STATE OF MINNESOTA

IN SUPREME COURT

A19-0595

Original Jurisdiction

Per Curiam
Took no part, Moore, J.

In re Petition for Disciplinary Action
against Richard Edward Bosse, a Minnesota
Attorney, Registration No. 0245501.

Filed: October 28, 2020
Office of Appellate Courts

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

Steven R. Sunde, Saint James, Minnesota, for respondent; and

Richard E. Bosse, Henning, Minnesota, pro se.

S Y L L A B U S

1. The record supports the referee's findings of fact and conclusions that respondent violated the Minnesota Rules of Professional Conduct.

2. A 60-day suspension is the appropriate discipline for respondent after he failed to diligently represent and properly communicate with clients, entered into improper flat fee and availability fee agreements with clients, failed to safeguard the funds of clients, dishonestly entered into fee agreements with a client and then unreasonably charged that client for the same services under multiple fee agreements, failed to refund unearned fees to a client, and knowingly made a false statement to a client.

Suspended.

O P I N I O N

PER CURIAM.

We appointed a referee after the Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action against respondent Richard Edward Bosse. After a hearing, the referee determined that Bosse committed professional misconduct during his representation of two clients, T.H. and D.H. The misconduct included failing to diligently represent and properly communicate with both clients, entering into improper flat fee and availability fee agreements with both clients, failing to safeguard the funds of both clients, dishonestly entering into fee agreements with T.H. and unreasonably charging him for the same services under multiple fee agreements, failing to refund unearned fees to T.H., and knowingly making a false statement to D.H. The referee recommended a 4-month suspension. Bosse challenges the referee's findings of fact and conclusions, arguing that the recommended suspension is excessive. We conclude that the referee did not clearly err and that the appropriate discipline for Bosse's misconduct is a 60-day suspension.

FACTS

Bosse was admitted to practice law in Minnesota in 1994, and was previously admitted to practice law in Florida in 1972. Bosse has practiced law for over 45 years, mostly in the medical malpractice field. Prior to the present misconduct, he received an admonition in 1997 and a public reprimand in 2000. *In re Bosse*, 607 N.W.2d 448, 448–49 (Minn. 2000) (order).

The Director filed a petition for disciplinary action against Bosse, alleging that Bosse committed professional misconduct during his representation of T.H. and D.H. As to T.H., the Director asserted that Bosse entered into improper fee agreements, dishonestly entered into and failed to fulfill his obligations under two of those agreements, charged unreasonable fees, failed to communicate with and diligently represent T.H., failed to place T.H.'s funds in trust, failed to return unearned fees, and improperly charged for copying the file. As to D.H., the Director similarly alleged that Bosse failed to communicate and provide diligent representation, entered into an improper flat fee agreement, failed to place client funds in trust, and made a false statement to D.H. about his matter.

Bosse's Representation of T.H.

On December 30, 2010, T.H. had coronary artery bypass surgery. Following the surgery, T.H. suffered complications. In May 2013, he consulted with Bosse about a potential medical malpractice claim. Four months later, in September 2013, T.H. and Bosse moved forward with the case. Over the next 2 years, T.H. signed three fee agreements with Bosse: (1) the Flat Fee Agreement, (2) the Availability Fee Contract for Pre-Suit Mediation of Potential Malpractice Claim (Availability Agreement), and (3) the Hourly Retainer/Contingency Fee contract (Hourly Agreement).

During those 2 years, Bosse did not respond to reasonable requests from T.H. for updates on the status of his case. T.H. explained that, although he requested an update on his case in December 2013, he did not speak with Bosse until March 6, 2014. He also requested updates by sending four emails to Bosse from April 2 through June 2, 2014; none were answered. T.H. also affirmed that Bosse never provided "any communication about

legal research," discussions with necessary witnesses, or a "recommendation as to the potential cause of action."

Despite the communication issues, Bosse prepared and served the summons and complaint on December 23, 2014, just before the statute of limitations expired on December 31, 2014. T.H. terminated the representation on February 20, 2015, for "[u]nreasonable charges for services rendered." Bosse then sent T.H. a copy of the client file. T.H. was unable to find another attorney to take his case; in the end, and after paying Bosse more than $50,000 for legal fees and expenses, T.H. agreed to dismiss the litigation.

Bosse's Representation of D.H.

On April 12, 2015, D.H. entered into a Flat Fee Agreement with Bosse for representation on a medical malpractice claim. D.H. contacted Bosse's office "probably half a dozen times" to request a case status update. Although he left messages asking that someone return his calls, no one ever did.

In July 2016, Bosse finally left a message on D.H.'s answering machine. After that message, D.H. had no further communication with Bosse.

Over a year later, prompted by the Director's investigation, D.H. received his file from Bosse. The file included an opinion from an expert that no medical malpractice occurred. Bosse admits that he never sent a copy of the expert opinion to D.H. With about 6 months remaining before the statute of limitations expired, D.H. contacted other attorneys, but none were willing to represent him in the medical malpractice litigation.

Disciplinary Hearing

Leading up to a disciplinary hearing, the Director retained an expert witness to testify about Bosse's handling of the T.H. matter (but not Bosse's representation of D.H.). The expert prepared a report, concluding that Bosse violated many of the Minnesota Rules of Professional Conduct.

The expert testified at the hearing. At one point, the Director asked the expert whether Bosse had fulfilled his obligation under a specific paragraph of the Flat Fee Agreement that required Bosse to gather documents. Bosse objected "to foundation" because the expert had "testified he has not seen all the medical records in Mr. Bosse's file." Because the referee required the Director to lay additional foundation, the Director asked the expert additional questions to establish foundation. The expert testified that he relied on "all the documents that were in [T.H.'s] file," which included Bosse's letters. The expert explained that his conclusion as to whether Bosse had "gathered all the documents necessary to complete this part of the agreement" was based on Bosse's admissions in his "own correspondence" that "he still didn't have all the medical records that he needed in order to evaluate the case" at the time he entered into the Availability Agreement. The referee overruled the objection.

Following the hearing, the referee found that Bosse committed multiple acts of professional misconduct, including the following: Bosse entered into improper Flat Fee Agreements with both clients, an improper Availability Agreement with T.H., and failed to deposit fees related to these agreements into trust, in violation of Minn. R. Prof. Conduct

1.2(a),[1] 1.2(c),[2] 1.5(b)(2),[3] 1.5(b)(3),[4] and 1.15(c)(5).[5] T.H.'s Availability Agreement and Hourly Agreement were unreasonable, and Bosse engaged in deceptive conduct with respect to those agreements by charging for services that he should have performed under prior agreements, in violation of Minn. R. Prof. Conduct 1.5(a),[6] 8.4(c), and 8.4(d).[7] Bosse failed to perform services under the Flat Fee Agreement and the Availability Agreement and failed to return unearned fees to T.H., in violation of Minn. R. Prof. Conduct 1.5(b)[8]

---

[1] "A lawyer shall abide by a client's decision whether to settle a matter." Minn. R. Prof. Conduct 1.2(a).

[2] "A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." Minn. R. Prof. Conduct. 1.2(c).

[3] "A lawyer may charge a fee to ensure the lawyer's availability to the client during a specified period or on a specified matter in addition to and apart from any compensation for legal services performed. . . . The writing shall clearly state that the fee is for availability only and that fees for legal services will be charged separately." Minn. R. Prof. Conduct 1.5(b)(2).

[4] "Fee agreements may not describe any fee as nonrefundable or earned upon receipt but may describe the advance fee payment as the lawyer's property subject to refund." Minn. R. Prof. Conduct 1.5(c)(3).

[5] "[E]xcept as specified in Rule 1.5(b)(1) and (2)," a lawyer shall "deposit all fees received in advance of the legal services being performed into a trust account and withdraw the fees as earned." Minn. R. Prof. Conduct 1.15(c)(5).

[6] "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . . ." Minn. R. Prof. Conduct 1.5(a).

[7] "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . [or] engage in conduct that is prejudicial to the administration of justice . . . ." Minn. R. Prof. Conduct 8.4(c)–(d).

[8] "Whenever a client has paid a flat fee or an availability fee pursuant to Rule 1.5(b)(1) or (2) and the lawyer-client relationship is terminated before the fee is fully earned, the lawyer shall refund to the client the unearned portion of the fee." Minn. R. Prof. Conduct 1.5(b)(3).

and 1.16(d).[9] In a message that Bosse left on D.H.'s answering machine, Bosse was dishonest with D.H. about his matter, in violation of Minn. R. Prof. Conduct 4.1[10] and 8.4(c). Finally, Bosse failed to diligently represent and properly communicate with D.H. and T.H, in violation of Minn. R. Prof. Conduct 1.3,[11] 1.4(a),[12] and 1.4(b).[13]

After making these findings, the referee concluded that our case law did not directly address the appropriate discipline for Bosse's misconduct. The referee determined that the appropriate discipline was a suspension within the range of 60 days to 1 year. The referee recommended a 4-month suspension.

Bosse challenges the referee's findings of fact and conclusions, arguing that the recommended suspension is excessive.

---

[9] "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fees or expenses that has not been earned or incurred." Minn. R. Prof. Conduct 1.16(d).

[10] "In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law." Minn. R. Prof. Conduct 4.1.

[11] "A lawyer shall act with reasonable diligence and promptness in representing a client." Minn. R. Prof. Conduct 1.3.

[12] "A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required . . . (2) reasonably consult with the client . . . (3) keep the client reasonably informed about the status of the matter" and "(4) promptly comply with reasonable requests for information." Minn. R. Prof. Conduct 1.4(a)(1)–(4).

[13] "A lawyer shall explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Minn. R. Prof. Conduct 1.4(b).

ANALYSIS

We begin by reviewing the referee's findings of fact and conclusions for clear error. *See In re Varriano*, 755 N.W.2d 282, 288 (Minn. 2008). When we agree with the referee's findings and conclusions, then we determine the appropriate discipline. *See In re Nathanson*, 812 N.W.2d 70, 78 (Minn. 2012).

I.

The Director bears the burden of proving misconduct by clear and convincing evidence. *Varriano*, 755 N.W.2d at 288. This standard requires a high probability that the facts are true. *In re Houge*, 764 N.W.2d 328, 334 (Minn. 2009).

Because Bosse ordered a transcript, the referee's findings of fact and conclusions are not conclusive. *See* Rule 14(e), Rules on Lawyers Professional Responsibility (RLPR); *In re Ryerson,* 760 N.W.2d 893, 901 (Minn. 2009). We give "great deference to a referee's findings and will not reverse those findings unless clearly erroneous, especially in cases where the referee's findings rest on disputed testimony or in part on respondent's credibility, demeanor, or sincerity." *In re Wentzell*, 656 N.W.2d 402, 405 (Minn. 2003). We review a challenge to a referee's legal interpretation of the Rules of Professional Conduct de novo. *In re Aitken*, 787 N.W.2d 152, 158 (Minn. 2010).

Bosse challenges the referee's findings and conclusions, making four arguments. First, he argues that any finding or conclusion based on the Director's expert witness is clearly erroneous because the expert's testimony lacked foundational reliability. Second, he asserts that the fee agreements with T.H. comply with the Rules of Professional Conduct and that he performed all of the services required by those agreements. Third, in the D.H.

matter, he challenges the referee's finding that he was dishonest in an answering-machine message, claiming that the absence of that message prevents the Director from meeting her burden of proof. Lastly, he asserts that he diligently represented and properly communicated with each client. Bosse's arguments are unavailing.

A.

Bosse argues that the referee clearly erred by relying on any opinion testimony from the Director's expert witness because the expert's opinion lacked foundational reliability. Bosse bases his foundational-reliability claim on the expert's failure to review Bosse's entire file in the T.H. matter. The Director argues that Bosse forfeited this argument because he did not make it before the referee.

"The Minnesota Rules of Evidence apply to disciplinary hearings." *In re Moulton*, 945 N.W.2d 401, 406 (Minn. 2020). Under those rules, "we will not consider a challenge to the admission of evidence 'unless . . . a timely objection or motion to strike appears of record, stating *the specific ground* of objection, if the specific ground was not apparent from the context.' " *State v. Rossberg*, 851 N.W.2d 609, 617–18 (Minn. 2014) (emphasis added) (quoting Minn. R. Evid. 103(a)(1)). "A party is not only bound to make specific objections at the time the evidence is offered, but he is also limited on appeal to the objections he raised below." *Becker Cnty. Nat'l Bank v. Davis*, 284 N.W. 789, 792 (Minn. 1939) (citation omitted) (internal quotation marks omitted); *see also Rossberg*, 851 N.W.2d at 617–18 (concluding that defendant's objection based on hearsay did not preserve claim on appeal that admission of evidence violated the Confrontation Clause).

At the hearing before the referee, Bosse objected to the expert's testimony based on a lack of foundation; he argued that, because the expert had not reviewed all of the medical records, the expert's opinion that Bosse had failed to comply with a specific paragraph in the Flat Fee Agreement requiring Bosse to gather documents lacked foundation. Bosse is improperly attempting to expand his foundation objection before us by arguing that the expert's opinion testimony *in its entirety* lacked foundation because the expert did not review Bosse's entire file. But because Bosse failed to raise the argument that all of the expert's opinion testimony lacked foundational reliability before the referee, *see Becker Cnty. Nat'l Bank*, 284 N.W. at 792, we will consider only the foundation objection that Bosse made before the referee.[14]

Expert opinion testimony "must have foundational reliability." Minn. R. Evid. 702. "[A]n essential element of reliability" is "expert familiarity with the facts of a case." *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 56 (Minn. 2019) (citation omitted) (internal quotation marks omitted). An expert's opinion needs to rely only on "enough facts to form a reasonable opinion that is not based on speculation or conjecture." *Gianotti v. Indep. Sch. Dist. 152*, 889 N.W.2d 796, 802 (Minn. 2017). A referee's ruling on whether there was adequate foundation for an expert's opinion rests "within the discretion of" the

[14] Although Bosse failed to preserve his argument related to the Director's expert failing to review all of Bosse's file in the T.H. matter, we find the handling of this matter by the Director's office concerning. The investigation lasted about 3 years. In addition, counsel for the Director's office failed to review all of the records from Bosse's file in the T.H. matter and to make them available for review by her expert, despite repeated communications from Bosse regarding the size of his file and at least one attempt by Bosse's counsel to provide the Director's office with a complete copy of the file.

referee, "subject to review for abuse of discretion." *Id.*; *see also In re Walsh*, 872 N.W.2d 741, 745 (Minn. 2015) (stating that a referee's "evidentiary rulings" are reviewed "for an abuse of discretion").

Here, the expert explained that he relied on Bosse's admissions in letters Bosse wrote to form his opinion that Bosse had not gathered all of the relevant documents for T.H.'s medical malpractice claim to fulfill his obligation under the Flat Fee Agreement. This was clearly "enough facts to form a reasonable opinion that is not based on speculation or conjecture" about whether Bosse had complied with this paragraph of the Flat Fee Agreement. *See Gianotti*, 889 N.W.2d at 802. The referee did not abuse his discretion when he concluded that there was adequate foundation for the expert's opinion.

B.

Bosse challenges the referee's findings with respect to his fee agreements with T.H.[15] Bosse entered into three fee agreements with T.H.: a Flat Fee Agreement, an Availability Agreement, and an Hourly Agreement. All three, in various ways, failed to comply with the Rules of Professional Conduct, and Bosse failed to perform some of the required services under each agreement. We address each agreement in turn.

1.

Bosse's Flat Fee Agreement violated Rule 1.5(b)(1) and (3). An attorney may charge a flat fee "for specified legal services." Minn. R. Prof. Conduct 1.5(b)(1). A written flat fee agreement must inform a client that "the client has the right to terminate the client-

[15] Bosse has not challenged the referee's findings or conclusions regarding his Flat Fee Agreement with D.H.

lawyer relationship." Minn. R. Prof. Conduct 1.5(b)(1)(iv). And a flat fee agreement "may not describe any fee as nonrefundable." Minn. R. Prof. Conduct 1.5(b)(3). Here, the Flat Fee Agreement violates Rule 1.5(b)(1) and (3) because it states that the "flat fee is non-refundable" and it does not inform T.H. of his right to terminate the client-lawyer relationship.

Bosse also did not complete all of the legal services required under the Flat Fee Agreement. The Flat Fee Agreement required Bosse to gather and review all necessary documents, discuss those documents with necessary witnesses, perform legal research, have preliminary discussions with experts, and provide a recommendation on the potential cause of action to T.H.

The referee found that Bosse failed to perform some of those services. For example, the referee found that Bosse never provided T.H. with a recommendation as to the potential cause of action. The referee was presented with conflicting testimony about whether Bosse told T.H. that his case was "no good." Critically, there is no copy of correspondence from Bosse declining to represent T.H. or concluding that the claim would not survive summary judgment, even though Bosse claims that he put his recommendation in writing after a March 6 telephone call with T.H. When the referee requested that writing, Bosse replied, "I can't put my hands on it." In finding that Bosse never provided a recommendation to T.H., the referee made a credibility finding in favor of T.H. and against Bosse, and without clear error, we uphold that credibility determination. *See Wentzell*, 656 N.W.2d at 405.[16]

[16] Some of Bosse's testimony supports, rather than undercuts, the referee's finding. For example, when explaining that he reviewed all of the documents, Bosse testified that

2.

We turn next to the Availability Agreement. Both Bosse's testimony and the plain language of the agreement establish that it was not a proper "availability fee" under Rule 1.5(b)(2).

Our rules require that an agreement for an availability fee have two critical features, neither of which was present in Bosse's Availability Agreement. First, an availability agreement must clearly state that the availability fee is for availability only. Minn. R. Prof. Conduct 1.5(b)(2) ("The writing shall clearly state that the fee is for availability only . . . ."). Here, Bosse's Availability Agreement does not contain any language limiting the availability fee to ensuring his availability. Instead, it states that the availability fee is "to be available *to investigate and prepare* [T.H.'s] claim for pre-suit mediation." (Emphasis added.) It then clarifies that "investigating and pre-suit services" means obtaining an expert report or affidavit, calculating damages, researching for the pre-suit demand letter, establishing pre-suit mediation, and executing pre-suit settlement documents. Finally, the agreement provides that the "availability fee shall include the cost of the expert for such investigation and pre-suit mediation." In plain terms, the availability fee is for much more than "availability only." *Id.*

Second, our rules require that an availability agreement provide that any fees for other legal services be charged separately. *Id.* ("The writing shall clearly state . . . that fees for legal services will be charged separately."). This language is absent from Bosse's

---

he received 788 pages of medical records in July 2014, which is contrary to his claim that he reviewed all of the records by March 6, 2014.

Availability Agreement; in fact, that agreement provides that Bosse will perform specific legal services and prepare the client's claim for pre-suit mediation.

It is not clear that either Bosse or the client understood what an availability fee is for under our rules.[17] Generally, an availability fee serves three main purposes: (1) it "ensures a lawyer's availability during a given period of time, or for a specified case or matter"; (2) it "place[s] the client's work atop the lawyer's list of priorities; or (3) it "bind[s] a lawyer or law firm to represent [the client] while simultaneously foreclosing the lawyer or law firm from representing an adversary or competitor." Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. Legal Prof. 113, 114-15 (2009). Each of these purposes "immediately benefits a client." *Id.* at 115. But the availability fee is not a lawyer's entire compensation; "[i]f the lawyer's services are actually needed, . . . the lawyer will charge the client for those efforts in addition" to the availability fee. *Id.* And "lawyers should not characterize or conceive [availability fees] as either fee advances or as prepayment for future legal services because they are neither." *Id.*

Bosse's description of the Availability Agreement suggests that he intended to form a special retainer agreement rather than an availability agreement. A special retainer "is money paid to an attorney in advance of performing a specific service." *Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs*, 671 N.W.2d 470, 476 (Iowa 2003). Our rules recognize two types of special retainers: "a flat fee for specified legal services," *see* Minn. R. Prof. Conduct 1.5(b)(1), or a fee advanced to a lawyer that the lawyer deposits into "a

[17] In the classic sense, an availability fee is also known as a general retainer. Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. Legal Prof. 113, 114 (2009).

trust account and withdraw[s] . . . as earned," *see* Minn. R. Prof. Conduct 1.15(c)(5). Flat fees "benefit the client by establishing before representation the maximum amount of fees that the client must pay," which removes the uncertainty associated with "escalating hourly fees that may exceed the client's ability to pay." *In re Sather*, 3 P.3d 403, 411 (Colo. 2000). Here, Bosse explained that T.H. declined to move forward under an hourly rate because T.H. wanted to "know exactly what it was going to cost to do the pre-suit litigation." This reasoning aligns with the purpose of a flat fee rather than an availability fee—Bosse was to perform pre-suit mediation, a specific service, and T.H. had the assurance of knowing the total cost for that legal service.[18] *See Frerichs*, 671 N.W.2d at 476.

3.

Lastly, and perhaps most critically, Bosse's Hourly Agreement was unreasonable. Although Bosse correctly notes that none of the other agreements governed the "preparation of summons, complaint or affidavit of attorney," his argument misses the point.

Bosse fails to appreciate *why* the referee found that the Hourly Agreement was unreasonable. The referee found that the Hourly Agreement was unreasonable because of how little work Bosse had *actually* done but for which he had already been paid when he

[18] Bosse also argues that this was a proper availability fee because (1) the contingency fee, which was also a part of the Availability Agreement, was for the legal services, and (2) he performed $30,000 worth of work. We are not persuaded. Bosse's contingency fee argument fails because the Availability Agreement explicitly states that the availability fee is for specific legal services and includes the cost of the expert. And Bosse's argument that he performed $30,000 worth of work also fails because it is an admission that the fee was compensation for legal services and not for availability and thus an admission that the Availability Agreement violated Rule 1.5(b)(2).

entered into that agreement: "Bosse had failed to obtain a medical expert report and/or affidavit on the standard of care or causation; there was no calculation of damages[,] . . . no research setting forth the medical doctors[']s theories of negligence[,] . . . [and] no identification of or contact with insurance companies . . . ." Because Bosse had not performed those services as required by the other agreements, the Hourly Agreement allowed him to charge T.H. a second or third time for services that he had already agreed to perform and had already been paid to perform. Put more simply, it is unreasonable to charge a client multiple times for the same services. Bosse fails to appreciate this distinction, and his argument is unpersuasive.

C.

Next, Bosse argues that the absence of an answering-machine message prevents the Director from meeting her burden of proof. Bosse argues that the referee clearly erred by concluding that, in an answering-machine message, he dishonestly told D.H. that he had sent D.H.'s medical records to a medical expert on a certain date, when in fact he had not done so. He asserts that this was error because the Director had not presented "the tape on the answering machine displaying [Bosse]'s dishonesty." We disagree.

This was a credibility determination for the referee. At the hearing, D.H. testified that Bosse left a message on his answering machine. Although Bosse now claims that he has no record of this telephone call or message, at the hearing he testified that his records confirm that he called D.H. and "got a voice mail and got no response." Bosse also recalled leaving a message. Essentially, the referee concluded that D.H. was more credible, a

determination entitled to deference. *See Wentzell*, 656 N.W.2d at 405. Accordingly, the referee did not clearly err.

D.

Finally, Bosse failed to diligently represent and properly communicate with both T.H. and D.H. As explained earlier, the referee did not clearly err by concluding that Bosse failed to represent T.H. diligently.

As to his communication with T.H., the referee did not clearly err by concluding that Bosse failed to inform and properly communicate with T.H. At the hearing, T.H. explained that Bosse was not responsive and failed to provide meaningful updates on his case. For example, T.H. testified that he requested an update on his case in December 2013 but that he did not speak with Bosse until March 6, 2014. Similarly, from April 2 through June 2, 2014, T.H. sent four emails to Bosse requesting updates, which went unanswered. T.H. also testified that Bosse failed to provide a meaningful update on his case and never informed him of the results of his work under either the Flat Fee Agreement or the Availability Agreement. This evidence is sufficient to establish that the referee did not clearly err by finding that Bosse violated Rule 1.4.

As to D.H., the referee did not clearly err by concluding that Bosse failed to inform and diligently represent D.H. Bosse admits that he did not inform D.H. about the medical expert's opinion, establishing a violation of Rule 1.4(a)(3) ("A lawyer shall . . . keep the client reasonably informed about the status of the matter[.]"). Similarly, Bosse never terminated his representation but stopped working on the case and thus did not diligently

represent D.H. *See* Minn. R. Prof. Conduct 1.3 ("A lawyer shall act with . . . promptness in representing a client.").

Moreover, the referee was justified in finding that Bosse failed to "promptly comply with reasonable requests for information[.]" *See* Minn. R. Prof. Conduct 1.4(a)(4). At the hearing, D.H. testified that, although he contacted Bosse's office on multiple occasions requesting an update on his case, "no one ever called" him. Bosse claims that his records reflect many telephone conferences between D.H. and himself or his office. But D.H. testified that Bosse's claims were "[a]bsolutely not true." Again, in reaching his decision, the referee found D.H. to be more credible than Bosse.

We therefore conclude that the referee did not clearly err in the findings of fact or conclusions that Bosse violated various rules of professional conduct, and Bosse has not shown any clear error by the referee.

II.

We next turn to the appropriate discipline for Bosse. The referee recommends, and the Director agrees, that we indefinitely suspend Bosse for 4 months. Bosse argues that a suspension would be excessive. We conclude that a 60-day suspension is the appropriate discipline for Bosse.

The purpose of attorney discipline "is not to punish the attorney but rather to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys." *In re Rebeau*, 787 N.W.2d 168, 173 (Minn. 2010). Although we "place great weight on the referee's recommended discipline," we "retain ultimate responsibility for determining the appropriate sanction." *Id.*

To determine the appropriate discipline warranted for an attorney's conduct, we consider (1) the nature of the misconduct, (2) the cumulative weight of the violation, (3) the harm to the public, and (4) the harm to the legal profession. *Nathanson*, 812 N.W.2d at 79. We also consider any mitigating or aggravating circumstances. *In re Perez*, 688 N.W.2d 562, 567 (Minn. 2004).

A.

We first consider the nature of Bosse's misconduct. The referee concluded that Bosse's "misconduct is very serious," finding that Bosse violated multiple rules governing fee agreements, diligence, communication, and honesty. With respect to honesty, Bosse dishonestly entered into fee agreements with T.H., charged unreasonable and deceptive fees to T.H. for services he should have performed under prior fee agreements, and made a knowingly false statement to D.H. about his matter. We have long said that "[h]onesty and integrity are chief among the virtues the public has a right to expect of lawyers" and that "breach of that trust is misconduct of the highest order." *In re Ruffenach*, 486 N.W.2d 387, 391 (Minn. 1992). Bosse's lack of diligence and failure to communicate also "warrant[] severe discipline." *In re Taplin*, 837 N.W.2d 306, 312 (Minn. 2013). We therefore agree with the referee that Bosse's misconduct is serious.

B.

We also consider the cumulative weight and severity of multiple disciplinary violations. *Nathanson*, 812 N.W.2d at 79. We distinguish between "a single isolated incident" and "multiple instances . . . occurring over a substantial amount of time." *In re Fairbairn*, 802 N.W.2d 734, 743 (Minn. 2011) (citation omitted) (internal quotation marks

omitted). Because Bosse's misconduct involved multiple attorney-client agreements and significant failures in communication with two clients, which occurred over a significant period, the misconduct is more than a brief lapse of judgment.

C.

Next, we must determine whether, and to what extent, Bosse's misconduct harmed the public or the legal profession. When assessing the harm to the public, we consider the number of clients harmed and the extent of the clients' injuries. *In re Rambow*, 874 N.W.2d 773, 779 (Minn. 2016). Here, the referee concluded that Bosse's conduct harmed T.H. and the legal profession. Specifically, the referee concluded that T.H. was harmed because, given Bosse's misconduct, T.H. "had no choice but to dismiss the case." The referee also properly found that Bosse's unreasonable fees and dishonesty reflect poorly on the legal profession and undermine the public's trust in lawyers. *See In re Bonner*, 896 N.W.2d 98, 108 (Minn. 2017) (concluding that attorney's misconduct involving dishonesty harmed "the legal profession by undermining the public confidence in the honesty and integrity of lawyers"); *In re Geiger*, 621 N.W.2d 16, 24 (Minn. 2001) (concluding that attorney's misconduct, including charging unreasonable fees, "subjects the profession to severe scrutiny and criticism and contributes to the public's general mistrust of attorneys"). We agree that Bosse's misconduct caused harm to the public and the legal profession.

D.

We also consider aggravating and mitigating factors. *In re Tigue*, 900 N.W.2d 424, 431 (Minn. 2017). Here, the referee found three aggravating factors and no mitigating factors. Bosse does not challenge these findings.

The referee found that Bosse's disciplinary history was an aggravating factor. Prior disciplinary history is an aggravating factor that weighs heavily when it involved similar misconduct. *In re Hulstrand*, 910 N.W.2d 436, 444 (Minn. 2018). Some of Bosse's conduct here is similar to his past misconduct. For example, in 1997, Bosse received an admonition, in part, for entering into a nonrefundable fee agreement without informing the client of her right to terminate the relationship or that the funds would not be held in trust. And Bosse's public reprimand in 2000 involved dishonesty. But Bosse's prior discipline occurred 20 years ago. Accordingly, Bosse's disciplinary history is an aggravating factor, but we will not weigh it heavily.

Next, the referee found that Bosse's lack of remorse was an aggravating factor. An attorney's lack of remorse is an aggravating factor. *See In re Klotz*, 909 N.W.2d 327, 340 (Minn. 2018). The referee substantiated his finding by citing Bosse's lack of "remorse for his misconduct" and failure to acknowledge "the harm he caused to T.H." We agree that Bosse's lack of remorse is an aggravating factor.

Lastly, the referee found Bosse's experience in the practice of law to be an aggravating factor. Substantial experience in the practice of law is an aggravating factor. *Tigue*, 900 N.W.2d at 432. Bosse has practiced law in the medical malpractice field for almost 45 years and has practiced in Minnesota for most of the last 26 years. We reasonably expect that the noncompliant attorney-client agreements, lapses in communication, excessive fees, and other problems that occurred here would occur less often with an experienced attorney. Therefore, we agree that Bosse's substantial experience in the practice of law is an aggravating factor.

E.

Finally, we consider similar cases to "ensure that [the] disciplinary decision is consistent with prior sanctions." *Nathanson*, 812 N.W.2d at 80. The Director essentially agrees with the referee that none of our prior cases fits well with the misconduct here. The referee concluded that, although all of our decisions are distinguishable, those decisions suggest that the range of reasonable suspension for Bosse's misconduct was between 60 days and 1 year.

We agree that no prior case involves the same range of misconduct that Bosse committed. Some of Bosse's most serious misconduct involves the deceptive and unreasonable fees he charged T.H. Charging excessive or unreasonable fees "provide[s] a basis for imposing discipline, depending on the egregiousness of that conduct, ranging from public reprimand, . . . to suspension, . . . or, when charging excessive fees was one of several acts of misconduct, to disbarment." *In re Simmonds*, 415 N.W.2d 673, 677 (Minn. 1987) (citations omitted). We have suspended attorneys whose misconduct involved improper fee agreements. *See In re Sutton*, 925 N.W.2d 35, 36 (Minn. 2019) (order) (imposing a 60-day suspension for, among other things, entering into improper fee agreements); *In re Izek*, 932 N.W.2d 476, 476 (Minn. 2019) (order) (imposing a 1-year suspension for, among other things, entering into improper flat fee and availability agreements). We have also suspended attorneys whose misconduct included neglecting and failing to communicate with a small number of clients. *See In re Milo*, 898 N.W.2d 281, 281–82 (Minn. 2017) (order) (imposing a 30-day suspension for, among other things, failing to diligently pursue representation and communicate with clients in three matters);

In re Egtvedt, 843 N.W.2d 223, 223–24 (Minn. 2014) (order) (imposing a 60-day suspension for, among other things, lack of diligence and failure to communicate with clients "in two client matters"); *In re Crandall*, 699 N.W.2d 769, 770 (Minn. 2005) (imposing a 3-month suspension for, among other things, "neglecting matters of three clients"). Our decisions make clear that Bosse's misconduct warrants more than a public reprimand.

The parties agree that Bosse's misconduct is unique. Bosse engaged in serious misconduct, including failing to properly communicate with and diligently represent two clients, entering into improper fee agreements with these clients, dishonestly charging one client multiple times for the same work, and making a false statement to one client. But Bosse's practice involves complex medical malpractice litigation, and he obtained a favorable expert opinion for T.H., prepared and served a complaint for T.H., and obtained an expert opinion, although unfavorable, for D.H. Given all of these considerations, we conclude that a 60-day suspension is appropriate for the misconduct here.

Accordingly, we order that:

1. Respondent Richard Edward Bosse 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, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals), and shall pay $900 in costs, *see* 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 he is current in continuing legal education requirements, has complied with Rules 24 and 26, RLPR, and has complied with any other conditions for reinstatement imposed by the court.

4. Within 1 year of the date of the filing of this order, respondent shall file with the Clerk of the Appellate Courts and serve upon the Director proof of 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 re-suspension, as provided in Rule 18(e)(3), RLPR.

5. Following reinstatement, respondent shall be placed on probation for 2 years, upon the following terms and 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 its due date. Respondent shall provide to the Director 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 be supervised by a licensed Minnesota attorney, appointed by the Director to monitor compliance with the terms of this probation. Within 2 weeks of the date of this order, respondent shall provide to the Director the names of four attorneys who have agreed to be nominated as respondent's supervisor. If, after diligent effort, respondent is unable to locate a supervisor acceptable to the Director, the Director will seek to

appoint a supervisor. Until a supervisor has signed a consent to supervise, the respondent shall on the first day of each month provide the Director with an inventory of active client files described in paragraph d. below. Respondent shall make active client files available to the Director on request.

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

e. Respondent shall initiate and maintain office procedures which ensure that there are prompt responses to correspondence, telephone calls, and other important communications from clients, courts, and other persons interested in matters which respondent is handling, and which will ensure that respondent regularly reviews each and every file and completes legal matters on a timely basis.

f. Within 30 days from the date of this order, respondent shall provide to the Director and to the probation supervisor, if any, a written plan outlining office procedures designed to ensure that respondent is in compliance with probation requirements. Respondent shall provide progress reports as requested.

MOORE, J., not having been a member of this court at the time of submission, took no part in the consideration or decision of this case.