No. _____

In the Supreme Court of the United States

In re Petition for
Reinstatement of Michelle MacDonald, a
Minnesota Attorney, Registration No. 0182370

Michelle MacDonald,
Petitioner,

vs.

Minnesota Office of Lawyers' Professional
Responsibility,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Speech by attorneys critical of the judiciary is an essential component of our American system of government. This Court has not addressed the restraint on free speech which is inherent in disciplining a lawyer for comments criticizing a judge, and that is why this case presents an issue of first impression regarding the First Amendment, Free Speech and the discipline of attorneys for statements concerning the qualifications or integrity of a judge. Across the country, for decades, in scores of cases, both state and federal courts have discipled attorneys for making disparaging remarks about the judiciary, and have almost universally rejected the constitutional standard established by the Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Garrison v. Louisiana,* 379 U.S. 64 (1964) for punishing speech regarding government officials. Attorneys are generally prohibited from, and severely punished for impugning judicial integrity, even though the American Bar Association expressly adopted the constitutional subjective standard established in *Sullivan* and *Garrison* in its Model Rule 8.2 to only prohibit attorneys from making "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"[1].

The checking power of attorney speech is not the antithesis of preserving judicial integrity---checking government power is the primary method for preserving government integrity.

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[1] See Rules of Professional Conduct R. 8.2 (a), Maintaining the Integrity of the Profession, Judicial & Legal Officials. The Model Rule is identical to Minnesota Rule of Professional Conduct R. 8.2 (a) Judicial & Legal Officials.

The questions presented are:

1. Whether a free speech right to impugn judicial integrity must be recognized for attorneys in order to reclaim their First Amendment Rights in invoking and avoiding government power in the protection of client life, liberty and property?
2. Whether the disciplinary proceedings for attorneys can constitutionally abrogate First Amendment Rights when rules are used to punish speech that impugns the integrity of the judiciary without requiring a showing of knowledge or reckless disregard to truth or falsity using the constitutional and subjective standard?
3. Whether attorney Michelle MacDonald, a candidate for the Minnesota Supreme Court and critic of the judiciary, may immediately appeal under 28 USC § 1291, to reverse the Minnesota Supreme Court's Judgment due to its refusal to adhere to her First and Fourteenth Amendment rights by deciding to "indefinitely" suspend her from the practice of law, and then by refusing to reinstate MacDonald without their "requisite" show of remorse" " or "change in conduct and state of mind", disregarding her participation in a restorative justice prayer circle, facilitated by Family Innocence, with Judge [David Knutson]?[2]

[2] See In re Petition for Reinstatement of Michelle MacDonald, A21-1636, Appendix 3a, at pp. 7a-10a

PARTIES TO THE PROCEEDINGS

The parties in this action are Attorney Michelle Lowney MacDonald and the Minnesota Office of Lawyers Professional Responsibility, Director Susan Humiston.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michelle MacDonald, respectfully petitions for a writ of certiorari, on behalf of herself and the over 1.3 million licensed attorneys in the United States, to review the judgment of the Minnesota Supreme Court, *In re Petition for Reinstatement of Michelle MacDonald*, A21-1636 (Minn. July 26, 2023), denying her Petition for reinstatement to the practice of law. A. p 3a . The Petition was necessitated by the June 30, 2021 Opinion of the Minnesota Supreme Court, *In re Petition for Disciplinary action against Michelle MacDonald*, 962 N.W. 2d 451 (Minn. 2021) where the court indefinitely suspended MacDonald for impugning the integrity of a judge, while campaigning for judicial office in 2018. A. p. 13a.

The full transcript of Candidate MacDonald's interview WCCO radio on October 3, 2018 is found at A. p. 42a, and can be heard on the following link: https://www.youtube.com/watch?v=Pu3q_pRkPxg

OPINIONS BELOW, ORDERS, AND JUDGMENTS

The Judgement denying MacDonald's petition for reinstatement, September 15, 2023, is attached as Appendix A, p.1a

The Order denying MacDonald's Petition for Rehearing, September 8, 2023, is attached as Appendix A, p. 2a

The July 26, 2023 Opinion of the Minnesota Supreme Court, *In re Petition for Reinstatement of Michelle MacDonald*, A21-1636 (Minn. July 26, 2023), published, is attached as Appendix A, p. 3a

The June 30, 2021 Opinion of the Minnesota Supreme Court, case no. A20-0473, *In re Petition for Disciplinary action against Michelle Lowney MacDonald*, 962 N.W. 2d 451 (Minn. 2021) is published, attached as Appendix A, p 13a

OTHER DOCUMENTS TO UNDERSTAND THE PETITION

The transcript of the Interview with Supreme Court Candidate Michelle MacDonald, Interview by Blois Olson, WCCO Radio Midday, October 3, 2018, for which she was suspended indefinitely from the practice of law, and refused reinstatement is attached as Appendix A, p 42 a.

Listen to Michelle MacDonald's interview at the following link.

https://www.youtube.com/watch?v=Pu3q_pRkPxg

Watch Michelle MacDonald's oral argument before the Minnesota Supreme Court, August 4, 2023 at the following link.

https://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/ArgumentDetail.aspx?vid=1608

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) for writ of certiorari in a civil case after rendition of a judgment or decree of a court of appeals. A judgment of the Minnesota Supreme Court was entered on September 15, 2023.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1291 to reverse the final decision of the Minnesota Supreme Court.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting, the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S. Const. I; *accord.* Minn. Const. art. I, §3.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. XIV; *accord*. Minn. Const. art. I, §7.

ABA Model Rule of Professional Conduct (MRPC) 8.2 (a) Maintaining the Integrity of the Profession, Judicial & Legal Officials:

> 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.

Minnesota Rule of Professional Conduct, 8.2 (a) Judicial and Legal Officials

> 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.

STATEMENT OF THE CASE

Petitioner Michelle MacDonald was admitted to practice law in Minnesota on September 11, 1987. This case originated from a complaint by Susan Humiston, Director of the Minnesota Office of Lawyer Professional Responsibility ("OLPR"), after it was reported to her that Michelle MacDonald, an attorney and candidate for the Minnesota Supreme Court, was interviewed on WCCO radio live on October 3, 2018 relating to the November 2018 election.

Candidate MacDonald's Radio Interview while Campaigning for Justice

In 2018, MacDonald also sought election to the Minnesota Supreme Court. The petition for disciplinary action arose from MacDonald's statements during a radio interview on WCCO radio regarding her statewide candidacy for the Minnesota Supreme court. See full transcript, attached as Appendix at A. p. 42a.

MacDonald appeared as a candidate for Associate Justice of the Minnesota Supreme Court, having been nominated by the Secretary of State. She had run for the position four years earlier when endorsed by the Republican Party, securing 47% of the popular vote.

At the onset 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" A. p. 42a.

Court Trial Presided Over by Judge Knutson with MacDonald in Handcuffs, mentioned on Interview (WCCO)

The WCCO interview quickly centered on MacDonald's involvement in the Sandra Grazzini-Rucki litigation, including the custody trial, which she had handled "while under arrest, with no mother, no pen, no paper, no materials." A p. 44a.

The interviewer asked MacDonald if a case involving Sandra Grazzini-Rucki, a former client of MacDonald's was "one of the cases that you are referring to of civil rights being violated" MacDonald replied that it was. A. p.43a.

MacDonald asserted that the judge in the Sandra Grazzini-Rucki case violated the rights of both parents when he ordered that they "have no contact with their children whatsoever" A. p.43a.

In her opinion, as a judicial candidate, MacDonald told radio host Olson that Ms. Grazzini-Rucki's rights had been violated by the District Court. As MacDonald explained, Ms. Grazzini-Rucki had been ordered to leave her home within two hours of the issuance of the Court's Order "or else she would be arrested." A. p 43a. Judge Knutson's Order of September 7, 2012, offered and accepted as MacDonald Exh. 6, required Ms. Grazzini-Rucki to leave " her home, and her children" that same day, "at or before 12:00 p.m.".

Candidate MacDonald said Judge Violated Parental Rights in Interview (WCCO).

She [MacDonald] 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 there… and ordered her not to return or else she would be arrested. " A. 42 a - 43 a. MacDonald opined that the process reflected in the September 7th Order was unfair to Ms. Grazzini-Rucki.

By using the phrase "without any process" to describe the proceedings, she testified that she was referring to 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. The telephone conference referenced in the September 7th Order did not satisfy procedural or substantive due process, in her opinion as a candidate.

Later in the WCCO interview, Ms. MacDonald opined that a deprivation of civil rights occurred when both Grazzini-Rucki parents were denied access to the children. A. p. 43a. Ms. MacDonald said she was referring to a deprivation of civil rights. 18 U.S.C. 242.

Candidate MacDonald Asserted Attorney-Client Privilege during Interview (WCCO).

The interviewer brought up the disappearance of SANDRA GRAZINNI-RUCKI's two daughters during the custody litigation and SANDRA GRAZZINI-RUCKI's conviction arising from that disappearance. The interviewer asked MacDonald when she had learned that the girls were missing and what SANDRA GRAZZINI-RUCKI had told her.

MacDonald stated that anything SANDRA GRAZZINI-RUCKI may have told her was protected by attorney-client privilege and that, in any event, she never believed that what SANDRA GRAZZINI-RUCKI 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." A. p. 47a.

Candidate MacDonald said Courts are Damaging Families during Interview (WCCO).

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.... [SANDRA GRAZZINI-RUCKI] is a, a example of that." A. p. 48 a. Her exact words were:

> "Well, basically, for the last 30 years I've stood up to judges on behalf of individuals and families so that people could learn the basic recognition of their civil and constitutional rights in our society. Rights once recognized as sacrosanct to everybody and 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." A 42a.

OLPR Investigates MacDonald's Appearance on WCCO Radio Show

The OLPR subpoenaed the radio station , and then sent a Notice of Investigation to MacDonald on October 29, 2018, by authority of Susan Humiston, when no one complained and independent of any client, judge or public complaint.

It was not until March 25, 2020, after Ms. MacDonald announced she was running again for Minnesota Supreme Court for the election to be held November 2020, that the Director of the OLPR filed the Petition for Disciplinary Action with the Minnesota Supreme Court.

MacDonald has a Hearing Before a Referee who Rejects First Amendment.

After a hearing, on October 20, 2020, Referee E. Anne McKinsey, determined MacDonald's speech was not protected by the First Amendment, and recommended discipline of a 1 year probation supervised by a family law lawyer. The Referee found that words used by Ms. MacDonald, a candidate for judicial office, violated Minn. R. Prof. Conduct 8.2 (a) and 8.4 (d), which reads:

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 8.2 (a) MRPC; and

"… it is professional misconduct for a lawyer to: engage in conduct that is prejudicial to the administration of justice. 8.4 (d) MRPC.

MacDonald is Indefinitely Suspended For the her Speech on the WCCO Radio Interview

MacDonald appealed the decision of the Referee that she violated the Rule to the Minnesota Supreme Court based on First Amendment grounds including the recommendation of the Referee for 1 year probation under the supervision of another attorney, A. p. 27 a.

On June 30, 2021, the Supreme Court rejected the First Amendment challenge. The Supreme Court further disregarded the Referee's discipline recommendations of 1 year probation, and instead suspended MacDonald indefinitely, with no right to Petition for reinstatement for 4 months, enhancing MacDonald's discipline due to her for lack of remorse. A. p. 13 a. The court's stated harm to the public and to the legal profession that she "here the harm is multiplied because MacDonald's statements were aired on a radio interview and were heard by countless listeners" warranting more sever discipline. A. p. 30 a. MacDonald's "lengthy experience " and failure to recognize the wrongfulness of he action or her expressions of remorse" were treated as an aggravating factor by the Minnesota Supreme Court to increase the punishment recommendation to suspension of 4 months with no right to reinstate until after 4 months. A. p.31a -32a.

MacDonald seeks Reinstatement to the Practice of Law

After 4 months, MacDonald sought reinstatement to the practice of law. Petitioner's Petition for reinstatement was filed on December 9, 2021. The matter was assigned to a panel of the Lawyers Professional Responsibility Board ("Panel"), and a hearing was conducted August 29-31, 2022.

Judge Knutson's Testimony Supported that MacDonald had the Requisite Remorse

At the hearings, Judge Knutson testified to a restorative justice circle facilitated by Family Innocence with Ms. MacDonald as "an opportunity for reconciliation" and he thought it was "great" T. p. 415. Judge David Knutson testified he was happy to pray with them". He called it an "opportunity for the two of us [Ms. MacDonald and himself] to be together and "forgive one another" T. p. 416.

He testified that he "certainly forgives Ms. MacDonald" and doesn't hold "any ill will against her." T. p. 416. He explained events from 2013 and how the Sandra Grazzini-Rucki's case "got out of control" T. p. 421-423 Judge Knutson acknowledged he and Ms. MacDonald have restored friendly relations. T. 426.

Panel Adopts Director's Proposed Findings Verbatim Recommending No Reinstatement

At the conclusion of the hearing, the panel requested proposed Findings of Fact, Conclusions of Law and Recommendation from the parties. The panel adopted and signed the Director's proposed Findings

and recommendation verbatim ---- that MacDonald not be reinstated to the practice of law --- as their written decision on October 14, 2022.

The OLPR argued that Petitioner has not demonstrated the requisite "remorse" and moral change, and recommended that Petitioner not be reinstated to the practice of law. MacDonald's legal intelligence, intellectual capacity, legal skills, and her reputation for honesty, diligence, reliability and her good character were not in question.

MacDonald Appeals the Panel's Recommendation Denying Reinstatement

MacDonald appealed the decision to the Minnesota Supreme Court. Again, MacDonald's legal intelligence, intellectual capacity, legal skills, and her reputation for honesty, diligence, reliability and her good character were not in question.

The only question before the Minnesota Supreme Court was whether the panel clearly erred in finding that Ms. MacDonald failed to prove the requisite remorse and moral change for reinstatement. Her oral argument is on this link, August 4, 2023: https://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/ArgumentDetail.aspx?vid=1608

The Minnesota Supreme Court Denies MacDonald's Reinstatement

In a July 26, 2023, the Supreme Court adopted the OLPR and panel's recommendations to denied MacDonald's reinstatement in its Opinion. A. p. 3a. The Minnesota Supreme Court ruled that MacDonald had not undergone the requisite remorse, or change in "state of mind":

The Minnesota Supreme Court stated "*Here, the panel made numerous determinations in evaluating MacDonald's alleged remorse and acceptance of responsibility for her misconduct, her change in conduct and state of mind, and her renewed commitment to the ethical practice of law. Although MacDonald testified that she was remorseful and sorry for her misconduct, the panel ultimately found that MacDonald failed to demonstrate the requisite remorse. The panel determined that MacDonald … was unable to show-through her own words or through the testimony of others-any recognition of the harm she caused by her misconduct.* " A. p.8a.

MacDonald's Legal Intelligence is Not in Question

Again, MacDonald's legal intelligence, intellectual capacity, legal skills, and her reputation for honesty, diligence, reliability and her good character were not in question. MacDonald filed for a rehearing, which was summarily denied on September 8, 2023. A. p. 2a. Judgment was entered on September 15, 2023. A. p.1a.

This appeal follows.

Michelle MacDonald's Background and Experience

Since 1987, Michelle MacDonald is an attorney in private practice in areas including civil rights, constitutional issues, family law, child custody, support, property, child protection, adoption, juvenile, wills, trust & probate, traffic & criminal defense, business, real estate, injury, appeals, dispute resolution, restorative services and more. She was a Adjunct Judge in Minneapolis, Hennepin county, in conciliation court for 15 years; and has been an Adjunct referee in family and civil court (1992- 2011). Since becoming a mediator in 1997, she has brought countless cases to resolution.

In 2011, MacDonald founded Family Innocence, a nonprofit dedicated to keeping families out of the court: resolving conflicts and injustices peacefully after a realization that litigating families in court should be eliminated. She has developed and taught restorative justice circle courses, including a 46 hour Restorative Justice Circle Mediation Training, certified by the Alternative Dispute Resolution, Supreme Court, that qualifies for 42 Continuing Legal Education credits for attorneys. MacDonald recently produced *Enjoy the Ride: Restorative Justice Circle Mediation Training; the movie series*, a 6 season edu-film designed to certify participants in restorative justice in order to keep families of court by use of restorative practices and peacemaking. www.Familycourt.com

Michelle MacDonald's Background – Continued

Michelle MacDonald owns MacDonald Law Firm, LLC since June, 2004, in West St. Paul, Minnesota. MacDonald's background includes:

- 35 years of experience as an attorney in private practice assisting thousands of people with legal challenges before hundreds of state and appellate court Judges.

- Since joining the Rule 114 ADR Neutral roster in 1997, Petitioner has maintained a mediation/dispute resolution division of the law firm, bringing cases to resolution.

- 22 years of experience serving as an Adjunct Referee in Family Court and a Conciliation (Small Claims) Court Judge, deciding hundreds of small claims court civil matters, receiving a Years of Service Award. Rule 114 Qualified Neutral since 1996.

    - Judge, Conciliation/Small Claims Court, Hennepin County (1999 to 2014)
    - Adjunct Referee/Arbitrator, family and civil court (1992-2011)

- Lead counsel on over Sixty (60) appellate decisions, researching and writing memorandums and briefs, which include amicus ("friend of the court") briefs for the Minnesota Supreme Court, appearances before the Appellate Court and Supreme Court, and Petitions to the U.S. Supreme Court.

Michelle MacDonald's Background – Continued

- Leadership activities include *Family Innocence*, a nonprofit dedicated to keeping families out of court, resolving conflicts and injustices peacefully, Founder/Volunteer President/ Mediator/Restorative Justice Circle Facilitator.

- Candidate, statewide for Minnesota Supreme Court: 40.61% or 1,016,245 million votes for Minnesota Supreme Court in 2020;

- Author/Editor of The World's Last Custody Trial (2016) by Michelle MacDonald and Michael Volpe; Bullied to Death: Chris Mackney's Kafkaesque Divorce by Michael Volpe (2015); The Long Version (2017) by Fletcher Long.

MacDonald's charitable endeavors, community work, and other projects:

- Family Innocence, a nonprofit dedicated to keeping families out of court, founder, volunteer president/board member 2011 – present

- Cooperative Private Divorce Project, formerly Divorce without courts. Regular meetings upon inception, 2013. Our group of developed proposed legislation Cooperative Private Divorce Bill, HF 1348, which creates an administrative pathway to divorce that skips the court adversarial system, additional hearings in 2018-2019.

Michelle MacDonald's Background – Continued

- Family Law Reform/ Child Custody/Parenting Time Dialogue Group. Regular meetings upon inception, 2013. The dialogue group is comprised of stakeholders who, despite having different philosophies, were able to reach compromise and consensus agreements on numerous legislative proposals in 2014 and 2015.

- Member, Minnesota State Bar Association --- Family Law, Alternative Dispute Resolution, Children and the Law sections; MSBA Professionalism Committee (Past Chair); MSBA Mock Trial Program, Minnesota State Bar Association, active participation, 2005-present; Hennepin County and Dakota County Bar Associations.

- Active member, national committee, National Association for Community & Restorative Justice (NACRJ), 2019 "Elevating Justice" Conference; and Restorative Practices International, 2018 International Conference on Restorative Practices

- Recognized Minnesota Pro Bono Lawyer, MSBA North Star Lawyers Program, 2013 to 2021

- Amdahl Inn of Court, 2012 to 2021

- Christian Legal Society, 2019 to present

Michelle MacDonald's Background – Continued

- Northstar Law and Policy Forum, 2018 to present

- Juris Divas, social group of women lawyers, judges, legal professionals, who raise money for various causes, since inception, 2005 to present

- Rosemount Police Department's Citizen's Police Academy, 2010

- Rosemount/Eagan Hockey Associations 1998-2007

- Council on International Education Exchange, exchange student program Active involvement in hosting high school exchange students from Brazil, Russia, Germany, Romania for the duration of the school year. Organized other host families and events. 1998-2007.

Michelle MacDonald's Background – Continued

MacDonald described the teaching she has done, continuing legal education, or other professional education programs to include that she developed and presented numerous Family Innocence advocacy, restorative circle and mediation trainings, and that the Family Innocence organization has been listed on the Supreme Court ADR Rule 114 roster for neutrals, and as a frequent Sponsor; Planning Committee/Presenter, 2019 National Association of Community & Restorative Justice Conference: "Elevating Justice: Widening the Circle, " Denver, Colorado; Planning Committee/Exhibitor, 2018 International Conference on Restorative Practices, Metropolitan State University, St. Paul, MN, 2018; Presenter, 2018 Whistleblower Summit, Washington, DC; numerous other presentations on Family Law Reform including Divorce Corp conference and Pro se America events, Washington, D.C. (2014 - 2018); Presented at the National Association of Relationships and Marriage Education (NARME), Restorative Justice & Family Circles, Fresno, Texas. (2014, 2015); Conducted continuing legal education seminars on behalf of the Minnesota State Bar, Professionalism Committee and Amdahl Inn of Court for ethics/bias credits to attorneys at the State Bar Convention, Collaborative Law, and continuing legal education on behalf of Family Innocence presenting restorative justice circles; Seminars to individuals and organizations on Estate and Tax Planning – wills, trusts and related documents, including probate court avoidance and revocable living trusts.

Petitioner has been in compliance with all Continuing Legal Education requirements since 1986.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL QUESTION PRESENTED IS EXCEEDLY IMPORTANT IN ORDER FOR LAWYERS RECLAIM THEIR FIRST AMENDMENT RIGHTS

The Minnesota Supreme Court, a court of last resort, has decided an important question in a way that diminishes, and even eviscerates the availability of the First Amendment's protective shield for lawyers in the regulatory and disciplinary contexts when discussing a judge or judicial system, or running for judicial office.

Law Professor, Margaret Tarkington, has made restoring free speech of attorneys her career's work. Professor Tarkington's book, *Voice of Justice: reclaiming the First Amendment Rights of Lawyers*, and related research are critical resources for lawyers and judges to understand the relationship between First Amendment rights of lawyers, and the integrity of the Justice system, and will be reference throughout this Petition.[3]

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[3] Margaret Tarkington, *Voice of Justice: Reclaiming the First Amendment Rights of Lawyers*, Cambridge University Press, Margaret Tarkington 2018 (hereinafter "Voice of Justice")

The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation, Margaret Tarkington, Georgetown Law Journal, Vol. 97, p. 1567, 2009 (hereinafter "Truth")

A Free Speech Right to Impugn Judicial Integrity in Court Proceedings, Margaret Tarkington, Boston College Law Review, Volume 51, Issue 2, Article 2, 2010.

Attorneys are Severely Punished for Impugning Judicial integrity

In Minnesota, and across the country, attorneys have been prohibited from and severely punished for impugning judicial integrity. In scores of cases, both state and federal courts have disciplined attorneys for making disparaging remarks about the judiciary. The punishment imposed for impugning judicial reputation has been severe, with suspension from the practice of law being typical.[4] In at least one state, suspension is mandatory.[5] Attorneys have been punished regardless of whether they were engaged in a representative capacity when making the statements and regardless of the forum in which the statements were made.

In disciplining attorneys for impugning the integrity of judges, courts have almost universally rejected the constitutional standard established by the Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Garrison v. Louisiana,* 379 U.S. 64 (1964) for punishing speech regarding government officials, which involves a subjective analysis, even though the American Bar Association expressly

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[4] *Voice of Justice,* at p. 151-52 See e.g. *In re Mire*, 197 So.3d 656 (La. 2016 (one year and a day suspension); *Stilley v. Sup Ct. Comm on Prof'l Conduct* 370 Ark 294 (2007) (six month suspension) *In re Pyle*, 283 Kan 807, 156 P 3d 1231 (2007 (3 month suspension); *In re Ogden*, 10 NW 3d 499, 502 (2014)(30 day suspension); *U.S. Dist. Ct. for E.D. of Wash v. Sandlin*, 12 F 3d 861 (9th Cir. 1993) (six month suspension). In at least one state, suspension is mandatory.

[5] *Voice of Justice,* p. 152. See *Office of Disciplinary Counsel v. Gardner*, 793 N.E. 2d 425, 423 (Ohio 2003) ("unfounded attacks against the integrity of the judiciary require and actual suspension from the practice of law")

adopted the rulings in the Model Rule of Conduct 8.2 (1), *Maintaining the Integrity of the Profession, Judicial & Legal Officials* which reads:
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. MRPC 8.2 (1)

The rule is identical Minnesota Rule of Professional Conduct, 8.2 (a) *Judicial and Legal Officials* which reads:

> 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. MRPC 8.2 (a)

Attorneys Being Sanctioned for Speech is An Epidemic

There are endless examples of lawyer speech, such that one writer noted with reference to attorneys that "speech is all we [attorneys] have".[6] Speech is the means that attorneys have to fulfill their role in the justice system to provide access to justice by invoking or avoiding government power in the protection of client life, liberty and property. Lawyer speech and association needs protection as directly tied to the protection of individual life, liberty and property protected against state and federal deprivation by the

[6] Fredrick Schauer, *The Speech of Law and Law of Speech*, 49 Ark L. Rev. 687 (1997).

Fifth and Fourteenth Amendments.[7]

Tarkington states that the United States Supreme Court has not taken up this topic head on since *NAACP v. Button,* 371 US 415 (1963), which reversed the Virginia Supreme Court, holding that Virginia's statute, as interpreted to prohibit the NAACP's attorney activities, violated the First Amendment rights of both the attorneys and their clients "to petition for redress of grievances" as well as the regulated attorneys' rights to engage in "political expression and association" Id at 430-431.[8]

Examples of Attorneys Sanctioned for Speech about the Judiciary

The statements by attorneys subject to sanction have been as mild as accusing the judiciary of being result-oriented or politically motivated.[9] At the other end of the spectrum are accusations of widespread judicial corruption and conspiracy.[10] Rarely do attorneys resort to crude language or expletives.[11]

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[7] *Voice of Justice*, p. 26

[8] *Voice of Justice*, p. 19, 26. The *Button* Court emphasized that the racial setting was "irrelevant to the ground of our decision" and that the First Amendment protections recognized by the Court would apply equally in other circumstances. Id at 445-45

[9] *Idaho State Bar v. Topp*, 925 P2d 1113, 1115 (Idaho 1996); see also *In re Reed*, 716 N.E.2d at 427; *In re Westfall*, 808 S.W.2d 829, 831 (Mo. 1991); *In re Raggio*, 487 P.2d 499, 500 (Nev. 1971) (per curiam).

[10] *In Committee on Legal Ethics of the West Virginia State Bar v. Farber*, 408 S.E.2d 274, 284 (W. Va. 1991), the attorney accused a judge of being part of a secret Masonic plot to cover up the arson of a local establishment.

[11] But see *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 129 (Mich. 2006) (making crude remarks on radio show about judges

Michelle MacDonald's statements on WCCO radio live, while running for judicial office , are set forth on Appendix A, p. 42a to 48a.

The Forum of the Attorneys' Speech Makes No Difference as to the Standard and Punishment

The forum in which the speech is made by the attorney makes no difference in terms of the standard applied or punishment imposed. Attorneys are punished for allegations in briefs and filings with courts,[12] statements to the press,[13] letters to the

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after verdict for client was reversed on appeal), cert. denied, 549 U.S. 1205 (2007);

[12] *In re Abbot*t, 925 A.2d 482, 483 (Del. 2007) (per curiam); *In re* Wilkins, 777 N.E.2d 714, 715-16 (Ind. 2002) (per curiam), modified, 782 N.E.2d 985, 987 (Ind. 2003); *Office of Disciplinar*y *Counsel v. Gardne*r, 793 N.E.2d 425, 427 (Ohio 2003) (per curiam); *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962, 967-68 (Utah 2007).

Attorneys have been punished for statements about the judiciary in briefs to the court even when the suit is filed against judges, and the question at issue is whether an exception to judicial immunity exists. See *Ramirez v. State Bar of Cal.*, 619 P.2d 399, 406, 414 (Cal. 1980) (*per curiam*).

[13] *Topp*, 925 P.2d at 1115 (statements to press that implied judge's decision was politically motivated); *In re Reed*, 716 N.E.2d at 427 (statements in interview with press); I*n re Atanga*, 636 N.E.2d 1253. 1256 (Ind. 1994) (per curiam) (statements in interview for ACLU local newsletter); *Ky. Bar Ass'n v. Heleringer*, 602 S.W.2d 165, 166 (Ky. 1980) (per curiam) (statement to press criticizing judge for holding restraining order hearing ex parte); *Ky. Bar Ass'n v. Nall*, 599 S.W.2d 899, 899 (Ky. 1980) (per curiam) (statements in radio interview); *Fieger*, 719 N.W.2d 123 (statements on radio show); *In re Westfall*, 808 S.W.2d at 831 (statements to press criticizing appellate decision that had been released); *In re Holtzman*, 577 N.E.2d 30, 40-41 (N.Y. 1991) (per curiam) (letter sent to press criticizing judge's treatment of sexual assault victim); *In re Raggi*o, 487 P.2d at 500 (statements made

judiciary,[14] communications with an authority to complain about a judge,[15] pamphlets or campaign literature,[16] comments posted on blogs,[17] emails to

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in television interview criticizing decision of Nevada Supreme Court to have death penalty case reheard); *In re Lacey*, 283 N.W.2d 250, 251 (S.D. 1979) (statements to press criticizing state courts' handling of the case after appellate decision received); *Ramsey v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn.*, 771 S.W.2d 116, 120-21 (Tenn. 1989) (statements to the press complaining about a judge and then the disciplinary process).

[14] *In re Evans*, 801 F.2d 703, 703-04 (4th Cir. 1986) (letter sent to magistrate after case was on appeal and no longer before the magistrate or the district court); *In re Guy*, 756 A.2d 875, 877-78 (Del. 2000) (letter sent to judge); *Fla. Bar v. Ray*, 797 So. 2d 556, 557 (Fla. 2001) (per curiam) (three letters sent to chief immigration judge complaining about another immigration judge); *In re Arnold*, 56 P.3d 259, 263 (Kan. 2002) (per curiam) (disqualified attorney sent letter to judge).

[15] *U.S. Dist. Co*urt *for the E. Dist. of Wash. v. Sandlin*, 12 F.3d 861, 863-64 (9th Cir. 1993) (statements made to FBI and appropriate authorities at U.S. Attorney's office regarding judge's editing of transcripts); *Ray*, 797 So. 2d at 560 (letter sent to chief immigration judge complaining about another immigration judge, which *Ray* and amici argued was "an accepted manner in which to seek redress when an attorney is having difficulties with an immigration judge"); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313, 315, n.3 (Minn. 1990) (*per curiam*) (statements made in letter to U.S. Attorney, in judicial misconduct complaint, and in affidavit in support of motion to recuse, although court indicates that the charges were also released to the public).

[16] See, e.g., *In re Glenn*, 130 N.W.2d 672, 674-75 (Iowa 1964) (leaflet circulated in community); *In re Charges of Unprofessional Conduct Involving File No. 1713*9, 720 N.W.2d 807, 810 (Minn. 2006) (statement by judicial candidate's campaign issued about incumbent judge).

[17] See, e.g., *Baldas*, supra note 25 (reporting pending proceedings in various states regarding discipline for comments posted by lawyers on blogs, including a Florida attorney who is

case participants.[18] and even correspondence with friends, family, and clients.[19]

Attorneys have been punished when the statements made could not have prejudiced or affected a pending proceeding[20] and when the statements are

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being disciplined for describing a judge on a blog as an "'evil, unfair witch' with an 'ugly condescending attitude'").

[18] *In re Ogden*, 10 N.E. 3d,499,502 ((Ind. 2014) (email sent to opposing counsel and case participants explaining why attorney had sought a change in Judge)

[19] See, e.g., *In re Pyle,* 156 P.3d 1231, 1233-36 (Kan. 2007) (per curiam) (letter sent to family, friends, and clients); *In re* Shay, 117 P. 442, 443-44 (Cal. 1911) (letter sent to client). Courts still rely on *Shay* as authority. See, e.g., *Ramirez v. State Bar of Ca*l., 619 P.2d 399, 411 (Cal. 1980).

[20] See, e.g., *In re Glenn*, 130 N.W.2d at 674-75 (pamphlet after cases decided with no appeal pending); *In re Pyle*, 156 P.3d 1231 (explanatory letter regarding earlier discipline sent to family, friends, and clients). There are several cases where statements are made to the press after an appellate decision has been handed down. See, e.g. *Grievance Adm'r v. Fiege*r, 719 N.W.2d 123, 129 (Mich. 2006), cert. denied, 549 U.S. 1205 (2007); In re Westfall, 808 S.W.2d 829, 831 (Mo. 1991); *In re Raggi*o, 487 P.2d 499, 500 (Nev. 1971) (per curiam); *In re Lacey*, 283 N.W.2d 250, 251 (S.D. 1979); see also *In re Evan*s, 801 F.2d at 704-05, 708 (attorney disbarred from United States District Court after sending letter accusing magistrate of incompetence and pro-Jewish bias, where attorney waited to send letter until after district court had adopted magistrate's ruling and Fourth Circuit had rejected summary reversal, although full disposition at the Fourth Circuit was still pending). Some courts have implicitly recognized a right of an attorney to criticize the judiciary after a case is no longer pending. See *In re Cobb*, 838 N.E.2d 1197, 1210 (Mass. 2005) (holding that the state has the power "to regulate the speech of an attorney representing clients in pending cases," suggesting it does not once a case is no longer pending); *In re Graham*, 453 N.W.2d at 321 (stating that the First Amendment protects the ability to "criticize rulings of the court once litigation was complete or to criticize judicial conduct or even integrity" (emphasis added)).

made by attorneys who are not engaged in a representative capacity before the criticized court.[21] There are certainly others.[22]

Professor Tarkington's articles *excludes* cases in which the speech was made verbally in a courtroom during a court proceeding or in which the speech was made at a time or in a manner that could potentially influence a jury trial. [23]

In order to preserve the First Amendment rights of attorneys, this Court should grant certiorari to clarify the due process requirements that must be met before attorneys can be punished for complaints that are critical of the judiciary.

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[21] *Standing Comm. on Discipline for the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1437, 1440 (9th Cir. 1995) (initially suspended for one year for comment sent to Prentice Hall for publication in the Almanac of the Federal Judiciary suspension reversed by Ninth Circuit, but Ninth Circuit still rejected applicability of Sullivan standard); *Idaho State Bar v. Topp*, 925 P.2d 1113, 1115 (Idaho 1996); *In re Pyle*, 156 P.3d at 1233-34, 1248; *Ky. Bar Ass'n v. Heleringer*, 602 S.W.2d 165, 166 (Ky. 1980) (per curiam).

[22] See *Lanre O. Amu, U.S. Supreme Court No. 14-689;2014 WL 6967828* (three year suspension for letters to judges where judges did not complain). Tarkington's book does not reference MacDonald's endeavors. See *In re MacDonald,* 906 N.W. 2d 238, 240, 241-43 (Minn. 2018,) where in January 2018, the Minnesota Supreme Court had suspended MacDonald for 60 days for allegedly making false statements about the integrity of a judge with reckless disregard for the truth. She was reinstated automatically after the 60 days.

[23] See *Truth,* at 1572-1573

Disciplinary Authorities and Courts Disregard the Constitutional Standard Found in *Sullivan,* adopted in *Garrison*, and adopted by the ABA Rule

In *New York Times Co. v. Sullivan*, 376 US 254 (1964), this court unanimously endorsed history's verdict on the Sedition Act of 1798 --- that "the restraint it imposed upon criticism of government and public officials was inconsistent with the First Amendment." 376 US at 276. *Sullivan* affords a defendant sued for defamation by a public official whom he criticizes the same kind of protection that the law provides to law enforcement by the doctrine of qualified immunity. The text of the unanimous opinion in *Sullivan* works to treat attorney criticism of the judge as privileged. See 376 U.S. at 261-262.

Attorneys are Disciplined with No Showing of "Reckless Disregard" of the Truth

Ms. MacDonald and countless other attorney are subject to discipline for statement about a judge or the judiciary without a showing that they knew their statements to be false or had acted with "reckless disregard" of truth or falsity, as that term is defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny.

In *Garrison v. Louisiana*, 379 US 64 (1964), the Supreme Court overturned the conviction of a district attorney for criminal defamation after holding a press conference where he attributed a large backlog of pending criminal cases to the inefficiency, laziness, excessive vacations of particular judges, and mused about possible "racketeer influences of our eight

vacation-minded judges." 379 US at 66. Recalling the evils of seditious libel in England, and of the Seditions Act of the United States, the Court held that " only those false statements made with a high degree of awareness of their probable falsity demanded by New York Times may be the subject of civil or criminal sanctions. 379 US at 74.

In *Garrison*, the U.S. Supreme Court found "no difficulty in bringing the appellant's statement within the purview of criticism of the official conduct of public officials, entitled to the benefit of the New York Times rule," for "[t]he accusation concerned the judges' conduct of the business of the Criminal District Court." 379 US at 76.

The American Bar Association Expressly Adopted the Sullivan Standard

After this court's decision in *Garrison v. Louisiana*, 379 US 64,74-75 (1964) (explaining "speech concerning public affairs is more than self-expression; it is the essence of self-government") (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), the American Bar Association (ABA) expressly adopted the *Sullivan* standard in Model Rule of Professional Conduct (MRPC) 8.2 (a) for regulating lawyer speech regarding the judiciary. In the proposed final draft, the drafters cited both Sullivan and Garrison, and explained that "the Supreme Court has held that false statements about public officials may be punished only if the speaker acts with knowledge that the statement is "false or

with reckless disregard of whether it is false."[24]

Thus Model Rule of Professional Conduct, 8.2 (a), which is identical to the Minnesota Rule, only prohibits attorneys from making "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".

Thus, the current regulatory regime for the vast majority of states merely prohibits lawyers from making 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."

The ABA expressly recognized the applicability of *Garrison* and *Sullivan*, and the drafters of Model Rules intentionally incorporated the *Sullivan* standard. The drafters also stated that: "[t]he critical factors in constitutional analysis are the statement's falsity and the individual's knowledge concerning its falsity at the time of the utterance," citing Garrison.

Disciplinary Authorities and Courts Disregard the Constitutional Standard Found in *Sullivan,* adopted in *Garrison*, and wrongly use an Objective Standard

The Sullivan standard for determining whether a statement is made with reckless disregard as to truth or falsity is determined by examining the speaker's subjective intent, which requires "that the defendant in fact entertained serious doubts as to the truth of his

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[24] *Voice,* at 154. See proposed Final Draft: Model Rules of Professional Conduct, Am. Bar Ass'n, May 30, 1981 (legal background explanation for Rule 8.2.

publication." *St. Amant v. Thompson* 390 U.S. 727, 731 (1968) (emphasis added).

In MacDonald's case, and countless others, the disciplinary authorities and courts apply the incorrect legal standard---- an objective standard, to determine whether an attorney's comments are protected by the First Amendment. The objective standard used to determine that an attorney acted with knowing or reckless disregard for the truth---- is what a reasonable attorney would say under the circumstances. See *Graham*, 453 NW 2d 313,322 (Minn. 1990). But the "modified version" of the constitution--- an objective standard--- is not the constitutional standard as prescribed by the United States Supreme Court, jurisprudence, and the American Bar Association, with respect to the disciplinary rule for attorneys, prohibiting them from impugning the integrity of Judges.

Application of the Modified Version of the Free Speech Analysis is Unconstitutional

Illustrating the divergence of opinion across the country, the Minnesota Supreme Court ruled that attorneys are subject to a *modified* version of the constitutional standard for defamation claims. The standard, adapted from *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), applies a version of the actual-malice standard from defamation cases, but Minnesota and countless other courts consistently modify it to ask what a "reasonable attorney . . . would do in the same or similar circumstances." *Graham,* 453 N.W.2d at 321-22,321 n.6. Courts wrongly reason that its "modified standard" provides adequate protection for attorney speech but also preserves the court's

ability to discipline attorneys who make baseless allegations against judges or other attorneys during the course of litigation. *See id.* at 321-22.

The Objective Reasonableness Approach was Expressly Rejected by this Court

An objective reasonableness approach was expressly rejected by this Court in *Garrison* in the precise context of lawyer speech regarding judges. Louisiana had convicted Garrison because his statement was "not made in the reasonable belief of truth" on the theory that it was "inconceivable" that he "had a reasonable belief , that not one but all eight of these judges… were guilty of what he charged them with *Garrison v. Louisiana*, 379 US 64, 78-79 (1964), This Supreme Court in Garrison in reversing the decision, was direct:

> "This is not a holding applying the New York Times test. The reasonable belief standard applied by the trial judge is not the same as the reckless-disregard-of-the-truth standard. According to the trial court's opinion, a reasonable belief is one which "an ordinary prudent man might be able to assign a just reason for, the suggestion is that under this test the immunity from criminal responsibility… disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in New York Times in not keyed to ordinary care, defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth."

This Court has never had the occasion to

address the issue of criticism of the judicial system and the judiciary in various cases involving attorneys. Professor Tarkington's contends, as does MacDonald, that an appropriate standard for evaluating the content of speech is found in *New York times v. Sullivan*, and *Garrison v. Louisiana*.

II. FREE SPEECH BY ATTORNEYS IS NECESSARY TO CHECK JUDICIAL POWER AND INFORM THE PUBLIC

Attorneys are free to praise the judiciary, but are not free to criticize the judiciary in any manner, the speech inextricably intertwined with the rules of professional conduct, specific that a violation would subject the lawyer to discipline.

Lawyers, like MacDonald, have the education and training to recognize, understand and articulate problems with the judiciary, and are exposed to and experience those problems as they bring clients' cases before Judges.

Tarkington writes that speech is essential to the attorney's role in the justice system in invoking or avoiding government power in the protection of client life, liberty and property, and is essential to the proper functioning of the justice system and to safeguard the integrity of the judiciary.

The Fundamental Issue is Free Speech for Attorneys in this Exemplary Case.

With ill-conceived disciplinary proceedings relating to attorney speech about judges, the harm imposed on the proper functioning of the justice system is evident.

The application of the professional responsibility rule here applies a standard which prohibits statements *in and of themselves* critical of a Judge, or the court system, and as such the standard typically used is an unconstitutional restriction of an attorney's right to free speech.

With this Petition, this Court has the opportunity to establish guidelines for attorney speech, by applying the Sullivan and Garrison standard originally adopted by the American Bar Association in its Model rule regarding maintaining the integrity of the profession. Given the present state of the law, guidance to the lower federal courts and state courts is clearly necessary.

An "Objective Reasonableness" standard was Expressly Rejected by this Supreme Court

Despite disciplining attorneys under a rule that on its face adopted the *Sullivan* standard, state and federal courts, including the Minnesota Supreme Court in MacDonald's case, interpret that rule to require an "objective reasonableness" standard --- the very standard expressly rejected by the Supreme Court in *Garrison*. This creates a trap for the unwary lawyer. Every lawyer is familiar with the Sullivan standard tested on the multi-state portion of the bar exam. Thus when a lawyer is considering making a

statement about a judge, the lawyer may consult the rule, recognize that it codifies Sullivan, and assume that Sullivan will shield the lawyer from punishment --- only to find out that despite the rules actual language, the standard to be applied is a far cry from Sullivan --- and the lawyer is subject to discipline.

Tarkington's research is that most state judiciaries have read the Sullivan standard out of the language of MPRC 8.2 interpreting it to punish speech *in and of itself* if it impugns the integrity of the judiciary, contrary to the drafters of the Model Rules which intentionally incorporated the Sullivan standard. [25]

Judges, in their capacities as individuals or courts, are entitled to no greater immunity from criticism than other persons or institutions. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

If an attorney's activity or speech is protected by the First Amendment, disciplinary rules governing the legal profession cannot punish the attorney's conduct. [26]

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[25] See *Truth,* at 1569.

[26] See *In re Green*, 11 P.3d 1078, 1086 n.7 (Colo. 2000) (*per curiam*) citing *In re Primus,* 436 U.S. 412, 432-433 (1978); *Bates v. State Bar of Arizona,* 433 U.S. 350, 355, 365, 384 (1977); *State of Oklahoma v. Porter,* 766 P.2d 958, 966-970 (Okla.1988); *see also Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1054 (1991) (Kennedy, J., dissenting in part). Green, 11 P.3d 1078, 1083 (Colo. 2000) (*per curiam*)

III. THIS COURT MUST PLACE IN CHECK THE DIMINISHING AVAILABILTY, IF NOT THE EVISERATION, OF FREE SPEECH BY ATTORNEYS THAT IS CORE POLITICAL SPEECH

It was in the very context of attorney speech impugning the integrity of the judiciary that the Supreme Court explained: " Speech concerning public affairs is more than self-expression, it is the essence of self-government. The first and fourteenth amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials. *Garrison v. Louisiana*, 379 US 64, 74-75 (1964) (quoting Sullivan, 376 US at 270)

Even if comments regarding an individual judge (or senator, or other government official) could be seen as affecting public perception of the overall integrity of the system, how does that make it speech worthy of suppression under *Sullivan* and *Garrison*? If speech can be punished as long as one can characterize the comments made about one government official as affecting the reputation of that entire branch of government, then the Sullivan rule can never be applied to statements about any government official.[27]

There can be no serious doubt that this case presents an issue of great national importance. Lawyer speech, association and petitioning are essential to securing justice for individuals and organizations.[28]

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[27] See *Voice of Justice*, p. 165

[28] See *Voice of Justice*, p. 23

While running for the Minnesota Supreme court, MacDonald was suspended from the practice of law indefinitely for saying that "[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." In re MacDonald, 962 NW 2d 451,458 (Minn.2021).

MacDonald claimed that, as a matter of law, she was permitted by the First Amendment, as interpreted in *Republican Party of Minnesota v. White*, 536 U.S. 765, 768 (2002), to state her opinion as to how the judicial branch functions, and to criticize the decisions it makes.

As a candidate for the judiciary, Ms. MacDonald had a First Amendment privilege to offer her opinions on issues and cases with which she disagreed pursuant to the United States Supreme Court decision because *White* held that the then Minnesota Code of Judicial Canon 5(a)(3)(d)(I), which prohibited a candidate from announcing "his or her views on disputed legal or political issues," violated the First Amendment.

Ms. MacDonald was permitted by *White* to discuss, during her WCCO radio interview, the merits of Judge Knutson's decisions in the Grazzini-Rucki case. Relying on *Republican Party of Minnesota v. White,* MacDonald argued to the OLPR, the Referee, the panel and the Minnesota Supreme Court ---- to no avail -----that her statements were protected, because she was commenting on legal issues as a *candidate for judicial office*.

Impugning judicial qualifications and integrity is core political speech protected by the First Amendment. The worst examples of unacceptable free speech involve efforts by government to insulate

itself from criticism.[29] The Sullivan and *Garrison* Courts relied upon Free Speech in holding that speech critical of our government officials could not be punished absent knowledge of or reckless disregard as to a statement's falsity. See *Garrison v. Louisiana*, 379 U.S. 64, 74--75 (1964) (explaining that "speech concerning public affairs is more than self-expression; it is the essence of self-government" (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)))

MacDonald has the Experience to Articulate Problems with the Judiciary

Lawyers, like MacDonald, have the education and training to recognize, understand and articulate problems with the judiciary, and are exposed to and experience those problems as they bring clients' cases before judges. Here MacDonald did so for 35 years with *one* client complaint. This is exactly the kind of information that the public has both the right and need to receive in order to make informed decisions about the judiciary, to fulfill their self-governing role, and check judicial abuses and incompetence.

Thirty -nine states elect their judiciary either initially or through retention elections. [30] If lawyers are prohibited from speaking and performing this checking function, then the judiciary is largely shielded from effective criticism and the public is left ignorant regarding the actual integrity of the judiciary.[31]

Tarkington writes that by silencing the very group of people with the requisite knowledge of and

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[29] Cass R. Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255, 305 (1992)

[30] See *Republican Party of Minn. v. White*, 536 US 765, 790 (2002).

[31] *Voice of Justice,* at p. 159, 160, 165-166

exposure to the judiciary to make informed judgments, the judiciary has shielded itself from effective criticism, allowing for judicial self-entrenchment and clogging the wheels of political change. In short , Courts are enforcing a self-serving prophylactic viewpoint-based restriction on political speech regarding the qualifications and integrity of government officials—speech at the core of the first amendment protection.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the denial of the reinstatement of Michelle MacDonald to the practice of law should be reversed to enable her to run for the Minnesota Supreme Court in 2024.

Dated: December 13, 2023.

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STATE OF MINNESOTA SUPREME COURT

JUDGMENT

In re Petition for Reinstatement of
Michelle MacDonald, a Minnesota Attorney,
Registration No. 0182370.

Appellate Court #A21-1636

Pursuant to a decision of the Minnesota Supreme Court duly made and entered, it is determined and adjudged that the petition for reinstatement is denied. Judgment is entered accordingly.

Dated and signed: September 15, 2023

FOR THE COURT

Attest: Christa Rutherford-Block
Clerk of Appellate Courts

By: _____
Clerk of Appellate Courts

STATE OF MINNESOTA
IN SUPREME COURT

A21-1636

In re Petition for Reinstatement of
Michelle MacDonald, a Minnesota Attorney,
Registration No. 0182370.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Michelle MacDonald for rehearing pursuant to Rule 15(c), Rules on Lawyers Professional Responsibility, is denied. *See also* Minn. R. Civ. App. P. 140.01.

Dated: September 8, 2023

BY THE COURT

s/
Natalie E. Hudson
Associate Justice

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

In re Petition for Reinstatement of Michelle MacDonald, a Minnesota Attorney, Registration No. 0182370.

No. A21-1636

Supreme Court of Minnesota

July 26, 2023

Original Jurisdiction Office of Appellate Courts.

Michelle L. MacDonald, West Saint Paul, Minnesota, pro se.

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

SYLLABUS

Based on our independent review of the record, the panel's conclusion that petitioner has not undergone the requisite moral change for reinstatement to the practice of law was not clearly erroneous.

Petition denied.

OPINION

PER CURIAM

On June 30, 2021, we issued an opinion indefinitely suspending petitioner Michelle MacDonald from the practice of law in Minnesota. In December 2021, MacDonald filed a petition for reinstatement to the practice of law. After a hearing, a panel of the Lawyers Professional Responsibility Board unanimously recommended against reinstatement, concluding that MacDonald failed to prove by clear and convincing evidence that she had undergone the requisite moral change. The Director of

the Office of Lawyers Professional Responsibility (Director) agrees with the panel. MacDonald contests the panel's findings, conclusions, and recommendation, and asserts that she should be reinstated.

Based on our independent review of the record, we hold that the findings and conclusions of the panel are not clearly erroneous. Because MacDonald has failed to show by clear and convincing evidence that she has satisfied the requirements for reinstatement to the practice of law in Minnesota, we deny her petition for reinstatement.

FACTS

MacDonald was admitted to practice law in Minnesota in 1987. She has a history of discipline. MacDonald was admonished in 2012 for trust-account violations and failing to cooperate with the Director's investigation. In January 2018, we suspended MacDonald for 60 days for violating several ethics rules in two matters, the most significant of which involved her representation of a family law client, S.G. *In re MacDonald* (*MacDonald I*), 906 N.W.2d 238, 240-43 (Minn. 2018). In *MacDonald I*, we determined MacDonald failed to competently represent a client; made false statements about the integrity of a judge (the judge in the S.G. matter) with reckless disregard for the truth; improperly used subpoenas; knowingly disobeyed a court rule and failed to follow a scheduling order; and engaged in disruptive courtroom conduct in the S.G. matter, including behavior resulting in her arrest. 906 N.W.2d at 239-43. We also concluded that MacDonald's legal experience was an aggravating factor as well as her "lack of remorse, lack of insight, and blaming of others." *Id.* at 248-49. In March 2018,

we reinstated MacDonald and placed her on probation for 2 years.

In June 2021, we suspended MacDonald for a second time. *In re MacDonald* (*MacDonald II*), 962 N.W.2d 451, 470 (Minn. 2021). This suspension was based, in part, on an October 3, 2018, radio interview about MacDonald's candidacy for the Minnesota Supreme Court, which MacDonald gave while she was on probation. *Id.* at 458. During the interview, MacDonald discussed S.G.'s case and made statements about the judge overseeing that dispute. *Id.* at 458-59. We determined that MacDonald violated Minn. R. Prof. Conduct 8.2(a) and 8.4(d) for "knowingly making false statements about the integrity of a judge" during her interview, and we also found that MacDonald, in another matter during her probation, failed to comply with the requirements of a fee-sharing representation, in violation of Minn. R. Prof. Conduct 1.5(e)(2). *MacDonald II*, 962 N.W.2d at 460-61, 466. We agreed with the referee that MacDonald's disciplinary history, probation status, and legal experience were aggravating factors. *Id.* at 467-68. Because "the record unequivocally establishe[d] that MacDonald ha[d] not expressed remorse and ha[d] sought only to justify her conduct," we concluded that MacDonald's lack of remorse was also an aggravating factor. *Id.* at 468. We indefinitely suspended MacDonald, with no right to petition for reinstatement for 4 months. *Id.* at 470.

During MacDonald's 2021 suspension, and after she filed her current petition for reinstatement, the Director admonished MacDonald for violating Minn. R. Prof. Conduct 3.1, 4.4(a), and 8.4(a). MacDonald's misconduct surrounding the admonishment stemmed from a family law matter in which MacDonald, during her probation, assisted one of the parents in creating and serving notices that had no substantial purpose

other than to harass, intimidate, and burden the parties to whom the notices were served. MacDonald did not contest the admonition.

MacDonald filed her petition for reinstatement in December 2021. The panel conducted a 3-day hearing. At the hearing, MacDonald presented the testimony of seven witnesses and testified on her own behalf. Testimony from MacDonald and her witnesses included descriptions of an encounter between MacDonald and the judge in the S.G. matter, in November 2018, that resulted in their participation in a prayer circle. The Director called the judge to testify, who also described the prayer circle.

In October 2022, the panel issued its findings, conclusions, and recommendation. The panel concluded MacDonald "failed to demonstrate through her actions or testimony, or through the testimony of others, the requisite moral change" and thus recommended denial of MacDonald's petition. MacDonald ordered a hearing transcript and now asks us to reinstate her.

ANALYSIS

We have the sole responsibility for determining whether an attorney should be reinstated to the practice of law in Minnesota. *In re Kadrie*, 602 N.W.2d 868, 870 (Minn. 1999). In evaluating whether to reinstate an attorney, we "conduct an independent review of the entire record; although we consider a panel's recommendation, we are not bound by it." *In re Tigue*, 960 N.W.2d 694, 699 (Minn. 2021). If the attorney orders a transcript, as MacDonald did here, we will uphold the panel's factual findings if the findings are supported by the record and are not clearly erroneous. *In re Stockman*, 896 N.W.2d 851, 856 (Minn. 2017). Factual findings are clearly

erroneous if we are left with the "definite and firm conviction that a mistake has been made." *Tigue*, 960 N.W.2d at 699 (citations omitted) (internal quotation marks omitted).

To be reinstated, the attorney must prove: "(1) compliance with the conditions of suspension, (2) compliance with the requirements of Rule 18, RLPR, and (3) demonstration of a moral change."[1] *Stockman*, 896 N.W.2d at 856 (citations omitted). We also recently held that an attorney must prove intellectual competence to practice law to be reinstated. *In re Mose*, ___ N.W.2d ___, 2023 WL 4479642, at *7 (Minn. July 12, 2023). Here, only the requirement to demonstrate moral change is at issue.

"Showing a moral change is the most important factor in the determination of whether to reinstate an attorney." *Stockman*, 896 N.W.2d at 857. An attorney must prove "by clear and convincing evidence that [she] has 'undergone such a moral change as now to render [her] a fit person to enjoy the public confidence and trust once forfeited.'" *In re Swanson*, 343 N.W.2d 662, 664 (Minn. 1984) (quoting *In re Smith*, 19 N.W.2d 324, 326 (Minn. 1945)). To establish a moral change, "a lawyer must show remorse and acceptance of responsibility for the misconduct, a change in the lawyer's conduct and state of mind that corrects the underlying misconduct that led to the suspension, and a renewed commitment to the ethical practice of law." *In re Mose*, 843 N.W.2d 570, 575 (Minn. 2014). "Evidence of moral change must come from an observed record of appropriate conduct and the petitioner's state of mind and values." *In re Lieber*, 834 N.W.2d 200, 204 (Minn. 2013).

Here, the panel made numerous determinations in evaluating MacDonald's alleged remorse and acceptance of responsibility for her misconduct, her

change in conduct and state of mind, and her renewed commitment to the ethical practice of law. Although MacDonald testified that she was remorseful and sorry for her misconduct, the panel ultimately found that MacDonald failed to demonstrate the requisite remorse. The panel determined that MacDonald minimized the seriousness of her misconduct, neglected to acknowledge her misconduct, and was unable to show-through her own words or through the testimony of others-any recognition of the harm she caused by her misconduct. The panel found that MacDonald "was unable to describe her understanding of the root cause of the misconduct, other than to place blame on the circumstances she was in when the misconduct occurred." Likewise, although MacDonald presented testimony from seven other people, the panel found that "none of petitioner's witnesses were able to point to any specific examples of petitioner's show of remorse outside of the prayer circle, other than her general statements to them that she felt remorse." Ultimately, the panel concluded that MacDonald did not meet her burden of proving by clear and convincing evidence that she has undergone the requisite moral change to render her fit to resume the practice of law.[2]

MacDonald primarily emphasizes the specific details of, and inferences from, the testimony of her and her witnesses before the panel. The panel did not find MacDonald or her witnesses' testimony on remorse credible, and "[w]e generally defer to the panel's findings that the petitioner's testimony regarding moral change was not credible." *Tigue*, 960 N.W.2d at 701. Here, the record supports the panel's findings that MacDonald and her witnesses lacked credibility on the issue of remorse.[3] We therefore defer to the panel's credibility determinations and its

findings. *In re Mose*, 754 N.W.2d 357, 362 (Minn. 2008) (deferring to the panel's credibility determination); *In re Griffith*, 883 N.W.2d 798, 802 (Minn. 2016) (same).

To demonstrate her remorse, MacDonald primarily relied on her interaction with the judge from the S.G. matter in November 2018-over 2 years before her 2021 suspension. The encounter occurred at a Rotary event when MacDonald and her friend approached the judge and asked him if he would pray with them. The panel found that "[n]one of the witnesses recalled what was specifically stated in the prayer circle, but a general request for forgiveness was made and accepted by both parties."

The record supports the panel's finding that evidence of the prayer circle did not demonstrate MacDonald's remorse for her misconduct during the 2018 radio interview. MacDonald's friend testified that MacDonald "didn't state any details at that time of, like, what was the apology for," but she apologized "basically for the past." The judge acknowledged the interaction but testified that MacDonald did not mention the harm she caused the judge or the public, nor did she mention the 2018 radio interview. Moreover, because MacDonald testified that she did not recognize that her radio interview was improper until our decision in 2021, any conduct that predated this awareness, such as the prayer circle, does not demonstrate remorse for the radio interview misconduct. Based on our independent review of the record, we conclude that the panel's finding that MacDonald did not show remorse and acceptance of responsibility for her misconduct is not clearly erroneous.

Without the prayer circle, MacDonald has little evidence of specific examples showing her moral change. *See In re Sand*, 951 N.W.2d 918, 922 (Minn.

2020) (stating that "evidence of this moral change must come . . . from an observed record of appropriate conduct" (citation omitted) (internal quotation marks omitted)); *Griffith*, 883 N.W.2d at 802 (holding that the panel did not clearly err by giving "little or no weight" to the testimony of a petitioner's witnesses when the witnesses did not provide "specific examples" of how the petitioner had demonstrated moral change). The panel also made numerous findings about whether MacDonald has changed her conduct and state of mind to correct the underlying misconduct that led to her suspension, and whether she has demonstrated a renewed commitment to the ethical practice of law. Again, the panel found the testimony of MacDonald and her witnesses to be unpersuasive, and there is no reason to depart from the panel's findings, which are supported by the record.[4] We are also particularly concerned about MacDonald's renewed commitment to the ethical practice of law given that she was admonished after filing her petition for reinstatement for assisting an individual in serving frivolous notices upon third parties and she was previously suspended for similar misconduct. *See In re Singer*, 735 N.W.2d 698, 705 (Minn. 2007) (concluding that the lawyer's conduct after filing his petition for reinstatement, which demonstrated a pattern of mismanagement of his personal finances when the lawyer was suspended for financial misconduct and failure to keep trust account books and records, "hinder[ed] his ability" to prove that he was "morally fit for the practice of law").

In summary, based on our independent review of the record, we hold that MacDonald has not met her burden of proving by clear and convincing evidence that she has undergone a moral change. Accordingly, we deny her petition for reinstatement.

Petition denied.

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.

Notes:

[1] In addition to reinstatement requirements, we weigh other factors in considering whether to reinstate a lawyer, including the attorney's recognition that the conduct was wrong, the seriousness of the misconduct, any physical or mental pressures susceptible to correction, and the length of time since the misconduct and suspension. *Stockman*, 896 N.W.2d at 856. Because moral change is dispositive here, we need not address these other factors.

[2] MacDonald argues the panel misstated the factors and applied the wrong burden of proof by requiring her to prove by clear and convincing evidence each of the three factors considered when evaluating moral change. We reject MacDonald's interpretation of the panel's decision; the panel appropriately considered the three factors relevant to a moral change analysis and ultimately concluded she failed to meet her burden of proof. And we need not decide if the clear and convincing burden of proof applies to each of the three factors or applies only to the overarching issue of whether an attorney has proven moral change. Even if the panel misapplied the burden of proof to a particular factor, our independent review assures us that MacDonald failed to prove "by clear and convincing evidence that [she] has 'undergone such a moral change as now to render [her] a fit person to enjoy the public confidence and trust once forfeited.'"

Swanson, 343 N.W.2d at 664 (quoting *Smith*, 19 N.W.2d at 326).

[3] MacDonald argues the panel adopted its findings verbatim from the Director's proposed findings of fact, conclusions of law, and recommendations and thus we should apply "strict scrutiny" to the findings of the panel. According to MacDonald, adopting the Director's proposal verbatim "indicates that the panel did not review and analyze the facts independently." But MacDonald concedes that the panel added two findings to its decision that were not included in the Director's proposal. Thus, we need not address whether a more rigorous review is required as the panel did not adopt verbatim the Director's *entire* proposal.

[4] We do not consider the professional status of MacDonald's law firm, or any alleged misconduct in its operations or annual report submissions, in our decision here. Although the panel noted concern regarding potential additional misconduct since her suspension, we do not need to decide whether the panel clearly erred in making those determinations because we do not rely on that evidence in reaching the conclusion that MacDonald has not demonstrated the requisite moral change.

IN RE Petition for DISCIPLINARY ACTION AGAINST Michelle Lowney MACDONALD, a Minnesota Attorney, Registration No. 0182370

A20-0473

Supreme Court of Minnesota.

Filed: June 30, 2021
Rehearing Denied August 12, 2021

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

Bobby Joe Champion, Minneapolis, Minnesota, for respondent.

OPINION

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

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).

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, 110 S.Ct. 2695, 111 L.Ed.2d 1 (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 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 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, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (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.

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, 122 S.Ct. 2528, 153 L.Ed.2d 694 (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, 122 S.Ct. 2528. 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, 112 S.Ct. 2538, 120 L.Ed.2d 305 (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, 112 S.Ct. 2538)). 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 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.

Notes:

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.

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.

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").

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."

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, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991), and *Snyder v. Phelps*, 562 U.S. 443, 131 S.Ct. 1207, 179 L.Ed.2d 172 (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.

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.

WCCO Interview~MN Supreme Court Candidate Michelle MacDonald

Unofficial transcript

Michelle MacDonald, interviewed by Blois Olson, WCCO Radio Midday,

October 3, 2018

BLOIS OLSON: Welcome back WCCO nine to noon, Mid-day. Blois Olson I'm in today. I'll be in tomorrow. Joining me now is Michelle MacDonald, who is running for Supreme Court. And as I was thinking about it, Brett Kavanaugh's hearings are one way to select Supreme Court justices and in Minnesota we actually have elections. And there's a competitive election this year, and I thought I'd bring on Michelle MacDonald who's running and who's run before for the Supreme Court. Michelle, thank you for joining us.

MICHELLE MacDONALD: Well, thank you for having me. I'm a first time caller, long time listener.

BLOIS OLSON: Well, great.

MICHELLE MacDONALD: Hello to all of your listeners and the good people of Minnesota.

BLOIS OLSON: Well, thank you. You know you've been fairly visible. You've run before. You've been endorsed by the republican party in previous campaigns. Um, is it your sense that, you know, either activism or partisanship is part of a good thing running for Supreme Court?

MICHELLE MacDONALD: Well, let's see, that's one of those loaded questions. Um, I'm speaking out because courts need reform, I've been an attorney in the system for 30 years and I don't think that the current judges want to talk about that because they think business as usual is okay. But their court

orders are damaging people and families. Um, there'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.
BLOIS OLSON: One of the cases you've been involved in was with Sandra Grazzini-Rucki. Is that one of the cases that you are referring to of civil rights being violated?
MICHELLE MacDONALD: Yes, that's one of the cases. That was just kind - - one of those cases that went viral um because what happened in that case is that I handled the trial while under arrest, with no mother, no pen, no paper, no materials.
BLOIS OLSON: Okay.
MICHELLE MacDONALD: Um, and the children had run away. So, that, that was a civil rights violation even before that happened. I have, on behalf of Sandra, sued the presiding judge. His name was David Knutson. I sued him in federal court. That suit was pending, um, when she was having her custody trial, that event occurred.
BLOIS OLSON: Ultimately, though, it was proven that Sandra Grazzini-Rucki was found guilty of denying the father's rights, so -- is that -- were his rights violated by her, or were her rights violated by the court?
MICHELLE MacDONALD: Both of their rights were violated the court. What the public needs to be aware of is that the reason I got involved -and I did the case pro bono-is that Sandra came to me and both she and her, um -the father, not her husband at the time -had no contact with their children whatsoever. Um, the 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 there, whom she had

custody of, five of them, and ordered her to not return or else she would be arrested. And she couldn't go to their churches. She couldn't have any contact with them. That was in 2012. And that was the father as well. The order applied to both Sandra and the father.
BLOIS OLSON: Okay. But once the, the court decided, when, when did you find -when the kids-you said the children ran away.
MICHELLE MacDONALD: Right.
BLOIS OLSON: But ultimately it was found that Sandra Grazzini-Rucki knew where the children were. When did you know where the children were?
MICHELLE MacDONALD: Well, this was years later and I didn't know until, um, it was reported on the news.
BLOIS OLSON: Okay. So, when you --
MICHELLE MacDONALD: So I had, I had no idea um, huh, what the public doesn't know that all five of them ran away from their own home that they had lived in for 14 years in September of 2012. They went to the police station. They ended up living with uh another aunt. And that was the status of the case. The two girls were being moved back into their home to not have custody of their dad. Their dad didn't have custody of but were being moved into their home that they had been away from for months. Um, they hadn't had any contact with either parent --
BLOIS OLSON: Yep.
MICHELLE MacDONALD: For months and that was the day they ran away.
BLOIS OLSON: Okay. Um, and you didn't know where they were?
MICHELLE MacDONALD: I didn't know where they were, um, I knew they had run - disappeared - ran away. I had no idea of, of her involvement and, um,

ultimately, she was convicted. That was months, months down the road.
BLOIS OLSON: Right. But it was, it was the idea that she had. So one of the things we always talk about, and we're talking about it in the Kavanaugh situation, is temperament. Um, there's a voicemail about you talking about uh, David Rucki's attorney that I wanna play, and I want to get your reaction. As a candidate for Supreme Court, is this, is this the kind of temperament that Minnesota -Minnesotans can expect from you if you're elected?

> VOICEMAIL OF MICHELLE MacDONALD: Hey, Sandra, I go to a, an event downtown, a lawyer event, and who's there. It's one we, we are very familiar with, that cooperative private divorce, that group I've been in since the beginning talking about the statute. Who's there? Oh God. Lisa Elliot. I'm like, oh my God. So she's uh there. And it's just like okay, I just, seeing her in a different setting, and she's such, you just wanna. You know if I had a gun, I might shoot her, just because she's so -- I just hate her.

BLOIS OLSON: Uh, my guest is Michelle MacDonald, candidate for the Minnesota Supreme Court. Michelle, that's a voicemail that you left for Sandra Grazzini-Rucki. Is that the kind of temperament that somebody running for Supreme Court should have?
MICHELLE MacDONALD: Well, of course not, and that's a private voicemail and I'm sure judges all across the state have private conversations like that. Urn, so obviously, no, that is not my temperament and it hasn't been my temperament at all. I've been, ah --

BLOIS OLSON: But why would you say something like that –
MICHELLE MacDONALD: Everything through the court system --
BLOIS OLSON: Why would you say something like that? That you wanted to shoot another lawyer.
MICHELLE MacDONALD: It's just an expression.
BLOIS OLSON: Okay. Uh, I'm sure you've said it uh –
BLOIS OLSON: No, actually I haven't –
MICHELLE MacDONALD: Before, so --
BLOIS OLSON: No, actually I've never said that I wanted to shoot somebody --
MICHELLE MacDONALD: Yeah, I know. That, and that was something I regret. But again, it was a private conversation um, because uh, the, the situation has been out of hand and it's still out of hand.
BLOIS OLSON: Okay. One of the things that people expect from judges, I think, is that they're honest. There's been other reporting that you did know where the girls were, in fact that you had actually said to Sandra Grazzini-Rucki I don't want the story to be about a mom hiding her girls. Is there anything you wanna come clean with today about when you knew the girls were missing and what Sandra told you?
MICHELLE MacDONALD: Well, I know I've, I've said a lot of things and I know many, many things were taken out of context. That was taken out of context as well. Um, but I heard that it was the same, same day everybody heard. Um, I had no idea. Um, she didn't tell me.
BLOIS OLSON: Okay.
MICHELLE MacDONALD: Um, and even if she had, and this is one of the things that really is bothersome

and your listeners and, and judges and lawyers should be bothered by this. I'm her attorney. Things are private.
BLOIS OLSON: Yep.
MICHELLE MacDONALD: Obviously, I've had many conversations with her as her family court attorney. This was one that I did not have, uh, so I did, I'm just telling you --
BLOIS OLSON: Yeah --
MICHELLE MacDONALD: I didn't know, and even ifl did, um, that, it's attorney-client privilege. She could have confessed to crimes, um, I never, never thought that what she, she did was a crime. Uh, the crime was with the court when Judge Knutson did an order that neither parent could contact their kids. That's when the deprivation happened.
BLOIS OLSON: Okay --
MICHELLE MacDONALD: At that moment. And that was back in September of 2012.
BLOIS OLSON: So, even though you've been, ah, sanctioned, um, and that even though the, the court ultimately found her guilty and named you as a, law enforcement named you as a person of interest, um, you think that that all should fall under attorney-client privilege, even if somebody's hiding their children?
MICHELLE MacDONALD: Um, anytime you go to an attorney and tell them something, it's privileged.
BLOIS OLSON: Yep. Okay.
MICHELLE MacDONALD: So, it is, if, that's just the way I was and if that is going to be disruptive and not honored, then it's a sad sorry state of affairs. If people can't go to attorneys and tell them certain events.
BLOIS OLSON: Got it. Um, as your -uh, as we wrap up the interview, is there anything that um,

you want voters to know in advance of the November election?
MICHELLE MacDONALD: Well, basically, for the last 30 years I've stood up to judges on behalf of individuals and families so that people could learn the basic recognition of their civil and constitutional rights in our society. Rights once recognized as sacrosanct to everybody and 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.
BLOIS OLSON: Got it.
MICHELLE MacDONALD: Sandra Grazzini-Rucki is a, a example of that.
BLOIS OLSON: Okay. Michelle MacDonald. Candidate for Supreme Court. Thanks for joining us today.
MICHELLE MacDONALD: Thank you so much.
BLOIS OLSON: Alright.