STATE OF MINNESOTA

IN SUPREME COURT

A20-0473

Original Jurisdiction

Per Curiam
Took no part, Chutich, Thissen, JJ.

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

Filed: June 30, 2021
Office of Appellate Courts

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

Bobby Joe Champion, Minneapolis, Minnesota, for respondent.

S Y L L A B U S

1. The referee's findings that respondent violated the rules of professional conduct are not clearly erroneous.

2. The referee did not clearly err by rejecting respondent's laches defense because she failed to show prejudice, and respondent's false statements impugning the integrity of a judge with knowing or reckless disregard for the truth are not protected by the First Amendment.

3. An indefinite suspension, with no right to petition for reinstatement for 4 months, is the appropriate discipline for an attorney who, after suspension for 60 days followed by 2 years of probation for misconduct that included recklessly making false

statements about the integrity of a judge, repeated her misconduct by knowingly making false statements about the integrity of the same judge while still on 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 Michelle Lowney MacDonald, alleging various acts of professional misconduct. We appointed a referee. After holding an evidentiary hearing, the referee determined that MacDonald's conduct violated several rules of professional conduct. The referee recommended that we impose 1 year of probation. We conclude that the referee's findings that MacDonald violated the rules of professional conduct are not clearly erroneous and that the referee did not clearly err by rejecting MacDonald's laches defense because she failed to show prejudice. We further conclude that MacDonald's false statements impugning the integrity of a judge with knowing or reckless disregard for the truth are not protected by the First Amendment. Finally, because of the repeated attorney misconduct, we conclude that an indefinite suspension, with no right to petition for reinstatement for 4 months, is the appropriate discipline.

FACTS

MacDonald was admitted to the practice of law in Minnesota in 1987. In 2012, MacDonald was admonished for trust-account violations and failing to cooperate with the Director's investigation. In January 2018, we suspended MacDonald for 60 days for, among other misconduct, making false statements about the integrity of a judge with

reckless disregard for the truth. *In re MacDonald*, 906 N.W.2d 238, 240, 241–43 (Minn. 2018). MacDonald's false statements arose from her representation of S.G., a client in a family law matter for whom MacDonald was the fourth attorney of record. *Id.* at 240. We reinstated MacDonald and placed her on probation for 2 years in March 2018. *In re MacDonald*, 909 N.W.2d 342, 342 (Minn. 2018) (order). One of the conditions of MacDonald's probation was that she abide by the Minnesota Rules of Professional Conduct. *Id.*

The current petition for disciplinary action arises from MacDonald's representation of R.P. and her statements during a radio interview. On May 21, 2018, R.P. initially consulted with MacDonald about potential personal injury litigation. MacDonald offered to evaluate the merits of R.P.'s personal injury claim for a flat fee of $500.

On June 5, 2018, R.P. returned to MacDonald's office to hire her firm to review the documents that he had provided. MacDonald introduced R.P. to K.P., the attorney who would review his case. R.P. signed a retainer agreement that authorized MacDonald's firm to "[r]eview data provided for" a possible personal injury case for a flat fee of $500, with representation to end "July 1 when review [is] complete." The agreement was signed by MacDonald and K.P., both purportedly on behalf of the firm, and R.P. paid the $500 fee. But MacDonald did not inform R.P. that K.P. was neither an employee nor member of her firm or that the fee would be split between K.P. and herself. MacDonald also did not obtain R.P.'s written consent to the fee-sharing arrangement, as required by Minn. R. Prof. Conduct 1.5(e)(2). After reviewing R.P.'s case, MacDonald declined to provide further representation.

In 2018, MacDonald also sought election to the Minnesota Supreme Court. On October 3, 2018—after she was reinstated to the practice of law but while she was still on supervised probation—MacDonald was interviewed on WCCO radio regarding her candidacy. At the outset of the program, MacDonald told the interviewer that she was speaking out "because courts need reform." She explained, "[C]ourt orders are damaging people and families. . . . [T]here's a severe failure to follow the rule of law, to follow our constitution and uphold it and, quite frankly, our civil rights are being violated by courts all over the state." The interviewer asked MacDonald if a case involving S.G., a former client of MacDonald, was "one of the cases that you are referring to of civil rights being violated." MacDonald replied that it was.

MacDonald asserted that the judge in the S.G. case violated the rights of both parents when he ordered that they "have no contact with their children whatsoever." She further stated, "[T]he judge did that in September of 2012 *without any hearing, without any process,* and in two hours ordered her, she was already divorced, to leave her home, leave her children . . . and ordered her to not return or else she would be arrested." (Emphasis added.) MacDonald testified at the disciplinary hearing that when she said "without any process," she meant "without any due process" and was referring to the judge's September 7, 2012 order. But she admitted that the order was issued after an emergency telephone conference in which then-counsel for both parents and a guardian ad litem participated. Further, that order was entered by mutual agreement of the parties and was even drafted by S.G.'s attorney at that time.

Later, the interviewer brought up the disappearance of S.G.'s two daughters during the custody litigation and S.G.'s conviction arising from that disappearance. The interviewer asked MacDonald when she had learned that the girls were missing and what S.G. had told her. MacDonald stated that anything S.G. may have told her was protected by attorney-client privilege and that, in any event, she never believed that what S.G. did was a crime. MacDonald continued, "*[T]he crime was with the court* when the judge did an order that neither parent could contact their kids. That's when the deprivation happened." (Emphasis added.)

Finally, at the end of the interview, MacDonald was asked whether there was anything she wanted voters to know before the election. She replied, "I'm running for Minnesota Supreme Court because time and time again as one attorney representing thousands of people across the state I've witnessed an unprecedented display of courts abusing their discretion and authority, damaging people and families. . . . [S.G.] is a, a example of that."

The Director filed a petition for disciplinary action against MacDonald in March 2020. Following an evidentiary hearing, the referee issued findings consistent with the facts described above. The referee concluded that, as to the R.P. matter, the Director had proven by clear and convincing evidence that MacDonald had failed to comply with the requirements of a fee-sharing representation, in violation of Minn. R. Prof. Conduct

1.5(e)(2).[1] As to the WCCO interview, she found that MacDonald's statements denigrating the judge in the S.G. case were "demonstrably false" because those statements repeated the false statements for which MacDonald was disciplined in 2018 and unfairly undermined public confidence in the administration of justice. The referee also found that, as a whole, MacDonald's statements about the judicial system "foster disrespect for the system." She concluded that the Director had proven by clear and convincing evidence that MacDonald's statements attacking the integrity of the judge and the Minnesota judicial system violated Minn. R. Prof. Conduct 8.2(a)[2] and 8.4(d).[3] The referee recommended 1 year of additional supervised probation.[4]

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[1] "A division of a fee between lawyers who are not in the same firm may be made only if . . . the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing . . . ." Minn. R. Prof. Conduct 1.5(e)(2).

[2] "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, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office." Minn. R. Prof. Conduct. 8.2(a).

[3] "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).

[4] The referee also found that MacDonald's misconduct violated the terms of her disciplinary probation and the fact that she was on probation when she committed the misconduct was an aggravating factor. In a case that was decided after the referee made her findings and conclusions, we held that it is improper double counting "to rel[y] on the fact that [an attorney's] misconduct occurred during his probation as both a violation of the Minnesota Rules of Professional Conduct and as an aggravating factor to increase [the attorney's] recommended discipline." *In re McCloud*, 955 N.W.2d 270, 277–78 (Minn. 2021). Just as we did in *McCloud*, we will consider the fact that MacDonald was on probation when she committed the misconduct as an aggravating factor but not as a separate violation of the rules of professional conduct. *See id.* at 278.

ANALYSIS

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 MacDonald ordered a transcript of the hearing before the referee, she may challenge the referee's findings of fact and conclusions. *Id.*; *see* Rule 14(e), Rules on Lawyers Professional Responsibility (RLPR). We give the referee's findings and conclusions "great deference" and will not reverse those findings or conclusions when "they have evidentiary support in the record and are not clearly erroneous." *Grigsby*, 764 N.W.2d at 60 (citations omitted) (internal quotation marks omitted); *see also In re Walsh*, 872 N.W.2d 741, 747 (Minn. 2015) (providing that when a transcript is ordered, "we review a referee's conclusion that an attorney's conduct violated the rules of professional conduct for clear error"). 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) (citation omitted) (internal quotation marks omitted). Even when a transcript is ordered, we review the referee's "conclusions of law that do not rely on the referee's factual findings," including the interpretation of the Rules of Professional Conduct, de novo. *In re Montez*, 812 N.W.2d 58, 66 (Minn. 2012).

In addition, the referee found that the Director had failed to meet her burden to prove other rule violations alleged in the petition. Because the Director did not challenge the referee's findings on those alleged violations, we do not consider them here.

I.

MacDonald first challenges the referee's factual findings. As to the WCCO interview, MacDonald claims that, because the referee quoted only portions of her statements, the referee's findings "represent the words of the Referee, not those actually spoken" by MacDonald. But MacDonald does not explain why quoting her words more extensively would change the referee's findings that her comments violated Rules 8.2(a) and 8.4(d) of the professional conduct rules. The referee is not required to recite the entire interview transcript, and the referee did not take MacDonald's remarks out of context or otherwise distort their meaning.

MacDonald also claims that the referee conflated two orders from the S.G. case that the parties offered as exhibits. We have carefully reviewed the referee's findings and the relevant exhibits and conclude that the referee properly explained those orders. The referee correctly observed that an emergency telephone conference was held before the September 7, 2012 order and that a later order identified a stipulation that had been made between the parties in the S.G. case. Therefore, the referee did not clearly err in her findings related to the WCCO interview.

As to the R.P. matter, MacDonald challenges the referee's finding that she failed to inform R.P. of the fee-splitting arrangement and to obtain his consent to the arrangement in writing, in violation of Minn. R. Prof. Conduct 1.5(e)(2). MacDonald claims that the referee lacked clear and convincing evidence to make this finding because MacDonald verbally informed R.P. of the arrangement and because R.P. wrote the fee split on a copy of the retainer agreement.

There is ample support in the record for the referee's findings. At the hearing, R.P. testified that he did not find out about the fee split until *after* the representation ended and that the notes were written to assist the Director in investigating a complaint he filed against MacDonald. Although MacDonald and R.P. offered conflicting testimony on this point, the referee was entitled to credit R.P. over MacDonald. *See In re Jones*, 834 N.W.2d 671, 677 (Minn. 2013) (stating that we find it "particularly appropriate to defer to the referee" when the referee's findings rest on disputed testimony and witness credibility). In addition, two of the handwritten dates on R.P.'s copy of the retainer agreement are after June 5, the day R.P. signed the retainer agreement, which supports R.P.'s testimony that he did not write the notes until a later date. Finally, as MacDonald admitted, her form retainer agreement does not contain any information about a fee-sharing arrangement. The referee did not clearly err by finding that MacDonald failed to obtain R.P.'s written consent to the fee split.

II.

Having upheld the referee's factual findings, we now turn to MacDonald's primary challenges to the referee's conclusions. MacDonald raises two general defenses: laches and the First Amendment. We address each in turn.

A.

MacDonald first asserts the defense of laches. She argues that the Director unfairly delayed by waiting to bring this disciplinary action until March 2020, although the underlying events took place in June and October 2018. Although the delay is not explained by the record, the referee correctly rejected MacDonald's defense. The doctrine

of laches bars prosecution of a disciplinary petition only when the attorney has been unfairly prejudiced by the delay. *See In re Sklar*, 929 N.W.2d 384, 390 (Minn. 2019) (rejecting a laches defense because there were "no concerning gaps in the procedural history" of the case and because the attorney had not "articulated any specific prejudice" from the delays); *In re N.P.*, 361 N.W.2d 386, 392 (Minn. 1985) ("Our concern, however, is not directed so much at the length of the delay itself but at whether the delay has resulted in prejudice to the attorney being investigated."). Because the referee found that "[n]o unfair prejudice to [MacDonald] is evident in the record of these proceedings," and because MacDonald does not explain how she was prejudiced by the delay, the referee did not clearly err by rejecting MacDonald's laches defense.

B.

MacDonald's next, and primary, defense is that her comments during the interview are protected by the First Amendment. We construe her brief as advancing the following arguments: (1) her statements were nonactionable opinion, (2) her statements were true, (3) the referee applied the wrong legal standard for determining whether MacDonald's speech was protected, and (4) the referee failed to apply strict scrutiny review. None of these arguments has merit.

Turning to MacDonald's first argument, we conclude that her comments were statements of fact, not of opinion. When determining whether a statement is an opinion, we consider the statement's "specificity and verifiability, as well as [its] literary and public context." *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990). "Merely cloaking an

assertion of fact as an opinion does not give that assertion constitutional protection." *In re Nathan*, 671 N.W.2d 578, 584 (Minn. 2003).

The first statement at issue is MacDonald's claim that the judge in the S.G. matter violated the rights of the parents by issuing the September 7, 2012 order "without any hearing, without any process." At the disciplinary hearing, MacDonald admitted that the order was issued after a telephone conference at which counsel for both parents participated, but, MacDonald testified, she does not consider a telephone conference to be a hearing. She also explained that by "without any process" she meant "without any due process," which she believes includes "her client's right to be personally noticed, to be personally heard, for the public to have access to the hearing, and compliance with all of [the] standard deadlines required in family court pleadings."

Without a doubt, MacDonald is free to speak her opinion about what due process should entail. But her comment was not an opinion; it was a statement of fact. MacDonald asserted that a *particular* order in a *particular* case was issued without *any hearing* or *any due process*. That claim is specific and verifiable. Further, in context, a reasonable person would not understand MacDonald merely to be opining about the sufficiency of a telephone conference because MacDonald failed to disclose that a telephone conference took place. A reasonable listener would have no reason to assume the relevant facts, namely, that the order was issued on the mutual agreement of the parties after a telephone conference, in which counsel for both parties participated, and that the order was drafted by then-counsel for MacDonald's former client. In fact, a reasonable listener would assume the opposite, namely, that those events did *not* take place. Consequently, even if MacDonald's statement

were merely an opinion, it would not be protected. *See Milkovich v. Lorain J. Co.*, 497 U.S. 1, 18–19 (1990) (stating that there is no "wholesale defamation exemption" for opinions because expressions of opinion often imply false statements of fact); Restatement (Second) of Torts § 566 cmt. c (1977) (explaining that even a statement of opinion can give rise to defamation liability when it implies the existence of undisclosed defamatory facts as the basis for the opinion). In any event, we reject MacDonald's attempt to immunize her statement by recasting it as an opinion now and conclude that MacDonald's assertion was a statement of fact.

Next, MacDonald's comment that "the crime was with the court when the judge did an order that neither parent could contact their kids" is also a statement of fact. The question of whether the judge exceeded his lawful authority by issuing the order is specific and verifiable.

Finally, MacDonald stated, "[C]ourt orders are damaging people and families. . . . [T]here's a severe failure to follow the rule of law, to follow our constitution and uphold it and, quite frankly, our civil rights are being violated by courts all over the state." Then, in response to the interviewer's question asking whether the S.G. case "was one of the cases that you are referring to of civil rights being violated," MacDonald replied that it was. MacDonald's statement that the S.G. matter is an example of courts damaging people and families, failing to follow the rule of law, and violating people's civil rights is specific and verifiable, and in context could be understood only as a factual claim. Accordingly, the

referee did not err by determining that MacDonald's statements were not protected opinions.[5]

Turning to MacDonald's second argument, we consider whether her statements were true. MacDonald's assertion that the September 7, 2012 order violated the rights of the parents because it was issued "without any hearing, without any process" is false. Ordinarily, procedural due process requires notice and a meaningful opportunity to be heard. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012). As MacDonald admitted at the disciplinary hearing, the order was issued after a telephone conference in which then-lawyers for both parents participated, and S.G's then-lawyer even drafted the

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[5] Two additional issues are presented by this discipline proceeding. First, the referee found that MacDonald's statements denigrating the judicial system as a whole violated the rules of professional conduct and are subject to discipline. Whether MacDonald's general assertions of failure in the Minnesota system of justice are subject to discipline, when they are not linked to specific facts and circumstances, presents a close question. *See Diesen*, 455 N.W.2d at 451 (stating that we consider a statement's specificity and verifiability when determining whether it is protected as a statement of opinion).

Second, we are concerned about possible due process issues presented by this disciplinary proceeding. In a disciplinary context, due process requires the charges against an attorney to be "sufficiently clear and specific" and for the attorney to be "afforded an opportunity to anticipate, prepare and present a defense." *In re Gherity*, 673 N.W.2d 474, 478 (Minn. 2004). Because the Director's petition did not allege that MacDonald's criticism of the judicial system violated the rules, there was no occasion for MacDonald to produce evidence or testimony at her disciplinary hearing to explain the basis of those statements. Consequently, whether MacDonald's general criticisms concerning the administration of justice, unrelated to the S.G. matter, were properly before the referee is unclear.

Because we do not rely on MacDonald's general statements denigrating the judicial system in imposing discipline, we need not decide either of these issues. *See In re Anderson*, 759 N.W.2d 892, 896 (Minn. 2009) (declining to reach factual and due process issues when other findings were "sufficient to support the sanction we believe to be appropriate").

order. *MacDonald*, 906 N.W.2d at 240. Therefore, the judge's order did not violate the parents' rights for lack of a hearing or due process, and MacDonald's statement to the contrary was false, as the referee properly found.[6]

Next, MacDonald's statement that the judge committed a "crime" in issuing the order is false because MacDonald has identified no crime committed by the judge, and MacDonald's due process claims were previously considered and rejected. *See id.* at 240, 243 (explaining that MacDonald's claims were rejected by the district court and in a subsequent federal lawsuit). For the same reason, MacDonald's statement that the S.G. case is an example of "civil rights . . . being violated by courts all over the state" was untrue. *Id.* MacDonald's second argument is without merit.

Turning to MacDonald's third argument, we consider whether the referee applied the correct legal standard to determine whether MacDonald's comments were protected by the First Amendment. Relying on *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990), the referee applied an objective standard to determine that MacDonald acted with knowing or

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[6] The referee found that MacDonald's statement was "demonstrably false" because it was "found to have been made with reckless disregard for the truth in the 2018 disciplinary proceedings." The referee implicitly refers to her finding that we disciplined MacDonald in 2018 because MacDonald falsely claimed in a federal lawsuit that the judge's order was issued *ex parte*. MacDonald challenges this finding.

Our 2018 decision suspending MacDonald does not expressly say that we were disciplining MacDonald for falsely claiming that the order was issued *ex parte*. Neither does it catalogue every false statement that formed that basis of our decision to discipline MacDonald. But it does carefully explain the circumstances surrounding the September 7, 2012 order, *see MacDonald*, 906 N.W.2d at 239–40, and it clearly identifies that MacDonald's discipline was based in part on her reckless, false statements about the integrity of the judge in the S.G. case, *see id.* at 246–47. Therefore, the referee was correct that, based on our 2018 decision, MacDonald's statements during the WCCO interview were "demonstrably false."

reckless disregard for the truth because a reasonable attorney would not have made her statements under the same circumstances. MacDonald argues that the referee should have considered MacDonald's belief that her statements were true because the United States Constitution requires a subjective "actual malice" standard for civil and criminal liability for defaming a public figure. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). MacDonald's argument is without merit. As we explained in MacDonald's 2018 disciplinary proceedings, *Graham* adopted a "modified version" of the constitutional standard with respect to attorney discipline. *MacDonald*, 906 N.W.2d at 246 (explaining the "modified actual-malice test" in *Graham*, 453 N.W.2d at 321–22, 321 n.6). Under that standard, the factfinder determines whether a "reasonable attorney" would have made the false statements under the same circumstances. *Id.* Nothing has changed since 2018 that would prompt us to reconsider our well-established standard, and no other authority cited by MacDonald requires us to do so.[7] Accordingly, the referee was correct to apply an objective standard.

[7] MacDonald's other attempts to bolster her position are not persuasive. She cites to the American Bar Association's version of Rule 8.2, which we have observed is consistent with the subjective standard articulated in *Sullivan*. *See Graham*, 453 N.W.2d at 321. But because in *Graham* we expressly declined to follow the *Sullivan* standard, her argument fails. *Id.*

MacDonald also relies on several cases whose authority we distinguished when we disciplined her in 2018. *See MacDonald*, 906 N.W.2d at 246 n.11 (distinguishing *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), and *Snyder v. Phelps*, 562 U.S. 443 (2011), and explaining that *In re Yagman*, 55 F.3d 1430, 1437–38 (9th Cir. 1995), applies an objective standard like *Graham*). And although MacDonald relies on *In re Green*, 11 P.3d 1078, 1085 (Colo. 2000), which applies a subjective standard, that decision is not binding on us.

Moreover, the referee also concluded that MacDonald's statements impugning the integrity of the judge were "knowingly" false, and we agree. MacDonald was aware that her claim that the September 7, 2012 order was issued without *any* hearing and without *any* due process was false as early as 2013. MacDonald had challenged the September 7, 2012 order, arguing that it was issued because of an *ex parte* communication between the judge and counsel for one parent. *Id.* The judge denied MacDonald's motion and explained that it was based on an inaccurate factual assumption because the order was issued by mutual agreement of the parties after a telephone conference in which then-counsel for both parents participated. *Id.* Further, her argument bordered on the absurd, given that the order had been drafted by S.G.'s then-attorney. *Id.* And not only did MacDonald know these facts in 2013, she also was reminded of these facts in her 2018 disciplinary proceedings, which predate her false statements of fact that prompted this disciplinary action. *See id.* Accordingly, the referee did not err by concluding that MacDonald's statements impugning the judge's integrity were knowingly false.

Relying on *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), MacDonald also argues that her statements were protected because she was commenting on legal issues as a *candidate for judicial office*, which, according to MacDonald, should merit greater constitutional protection. Her reliance is misplaced. *White* struck down a rule of the Minnesota Code of Judicial Conduct that broadly prohibited candidates for judicial office from announcing their views on disputed legal or political issues. *Id.* at 788. But *White* did not hold that a candidate may knowingly or recklessly make false statements of fact about the integrity of judicial officers without consequence, which is the issue here.

Neither did *White* conclude that candidates for judicial office receive greater constitutional protection than other lawyers. As a candidate for judicial office, MacDonald was obligated to follow the rules of professional conduct, and MacDonald's knowingly false statements about a judge, made during a public interview as a candidate for judicial office, are not protected by *White.*

Turning to MacDonald's final argument, we consider whether the referee erred by not applying strict scrutiny when determining whether MacDonald's comments could subject her to discipline under the rules of professional conduct. It is well established that "[t]he First Amendment 'generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed.' " *State v. Casillas*, 952 N.W.2d 629, 636 (Minn. 2020) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)), *petition for cert. filed*, 89 U.S.L.W. 3398 (U.S. May 24, 2021) (No. 20-1635). Generally, a statute that regulates speech based on its content is presumptively unconstitutional and will be upheld only when it survives strict scrutiny, that is, if the statute is narrowly tailored to serve a compelling government interest. *Id.* at 640.

Strict scrutiny review is not required when a lawyer is disciplined for defamatory conduct that violates the rules of professional conduct. Defamation is a category of speech to which ordinary constitutional protections do not apply. *See id.* at 637 (identifying defamation as one of the "limited areas" in which the content of speech may be restricted because it is " 'of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the societal interest in order and morality' " (quoting *R.A.V.*, 505 U.S. at 382–83)). Minnesota Rule of Professional Conduct 8.2(a)

prohibits a subset of defamatory speech, namely, false statements of fact by a lawyer "concerning the qualifications or integrity of a judge, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office." Accordingly, strict scrutiny review is not required. Instead, as we held in *Graham*, the proper test for determining whether a lawyer may be subject to discipline under Rule 8.2(a) is whether a reasonable lawyer in the same circumstances would have made the statement. 453 N.W.2d at 322.

In sum, we conclude that the referee properly rejected MacDonald's laches and First Amendment defenses.[8]

III.

We now consider the appropriate discipline. The referee recommends that we impose a period of probation for 1 year under the supervision of an attorney who is familiar with the allegations of both the 2018 discipline and the violations in this case. The Director

[8] MacDonald also claims, in passing, that the referee's conclusions about her interview statements were made "with no analysis," "based on [the referee's] beliefs," and "without applying a legal standard." To the contrary, the referee's conclusion that MacDonald's statements violated the rules of professional conduct is well supported by the referee's findings and the evidence in the record. And the referee's conclusion that MacDonald's statements harmed the public and legal profession are consistent with our precedent. For example, in MacDonald's 2018 disciplinary proceedings, we stated that "baselessly attacking the integrity of a judge" in itself harms the legal profession. *MacDonald*, 906 N.W.2d at 248. We have observed elsewhere that an attorney's "unprofessional actions and demeanor 'reflect adversely on the bar, and are destructive of public confidence in the legal profession.' " *In re Torgerson*, 870 N.W.2d 602, 616 (Minn. 2015) (quoting *In re Shaughnessy*, 467 N.W.2d 620, 621 (Minn. 1991)). Therefore, the referee did not clearly err by concluding that MacDonald's statements violated the rules of professional conduct and harmed the public and the legal profession.

asks us to impose a 90-day suspension with the requirement of a petition for reinstatement. MacDonald requests that we impose no discipline.

"Although we give 'great weight' to the referee's recommendation, we maintain the ultimate responsibility for determining the appropriate sanction." *In re Greenman*, 860 N.W.2d 368, 376 (Minn. 2015) (citation omitted). In determining the appropriate sanction, we examine four factors: the nature of the misconduct, the cumulative weight of the disciplinary violations, the harm to the public, and the harm to the legal profession. *Id.* We also consider aggravating and mitigating factors. *Id.* Finally, although we may consider similar cases, the discipline is tailored to the specific facts of each case. *Id.* Ultimately, the goal of 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 Albrecht*, 779 N.W.2d 530, 540 (Minn. 2010) (citation omitted) (internal quotation marks omitted).

A.

We first address the four factors, beginning with the nature of MacDonald's misconduct. MacDonald committed two types of misconduct: knowingly making false statements about the integrity of a judge and failing to obtain her client's written consent to a fee-splitting arrangement. Because "[h]onesty and integrity are chief among the virtues the public has a right to expect of lawyers," *In re Ruffenach*, 486 N.W.2d 387, 391 (Minn. 1992), it is well established that dishonesty "warrants severe discipline," *In re Houge*, 764 N.W.2d 328, 338 (Minn. 2009). *Accord In re Nett*, 839 N.W.2d 716, 722 (Minn. 2013) (stating that an attorney's misconduct, which included making false

statements about members of the judiciary, "warrants a serious disciplinary sanction"). Therefore, MacDonald's false statements about the judge weigh in favor of serious discipline.

The rules governing fee splitting between attorneys in different firms protect important client rights. *See Christensen v. Eggen*, 577 N.W.2d 221, 225 (Minn. 1998) (explaining that the rules protect the right of clients to choose their attorney, remain knowledgeable about their case, and avoid the risks inherent in referral fees). Here, MacDonald failed to obtain a client's written consent to a fee-splitting arrangement, but the arrangement involved a single client, a relatively small amount of money ($500), and only one attorney from another firm. Consequently, the nature of this misconduct is less significant.

B.

We next address the cumulative weight of MacDonald's disciplinary violations. In doing so, we distinguish "a brief lapse of judgment or a single, isolated incident of misconduct from multiple instances of misconduct occurring over a substantial amount of time." *Greenman*, 860 N.W.2d at 377 (citation omitted) (internal quotation marks omitted). MacDonald's misconduct took place on only two occasions and in fairly close proximity: June 5 and October 3, 2018. She also committed each type of misconduct on only one occasion. Consequently, this factor does not weigh heavily against MacDonald.

C.

The final two factors—harm to the public and to the legal profession—require us to consider "the number of clients harmed and the extent of their injuries." *In re Nwaneri*,

896 N.W.2d 518, 526 (Minn. 2017). Here, MacDonald's misconduct in the R.P. matter is relatively minimal. It involved a single client, a sum of only $500, and an initial review of his case. In addition, MacDonald's misconduct did not waste judicial resources beyond those involved in the disciplinary process. But the harm from MacDonald's comments during the interview is serious. As we stated when MacDonald was previously before us, "baselessly attacking the integrity of a judge" in itself harms the legal profession. *MacDonald*, 906 N.W.2d at 248; *see* Minn. R. Prof. Conduct 8.2 cmt. 1 ("Expressing honest and candid opinions on [matters such as the fitness of judicial candidates] contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice."). Here, the harm is multiplied because MacDonald's statements were aired on a radio interview and were heard by countless listeners. Therefore, these factors warrant more severe discipline.

D.

We also must consider any aggravating and mitigating factors. The referee found three aggravating factors: (1) MacDonald has a disciplinary history; (2) MacDonald was on probation at the time of her misconduct; and (3) MacDonald has over 30 years of experience. The referee found that no mitigating factors are applicable.

We agree with the referee that MacDonald's disciplinary history and probation status are two aggravating factors. *See In re McCloud*, 955 N.W.2d 270, 278 (Minn. 2021) (finding history of prior discipline and probation status at the time of misconduct as two aggravating factors). We give serious weight to MacDonald's disciplinary history because

her prior discipline involved the same type of misconduct. *See In re Hulstrand*, 910 N.W.2d 436, 444 (Minn. 2018). MacDonald does not contest these factors.

MacDonald challenges the referee's use of her experience practicing law as an aggravating factor. She argues that her career should be a mitigating factor. As support, she cites *In re Wylde*, 454 N.W.2d 423, 423 (Minn. 1990), in which we held that the appropriate discipline for a lawyer who had an unblemished disciplinary record for 20 years, and whose only misconduct had been the late filing and payment of personal income taxes, was a public reprimand followed by probation.

We agree with the referee. It is well established that an attorney's "lengthy experience" may be treated as an aggravating factor. *In re Sea*, 932 N.W.2d 28, 37 (Minn. 2019). In fact, we treated MacDonald's lengthy experience as an aggravating factor when we disciplined her in 2018. *MacDonald*, 906 N.W.2d at 248–49. Further, even in *Wylde*, we did not consider the length of the lawyer's career in isolation; we considered it in conjunction with the attorney's professional reputation, which can itself be a mitigating factor. *See* 454 N.W.2d at 424 (explaining that the attorney was "held in high esteem" for his "professional competence"); *Albrecht*, 779 N.W.2d at 537 (noting that a lawyer's reputation "for integrity and hard work" can be a mitigating factor). Finally, our law has changed since we decided *Wylde*, and we no longer consider the absence of a disciplinary history to be a mitigating factor. *See In re Aitken*, 787 N.W.2d 152, 162 (Minn. 2010). Therefore, MacDonald's lengthy experience is an aggravating factor.

The Director asks us to recognize an additional aggravating factor not found by the referee, namely, MacDonald's failure to recognize the wrongful nature of her misconduct

and her failure to express remorse. "Whether an attorney is remorseful for [her] misconduct is an important issue in an attorney discipline case," and the failure to address it can be clear error. *Albrecht*, 779 N.W.2d at 538. Here, the referee made no findings expressly related to MacDonald's recognition of the wrongfulness of her actions or her expression of remorse, despite the Director arguing that lack of remorse was an aggravating factor. But the record unequivocally establishes that MacDonald has not expressed remorse and has sought only to justify her conduct. For example, at the disciplinary hearing, MacDonald repeatedly defended her comments from the WCCO interview, saying, "My opinion was that [the September 7, 2012 order] didn't have any due process," "There was no phone hearing [but only a phone *conference* because] that didn't resemble any type of hearing that I've ever been involved with," "My opinion is absolutely positively there was no due process there. . . . Due process is more extensive than that," and "My opinion is [the telephone conference] is ex parte . . . but my opinion is different than yours, I guess." She also refused to acknowledge that she had failed to obtain R.P.'s written consent to the fee-splitting arrangement, even though she admitted that, at most, she verbally told R.P. of the fee split, and that he wrote it down himself. Therefore, the referee clearly erred by not finding that MacDonald's failure to acknowledge the wrongfulness of her conduct, and her lack of remorse, are an aggravating factor.

Next, MacDonald asserts that her pro bono work is a mitigating factor. Although " 'extensive pro bono or civil work' *might* constitute mitigation," this factor requires a "qualitative judgment" by the referee to determine whether the pro bono work is "adequately extensive to deserve mitigation." *MacDonald*, 906 N.W.2d at 249 (quoting

Wylde, 454 N.W.2d at 426 n.5). Here, the referee did not make specific findings as to MacDonald's pro bono work; the referee simply found that "[n]o mitigating factors are applicable." Although the failure to address aggravating or mitigating factors can be clear error, a "lack of clarity" in addressing a lawyer's pro bono work is not clear error when the record contains few details about the extent, or number of hours, of the lawyer's involvement. *Albrecht*, 779 N.W.2d at 539. That is the case here. MacDonald has offered some evidence of the extent of her work by testifying that she has received the Northstar Lawyers pro bono recognition every year from 2013 to 2019. But it is not clear whether, or the extent to which, her other activities or accomplishments constitute pro bono legal work. Overall, the record does not show that MacDonald's pro bono work was so extensive that the referee clearly erred by determining that no mitigating factors applied.

E.

Finally, we examine similar cases to ensure the imposition of consistent discipline. The Director cites three cases to support her request that we impose a 90-day suspension with the requirement of a petition for reinstatement. MacDonald cites no cases for comparison to support her request that we impose no discipline.

The most similar case is MacDonald's 2018 disciplinary proceedings in which we suspended her for 60 days, followed by 2 years of probation. *MacDonald*, 906 N.W.2d at 240. As here, MacDonald made false statements about the integrity of the *same judge* in his handling of the *same matter* that was the subject of MacDonald's comments on WCCO radio. *See id.* But there, MacDonald's false statements were of a greater variety, were made orally and in writing, were asserted in three fora, and were repeated over a longer

duration of time. *See id.* at 240–45. In addition, MacDonald had engaged in extensive other misconduct, which included failing to competently represent a client, improperly using subpoenas, knowingly disobeying a court rule, failing to follow a scheduling order, and engaging in disruptive courtroom conduct, including behavior resulting in her arrest. *Id.* at 244. But, unlike here, MacDonald did not engage in repeat behavior for which she had previously been suspended from the practice of law and subsequently placed on supervised probation.

We also look to *Graham*, a case we relied on when fashioning MacDonald's discipline in 2018. *See MacDonald*, 906 N.W.2d at 250. There, Graham's misconduct included repeatedly making false statements about multiple people, including a district court judge and a magistrate judge, with reckless disregard for the truth. *Graham*, 453 N.W.2d at 315. We stated that "[w]here an attorney makes statements 'of his certain knowledge,' with reckless disregard as to the statements' truth or falsity, impugning the integrity of those who work within the judicial system, at the very least a public reprimand is in order." *Id.* at 325. But we also considered several aggravating factors, including that Graham had accused the judge of "perjury, deliberate falsehoods and criminal abuse of power" and lodged multiple frivolous motions. *Id.* We also gave serious weight to Graham's "attitude" of "believ[ing] in a conspiracy against him and preferr[ing] to find fault with others than himself." Therefore, we concluded that a 60-day suspension was appropriate. *Id.* As in *Graham*, MacDonald's primary misconduct is her persistent denigration of a judge's integrity, and her statements bear some notable similarities to those in *Graham* as to the allegedly unfair and criminal process used by the judge. Although

here the referee made no findings as to MacDonald's attitude, we have determined that MacDonald has shown a lack of remorse, which constitutes an aggravating factor. Moreover, Graham had not previously been suspended for recklessly making false statements about the integrity of a judge.

Another decision cited by the Director, which we also relied on in 2018, is *In re Torgerson*, 870 N.W.2d 602 (Minn. 2015). *See MacDonald*, 906 N.W.2d at 249–50. We disciplined Torgerson for disobeying a court order, repeatedly making false statements, making unfounded accusations against a judge, acting belligerently toward a judge and court staff, and charging a nonrefundable flat fee. *Torgerson*, 870 N.W.2d at 605. Although the referee recommended a public reprimand, we imposed a 60-day suspension. *Id.* at 606. Unlike MacDonald, Torgerson did not have a prior disciplinary history and had at least one mitigating factor in her favor. *Id.* at 614. But Torgerson's misconduct was of a broader range than MacDonald's misconduct and took place on multiple occasions.

The final decision cited by the Director is *Nathan.* We disciplined Nathan for engaging in "a pattern of harassing and frivolous conduct," "violating, threatening to violate and assisting others in violating court orders and confidentiality statutes," and "making unfounded derogatory statements about judges and false statements to others." . 671 N.W.2d at 580. We suspended Nathan for 6 months, relying heavily on Nathan's pattern of harassing and frivolous litigation and on his refusal to acknowledge that his actions were wrong. *Id.* at 585–86. The Director acknowledges that MacDonald's misconduct was less severe than Nathan's misconduct, and we agree.

The referee's recommendation of 1 year of probation is not well supported by these decisions, each of which, except for *Nathan*, imposed a 60-day suspension. In her disposition memorandum the referee reasoned that the record and procedural posture "militate[] against the severe sanction recommended by" the Director because "no other claims" of a similar nature were made against MacDonald since the WCCO interview in 2018 and because MacDonald submitted to close supervision during her probation. Although the referee is factually correct, we disagree with her assessment of the implications. MacDonald's avoidance of further misconduct during the remainder of her probation is not a mitigating consideration. *See Albrecht*, 779 N.W.2d at 538–39 ("We have repeatedly stated that mere compliance with the rules of professional conduct is not a mitigating factor in attorney discipline cases."). Neither is the mere passage of time, which, as the referee properly concluded, bars prosecution only after a showing that it prejudiced the attorney. *See N.P.*, 361 N.W.2d at 392.

We ultimately bear the responsibility of fashioning discipline that will "protect the public," "protect the judicial system," and "deter future misconduct by the disciplined attorney as well as by other attorneys." *Albrecht*, 779 N.W.2d at 540 (citation omitted) (internal quotation marks omitted). Close supervision on probation has not been enough to prevent MacDonald from repeating her misconduct, so we have no confidence that an additional year of probation would prevent similar misconduct in the future. Neither was her 60-day suspension in 2018 sufficient motivation. We are especially troubled by the repeated nature of MacDonald's misconduct after discipline, MacDonald's knowledge of

the factual falsity of her statements, her refusal to acknowledge the wrongfulness of her conduct, and her lack of remorse.

Accordingly, we order that:

1. Respondent Michelle Lowney MacDonald 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 4 months.

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

3. Respondent may petition for reinstatement pursuant to 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; Rule 4.A.(5), Rules for Admission to the Bar (requiring evidence that an applicant has successfully completed the Multistate Professional Responsibility Examination), and satisfaction of continuing legal education requirements, *see* Rule 18(e)(4), RLPR.

Suspended.

CHUTICH, J., took no part in the consideration or decision of this case.

THISSEN, J., took no part in the consideration or decision of this case.