

STATE OF MINNESOTA

IN SUPREME COURT

A17-0429

Original Jurisdiction

Per Curiam

In re Petition for Disciplinary Action
against Joseph Michael Capistrant,
a Minnesota Attorney, Registration
No. 0187112.

Filed: January 10, 2018
Office of Appellate Courts

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

Joseph Michael Capistrant, Plymouth, Minnesota, pro se.

S Y L L A B U S

Disbarment is the appropriate discipline for an attorney who misappropriated client
funds, neglected a client, and failed to cooperate with the disciplinary process.

O P I N I O N

PER CURIAM.

The only issue before us is the appropriate discipline to impose on Joseph Michael
Capistrant. In 2017, the Director filed a petition for disciplinary action, which alleged that
Capistrant misappropriated client funds, neglected a client, and failed to cooperate with the
Director's investigation. Capistrant did not respond to the petition, so we deemed the
allegations admitted and allowed the parties to file memoranda on the appropriate

discipline. Capistrant has not filed a memorandum or otherwise appeared in this case. The Director requests disbarment. We agree that disbarment is the appropriate sanction.

FACTS

Capistrant was admitted to practice law in Minnesota in 1987. We indefinitely suspended him in 2015, with no right to petition for reinstatement for 6 months, for refusing to promptly return a client file, not informing a client that his Wisconsin law license had been suspended, neglecting two lawsuits in Wisconsin, and failing to cooperate with the disciplinary investigation. *In re Capistrant*, 863 N.W.2d 398, 398 (Minn. 2015) (order). Capistrant has not petitioned for reinstatement and therefore remains suspended.

Capistrant's misconduct in this case, which largely predates his 2015 suspension, relates to a single client. The client sought legal services from Capistrant to handle his son's probate action and revise a trust that named his deceased son as a beneficiary. Capistrant met with the client only twice. At their second meeting, Capistrant presented the client with an invoice in the amount of \$2,643. The invoice itemized \$547 as "advances" for future filing fees and related costs for the probate action. The client paid the invoice in full.

Shortly thereafter, Capistrant abandoned the client's case altogether. He never deposited the \$547 into trust, stopped communicating with the client, and did not file the probate action. Months later, the client finally received his file back from Capistrant. Although Capistrant had agreed to refund the \$547, he never did so. The client subsequently filed his son's probate action on his own, proceeding pro se, and again incurred the filing fees that he had previously paid to Capistrant.

In late 2015, the Director sent three notices of investigation to Capistrant, none of which he answered. In 2017, the Director personally served Capistrant with a petition for disciplinary action alleging: (1) misappropriation of client funds; (2) client neglect, including failure to communicate with the client and to diligently pursue the client's case; and (3) noncooperation with the Director's investigation. Because Capistrant did not answer the petition, we deemed the allegations admitted under Rule 13(b), Rules on Lawyers Professional Responsibility (RLPR). *In re Capistrant*, A17-0429, Order at 1–2 (Minn. filed June 28, 2017).

Aside from one e-mail exchange with the Director suggesting that he was entitled to “mitigation,” which Capistrant sent nearly 16 months after the Director first attempted to contact him, Capistrant has otherwise failed to cooperate with the disciplinary process. He has not filed any document in this proceeding, nor did he appear at oral argument.

ANALYSIS

The only issue in this case is the appropriate discipline. *See, e.g., In re Swensen*, 743 N.W.2d 243, 247 (Minn. 2007). “The purpose of attorney discipline is not to punish the attorney but rather to protect the courts, the public, and the legal profession.” *In re Nelson*, 733 N.W.2d 458, 465 (Minn. 2007). To determine the appropriate sanction in an attorney-discipline matter, we consider four factors: “(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.” *Id.* at 463. We also consider aggravating and mitigating circumstances. *In re Albrecht*, 779 N.W.2d 530, 540 (Minn. 2010). Finally, although we impose discipline on a case-by-case basis, we look to similar cases for

guidance. See *In re Schulte*, 869 N.W.2d 674, 677 (Minn. 2015).

We first consider the nature of Capistrant’s misconduct, the most serious of which is misappropriation of client funds. Misappropriation occurs when “funds are not kept in trust and are used for a purpose other than one specified by the client,” or when a lawyer “perform[s] no work on [client] matters and never return[s] the funds to the clients.” *In re Taplin*, 837 N.W.2d 306, 311 (Minn. 2013) (citations omitted) (internal quotation marks omitted) (alterations in original). Misappropriation alone “usually warrants disbarment absent clear and convincing evidence of substantial mitigating factors.” *In re Garcia*, 792 N.W.2d 434, 443 (Minn. 2010) (citation omitted) (internal quotation marks omitted). Here, Capistrant misappropriated client funds when he failed to place the advance funds into his trust account and then did not use the funds for their specified purpose: to pay the filing fees and costs for the probate action. This conduct violated Minn. R. Prof. Conduct 1.15(a) and 8.4(c), and alone warrants disbarment absent substantial mitigating circumstances.

But Capistrant’s misconduct did not end there. He also failed to perform work on a client matter and to communicate with the client, which constitutes client neglect and independently warrants discipline. *Taplin*, 837 N.W.2d at 312. In fact, “[d]epending on the severity, client neglect alone may also warrant indefinite suspension or disbarment.” *In re Rymanowski*, 809 N.W.2d 217, 224 (Minn. 2012). Additionally, noncooperation with the Director’s investigation increases the disciplinary sanction when the noncooperation is accompanied by other misconduct. *Taplin*, 837 N.W.2d at 312. In this case, Capistrant neglected his client by never filing the probate action and failing to inform him about the status of his case. He also failed to cooperate with the disciplinary process, both with

respect to the Director's investigation and the proceeding before us. *See In re Walker*, 461 N.W.2d 219, 223 (Minn. 1990) (holding that an attorney engaged in a pattern of noncooperation when he did not respond to the Director, answer the petitions, or file a brief with this court). These actions violated Minn. R. Prof. Conduct 1.3, 1.4(a)(3)–(4), 8.1(b), and Rule 25, RLPR.

We next consider the cumulative weight of the violations. “[T]he cumulative weight and severity of multiple disciplinary rule violations may compel severe discipline even when a single act standing alone would not have warranted such discipline.” *In re Oberhauser*, 679 N.W.2d 153, 160 (Minn. 2004) (citation omitted). We distinguish a “brief lapse in judgment” or a “single, isolated incident” from “multiple instances of mis[conduct] occurring over a substantial amount of time,” the latter of which warrants greater discipline. *Taplin*, 837 N.W.2d at 312 (citation omitted) (internal quotation marks omitted) (alteration in original).

To be sure, Capistrant's misappropriation occurred only once, when he failed to deposit the \$547 into his trust account and use it for its specified purpose. But his misconduct was neither a “brief lapse in judgment” nor a “single, isolated incident” because he violated numerous rules of professional conduct over a span of 2 years. *See In re Ulanowski*, 834 N.W.2d 697, 703 (Minn. 2013) (concluding that misconduct spanning “more than a year” was not a “brief lapse in judgment”). His misconduct ranged from failing to deposit the advance fees and costs into his trust account to neglecting his client altogether. Although the client eventually received his file back and Capistrant promised

a refund, Capistrant never returned the client's funds. Capistrant also ignored the Director's communications for approximately 16 months.

Finally, Capistrant's misconduct harmed both the public and the legal profession. In evaluating the harm to the public, we consider "the number of clients harmed [and] the extent of the clients' injuries." *In re Coleman*, 793 N.W.2d 296, 308 (Minn. 2011) (citation omitted) (internal quotation marks omitted) (alteration in original). Here, Capistrant's misconduct harmed only one client. But the client suffered permanent financial harm because Capistrant deprived him of \$547.

Moreover, regardless of the amount, misappropriation harms the legal profession because it is "a breach of trust that reflects poorly on the entire legal profession and erodes the public's confidence in lawyers." *In re Fairbairn*, 802 N.W.2d 734, 743 (Minn. 2011) (citation omitted) (internal quotation marks omitted). Capistrant's neglect of the client and the client's matter also undermined the public's confidence in the legal profession. *In re O'Brien*, 894 N.W.2d 162, 167 (Minn. 2017); *In re Hummel*, 839 N.W.2d 78, 82 (Minn. 2013). And his failure to cooperate with the disciplinary investigation "undermin[ed] the integrity of the attorney disciplinary system and weaken[ed] the public's perception of the legal profession's ability to self-regulate." *O'Brien*, 894 N.W.2d at 167 (citation omitted) (internal quotation marks omitted).

In addition to the four factors above, we consider any aggravating and mitigating circumstances. *In re Haugen*, 543 N.W.2d 372, 375 (Minn. 1996). There are no mitigating factors to consider here because Capistrant did not file an answer to the petition. *See In re Matson*, 889 N.W.2d 17, 25 (Minn. 2017) (declining to consider any mitigating

circumstances because the attorney did not file an answer to the petition). There are, however, two aggravating factors, including Capistrant’s disciplinary history. *See In re Cutting*, 671 N.W.2d 173, 175 (Minn. 2003) (providing that “previous misconduct of the same type is considered an aggravating factor”). Capistrant was disciplined in 2015 for, among other things, neglecting clients and noncooperation with a disciplinary investigation—two of the types of misconduct committed in this case. *Capistrant*, 863 N.W.2d at 398. This factor “weighs heavily” because Capistrant’s prior discipline was for similar misconduct. *In re Tigie*, 900 N.W.2d 424, 432 (Minn. 2017). Moreover, Capistrant’s substantial legal experience is aggravating. He was admitted to practice law in Minnesota in 1987. “Committing misconduct despite this substantial experience is an aggravating factor.” *Id.*

We typically disbar attorneys who intentionally misappropriate client funds. *In re Wentzel*, 711 N.W.2d 516, 520–21 (Minn. 2006) (collecting cases). Indeed, we have even disbarred attorneys who have misappropriated small amounts of money. *See In re Rodriguez*, 783 N.W.2d 170, 170 (Minn. 2010) (order) (disbarring an attorney who misappropriated \$650); *In re Grzybek*, 567 N.W.2d 259, 265 (Minn. 1997) (disbarring an attorney who misappropriated \$750). Only when there are “substantial mitigating circumstances” have we imposed a lengthy suspension instead. *Wentzel*, 711 N.W.2d at 521 (citation omitted) (internal quotation marks omitted).

In this case, there are no mitigating factors, much less “substantial mitigating circumstances,” that warrant a sanction other than disbarment. *In re Grzybek*, in particular, is similar to this case. Three separate grounds supported disbarment in *Grzybek*:

(1) repeated neglect of client matters and noncooperation with the disciplinary process less than a year after receiving a 6-month suspension for similar misconduct; (2) misappropriation of \$750 in client funds and no attempt to return the money; and (3) repeated lack of compliance with court orders. 567 N.W.2d at 265. Like the attorney in *Grzybek*, Capistrant has repeatedly neglected client matters, both as a part of the misconduct underlying his 2015 suspension and here, and has failed to cooperate with the disciplinary process less than a year after receiving a suspension for similar misconduct. Moreover, Capistrant misappropriated \$547 of client funds, similar to the amount of money taken in *Grzybek*, and has made no attempt to return the funds.

In sum, Capistrant committed professional misconduct when he misappropriated client funds, neglected a client, and failed to cooperate with the disciplinary process. The appropriate sanction is disbarment.

Accordingly, we order that:

1. Respondent Joseph Michael Capistrant is disbarred from the practice of law in the State of Minnesota, effective on the date of the filing of this opinion.
2. Respondent shall comply with Rule 26, RLPR (requiring notice to clients, opposing counsel, and tribunals), and shall pay \$900 in costs under Rule 24(a), RLPR.