STATE OF MINNESOTA

IN SUPREME COURT

A22-0413

Original Jurisdiction — Per Curiam

In re Charges of Unprofessional Conduct in Panel File No. 43372

Filed: February 8, 2022
Office of Appellate Courts

May C. Yang, Law Office of May C. Yang, Saint Paul, Minnesota, for appellant.

Susan M. Humiston, Director, Binh T. Tuong, Managing Attorney, Office of Lawyers Professional Responsibility, Saint Paul, Minnesota, for respondent.

S Y L L A B U S

1. A panel of the Lawyers Professional Responsibility Board did not clearly err by finding that appellant attorney solicited professional employment for pecuniary gain in person on two occasions over consecutive days and gave an individual advertising material without properly affixing the words "Advertising Material" to the outside of the envelope, thereby violating Minn. R. Prof. Conduct 7.3(a) and (c) (2022) (amended May 13, 2022).

2. In this case, an admonition is the appropriate discipline for an attorney who violated two solicitation rules, Minn. R. Prof. Conduct 7.3(a) and (c).

Admonition affirmed.

Considered and decided by the court without oral argument.

O P I N I O N

PER CURIAM.

In this discipline case, an attorney challenges the findings made by a panel of the Lawyers Professional Responsibility Board and the discipline imposed. We conclude that the panel's findings—that appellant violated Minn. R. Prof. Conduct 7.3(a) and (c) (2022) (amended May 13, 2022)—are supported by the evidence, that they are not clearly erroneous, and that the appropriate discipline is an admonition.[1]

FACTS

The Office of Lawyers Professional Responsibility received a complaint against appellant, an attorney licensed to practice in this state since 1979. After an investigation, the Director of the Office of Lawyers Professional Responsibility (Director) issued an admonition to appellant for solicitation of professional employment for pecuniary gain, in violation of Minn. R. Prof. Conduct 7.3(a), as well as failure to include the words "Advertising Material" on the outside of an envelope containing solicitation material, in violation of Minn. R. Prof. Conduct 7.3(c), under the version of these rules in effect at the time.[2] *See* Rule 8(d)(2), RLPR. Appellant then demanded that the Director present the

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[1] An admonition is a form of private, nonpublic discipline that may be imposed for conduct that "was unprofessional but of an isolated and non-serious nature." Rule 8(d)(2), Rules on Lawyers Professional Responsibility (RLPR); *see In re Trombley*, 916 N.W.2d 362, 366 n.2 (Minn. 2018).

[2] The relevant text of Minn. R. Prof. Conduct 7.3 in effect at the time of appellant's conduct—and prior to the May 13, 2022, amendment to the rule that went into effect on September 1, 2022—reads as follows:

charges against him to a three-member panel of the Lawyers Professional Responsibility Board for de novo consideration. *See* Rule 8(d)(2)(iii), RLPR; Rule 4(e), RLPR.

The panel held an evidentiary hearing. The evidence presented showed that appellant visited complainant M.B.'s home on three separate occasions over 3 consecutive days. Appellant and M.B. provided differing accounts of what happened on the first visit.

According to appellant, on the morning of Sunday, August 2, 2020, he was viewing houses for sale on behalf of a friend. After attending a real-estate open house in the area, he spoke with a "casual acquaintance" who pointed out M.B.'s home around the corner and expressed concern about the homeowner. Appellant acknowledged to the panel that he had no previous contact with M.B. Nevertheless, after speaking with another neighbor and determining that M.B.'s house was "in a state of disrepair," appellant decided to conduct a "welfare check" at M.B.'s home. Appellant knocked on M.B.'s front door, and,

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> (a) A lawyer shall not by in-person or live telephone contact solicit professional employment from anyone when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
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> (1) is a lawyer; or
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> (2) has a family, close personal, or prior professional relationship with the lawyer.
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> . . . .
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> (c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall clearly and conspicuously include the words "Advertising Material" on the outside envelope, if any, and within any written, recorded, or electronic communication, unless the recipient of the communication is a person specified in paragraph (a)(1) or (a)(2).

Minn. R. Prof. Conduct 7.3 (a), (c) (amended June 11, 2015); *see also* Promulgation of Amendments to the Minn. R. Prof. Conduct, No. ADM10-8005, Order at 1–2 (Minn. filed May 13, 2022); Promulgation of Amendments to the Minn. R. Prof. Conduct, No. ADM10-8005, Order at 1 (Minn. filed Aug. 24, 2022).

when M.B. answered, according to appellant, the two discussed M.B.'s wellbeing, whether M.B. was willing to sell his house, whether appellant could enter M.B.'s home, whether M.B. needed any home-maintenance service, M.B.'s unemployment, and M.B.'s financial concerns. Appellant testified that M.B. then asked him for a business card "and other information that he thought would be helpful."

M.B., on the other hand, testified that he "was awakened by the sound of [appellant] entering his enclosed porch and pounding on [his] back door and dining room window," in what M.B. characterized as a "home invasion" that placed him in fear for his life. Appellant then proceeded around to the front door and spoke to M.B. through the storm door, asking M.B. "whether he was being sued" and what his name was. Appellant commented that M.B. "owed a lot of money." M.B. recalled that the fact that appellant is an attorney came up "[a]t some point during the conversation." According to M.B., appellant never suggested that he was there for a welfare check, nor did M.B. ask appellant to return or provide any information or documentation related to M.B.'s legal matters. Rather, M.B. testified that he advised appellant that he was unwilling to let appellant enter his home unless appellant "provided a form of identification, such as a business card."

The relevant facts regarding the next two visits were undisputed. Appellant returned to M.B.'s home the following day, on Monday, August 3, 2020. Appellant knocked on M.B.'s door, and, after receiving no response, left an envelope in M.B.'s mailbox. The letter contained a handwritten note with appellant's name at the top stating, "Mr. [M.B.] – Please call and I will be able to assist you." It also contained a copy of appellant's business card, a printout of the homepage of his law firm's website, a printout of a court record for

a pending civil case in which M.B. was named as the defendant, and a property-tax summary from the Ramsey County website stating that M.B. was behind on paying his taxes. The envelope did not indicate that the documents were advertising materials. M.B. did not respond.

On Tuesday, August 4, 2020, appellant returned to M.B.'s home for the third and final time. According to appellant, he returned to verify that M.B. had received the documents he had dropped off. Appellant knocked on the door. M.B. answered but told appellant "that he was not interested in what [appellant] was proposing and asked [appellant] to leave." The two did not have any further contact. Three days later, on August 7, 2020, M.B. filed a complaint with the Office of Lawyers Professional Responsibility.

After hearing the testimony of both M.B. and appellant, the panel determined that on August 2, 2020, appellant approached M.B.'s home to check on his welfare and determine whether M.B. might be interested in selling his house to appellant's friend. As a result, the panel concluded that this visit "did not violate any of the Minnesota Rules of Professional Conduct."

The panel found, however, that on August 3, 2020, appellant placed an envelope in M.B.'s mailbox and that, other than appellant's business card, M.B. had not requested that appellant provide any of the information in the envelope. Nor, the panel concluded, did M.B. invite appellant to return or ask appellant to provide him with legal services. This second visit, according to the panel, "constituted a solicitation for professional employment for the purposes of pecuniary gain," in violation of Minn. R. Prof. Conduct 7.3(a). Moreover, the panel found that appellant's failure to include the words "Advertising

Material" on the envelope he left at M.B.'s house violated Minn. R. Prof. Conduct 7.3(c). Finally, the panel determined that appellant returned to M.B.'s home once more without invitation on August 4, 2020, at which point M.B. told appellant that he was not interested in his services. This final visit, the panel concluded, also constituted a solicitation for professional employment for pecuniary gain, in violation of Minn. R. Prof. Conduct 7.3(a). Based on these findings of fact and conclusions of law, the panel unanimously affirmed the admonition issued by the Director to the appellant.

Pursuant to Rule 9(m), RLPR, appellant appealed this admonition. Specifically, appellant challenges whether the panel could have found by clear and convincing evidence that he violated the Minnesota Rules of Professional Conduct and asserts that, as a matter of law, his conduct did not violate the rules against advertising and solicitation because he acted in response to M.B.'s inquiry for further information.[3]

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[3] Appellant also filed a motion asking us to take judicial notice of the Director's admonition and accompanying memorandum, as well as a memorandum prepared by a District Ethics Committee member. There is no need to take judicial notice of these documents. They were part of the record before the panel. As a result, they are already part of the record on which we review this case. *See* Rule 9(m), RLPR (stating that in an attorney's appeal of a panel's admonition that we "review the matter on the record").

Appellant's motion further requested that the court take judicial notice of district-court filings from a civil proceeding in which M.B. was a party that were not made part of the record before the panel. Appellant seeks to use these documents as impeachment evidence to support his argument that the panel clearly erred in making its factual determinations because these records allegedly show that M.B.'s testimony was not credible.

When an attorney appeals a panel's admonition, we "review the matter on the record" before the panel. Rule 9(m), RLPR. We certainly have the power to take judicial notice of records. *See Sharood v. Hatfield*, 210 N.W.2d 275, 276 (Minn. 1973) (taking judicial notice of "our own past orders and records"). An attorney, however, cannot circumvent the applicable rule regarding the record on appeal by asking us to take judicial notice of potential impeachment evidence that was not introduced at the panel proceeding. *See*

ANALYSIS

"At a disciplinary hearing, the Director bears the burden of proving by clear and convincing evidence that [a lawyer] violated the Rules of Professional Conduct." *In re Varriano*, 755 N.W.2d 282, 288 (Minn. 2008). When an appellant has ordered a transcript, the panel's findings and conclusions are not conclusive. *In re Panel File No. 42735*, 924 N.W.2d 266, 271 (Minn. 2019). We will nonetheless "uphold the findings by a Lawyers Professional Responsibility Board panel when those findings have evidentiary support in the record and are not clearly erroneous." *In re Panel File No. 41310*, 899 N.W.2d 821, 825 (Minn. 2017). We interpret the Minnesota Rules of Professional Conduct de novo, *id.*, but we also "review the application of" those rules "to the facts of the case for clear error," *In re Aitken*, 787 N.W.2d 152, 158 (Minn. 2010).

I.

We turn first to appellant's argument that the panel clearly erred because it improperly afforded weight to M.B.'s testimony despite M.B. having given, according to appellant, conflicting and dubious testimony that should have undermined his credibility.[4]

Hinneberg v. Big Stone Cnty. Hous. & Redev. Auth., 706 N.W.2d 220, 224 (Minn. 2005) (striking records when they were "evidentiary" in nature and not part of the record). In addition, a party's request to introduce impeachment evidence does not appear to be a proper purpose to grant a motion for judicial notice because it seeks to usurp the factfinder's role. *Id.*; *see also Cordova v. State*, 675 So. 2d 632, 636 (Fla. Dist. Ct. App. 1996) ("[J]udicial notice 'must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.' " (quoting *Cnty. Ct. v. Allen*, 442 U.S. 140, 156 (1979))). Accordingly, we deny appellant's motion for judicial notice.

[4] Specifically, appellant says that M.B. denied that appellant ever asked him about his employment status during their first in-person interaction on August 2, 2020, but M.B.

In light of these purported aberrations in M.B.'s testimony before the panel, appellant asserts that the panel committed clear error because it could not have found by clear and convincing evidence that he committed misconduct based on M.B.'s account of events. We disagree.

Appellant's concerns amount to a challenge to M.B.'s credibility, but the panel, like a referee, was free to afford more weight to M.B.'s testimony than the conflicting testimony of appellant in making its factual determinations. *See In re Ulanowski*, 800 N.W.2d 785, 804 (Minn. 2011) (holding that a referee is in the best position to assess credibility); *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). The evidence in the record, including M.B.'s testimony, supports each of the panel's relevant findings of fact.

Because we defer to a panel's findings when there are factual disputes and the record contains evidence to substantiate the panel's findings, there is no merit to appellant's

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was unable to explain how appellant could have known that M.B. was unemployed. According to appellant, this suggests that M.B. offered this information himself, putting M.B.'s credibility in question and showing that he requested assistance with finding employment. Moreover, appellant cites M.B.'s testimony in which he denied being aware of any pending lawsuit against him when appellant first visited his residence, but various court filings, according to appellant, suggest that M.B. in fact knew that there was litigation that had been filed against him at the time. Appellant argues that this information demonstrates that M.B. willfully testified falsely before the panel and instead supports appellant's own credibility. Appellant also argues that his testimony was more credible than that of M.B. because (1) his account of what the two discussed has always been consistent, whereas M.B. never refuted appellant's account of events until the panel hearing, (2) M.B.'s testimony was incredulous and reflected an altered perception of reality, and (3) M.B.'s demeanor at the panel hearing suggested that M.B. harbored animosity and vindictiveness toward appellant that clouded his testimony.

contention that the panel's findings were clearly erroneous. *See In re Severson*, 923 N.W.2d 23, 28 (Minn. 2019) ("Where, as here, a transcript has been ordered, 'we will defer to the panel's credibility assessments and uphold the panel's factual findings if those determinations have factual support in the record and are not clearly erroneous.' " (quoting *In re Mose*, 843 N.W.2d 570, 573 (Minn. 2014))).

As noted above, the panel determined that appellant's second and third visits were improper solicitations for legal services. Appellant relies on *In re 97-29*, 581 N.W.2d 347 (Minn. 1998), to argue that his second and third visits cannot be considered "solicitations" as a matter of law because a solicitation does not include a return communication that the attorney reasonably believes a potential client has asked the attorney to make. Applying this logic, appellant argues that his later visits were not solicitations because he testified that he told M.B. during the first visit that he would return to M.B.'s home, and M.B. did not object.

Appellant mischaracterizes our holding in *97-29*. In that case, an attorney made several phone calls to a potential client and argued that later calls made after the initial call were not solicitations because, when the attorney asked the potential client if he could contact the potential client again during the first call, the potential client responded with, " 'whatever.' " *Id.* at 349. The panel concluded that the later calls did not violate Minn. R. Prof. Conduct 7.3 as solicitations of professional employment by telephone "because appellant could have believed that his calls were invited by complainant." *Id.* at 350. In affirming the panel's conclusion, however, we did not consider these subsequent calls because the panel had already determined that they were not a violation of the rule. *Id.*

Rather, in reviewing the panel's determination that the first call violated Minn. R. Prof. Conduct 7.3, we noted that "[s]olicitation need not be as blunt as a direct request to represent a party" but "can be found in the totality of all the circumstances." *Id.* Likewise, the panel's conclusion here that appellant's conduct constituted solicitation in violation of Minn. R. Prof. Conduct 7.3 can be found in the totality of the circumstances. Based on the evidence in the record, we are unable to conclude that the panel clearly erred when considering those circumstances.

But even if we had held that return communications by an attorney to a potential client are permissible when the attorney may reasonably believe the communications are invited, such a holding would afford appellant no relief. In this case, the panel found only that M.B. requested a business card from appellant for identification purposes during their first meeting. The panel determined that during the first visit, "[M.B.] did not invite [appellant] to return nor did Complainant ask [appellant] to provide him with legal services." It also found that "Complainant had not requested that [appellant] provide him with any of the information contained in the Envelope" he left on the second visit, except for the business card, "which Complainant had requested from [appellant] for identification purposes." And the panel found that "[o]n Tuesday, August 4, 2020, [appellant] returned to Complainant's home without having been invited by Complainant or anyone else to do so." These findings, for which there is adequate support in the record, do not comport with appellant's claim that he could have reasonably believed that M.B. requested him to return after the first visit. Accordingly, we hold that the panel did not clearly err by finding that

appellant's second and third visits to M.B.'s home violated Minn. R. Prof. Conduct 7.3(a) and (c).

II.

Finally, we turn to the appropriate discipline for appellant's violation of Minn. R. Prof. Conduct 7.3(a) and (c). Although "[w]e give great weight to the recommendations of the Panel," *In re Panel File No. 39302*, 884 N.W.2d 661, 669 (Minn. 2016), we have the "ultimate responsibility for determining appropriate discipline" for an attorney who violates the Minnesota Rules of Professional Conduct, *In re Montez*, 812 N.W.2d 58, 66 (Minn. 2012). "The purpose of discipline for professional misconduct is not to punish the attorney but to protect the public and the judicial system, and to deter future misconduct by the disciplined attorney and other attorneys." *In re Nathanson*, 812 N.W.2d 70, 78 (Minn. 2012). In determining the appropriate discipline, we consider " '(1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violations; (3) the harm to the public; and (4) the harm to the legal profession.' " *In re Schulte*, 869 N.W.2d 675, 677 (Minn. 2015) (quoting *In re Nelson*, 733 N.W.2d 458, 463 (Minn. 2007)).

Although Minn. R. Prof. Conduct 7.3 is designed to protect vulnerable members of the public from overreaching by professionals "trained in the art of persuasion," *see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465 (1978), the nature of the misconduct in this case "was unprofessional but of an isolated and non-serious nature," Rule 8(d)(2), RLPR.

When assessing harm from disciplinary violations, we consider " 'the number of clients harmed [and] the extent of the clients' injuries.' " *In re Coleman*, 793 N.W.2d 296,

308 (Minn. 2011) (quoting *In re Randall*, 562 N.W.2d 679, 683 (Minn. 1997)). Appellant engaged in misconduct which consisted of two instances of solicitation for professional employment for the purposes of pecuniary gain and one instance of failing to include the words "Advertising Material" on the outside of the envelope he left at M.B.'s home. The misconduct is isolated because it occurred on only two occasions, both involving the same set of documents—one where appellant dropped them off and one where he returned to verify M.B.'s receipt of the documents—and involved only one individual. Appellant's misconduct only affected M.B. and did not cause M.B. any lasting harm beyond his discomfort when appellant arrived at M.B.'s home on the two occasions at issue.

Nevertheless, this type of misconduct harms the public and the legal profession because it risks leading to "abuses of the legal process." *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 239 (Minn. 2020). Considering all these factors, we conclude that the appropriate discipline is an admonition.

CONCLUSION

For the foregoing reasons, we affirm the admonition.

Admonition affirmed.