STATE OF MINNESOTA

IN SUPREME COURT

A19-0444

Original Jurisdiction — Per Curiam

In re Petition for Disciplinary Action against Daniel J. Moulton, a Minnesota Attorney, Registration No. 0136888.

Filed: July 1, 2020
Office of Appellate Courts

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

Daniel J. Moulton, Rochester, Minnesota, pro se.

S Y L L A B U S

A 90-day suspension with a requirement to petition for reinstatement is the appropriate discipline for respondent, who failed to remain current on tax obligations and failed to affirmatively report his tax compliance to the Director as required by the terms of his probation.

Suspended.

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 Daniel J. Moulton, alleging that he had violated the Minnesota Rules of Professional Conduct by failing to file and pay his taxes and failing

to affirmatively report his tax compliance to the Director as required by the terms of his probation. Following an evidentiary hearing, the referee concluded that Moulton had violated the Rules of Professional Conduct. The referee recommended that Moulton be suspended from the practice of law for 90 days and that he be required to petition for reinstatement. We conclude that the referee did not clearly err in her findings, Moulton was afforded a fair disciplinary hearing, and a 90-day suspension with the requirement that Moulton petition for reinstatement under Rule 18, Rules on Lawyers Professional Responsibility (RLPR), is the appropriate discipline.

FACTS

Moulton practices law at Moulton Law Office, a sole proprietorship. In addition to his law practice, until April 2016, Moulton owned, operated, and was the sole corporate officer of Moulton Trucking, Inc.

On September 28, 2006, Moulton was suspended from the practice of law for a minimum of 90 days for failing to file and timely pay state and federal employer withholding tax returns for the period of 1998 through 2005. *In re Moulton*, 721 N.W.2d 900 (Minn. 2006), *as modified*, 733 N.W.2d 777 (Minn. 2007) (order). Moulton was conditionally reinstated on June 10, 2010, and placed on unsupervised probation. *In re Moulton*, 783 N.W.2d 168 (Minn. 2010) (order). Moulton was required to remain on probation until he had fully paid all past-due employer withholding tax liabilities or for two years, whichever was longer. *Id.* at 169.

As a condition of his reinstatement, we ordered Moulton to "remain current on all tax obligations to federal and state taxing authorities arising in the future, and on any

payment agreements with such federal and state taxing authorities." *Id.* We also required Moulton to "affirmatively report to the Director, on or before the due date of the required return, his compliance with tax filing and payment." *Id.* The conditional reinstatement order also required Moulton to "provide the Director with all of the documents and information required without specific reminder or request." *Id.*

Moulton's outstanding state and federal liabilities incurred from 1998 through 2005 totaled in the hundreds of thousands of dollars. He made efforts to reduce his federal and state tax debt over many years and negotiated with the IRS on settlement terms. In accordance with the terms of our reinstatement order, he remained on probation while negotiating settlement terms with the IRS. In February 2017 Moulton entered into a global agreement with the IRS to settle his outstanding tax liabilities. The agreement required Moulton to make 24 payments of $25.00 and a final lump sum payment of $202,209.17. Moulton made timely payments to the IRS, including his final lump sum payment, and satisfied his outstanding tax liabilities.

But during Moulton's time on probation, he failed to remain current on his tax obligations on numerous occasions. He failed to timely file state and federal income tax returns for Moulton Trucking, and on multiple occasions he failed to timely pay monthly state and federal employer withholding taxes for Moulton Trucking and Moulton Law Office. Additionally, during this time Moulton on multiple occasions failed to report and provide to the Director documentation about his tax filings and payments as required by his probation. He provided some information to his attorney who was in periodic

communication with the Director. He provided the required information to the Director after receiving a June 9, 2015 letter from the Director.

As part of her supervisory responsibilities, the Director conducted a review of Moulton's compliance with the reinstatement order. Based on irregularities found during the investigation, the Director filed a petition for disciplinary action on March 18, 2019, alleging that Moulton failed to remain current on tax payment obligations in violation of Minn. R. Prof. Conduct 8.4(d) and failed to affirmatively report and provide documents to the Director in violation of Minn. R. Prof. Conduct 3.4(c) and 8.1(b), Rule 25, RLPR, and our June 2010 reinstatement order. Following a day-long hearing, the referee found that the Director had proven by clear and convincing evidence that Moulton's conduct violated the rules and our order as alleged. The referee recommended that Moulton be suspended for a minimum of 90 days and required to petition for reinstatement.

ANALYSIS

I.

In a disciplinary proceeding, the Director must prove by clear and convincing evidence that an attorney violated the Rules of Professional Conduct. *In re Grigsby*, 764 N.W.2d 54, 60 (Minn. 2009). Because Moulton ordered a transcript of the hearing before the referee, he can challenge the referee's factual findings. *See* Rule 14(e), RLPR. We give "great deference to the referee's findings of fact" and will not reverse the referee's findings when the findings "have evidentiary support in the record and are not clearly erroneous." *In re Coleman*, 793 N.W.2d 296, 303 (Minn. 2011) (citations omitted) (internal quotation marks omitted). A finding of fact is clearly erroneous when, upon

review, we are "left with the definite and firm conviction that a mistake has been made." *In re Ulanowski*, 800 N.W.2d 785, 793 (Minn. 2011) (citations omitted) (internal quotation marks omitted).

Moulton challenges the referee's findings that he failed to report to the Director his compliance with state and federal tax filing and payment requirements during his probation and failed to provide copies of the proper tax documents to the Director. We conclude that the referee's finding is supported by the record and, therefore, is not clearly erroneous.

Moulton does not dispute that he failed on numerous occasions to directly report to the Director about his taxes and provide the Director with copies of the required tax returns. He acknowledges that on many occasions the Director did not receive the reports and copies of the tax returns as required by the reinstatement order. But Moulton argues that he complied with his obligations under the reinstatement order by providing the information and documents to his attorney with the expectation that his attorney would forward the information and documents to the Director.

We disagree. Our reinstatement order directed Moulton to report and provide the documents to the Director without a request or reminder by the Director. His obligation was clear. Nothing in our order states or suggests that submitting the information to his attorney fulfilled Moulton's duty to report information to the Director. Further, the record does not disclose that Moulton supplied the documents to his attorney every time that he was obligated to file a return and make a tax payment. The referee did not clearly err by finding that Moulton knowingly failed in his duties under the reinstatement order to

affirmatively report and provide documents to the Director, in violation of Minn. R. Prof. Conduct 3.4(c) and 8.1(b), and Rule 25, RLPR.

II.

Before turning to the question of discipline, we consider Moulton's argument that he did not receive a fair disciplinary hearing. Moulton asserts that his due process rights were violated when the referee failed to admit certain exhibits offered by Moulton, allowed a paralegal from the Director's office to sit at counsel table, limited his opening statement, and fell asleep during his hearing. An attorney receives due process in a disciplinary proceeding if the charges against the attorney are "sufficiently clear and specific" and the attorney was "afforded an opportunity to anticipate, prepare and present a defense." *In re Murrin*, 821 N.W.2d 195, 206 (Minn. 2012) (citation omitted) (internal quotation marks omitted). We also consider whether the attorney had an opportunity at the hearing to present evidence of good character and mitigating circumstances. *Id.* Here, during a day-long hearing, Moulton presented an extensive defense. Moulton offered several exhibits that were admitted into the record, testified on his own behalf, and called several witnesses. He was allowed to testify about factors that he believed mitigated the severity of his misconduct.

The Minnesota Rules of Evidence apply to disciplinary hearings. *In re Dedefo*, 752 N.W.2d 523, 528 (Minn. 2008). "We will not reverse a referee's evidentiary rulings absent an abuse of discretion." *Id*.

Moulton first contends that the referee improperly denied the admission of voluminous medical records that predated the misconduct as well as financial documents

such as Moulton's individual and corporate tax returns, credit scores, information on his child support obligations, and information of past clients who had not paid his legal fees. Under the Rules of Evidence, only relevant evidence is admissible, Minn. R. Evid. 402, and even relevant evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, Minn. R. Evid. 403. The medical and financial records were relevant, if at all, only to Moulton's claim that his financial and other stresses should be considered as mitigating factors. The probative value of many of those documents is diminished, however, because the records relate to time periods well before the occurrence of the misconduct at issue in this case or to tax obligations that have nothing to do with the charges before the referee. Further, the medical and financial records were cumulative because the referee allowed Moulton to address financial and health stresses and hardships in his direct testimony. Moulton fails to identify any specific evidence from the financial or medical records that he was not allowed to bring forth through his testimony and he does not explain why his personal testimony was insufficient to inform the referee of his claimed mitigation. *See W.G.O. v. Crandall*, 640 N.W.2d 344, 349 (Minn. 2002) (noting that erroneous admission of evidence that is cumulative of other admissible evidence is "harmless and will not warrant a new trial"). The referee did not abuse her discretion by excluding Moulton's financial and medical records.

Moulton next argues that he was denied due process when the referee limited his opening statement. The referee directed Moulton to withhold some of his comments until his direct testimony. Moulton ultimately testified at length during the hearing and was

allowed to submit briefing after the hearing on the appropriate discipline. He does not identify any information that he was unable to convey due to the referee's limitation on his opening statement. Accordingly, the referee's decision to limit Moulton's opening statement was not an abuse of discretion. *See In re Walsh*, 872 N.W.2d 741, 745 (Minn. 2015) (recognizing that because disciplinary proceedings are conducted in accordance with the Rules of Civil Procedure and referees are granted all the powers of a district court judge, we review procedural decisions for an abuse of discretion).

Moulton also argues that he was denied due process when the referee allowed a testifying witness, who was a paralegal with the Director's office, to sit at the Director's counsel table. Moulton does not assert any reason why the placement of the witness at counsel table affected his right to a fair hearing or impacted his ability to mount a defense and our review of the record does not find any. We therefore reject this argument.

Lastly, Moulton asserts that the referee fell asleep during his disciplinary hearing. In support of his position, Moulton submitted the affidavits of three persons who attended the hearing, including Moulton's wife. The witnesses assert that during the hearing the referee "appeared to be dozing off," "looked like she was dozing off," and "appear[ed] to have fallen asleep," although the witnesses did not identify when the referee allegedly fell asleep or which witness testimony she may have missed. Moulton himself did not see the referee fall asleep and did not object during the hearing.[1]

[1] We acknowledge that Moulton's view of the referee may have been obstructed during the time that he was testifying.

We conclude that Moulton failed to prove that the referee actually fell asleep and missed testimony, thereby rendering the hearing unfair. *See Chubb v. State*, 640 N.E.2d 44, 48 (Ind. 1994) (holding that a trial spectator's conclusory affidavit claiming that a factfinder fell asleep was insufficient to prove the fact of inattentiveness); *State v. Kimmel*, 448 P.2d 19, 22 (Kan. 1968) (same). Our thorough review of the transcript shows that the referee was actively involved in the hearing. The referee spoke at least once during the testimony of every witness who was called. And a review of the transcript suggests that the longest period of time during which the referee did not speak occurred when the Director was introducing the documentary evidence that Moulton failed to pay and file his taxes—evidence available for independent review by the referee. Further, even those who claim that the referee was dozing do not suggest that the referee was inattentive during Moulton's testimony. Finally, the referee's findings of fact were detailed and comprehensive and consistent with the transcript. On this record, we find that Moulton received a fair disciplinary hearing.

III.

We finally consider the appropriate discipline for Moulton's misconduct. "We are the 'sole arbiter' of the discipline to be imposed for professional misconduct by Minnesota lawyers," *In re Albrecht*, 845 N.W.2d 184, 191 (Minn. 2014), and retain "ultimate responsibility for determining appropriate discipline," *In re Montez*, 812 N.W.2d 58, 66 (Minn. 2012). We impose discipline to deter future misconduct, both by the attorney subject to discipline and by other attorneys. *Albrecht*, 845 N.W.2d at 191. When determining appropriate discipline, "[c]oncepts of fairness dictate that consistency in the

imposition of sanctions be an important goal," but we recognize that each case has "its own unique factual circumstances." *In re Pyles*, 421 N.W.2d 321, 325 (Minn. 1988).

In determining the appropriate discipline to impose, we consider: (1) the nature of the misconduct, (2) the cumulative weight of the violations, (3) the harm to the public, and (4) the harm to the legal profession. *In re Singer*, 541 N.W.2d 313, 316 (Minn. 1996). We also consider similar cases, as well as aggravating and mitigating circumstances specific to the case. *In re Albrecht*, 779 N.W.2d 530, 540 (Minn. 2010).

A.

We first consider Moulton's failure to timely file state and federal income tax returns and his failure to timely file and pay employee withholding taxes in violation of Rule 8.4. These are serious violations. We have previously expressed particular concern with the failure to pay employer withholding taxes because an attorney "essentially convert[s] to his own use temporarily money belonging to his employees which he withheld from paychecks and placed in his business checking account." *In re Tyler*, 495 N.W.2d 184, 186 (Minn. 1992). Such conduct "is tantamount to taking employees' money for the attorney's own use, breaches the trust established between employer and employee, and calls on governmental resources to enforce compliance with the law by those who are sworn to uphold it." *In re Gurstel*, 540 N.W.2d 838, 842 (Minn. 1995).

As part of our consideration of the nature of Moulton's misconduct, we take into account that Moulton ultimately took responsibility for paying off his tax liability and, with significant effort, paid past-due taxes on his own accord without intervention from the Director. *See In re Selmer*, 749 N.W.2d 30, 37–38 (Minn. 2008) (crediting Selmer for

making efforts to pay off past-due tax balances without prompting by the Director and noting that his balances were paid off prior to the disciplinary hearing). We also note that for the one instance when Moulton failed to file a federal and state income tax return—for Moulton Trucking in 2012—the company owed no taxes. *See id.* at 40 (failure to timely file tax returns when no taxes were owed is less serious conduct).

The remaining factors support a finding that Moulton's misconduct is serious. Moulton's failure to file his tax returns and pay his taxes was not a brief lapse in judgment or a single, isolated incident, but rather occurred episodically over several years. *See In re Bonner*, 896 N.W.2d 98, 108 (Minn. 2017) (holding that an attorney's failure to withhold employee contributions to an IRA account over the course of 5 months was not a brief lapse of judgment). Further, Moulton's conduct in failing to file his returns and pay his taxes harmed the public. In particular, misappropriation of employee withholding tax harms the employees whose contributions were misappropriated by Moulton. *See id.* Finally, because Moulton's violation of tax regulations is a failure to abide by the rule of law, his conduct harmed the legal profession. *See In re Brost*, 850 N.W.2d 699, 704 (Minn. 2014) (stating that misconduct that "undermine[s] the public's confidence in the ability of attorneys to abide by the rule of law" harms the legal profession).

B.

Moulton's other misconduct involves his failure to affirmatively report to the Director his compliance with tax filing and payment requirements as mandated by the terms of his probation. This is also a significant violation. We observe, however, that while Moulton failed to provide the Director with all of the documents and information required

without specific reminder or request, as required by our reinstatement order, he cooperated and provided the information to the Director when subsequently asked. Accordingly, the nature of Moulton's misconduct is less serious than a case where a lawyer altogether refuses to provide information to the Director. *Compare Selmer*, 749 N.W.2d at 37 (publicly reprimanding an attorney who failed to comply with the terms of his probation, which included late responses to the Director, but noting that the attorney eventually provided most of the information that the Director requested of him), *with In re Danielson*, 620 N.W.2d 718, 720–21 (Minn. 2001) (indefinitely suspending an attorney who failed to provide required documents to the Director and failed to cooperate with the Director in the investigation of her misconduct, as required by the terms of her probation).

In considering the proper discipline, we further note that Moulton's failure to report and provide documents occurred over several years. In addition, as a direct violation of our reinstatement order, Moulton's failure to report his tax-filing compliance to the Director in accordance with his probation conditions exhibited a failure to abide by the rule of law and so harmed the legal profession.

C.

In addition to evaluating these four factors, we consider both aggravating and mitigating factors to determine the appropriate discipline. *In re Jones*, 834 N.W.2d 671, 682 (Minn. 2013) (citing *In re Rooney*, 709 N.W.2d 263, 268 (Minn. 2006)). The referee found that Moulton's disciplinary history, the fact that his misconduct was intentional, his failure to recognize the wrongful nature of his misconduct, his selfish motivation, and his lack of remorse were all aggravating factors.

Moulton's disciplinary history includes five admonitions and, most critically, a previous 90-day suspension of his law license for similar tax-related misconduct. In fact, Moulton was reinstated in June 2010 and failed to pay employer withholding taxes for Moulton Trucking in July 2010. Because the misconduct here is the same type of conduct that resulted in his 2006 suspension, and occurred while Moulton was on probation for that violation, Moulton has failed to show a "renewed commitment" to professional ethics after being disciplined. *See In re Milloy*, 571 N.W.2d 39, 45–46 (Minn. 1997). "[S]uch repeated misconduct will not be tolerated." *Albrecht*, 779 N.W.2d at 542.

Our concern about Moulton's commitment to abiding by his professional obligations is heightened by the referee's finding that Moulton attempted to minimize the seriousness of his misconduct and blamed others for his misconduct. *Ulanowski*, 800 N.W.2d at 803–04.[2] We agree that we should take these findings into consideration when assessing the appropriate discipline in this case, particularly regarding whether we should require Moulton to petition for reinstatement under Rule 18(a)–(d), RLPR. *See In re Dedefo*, 781 N.W.2d 1, 8 (Minn. 2010) (a lawyer petitioning for reinstatement must demonstrate he has "undergone such a moral change as now to render him a fit person to enjoy the public confidence and trust once forfeited").

[2] The referee found Moulton's minimization of misconduct and finger-pointing to be evidence of both a failure to acknowledge wrongful conduct and lack of remorse, both of which may be aggravating factors. We will not doubly weigh the underlying aggravating conduct simply because it may fit into two separate aggravating factor categories. *See In re MacDonald*, 906 N.W.2d 238, 249 (Minn. 2018).

We also consider Moulton's selfish motivation and the intentional nature of his misconduct in assessing the appropriate discipline. The referee found the Moulton acted with a selfish motive because he took money that he should have used to pay his employees' share of withholding taxes to cover his own business and personal obligations. *See Brost*, 850 N.W.2d at 705 (holding that misconduct committed for a selfish motive, such as permanently misappropriating money for personal use, may be an aggravating factor). The referee also found Moulton's intentional failure to pay his withholding taxes (as opposed to an inadvertent mistake) to be an aggravating factor. Each aggravating factor, however, weighs less heavily on the scales because Moulton ultimately paid those withholding taxes.[3]

When considering appropriate discipline for lawyer misconduct, we may also consider mitigating factors. Moulton unsuccessfully urged the referee to consider as mitigation a number of reasons that impacted his ability to pay his taxes in a timely manner, including a loss of income due to his previous disciplinary suspension, child support obligations, and client bankruptcies that left him unpaid for certain legal services he had provided, as well as health issues and a car accident.

The referee did not clearly err by refusing to consider Moulton's other financial obligations as mitigation. We have considered severe financial distress to be a mitigating

[3] The purposeful nature of Moulton's intentional failure to report and provide documents to the Director is not an aggravating factor because Moulton's violations of Rule 3.4(c) and Rule 8.1(b) require proof of intent. *See In re Sea*, 932 N.W.2d 28, 37–38 (Minn. 2019) (noting that when the rules of professional conduct at issue require proof of intent, it is "double count[ing]" to include intentionality as an aggravating factor).

factor, *see, e.g.*, *Selmer*, 749 N.W.2d at 40, but also have held that financial stress must in some circumstances be coupled with some other type of extreme stress to constitute mitigation in cases of misappropriation, *Bonner*, 896 N.W.2d at 112. Moulton points to the stress he suffered as a result of his ongoing health problems. We conclude that the referee did not clearly err by refusing to find Moulton's financial and other stress a mitigating factor here. Moulton's health problems started well before the specific misconduct in this case occurred and, when he was reinstated in 2010, his physician stated that his health problems would not interfere with his ability to practice law. Moreover, we are taking into account Moulton's ultimately successful efforts to unbury himself from his massive tax debt as part of our consideration of the seriousness of the nature of Moulton's misconduct.

D.

We last turn to other cases to determine the appropriate discipline. *In re Nathanson*, 812 N.W.2d 70, 80 (Minn. 2012) (holding that we consider similar cases to "ensure that [the] disciplinary decision is consistent with prior sanctions"). We find *In re Jones*, 383 N.W.2d 686, 688–89 (Minn. 1986), and *Selmer*, 749 N.W.2d at 40–41, to be apt comparisons.

In *Jones*, we imposed a 90-day suspension because an attorney's misconduct included a failure to file and pay individual taxes and failure to report to the Director as required by the terms of his probation. 383 N.W.2d at 688–89. In *Selmer*, we imposed a public reprimand and one year of unsupervised probation when an attorney failed to pay a Wisconsin disciplinary judgment, failed to abide by terms of his probation that were in

effect when the misconduct occurred, failed to timely file income tax returns, and failed to affirmatively report information to the Director. 749 N.W.2d at 40–41. But in contrast to this case, the attorney in *Selmer* paid all taxes owing when due; he simply failed to file the corresponding return. *Id*. at 38–39. Further, we have held that failure to pay and file withholding income taxes is more serious than failure to file an individual income tax return. *Tyler*, 495 N.W.2d at 186 (observing that failing to pay withholding taxes converted money belonging to the lawyer's employees to lawyer's own use).

Based on all of these factors and considerations, we conclude that a 90-day suspension with a requirement that Moulton must petition for reinstatement under Rule 18(a)–(d), RLPR, is appropriate discipline for Moulton's misconduct. There are "exceptional circumstances" that support a requirement to petition for reinstatement. *In re Eichhorn-Hicks*, 916 N.W.2d 32, 41 (Minn. 2018) (stating that when an attorney is suspended for 90 days or less, "it is only under exceptional circumstances that the attorney is required to petition for reinstatement"). When we suspend an attorney for a disciplinary violation and reinstate the attorney to the practice of law, we expect that the attorney will follow the terms of his or her reinstatement order, will comply with the Director, will not repeat the same misconduct upon reinstatement and will take responsibility for such misconduct if it occurs. *See In re Hansen*, 868 N.W.2d 55, 61 (Minn. 2015) (suspending attorney for 90 days and requiring him to petition for reinstatement because he "repeatedly failed to live up to [the] obligation" of an attorney who was on a disciplinary probation after being suspended and reinstated).

Accordingly, we order that:

1. Respondent Daniel J. Moulton is indefinitely suspended from the practice of law, effective 14 days from the date of this opinion, with no right to petition for reinstatement for 90 days.

2. Respondent shall pay $900 in costs, pursuant to Rule 24(a), RLPR, and comply with the requirements of Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals).

3. If respondent seeks reinstatement, he must comply with the requirements of Rule 18(a)–(d), RLPR. Reinstatement is conditioned on 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, *see* Rule 18(e)(2), RLPR; and satisfaction of continuing legal education requirements, *see* Rule 18(e)(4), RLPR.

Suspended.