere 60 days and its reluctance to require a mental-health evaluation. Our duty to the public demands more of us, and more of respondent. I conclude that a 6-month suspension, including a petition for reinstatement, and a 2-year probation term, including a mental-health evaluation, is warranted. On these grounds, I respectfully dissent.