

STATE OF MINNESOTA

IN SUPREME COURT

A19-0917

Original Jurisdiction

Per Curiam

In re Petition for Disciplinary Action against
Kent Frederick Strunk, a Minnesota Attorney,
Registration No. 0288391.

Filed: July 1, 2020
Office of Appellate Courts

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

James M. Ventura, Wayzata, Minnesota, for respondent.

S Y L L A B U S

1. In a case concerning intentional misconduct, the referee clearly erred by failing to make a finding regarding the severity of the psychological disorder alleged to be a mitigating factor.

2. An indefinite suspension with no right to petition for reinstatement for 5 years is the appropriate discipline, in this instance, for an attorney who pleaded guilty to felony possession of child pornography.

3. Although an attorney's proactive efforts to mitigate harm to clients from the attorney's misconduct may be considered when determining the appropriate discipline to impose, no credit will be applied for an attorney's own decision to suspend the attorney's practice.

Suspended.

OPINION

PER CURIAM.

The Director of the Office of Lawyers Responsibility filed a petition for disciplinary action against respondent Kent Frederick Strunk, alleging that Strunk violated Rule 8.4(b) of the Minnesota Rules of Professional Conduct by committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Based on the referee's findings and our own review of the record, we conclude that Strunk's misconduct warrants an indefinite suspension with no right to petition for reinstatement for 5 years.

FACTS

In October 2017, the National Center for Missing and Exploited Children provided a tip to the Bureau of Criminal Apprehension (BCA) that suspected child pornography had been uploaded to an online chatroom. The BCA traced the IP address used to upload the image to Strunk. On May 2, 2018, the BCA executed a search warrant at Strunk's residence and recovered Strunk's computer, which contained numerous images of child pornography, including images of infants. Strunk was arrested and subsequently charged with five counts of felony possession of child pornography in violation of Minn. Stat. § 617.247, subd. 4(a) (2018). Strunk pleaded guilty to all five counts in October 2018. In April 2019, Strunk was sentenced to a stay of imposition on each count, with a 5-year supervised probationary period.

Shortly after Strunk's arrest, the Director of the Office of Lawyers Professional Responsibility began investigating possible misconduct by Strunk. Strunk's attorney

requested a delay in responding to the investigation until the corresponding criminal proceeding was resolved. The referee found that this request, sent via letter by counsel for Strunk, was also meant to assure the Director that Strunk had been “placed on leave by the Seventh District Public Defender, and had either resolved or [withdrawn] from his private practice cases.”¹

After the criminal proceedings were resolved, the Director filed the petition for disciplinary action with our court. Strunk filed an answer, admitting to his criminal conduct and requesting a hearing to establish mitigating circumstances for disciplinary purposes.

Strunk testified at the disciplinary hearing that he voluntarily suspended his practice, completed a psychosexual evaluation, and enrolled in out-patient therapy. A clinical psychologist testified to Strunk’s participation and progress in out-patient treatment at Alpha Human Services. Although she testified that Strunk’s “official diagnosis” was “Unspecified Paraphilic Disorder,” she offered no testimony describing its diagnostic criteria or qualifying Strunk’s unspecified paraphilia.

Strunk also introduced four exhibits, which included a copy of his psychosexual examination, intake documents and progress notes completed by Alpha Human Services, and an expert evaluation of Strunk’s medical records that was prepared for sentencing in Strunk’s criminal matter. References to Strunk’s diagnosis of “Unspecified Paraphilic

¹ Strunk was a part-time contract public defender in the Seventh District, in addition to maintaining a solo law practice. Strunk relies on the letter that his lawyer sent to the Director as proof that he voluntarily suspended his practice of law. The June letter is not included in the record for our review.

Disorder” did not discuss the severity of Strunk’s condition. The Director introduced eight exhibits: the complaint, plea, and warrant of commitment in Strunk’s criminal matter, and the final rulings in Strunk’s five prior disciplinary actions.

The referee found that Strunk “candidly admitted his criminal behavior and subsequent convictions.” The referee found that Strunk’s testimony and evidence of his past behavior demonstrated remorse for his misconduct and a commitment to recovery from his addiction.

The referee found that Strunk’s diagnosis “was and is Unspecified Paraphilic Disorder.” He then evaluated whether Strunk’s condition was a mitigating factor, using the five-factor test we adopted in *In re Weyhrich*, 339 N.W.2d 274, 279 (Minn. 1983): (1) the existence of a severe psychological disorder; (2) the psychological disorder directly caused the misconduct; (3) the attorney is undergoing treatment and is making progress to recover from the psychological disorder that caused the misconduct; (4) recovery has arrested the misconduct; and (5) the misconduct is not apt to recur. The referee found “[b]eyond a doubt, factors 3, 4 and 5 have been clearly proven,” but made no specific findings regarding factors 1 or 2. Instead, the referee found that the experts’ reports “all demonstrate that [Strunk’s] diagnosed paraphilia was at the heart of his criminal behavior that is the basis of his misconduct,” and adopted the finding in the psychosexual examination report that Strunk’s criminal actions were “due to a complicated set of

interconnected issues of impulsivity, narcissism, and distorted thinking for which he is receiving treatment.” Concerning the severity of Strunk’s condition, the referee wrote:

A careful and repeated reading of all of [Strunk’s] exhibits provides a complex and nuanced view of the respondent, his psychological issues and the treatment necessary to address them. How great is the leap between “a severe psychological problem” and an Unspecified Paraphilic Disorder? The record and the testimony does not directly address that.

Nonetheless, the referee concluded that Strunk had satisfied the *Weyhrich* test and treated Strunk’s psychological condition as a mitigating factor.

Ultimately, the referee recommended that Strunk be suspended from the practice of law for a period of 3 years, and that he “be given credit for one year for his self-imposed suspension.” The referee recommended that Strunk’s suspension continue until the successful completion of his treatment program or his dismissal from probation in the corresponding criminal case, whichever occurs sooner.

The Director ordered a transcript, challenging the referee’s findings of fact and conclusions regarding Strunk’s psychological condition and “self-imposed suspension.” The Director asks us to impose an indefinite suspension with no right to petition for reinstatement for a period of 5 years. Strunk, in turn, asks us to affirm the referee’s findings and impose the referee’s recommended discipline.

ANALYSIS

I.

The Director challenges the referee’s treatment of Strunk’s psychological condition as a mitigating factor. Because the Director ordered a transcript of the disciplinary hearing, the referee’s findings of fact and conclusions are not conclusive, *see* Rule 14(e), Rules on

Lawyers Professional Responsibility (RLPR). We review the referee’s findings—and the lack of particular findings—for clear error. *In re Farley*, 771 N.W.2d 857, 861 (Minn. 2009). A referee’s findings are clearly erroneous when they leave us with the definite and firm conviction that a mistake has been made. *In re Lieber*, 939 N.W.2d 284, 291 (Minn. 2020).

After the Director has proven misconduct, the burden shifts to the attorney to prove a mitigating psychological disorder. *Farley*, 771 N.W.2d at 861. The attorney must prove, by clear and convincing evidence, that: (1) the attorney has a severe psychological disorder; (2) the psychological disorder directly caused the misconduct; (3) the attorney is undergoing treatment and is making progress to recover from the psychological disorder that caused the misconduct; (4) recovery has arrested the misconduct; and (5) the misconduct is not apt to recur. *Weyhrich*, 339 N.W.2d at 279; *see Farley*, 771 N.W.2d at 862 (discussing severity and direct causation). We only consider psychological disorders as mitigating factors for intentional misconduct if the lawyer has proven all of the *Weyhrich* factors. *In re Mayne*, 783 N.W.2d 153, 161 (Minn. 2010). Here, the first two *Weyhrich* elements are in dispute.

Our precedent requires attorneys to show, by clear and convincing evidence, that a psychological disorder is “severe” before the disorder is a mitigating factor. *Weyhrich*, 339 N.W.2d at 279. The clear-and-convincing evidentiary standard is demanding, requiring “a high probability that the facts are true.” *See In re Houge*, 764 N.W.2d 328, 334 (Minn. 2009); *see also In re Stoneburner*, 882 N.W.2d 200, 203 (Minn. 2016) (“[C]lear and convincing evidence requires more than a preponderance of the evidence, but

less than proof beyond a reasonable doubt.”). Our cases have limited the use of psychological disorders as a mitigating factor, distinguishing between serious conditions and conditions that are sufficiently “severe” to support mitigation. *See In re Albrecht*, 779 N.W.2d 530, 536 (Minn. 2010) (noting that a serious condition did not qualify as a severe disorder, so was not a mitigating factor).

In evaluating whether a condition is “severe,” we consider all of the evidence, such as evidence that the condition qualified as a severe problem on a recognized psychological diagnostic scale, or evidence of drastic, self-destructive behavior. *See In re Jones*, 834 N.W.2d 671, 678 (Minn. 2013); *In re Munns*, 427 N.W.2d 670, 672 (Minn. 1988). Because of the significance of the severity of a condition to the *Weyhrich* analysis, the referee erred by not making a specific finding regarding the severity of Strunk’s unspecified paraphilic disorder.

Strunk asserts that his medical records and his diagnosis speak for themselves. He argues, “[i]t is abundantly clear that addiction to viewing child pornography is a ‘severe’ psychological problem. Possessing child pornography is a serious, harmful, felony level offense.” He urges this court to consider that the referee found the testimony of Strunk’s clinical psychologist credible when she testified that his addiction “grew over time.” Strunk also points to the presence of a diagnosis recognized by the American Psychiatric Association and to the general consensus in the proffered exhibits that he requires sexual offender treatment as evidence that his condition is severe. He suggests that the length of his required treatment, particularly when compared to the length of treatment for alcohol and chemical dependency, also supports a finding of severity.

We disagree. None of the evidence presented meets the severity test. As the referee acknowledged, “[t]he record and the testimony does not directly address” whether “Unspecified Paraphilic Disorder” is a severe psychological disorder. Although the evidence necessary to establish the severity of a diagnosis may differ in each case, we conclude that a reference to a diagnosis of “Unspecified Paraphilic Disorder” is not enough, by itself, to meet the exacting *Weyhrich* standard.

II.

The next issue before us is the appropriate discipline to impose for Strunk’s misconduct. In deciding what discipline is appropriate, we afford great weight to the referee’s recommendation, but we alone make the final determination. *In re Hansmeier*, 942 N.W.2d 167, 172 (Minn. 2020). The purposes of attorney discipline “are 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 Oberhauser*, 679 N.W.2d 153, 159 (Minn. 2004). In determining an appropriate disciplinary sanction, we consider 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 impose sanctions “on a case-by-case basis after considering both aggravating and mitigating circumstances, as well as looking to similar cases for guidance.” *Id.*

A.

We begin with the nature of Strunk’s misconduct. “[W]e have repeatedly stated that an attorney may be disciplined for acts which are criminal but do not result in a criminal conviction.” *In re Gurstel*, 540 N.W.2d 838, 841 (Minn. 1995) (citation omitted) (internal

quotation marks omitted); *see also In re Samborski*, 644 N.W.2d 402, 407 (Minn. 2002) (“We need not await a conviction to discipline an attorney for criminal acts.”); *In re Reutter*, 474 N.W.2d 343, 345–46 (Minn. 1991) (discussing the relationship between criminal and professional sanctions); *In re Hanratty*, 277 N.W.2d 373, 375–76 (Minn. 1979) (collecting cases). Here, the evidence presented at the disciplinary hearing establishes that, in addition to possessing child pornography, Strunk intentionally distributed pornographic images to others by uploading files to an online chatroom.

To evaluate the severity of a felony offense, we may consider the severity ranking assigned under the Minnesota Sentencing Guidelines. *See Farley*, 771 N.W.2d at 865. First-time possession of child pornography with victims over 13 is rated a G-level offense, akin to soliciting a child for sexual conduct. Minn. Sent. Guidelines 4.B (2019) (Sex Offenders Grid). Subsequent possession of child pornography, and possession of pornography of children under 13, is an F-level offense, akin to certain fourth-degree criminal sexual conduct (sexual contact with a child victim) and fifth-degree criminal sexual conduct. *Id.* Dissemination of child pornography is an E-level offense, akin to all other fourth-degree criminal sexual conduct. *Id.* Here, the evidence in the record reflects that Strunk’s conduct rises to the severity of an E-level offense.

Strunk asks us to discipline possession of child pornography less severely than solicitation of a minor. Strunk notes that he did not attempt to physically harm a child, and he did not create any of the images. Because the sentencing guidelines rank possession of child pornography and solicitation of a minor similarly, Strunk’s argument is unpersuasive. Moreover, possession of child pornography is not a victimless crime. Unlike misconduct

discovered through sting operations, the photographs that Strunk possessed—and distributed—were of actual child victims. The market for child pornography, of which Strunk was a part, fuels the sexual assault of child victims. The nature of Strunk’s misconduct is undoubtedly very serious.

B.

We next consider the cumulative weight of the misconduct in this case. We will distinguish a brief lapse in judgment or a single, isolated incident from multiple instances of misconduct occurring over a substantial amount of time. *Lieber*, 939 N.W.2d at 292.

The record reflects that Strunk viewed, possessed, and distributed child pornography over the course of 1 year. During his psychosexual evaluation, Strunk admitted that he knew his behavior was illegal and chose to continue saving images “because he found them unique, he figured he would not get caught, and he believed that because the images had likely been seen by thousands of other people it did not matter if he also saw them.”

Strunk’s five felony convictions for possession of child pornography, combined with the volume of images Strunk possessed over a protracted period of time, his admission of distribution, his willful illegal behavior, and his deliberate efforts to avoid detection add cumulative weight to Strunk’s violations.

C.

Our next task is to consider the harm to the public and the legal profession. Our inquiry includes consideration of the number of victims harmed and the extent of the victims’ injuries. See *In re Harrigan*, 841 N.W.2d 624, 630 (Minn. 2014).

A conviction for a felony-level offense harms the legal profession by undermining the public's confidence in the ability of attorneys to abide by the rule of law. *See In re Riehm*, 883 N.W.2d 223, 234 (Minn. 2016). As a self-regulated profession, the criteria we consider for admission to the Minnesota bar include an individual's ability to be honest and candid, use good judgment, conduct oneself with respect for and in accordance with the law, and avoid acts that exhibit disregard for the rights or welfare of others. "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Minn. R. Prof. Conduct Preamble para. 1. "[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." *Id.*, para. 6

The damage to the legal profession incurred when its members commit serious crimes cannot be easily undone. Here, the harm that Strunk caused to the public and the legal profession is significant. Strunk possessed nearly 100 pornographic images of child victims of abuse and sexual exploitation, including infants. The possession and distribution of pornography harms the victims long after the original photograph was taken. By distributing pornographic images to others, Strunk perpetuated the harm caused to his absolutely vulnerable child victims through republication, and facilitated the criminal desires of others. Moreover, Strunk knew that his conduct was wrong, and he took affirmative steps to evade detection. Strunk's criminal conduct was intentional, ongoing,

and done with the express belief that he would not be caught. The harm that Strunk caused to the public and the profession was very serious.

D.

We also consider the presence of aggravating and mitigating factors. Strunk has a history of five prior disciplinary actions, resulting in a 90-day suspension, two 2-year periods of private probation, and two admonitions. Strunk's prior misconduct occurred more than 10 years ago and is unrelated in nature to the present matter. Although concerning, we do not consider Strunk's disciplinary history to be a particularly strong aggravating factor in this case.

The Director does not dispute the referee's finding that Strunk has demonstrated remorse, or that Strunk proactively sought out, and continues to attend, treatment. Although we do not view Strunk's psychological condition itself to be a mitigating factor, we recognize Strunk's efforts to mitigate the consequences of his condition.

E.

Finally, we consider the appropriate discipline for this matter according to the totality of the circumstances, mindful of the discipline we have previously imposed in similar cases.

The presumptive sanction for a lawyer convicted of a felony is disbarment. *In re Morris*, 827 N.W.2d 427, 429 (Minn. 2013). We will not automatically disbar attorneys convicted of felonies, however, and will consider the circumstances surrounding the criminal act to determine if any discipline short of disbarment is appropriate. *In re Bonner*, 896 N.W.2d 98, 114 (Minn. 2017). Our inquiry is fact intensive, and considers numerous

factors, including the nature of the criminal conduct, whether the felony was directly related to the practice of law, and whether the crime would seriously diminish public confidence in the profession.

The possession and distribution of child pornography is no exception. *In re Laurie*, 917 N.W.2d 772 (Minn. 2018) (order) (disbarring an attorney convicted of five counts of felony distribution of child pornography); *In re McCarthy*, 528 N.W.2d 229 (Minn. 1995) (order) (disbarring an attorney convicted of one count of felony possession of child pornography). We find that the presumptive sanction for felony misconduct is particularly appropriate in cases concerning sexual crimes against children because of the degree of harm such crimes cause to the public and the profession. A growing number of jurisdictions agree. See American Bar Association, *Annotated Standards for Imposing Lawyer Sanctions* 268–71 (2d ed. 2019) (collecting cases of attorney misconduct involving sex crimes against children).

Strunk asks us to accept the referee’s recommended discipline, and turns to the discipline imposed in *Lorentzen*, *Lichtenwalter*, *Siders*, *Scannell*, *Blashack*, and *Farley* for support. See *In re Lorentzen*, 935 N.W.2d 435 (Minn. 2019) (order) (imposing an indefinite suspension with no right to petition for reinstatement for 3 years for soliciting a minor to engage in prostitution); *In re Lichtenwalter*, 929 N.W.2d 431 (Minn. 2019) (order) (imposing an indefinite suspension with no right to petition for reinstatement for 3 years for engaging in a pattern of sexual offenses, including felony-level solicitation of a child and a misdemeanor involving indecent exposure); *In re Siders*, 903 N.W.2d 218 (Minn. 2017) (order) (imposing an indefinite suspension with no right to petition for

reinstatement for 2 years for soliciting a minor to engage in prostitution); *In re Scannell*, 861 N.W.2d 678 (Minn. 2015) (order) (imposing an indefinite suspension with no right to petition for reinstatement for 3 years for committing two counts of fourth-degree criminal sexual conduct); *In re Blashack*, 793 N.W.2d 437 (Minn. 2011) (order) (imposing an indefinite suspension with no right to petition for reinstatement for 3 years for committing fourth-degree criminal sexual conduct); *Farley*, 771 N.W.2d 857 (imposing an indefinite suspension with no right to petition for reinstatement for 1 year for soliciting a minor over the internet). With the exception of *Farley*, however, we chose to adopt a joint recommendation by the parties in each of the aforementioned cases.² No such recommendation is present here.

Notably, the Director does not request disbarment in this case, instead suggesting that *In re Flynn*, 679 N.W.2d 330 (Minn. 2004) (order) is an appropriate case for comparison. Flynn was convicted on a single count of felony possession of child pornography. We accepted the joint recommendation of the parties and imposed a 5-year suspension from the practice of law, with reinstatement contingent on the successful completion of criminal probation.

Strunk's misconduct is very serious and arguably warrants disbarment. But we give some deference to the Director's recommendation of a 5-year suspension, and we also give

² Although we bear final responsibility for and are the sole arbiter of the discipline to be imposed, we will give some deference to the Director's decision to enter into a stipulation for discipline because "the Director is in the best position to weigh the cost and risk of litigation and to determine when a stipulated discipline will best serve the interests of the Lawyers Professional Responsibility Board." *Riehm*, 883 N.W.2d at 233 (citation omitted) (internal quotation marks omitted).

some weight to the referee’s recommendation of a lesser amount. As we have previously noted, “a minimum 5-year suspension is lengthy and subject to reinstatement procedures.” *Riehm*, 883 N.W.2d at 235 (citing Rule 18, RLPR).

Accordingly, we impose an indefinite suspension from the practice of law, effective as of the date of this opinion, with no right to petition for reinstatement for 5 years.

III.

Our last task is to address the referee’s recommendation—and Strunk’s renewed request—for “credit” for his voluntary “self-suspension” of his practice of law.

Suspensions are effective mechanisms for protecting the public because of the oversight, transparency, and accountability requirements that accompany the discipline. For example, unless ordered otherwise, a lawyer who has been suspended must notify each client, opposing counsel, and tribunal involved in pending litigation or administrative proceedings of the lawyer’s suspension. Rule 26(a)–(b), RLPR. The notice must urge clients to seek legal advice of the client’s own choice elsewhere and urge the prompt substitution of counsel. *See id.* Each notice must include a copy of this court’s disciplinary order. Rule 26(e), RLPR. All notices must be sent by certified mail, return receipt requested, within 10 days of this court’s disciplinary order. Rule 26(c), RLPR. Proof of compliance, including copies of all notices sent by the suspended lawyer, must be provided to the Director within 15 days of the effective date of this court’s order, and the returned receipts from the certified mailing must be provided to the Director within 2 months of the mailing. Rule 26(e), RLPR. Proof of compliance with these notice requirements is a condition for reinstatement. Rule 26(g), RLPR.

A “self-suspension” carries no similar assurances of transparency or accountability. Because the “primary purpose of disciplinary action is ‘to guard the administration of justice and to protect the courts, the legal profession, and the public,’ ” we reject Strunk’s request that we relax our standards for suspension to give him credit. See *In re Andrade*, 736 N.W.2d 603, 606 (Minn. 2007) (quoting *In re Hanson*, 103 N.W.2d 863, 864 (Minn. 1960); *In re Crissey*, 645 N.W.2d 141, 143 (Minn. 2002) (“[W]e must regulate the legal profession in view of the public . . .”).

Accordingly, we order that:

1. Respondent Kent Frederick Strunk is indefinitely suspended from the practice of law, effective as of the date of this opinion, with no right to petition for reinstatement for a minimum of 5 years.
2. Respondent shall pay \$900 in costs, pursuant to Rule 24(a), RLPR, and comply with the requirements of Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals).
3. If respondent seeks reinstatement, he must comply with the requirements of Rule 18(a)–(d), RLPR. Reinstatement is also conditioned on successful completion of the written examination required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility and the satisfaction of continuing legal education requirements. Rule 18(e), RLPR. Finally, respondent must comply with the terms of his criminal probation, as set forth in the district court’s April 2, 2019 sentencing order, and successfully complete sex offender treatment.

Suspended.