STATE OF MINNESOTA

IN SUPREME COURT

A18-1799

Original Jurisdiction — Per Curiam

In re Petition for Disciplinary Action
against Duane A. Kennedy, a Minnesota
Attorney, Registration No. 0055128.

Filed June 17, 2020
Office of Appellate Courts

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Susan M. Humiston, Director, Jennifer S. Bovitz, Senior Assistant Director, Office of Lawyers Professional Responsibility, Saint Paul, Minnesota, for petitioner.

Eric L. Newmark, Minneapolis, Minnesota, for respondent.

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S Y L L A B U S

1. The referee's findings of fact and conclusions of law that respondent attorney violated the Minnesota Rules of Professional Conduct by sexually harassing a client, attempting to have sexual relations with a client, and lying to police and the Director of the Office of Lawyers Professional Responsibility, in violation of Minn. R. Prof. Conduct 8.1(a), 8.4(a), 8.4(c), 8.4(d), and 8.4(g), are supported by the record.

2. The appropriate discipline is an indefinite suspension from the practice of law with no right to petition for reinstatement for 2 years.

Indefinitely suspended.

## O P I N I O N

PER CURIAM.

The Director of the Office of Lawyers Professional Responsibility filed a petition for revocation of probation and for further disciplinary action and a supplementary petition against respondent Duane A. Kennedy. The petition alleged that Kennedy violated Minn. R. Prof. Conduct 8.1(a), 8.4(a), 8.4(c), 8.4(d), and 8.4(g), by bartering with his client for sexual favors and making false statements to police and to the Director about his misconduct with knowledge that those statements were false. The supplementary petition alleged that Kennedy violated Minn. R. Prof. Conduct 1.15 and Appendix 1 by failing to provide checkbook registers to the Director as required.

Kennedy admitted the allegations of the supplementary petition, and denied the allegations of the initial petition. Following an evidentiary hearing, a referee found that Kennedy violated the Rules of Professional Conduct as alleged and that there were multiple aggravating factors and concluded that Kennedy caused harm to his client and to the legal profession. The referee recommended that Kennedy be indefinitely suspended from the practice of law and ineligible to petition for reinstatement for a period of 2 years. We conclude that the referee did not clearly err by finding that Kennedy committed the alleged misconduct and that the referee's recommended discipline is appropriate.

## FACTS

Kennedy was admitted to the Minnesota Bar in 1976. Kennedy is a solo practitioner in Rochester, and a significant part of his practice is criminal defense.

Kennedy's disciplinary history includes a public reprimand, multiple suspensions, and multiple periods of probation. Some of Kennedy's past misconduct has included improper communication with clients. Kennedy has violated the probation conditions each time he was placed on probation.[1]

While on probation, Kennedy was retained by 22-year-old K.P. in April 2015. K.P. was charged with fifth-degree possession of a controlled substance (three Adderall pills). Outside of a single speeding ticket, K.P. had no prior involvement with the criminal justice system. K.P. was embarrassed and ashamed that she was charged with a crime and wanted to avoid public attention.

On April 15, 2015, K.P. met with Kennedy at his office and signed a retainer agreement that set a flat fee for representation at $11,500. K.P. paid part of the fee during her office visit, and Kennedy agreed to accept payments over time on the remaining balance. Between April and June, K.P. met with Kennedy at both his office and her work location and made additional payments. As of June, K.P. owed a remaining balance of $4,700 to Kennedy.

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[1] Kennedy's disciplinary history includes admonitions, public reprimands, and suspensions, and his prior misconduct occurred from 2008 to 2017. *See In re Kennedy*, 831 N.W.2d 912 (Minn. 2013) (order) (public reprimand for representing both a defendant and a witness in the same matter, and failing to inform a client of a settlement offer in a criminal matter unless the client paid outstanding attorney fees); *In re Kennedy*, 864 N.W.2d 342 (Minn. 2015) (30-day suspension for conduct associated with arranging "more favorable" testimony from his client in exchange for settling his client's civil claims); *In re Kennedy*, 873 N.W.2d 133 (Minn. 2016) (order) (30-day suspension for practicing law while on disciplinary suspension); *In re Kennedy*, 902 N.W.2d 633 (Minn. 2017) (order) (30-day suspension for failing to clarify the basis and rate of a fee, failing to deposit unearned client funds into a trust account, failing to maintain required trust account books and records, and improperly sharing fees with a nonlawyer).

Shortly after retaining Kennedy, K.P. told others that she was uncomfortable with Kennedy. K.P. recorded conversations with Kennedy using her cell phone during two meetings in June 2015. K.P. met with police in September and gave them her cell phone to retrieve those conversations. Police met with Kennedy regarding K.P.'s claim that Kennedy had attempted to obtain sexual favors from her in exchange for payment of legal services. Kennedy denied the allegation. He was not charged with a crime arising out of his representation of K.P.

The Director subsequently interviewed Kennedy. Kennedy denied engaging in any sexual conversations with K.P., stating that "none of that happened." When asked if he was being truthful, Kennedy responded that he was being truthful.

The Director filed a disciplinary petition, alleging that Kennedy bartered with K.P. for sexual favors in exchange for legal services and that he made false statements to police and the Director about his misconduct, in violation of Minnesota Rules of Professional Conduct 8.1(a), 8.4(a), 8.4(c), 8.4(d), and 8.4(g), and in attempted violation of Rule 1.8(j). The Director also filed a supplementary petition for disciplinary action, alleging that Kennedy had failed to provide accurate trust account books and records as required by the terms of his probation. Kennedy admitted the allegations related to his bookkeeping, and he denied the allegations that he had bartered with K.P. for sexual favors in exchange for legal services.

At Kennedy's disciplinary hearing, K.P. testified that, throughout their attorney-client relationship, Kennedy had repeatedly made sexual remarks to K.P. For example, when discussing legal fees during an initial meeting, Kennedy said, "A cute girl like you,

you should not have to pay anything, right?" In addition to comments related to K.P.'s appearance, Kennedy asked where K.P. lived, the location of her bedroom in her home, and whether she lived with other people. Kennedy also requested to come to K.P.'s home after business hours, or alternatively, proposed that she come to his office after business hours to make payments on her attorney fee obligations. K.P. testified that she believed his comments and suggestions were an effort by Kennedy to obtain sexual favors as payment for her outstanding bill for legal services.

The cell phone recordings made by K.P. were also admitted at the hearing. A recording from June 2, 2015, included a number of sexual comments by Kennedy that were interspersed with the discussion of K.P.'s case. For example, during the recorded conversation, immediately after K.P. expressed frustration with the legal system and concern that she was unable to take out a loan to pay for her legal fees, the following exchange occurred:

> K.P: It's only like -- I could ask for a $ 3,000 -- Like they couldn't even give me a $3,000 loan. Like that is stupid.
> Kennedy: Yeah. How old are -- Oh, (unintelligible).
> K.P.: I make $3,000 in like a month, like -- not quite, but I'm pushing it.
> Kennedy: Yeah.
> K.P.: But it's still --
> Kennedy: What about keeping promises?
> K.P.: Keeping promises? Well, that --
> Kennedy: You promised you would do it. Then you won't do it. You changed your mind.
> K.P: No. Well --
> Kennedy: You did too.
> K.P.: Well, you told me, I mean if I can get the money. I'm all about that money. You know, kind of like you, right?
> Kennedy: Yeah.
> K.P.: All about that money.
> Kennedy: It's not all about money.

Later in that conversation, the following exchange occurred:

> Kennedy: So we're a no go -- we're no go on the nap?
> K.P.: On the nap?
> Kennedy: You don't want to do it now, do you?
> K.P.: Well, how much money?
> Kennedy: Buck a time. I want it to last a little bit.
> K.P.: A buck a time. That's not even worth it.
> Kennedy: It is for me.
> K.P.: For me, for you.
> Kennedy: Quit (unintelligible) and quit being nervous.
> K.P.: Your time -- Your time will be one minute.
> Kennedy: I promise two.
> K.P.: Or three?
> Kennedy: Promise three zero. I promise 14 inches. Think about that when you're thinking about this case.
> K.P.: I won't be able to think.
> Kennedy: You know -- You know what we're going to do.
> K.P.: Yes.

A few minutes later, Kennedy made the following comment to K.P. after discussing his recent surgery:

> So they went into the joint and pulled it away from the nerve. Now it just hurts like a son of a bitch all the time. So if I rub you with this hand, I can only use these two fingers. All right. Any questions?

In a different recorded attorney-client conversation between K.P. and Kennedy, the following exchange occurred:

> Kennedy: And then I want you to do like you're doing now.
> K.P.: Be serious.
> Kennedy: Yeah. You're not smiling. You're not acting goofy. You don't have your tits sticking out and stuff like that. Not that I don't like that, but not -- it's not for court.
> K.P.: No, it's not for court.
> Kennedy: No.
> K.P.: I know. I think --
> Kennedy: We're talking about the rest of your life here.
> K.P.: Yeah, I know. I'm talking about the rest of my life here, and my life is kind of on hold right now.

In the same meeting, Kennedy also told K.P. that a former client who worked at a hair salon had offered him oral sex for legal services in a criminal case:

> Kennedy: I called up about the massage, because I was representing some girls there too. And I says, [w]ell, what do I get for this massage? What do I get massaged? Whatever you want. I said [o]kay. How much? And the price went way up. But I suppose you're just getting a hand job or head or something. I said, [n]o. I want to come over to your fucking apartment and wake you up. You give me a key. I'll sneak in there, slip in bed with you.
> K.P.: Mr. Kennedy.
> Kennedy: You started it. You started it.
> K.P.: I never said anything.
> Kennedy: You did too.
> K.P.: I don't know what you're talking about.
> Kennedy: (Unintelligible)
> K.P.: I don't know what you're talking about, but okay. Is that it then? Okay.
> Kennedy: Yeah. We won't do anything with this until we get like two or three weeks away from the hearing.
> K.P.: Okay.
> Kennedy: Then we have to start practicing.
> K.P.: Okay.
> Kennedy: Because I want to practice.

Not all conversations between K.P. and Kennedy were recorded. K.P. also acknowledged that when she retained Kennedy she signed a fee agreement, which provided that she could terminate Kennedy at any point and was entitled to the return of any monies that Kennedy had not earned. K.P. did not report Kennedy's conduct to police until after she had entered a plea of guilty in her criminal case.

Kennedy also testified at the disciplinary hearing. Kennedy testified that he did not remember the recorded conversations that he had with K.P. because during that time he was taking prescription pain medication that affected his memory. Kennedy also stated that he did not remember what he had told police.

The referee concluded that Kennedy's conduct violated Minnesota Rules of Professional Conduct 8.1(a), 8.4(c), 8.4(d), and 8.4(g). The referee also concluded that Kennedy attempted to violate the Rules of Professional Conduct, which is prohibited by Rule 8.4(a). Specifically, the referee concluded that Kennedy's conduct constituted an attempt to violate Rule 1.8(j), which prohibits sexual relations with a client. In making his findings, the referee found that K.P.'s testimony was credible and that Kennedy's testimony was not credible. The referee specifically rejected Kennedy's testimony regarding his purported memory loss, citing testimony by police and employees of the Office of Lawyers Professional Responsibility, a lack of supporting medical evidence, internal inconsistencies in Kennedy's testimony, and Kennedy's ongoing representation of clients during the relevant time period. The referee noted that, when interviewed by police and the Director, Kennedy did not claim memory loss, but rather denied the allegations of misconduct without qualification. The referee further found that Kennedy's misconduct was aggravated by his disciplinary history, the fact that the misconduct occurred while he was on probation, his experience practicing law, and his lack of remorse. Based on these findings, the referee recommended that Kennedy be indefinitely suspended from the practice of law and ineligible to apply for reinstatement for a period of 2 years.

## ANALYSIS

### I.

It is the Director's burden to prove by clear and convincing evidence that Kennedy violated the Rules of Professional Conduct. *See In re Grigsby*, 764 N.W.2d 54, 60 (Minn. 2009). Kennedy ordered a transcript of the referee's hearing, preserving his right to

challenge the referee's factual findings. Rule 14(e), Rules on Lawyers Professional Responsibility (RLPR). But we give "great deference to a referee's findings and will not reverse those findings unless they are 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). Findings "are clearly erroneous only 'when they leave us with the definite and firm conviction that a mistake has been made.' " *In re MacDonald*, 906 N.W.2d 238, 244 (Minn. 2018) (quoting *In re Glasser*, 831 N.W.2d 644, 646 (Minn. 2013)). Kennedy challenges the factual findings made by the referee that related to his comments to K.P. and his statements to police and the Director.

A.

The referee determined that Kennedy's repeated unwelcome sexual comments harassed K.P. in violation of Rule 8.4(g). The referee also found that Kennedy's conduct was motivated by an attempt to have sexual relations with K.P. and that this conduct violated Rule 8.4(a), which prohibits lawyers from "attempt[ing] to violate the Rules of Professional Conduct." Kennedy argues that his comments to K.P. were the product of consensual sexual banter, and therefore he did not violate the Minnesota Rules of Professional Conduct. We disagree.

It is professional misconduct to "harass a person on the basis of sex . . . in connection with a lawyer's professional activities." Minn. R. Prof. Conduct 8.4(g). A comment to Rule 8.4 further states: "What constitutes harassment [for the purpose of determining whether misconduct has occurred] may be determined with reference to antidiscrimination

legislation and case law . . . . [H]arassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly." Minn. R. Prof. Conduct 8.4, cmt. 4. During client meetings with K.P., Kennedy made comments related to K.P.'s appearance, such as whether or not her breasts were "sticking out," and stating that she was "a cute girl." Throughout the span of their professional meetings, Kennedy made clear that she was charged with a serious crime. When discussing her payments of attorney fees, he repeatedly tied those conversations to sexual activity by asking to pick up her payments owed at her home after business hours, by discussing other clients offering to pay him with sexual favors, and by inquiring about a "nap." Others observed the effect of Kennedy's behavior on K.P. and noticed her discomfort. K.P. was sufficiently concerned about Kennedy's behavior that she recorded conversations with Kennedy and she went brought those recordings to the police. Under these circumstances, we find that the referee did not clearly err by concluding that this conduct was not mere consensual banter, but rather harassment, and therefore Kennedy's conduct violated Rule 8.4(g).

We next turn to the question of whether Kennedy's conduct was an attempt to violate the Rules of Professional Conduct. "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced." Minn. R. Prof. Conduct 1.8(j). "Sexual relations" is defined as "sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer." Minn. R. Prof. Conduct 1.8(j)(1). There is no allegation in this matter that Kennedy actually engaged in

sexual relations with K.P. Rather, Kennedy challenges the factual inferences made by the referee when determining whether he had attempted to violate Rule 1.8(j).

It is professional misconduct to "attempt to violate the Rules of Professional Conduct." Minn. R. Prof. Conduct 8.4(a).[2] The words uttered in the recorded conversations between Kennedy and K.P. are not in dispute. Kennedy and the Director dispute the context, intent, and effect of the conversation. Kennedy argues that the only reasonable interpretation of his conversations with K.P. is that of consensual sexual banter, and therefore his conduct did not violate the Rules of Professional Conduct. Stated another way, Kennedy objects to construing his words as intending that he and K.P. have sexual relations. In support of his assertion, Kennedy gives the example of a conversation in which Kennedy suggests to K.P. that she could earn a "buck a time" for sexual favors. He argues that because K.P. owed nearly $5,000 in legal fees, his suggestion was clearly not a

[2] The Rules of Professional Conduct do not define "attempt," and our decisions do not provide a definition. The referee concluded that Kennedy's conduct constituted an attempt under the Rules because "[r]espondent's overt and implied sexual statements to K.P. constitute a *substantial step* in respondent's efforts to obtain sexual services for payment and to engage in sexual relations with K.P." (Emphasis added.) Kennedy does not challenge the referee's legal conclusions that "substantial step" is the appropriate standard for an attempt under Rule 8.4(a) or that Kennedy's conduct was a substantial step. In the absence of an adversary proceeding focused on the definition of attempt, we assume without deciding that the standard used by the referee applies here—that Kennedy's conduct constitutes a "substantial step." *See In re Eichhorn-Hicks*, 916 N.W.2d 32, 38 n.9 (Minn. 2018) ("Summary arguments made without analysis or citation to legal authorities are forfeited."). But Kennedy does challenge the factual inferences drawn by the referee and therefore we consider Kennedy's claim that his comments were merely consensual sexual banter, leaving for another day the debate about the precise definition of attempt in the context of professional responsibility.

serious attempt at bartering because at "one hand job a day, it would take nearly 13 years to work off that legal bill."

Kennedy's argument is both unpersuasive and obnoxious. K.P. credibly testified that she felt pressured to engage in sexual relations with Kennedy in order to secure a favorable result in her criminal case. K.P. was young, immature, embarrassed, and, as noted by the referee, "wholly without knowledge whatsoever of court proceedings or lawyers." Against the backdrop of the enormous differences in age, experience, and knowledge between Kennedy and K.P., the referee's findings that Kennedy sexually harassed K.P. and attempted to engage in sexual relations with her are not clearly erroneous.

Kennedy set the tone from the first meeting by stating that, because K.P. was "cute," she should not have to pay for legal services, and by inquiring about her living arrangements and whether she lived alone. Thereafter, he requested to meet with K.P. after business hours at either her home or his office to receive payment. He admitted that his prior comments were sexual by apologizing for them when he met with K.P. at her place of employment. His conversations with K.P included a reference to a "nap," the context of which reasonably implied sexual behavior, and a statement about the length of his penis. He also told K.P. that one of his prior clients had offered to perform oral sex in exchange for reduced legal fees. These conversations occurred while Kennedy was discussing the seriousness of K.P.'s crime and her unpaid legal fees, which she was struggling to pay. K.P. credibly testified that she felt so uncomfortable by the interactions that she contacted the police about Kennedy's behavior. In contrast, the referee determined that Kennedy's

testimony lacked credibility overall. All of these facts, taken together, support the findings and conclusions reached by the referee.

B.

We next turn to the question of whether Kennedy's communications with the Director and police violated the Rules of Professional Conduct. It is professional misconduct for a lawyer to "engage in conduct involving dishonesty . . . deceit, or misrepresentation." Minn. R. Prof. Conduct 8.4(c). Additionally, it is misconduct for a lawyer in connection with a disciplinary matter to "knowingly make a false statement of material fact." Minn. R. Prof. Conduct 8.1(a). Finally, it is professional misconduct to "engage in conduct that is prejudicial to the administration of justice." Minn. R. Prof. Conduct 8.4(d). The referee concluded that Kennedy violated these Rules when he (1) told police that he did not have sexual conversations with K.P. and knew those statements were false; (2) falsely told the Director that sexual conversations had never occurred, and told the Director that he was telling the truth; and (3) made no efforts to correct his knowingly false statements.

Kennedy argues that the referee's findings are clearly erroneous because the record tended to show that Kennedy was on pain medication throughout 2015 due to a surgery and that Kennedy "should not be expected to recall" all the conversations he had with K.P. while taking medication. The referee's reasoning for rejecting Kennedy's testimony on the basis of credibility was robust, and we defer to the referee's findings "when the referee's findings rest on disputed testimony or in part on credibility, demeanor, and sincerity." *In re Lyons*, 780 N.W.2d 629, 635 (Minn. 2010); *see also In re Farley*, 771 N.W.2d 857, 863

(Minn. 2009) (holding that a referee may reject testimony). The referee found that Kennedy's testimony was not credible because it was inconsistent and not supported by record evidence. Kennedy offered no medical testimony or other evidence to support his claim that his medication caused his memory loss. Kennedy offered neither a basis for his current lack of memory nor an explanation as to why he recalled events when speaking to the police and the Director, but then at his disciplinary hearing did not recall the same events. Kennedy also provided certain details about events in 2015, such as whether a door was open or closed for a particular meeting, conversations he had with K.P.'s boyfriend, and other events from around that time period, all undercutting the credibility of his claimed memory loss.

Because the factual finding that Kennedy knowingly made false statements to police and the Director in violation of Rules 8.1(a), 8.4(c), and 8.4(d) turns largely on Kennedy's credibility, and the evidence that Kennedy was not credible was substantial, the referee's findings are not clearly erroneous.

II.

We next consider the appropriate discipline to be imposed for Kennedy's misconduct. The referee recommended that he be indefinitely suspended from the practice of law and ineligible to petition for reinstatement for a period of 2 years. The Director agrees with the referee's recommendation. Kennedy suggests that if the court agrees with the referee's findings regarding misconduct, a 30-day suspension would be appropriate.

When determining the appropriate discipline for attorney misconduct, we "place great weight on the referee's disciplinary recommendation but retain ultimate

responsibility for determining the appropriate sanction." *In re Nathanson*, 812 N.W.2d 70, 78 (Minn. 2012). We impose attorney discipline to deter future misconduct, both by the attorney subject to discipline and by other lawyers. *In re Albrecht*, 845 N.W.2d 184, 191 (Minn. 2014). In determining the appropriate discipline to impose, we consider four factors: (1) the nature of the misconduct, (2) the cumulative weight of the violations, (3) the harm to the public, and (4) the harm to the legal profession. *Id.* In seeking to impose consistent discipline, we examine similar cases, as well as aggravating and mitigating circumstances. *In re Albrecht*, 779 N.W.2d 530, 540 (Minn. 2010). When determining appropriate discipline, "[c]oncepts of fairness dictate that consistency in the imposition of sanctions be an important goal," but we recognize that each case has "its own unique factual circumstances." *In re Pyles*, 421 N.W.2d 321, 325 (Minn. 1988). Finally, "[e]ven where no single act of misconduct standing alone warrants severe public discipline, the cumulative weight and severity of multiple disciplinary rule violations may compel such discipline." *In re Geiger*, 621 N.W.2d 16, 23 (Minn. 2001).

A.

*Nature of the Misconduct*

The nature of Kennedy's misconduct includes sexual harassment and attempted sexual relations with a current client, as well as making false statements to the police and the Director. Each violation here independently warrants serious discipline.[3]

[3] Kennedy also violated the Rules of Professional Conduct and the terms of his probation by not keeping adequate records to account for permissible personal funds that were in his trust account. *See In re Ganley*, 549 N.W.2d 368, 370–71 (Minn. 1996) (stating that an attorney is "charged with the knowledge that [the attorney] must maintain a separate

Kennedy's sexual comments to K.P. during client meetings was harassment in violation of Rule 8.4(g). Pressuring a client to engage in sexual relations is serious misconduct. *Albrecht*, 845 N.W.2d at 191. The lewd sexual comments by Kennedy were persistent, pervasive, and took advantage of the confidences created by the attorney-client relationship.

The nature of the misconduct is particularly serious here because K.P. had retained Kennedy to defend her in a criminal prosecution. Even though K.P. was entitled by statute[4] to a mandatory diversion for her first-time controlled-substance offense, and was in no immediate risk of incarceration, Kennedy repeatedly played on K.P.'s fears that "she was on trial for her life."

Kennedy's repeated false statements to police and the Director also warrant serious discipline. *See In re Ruffenach*, 486 N.W.2d 387, 391 (Minn. 1992) ("Honesty and integrity are chief among the virtues the public has a right to expect of lawyers. Any breach of that trust is misconduct of the highest order and warrants severe discipline.").

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account and adequate records," and imposing discipline even where an attorney's trust account violations were not undertaken with intent to defraud the client (citation omitted) (internal quotation marks omitted)). The referee concluded that this violation was "technical in nature" and "did not involve client funds or any loss." Although it is misconduct to fail to comply with the recordkeeping requirements of the Rules of Professional Conduct, even if the violation is merely "technical," in comparison to Kennedy's other violations, this violation is less significant. It is also important that Kennedy admitted the violation and no harm accrued to clients as a result of the recordkeeping errors. Therefore, our analysis here focuses on Kennedy's more serious misconduct.

[4] Deferred prosecution is required for certain first-time controlled-substance offenses, including fifth-degree possession of a Schedule II controlled substance. Minn. Stat. § 152.18, subd. 1(b) (2018).

*Cumulative Weight of the Violations*

We next consider the cumulative weight of Kennedy's violations. When considering the cumulative weight of misconduct, we distinguish "a brief lapse in judgment or a single, isolated incident" from "multiple instances of misconduct occurring over a substantial amount of time." *In re Severson*, 860 N.W.2d 658, 673 (Minn. 2015). And "the cumulative weight and severity of multiple disciplinary rule violations may compel severe discipline even when a single act standing alone would not have warranted such discipline." *In re Oberhauser*, 679 N.W.2d 153, 160 (Minn. 2004). The varying types of violations, which include repeated sexual harassment and solicitation of a client, and multiple false statements to the Director and the police, weigh in favor of greater discipline. *See In re Nwaneri*, 896 N.W.2d 518, 525–26 (Minn. 2017) (stating that the attorney's late filing and false affidavit were part of a single incident, but his lie to the investigator 72 days later was a separate instance of misconduct).

*Harm to the Public*

The third factor we consider is the harm to the public caused by Kennedy's misconduct. In assessing harm to the public, we consider the number of persons harmed and the extent of the injuries. *In re Voss*, 830 N.W.2d 867, 878 (Minn. 2013). The referee noted that K.P. was "unsophisticated, naïve and completely inexperienced with the law" and that Kennedy took advantage of those qualities "in an attempt to attain his sexual desires." At the time of Kennedy's actions, K.P. felt as if she had "no way out" due to her fear that Kennedy's behavior was typical of all lawyers and her desire to keep her criminal charge secret. As a result of Kennedy's unwanted sexual suggestions, K.P. became more

concerned about her safety. The extent of the harm caused by Kennedy's misconduct warrants significant discipline.

*Harm to the Legal Profession*

The fourth factor we consider is the harm to the legal profession. Misconduct that "undermine[s] the public's confidence in the ability of attorneys to abide by the rule of law" harms the legal profession. *In re Brost*, 850 N.W.2d 699, 704 (Minn. 2014). K.P. had no experience with the legal profession and, as a result of Kennedy's repeated unwanted sexual harassment and attempts to exchange services for sexual favors, K.P. is now distrustful of other lawyers and the legal system.

The profession is also harmed by Kennedy's false statements to police and the Director. Dishonest acts by lawyers violate the public's right to trust in the integrity of the legal profession. *Ruffenach*, 468 N.W.2d at 391.

B.

In addition to evaluating the four factors, we consider both aggravating and mitigating factors to determine the appropriate discipline. *In re Jones*, 834 N.W.2d 671, 682 (Minn. 2013) (citing *In re Rooney*, 709 N.W.2d 263, 268 (Minn. 2006)). No mitigating factors were argued here and none exist. The referee found that Kennedy's misconduct was aggravated by his disciplinary history, the fact that the misconduct occurred while he was on probation, his experience practicing law, and his lack of remorse. Although we consider Kennedy's disciplinary history and current probationary status as aggravating factors, we do not rely on any of the remaining aggravating factors found by the referee in our assessment of the appropriate discipline. We expressly considered Kennedy's

experience in the area of criminal law when we assessed the nature of his misconduct, so considering it an aggravating factor is duplicative. *See In re Mollin*, 940 N.W.2d 470, 476 (Minn. 2020); *In re O'Brien*, 809 N.W.2d 463, 466 n.9 (Minn. 2012) ("We caution referees not to rely on the same acts . . . to support both a finding of attorney misconduct and the existence of an aggravating factor."). Further, we reject the referee's conclusion that Kennedy's lack of remorse was an aggravating factor that warranted more severe discipline. After a careful review of the record, we conclude that, even though Kennedy's admission of remorse was not a model of clarity, here, lack of remorse is not an aggravating factor.

We turn next to considering whether Kennedy's probationary status and disciplinary history are aggravating factors here. At the time of Kennedy's misconduct, he was on probation for previous misconduct. Misconduct by an attorney while on disciplinary probation is an aggravating factor, regardless of whether the rule violations are the same or different. *In re Kurzman*, 871 N.W.2d 753, 758 (Minn. 2015). Kennedy's probationary status at the time of his misconduct is therefore an aggravating factor that warrants significant discipline. *See id.*

We also consider Kennedy's prior misconduct an aggravating factor because, after being discipline, an attorney is expected to show a "renewed commitment" to professional ethics. *In re Milloy*, 571 N.W.2d 39, 45–46 (Minn. 1997). We have imposed more severe sanctions on attorneys with a history of disciplinary action "to send a clear message that such repeated misconduct will not be tolerated." *Albrecht*, 779 N.W.2d at 542; *see also In re Rebeau*, 787 N.W.2d 168, 176 (Minn. 2010) (indefinitely suspending an attorney for a

minimum of 12 months because the attorney had "committed serious misconduct during 10 of his 31 years in practice" and that it was "not a single misstep[,] . . . it was a series of violations committed during nearly one-third of his legal career"). Here, Kennedy's disciplinary history began in 2008 and includes admonitions, a public reprimand, and multiple suspensions. He also had been disciplined for inappropriate, but nonsexual, communication with a prior client. *Kennedy*, 831 N.W.2d at 912 (order) (imposing discipline in part for failing to inform a client of a settlement offer in a criminal matter unless the client paid outstanding attorney fees). We are particularly concerned that Kennedy's disciplinary history includes violating probation every time probation was imposed, suggesting an absence of a "renewed commitment" to professional ethics.

Additionally, Kennedy made false statements to the tribunal at his disciplinary hearing, selectively stating that he did not remember the conversations. Although Kennedy's false statements in the proceedings before the referee were not charged as misconduct, they are an additional aggravating factor. *Cf. In re Hulstrand*, 910 N.W.2d 436, 444 (Minn. 2018) (observing that acts of noncooperation cannot be "double count[ed]" as both substantive misconduct and an aggravating factor, but that failure to cooperate in proceedings before the referee is an aggravating factor).

We therefore find Kennedy's disciplinary and probationary history, as well as his false statements at his disciplinary hearing, to be aggravating factors.

C.

After considering the four factors, we next look to similar cases to "ensure that [the] disciplinary decision is consistent with prior sanctions." *Nathanson*, 812 N.W.2d at 80.

We have imposed discipline in cases in which lawyers had sexual relationships with clients or witnesses, and we impose more significant discipline when the victim is vulnerable or is coerced to perform sexual acts with the lawyer in order to pay the lawyer's legal fees. For example, we suspended a lawyer when he engaged in a sexual relationship with the spouse of a client charged with first-degree murder and made false statements about the relationship to an investigating county attorney. *In re Bulmer*, 899 N.W.2d 183, 184 (Minn. 2017) (order). In that case, a 3-year suspension was imposed because "the sexual relations occurred under circumstances in which coercion might be suspected: the client's wife had fallen behind in her payment of legal fees, and it was suggested that [the lawyer] and the wife might 'work out a situation because [the wife] didn't have the money to pay [the lawyer].' " *Id.*

We disbarred an attorney with a significant disciplinary history who engaged in sexual relations with a client over an extended period of time and pressured her for sex whenever she sought legal advice, practiced law while suspended, received payment for legal services while suspended, and made false statements to the Director's office and the referee. *Albrecht*, 845 N.W.2d at 191. We noted that, after the client had communicated that she was no longer interested in engaging in sexual activity with Albrecht, Albrecht's behavior of "pressuring his client for sexual favors every time she sought to discuss legal matters . . . exemplifie[d] the very inequality and exploitation of the lawyer's role that Rule 1.8(j) prohibits." *Id.* at 192. Albrecht had a longer disciplinary record than Kennedy and his conduct was more egregious than Kennedy's conduct. *See id.* at 191–92.

Independent of the sexual coercion aspect of Kennedy's misconduct, we impose significant discipline for attorneys who make false representations to the Director or to police. We suspended an attorney for 3 months and placed the attorney on supervised probation for 2 years after the attorney intentionally misled his clients and lied to the Director's office regarding a fabricated settlement. *In re Iliff*, 487 N.W.2d 234, 236–37 (Minn. 1992). We have imposed reciprocal discipline of a 2-year suspension (with 1 year stayed) for an attorney who had filed false reports with the police and the attorney's insurance company, alleging that his car had been stolen. *In re Forstrom*, 806 N.W.2d 76 (Minn. 2011) (order).

Kennedy abused his position of power and trust to exploit a client in an attempt to achieve his sexual desires. He then, while on probation, repeatedly made false statements to police and the Director about the conversations with K.P. His disciplinary history and probationary status warrant substantial discipline, and under these circumstances, we conclude that the referee's recommended discipline, a 2-year suspension, is appropriate.

Accordingly, we order that:

1. Respondent is indefinitely suspended from the practice of law, effective 14 days from the date of this opinion, and with no right to petition for reinstatement for 2 years from the effective date of the suspension.

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

3. If respondent seeks reinstatement, he must comply with the requirements of Rule 18(a)–(d), RLPR. Reinstatement is conditioned on successful completion of the written examination required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility and satisfaction of continuing legal education requirements. *See* Rule 18(e)–(f), RLPR.

Indefinitely suspended.