

COMING IN FROM THE COLD: SUSPENSION AND REINSTATEMENT

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Good judgment comes from experience.

And experience results from bad judgment.

Few lawyers have such bad lapses of judgment that their license to practice law is suspended. Of those who do have their license suspended, some learn from their experience, rectify their problems, and acquire reasonable, if not always "good," judgment. Others refuse to learn from their experience and blame the system.

Recently an article was published in a local bar publication that was authored by an attorney who had undergone a suspension.^{Ftn 1} The article was brought to my attention by a friend in private practice who opened our phone conversation with "Seig Heil." That salutation should tell the reader a great deal about the tenor of the article that was published and the attitude of the author towards professional discipline. The message of the article was not unfamiliar to members of the Office of Lawyers Professional Responsibility because a version has been sent by the author to suspended attorneys over the past few years. The diatribe is sometimes unfair, often condescending, and other times very misleading.

As an attorney in private practice, I had my own view of the professional responsibility system. Like many of you, I felt somewhat intimidated by its presence while understanding the need for its existence. When I took office, I was reminded of a lawyer I know who told me that on occasion he would call a previous director and ask that director if he'd ever heard of him. When the director would say no, he would say "good" and hang up. There are few more sobering experiences than a call or a letter from a member of the Director's Office. This is perhaps both unfortunate and unavoidable.

It seems to me that the issues raised by this article and others like it should be addressed and as a new director without an ax to grind, I am, perhaps, the right person to do it. As it regards the article in question, I have never met or talked to the author, nor did I participate in his case in any manner. Some lawyers have indicated surprise that a bar publication would print an article so highly critical of the professional responsibility system (no one escapes criticism, even the members of the Supreme Court), but as a strong proponent of free expression I welcome the airing of differing viewpoints on important topics, provided all have a chance to be heard. As Justice Brandeis used to say, "Sunlight is the best disinfectant."

RULE 18: REINSTATEMENT

The vast majority of the bar will never need to resort to the provisions of Rule 18. Nevertheless, this

provision is the "last chance" section of the Rules and as such takes on added importance, in theory, if not in practice, for all members of the legal profession.Ftn 2

To begin with, this provision only has application if you have been either suspended for more than 90 days or disbarred.Ftn 3 While the Court has said that "disbarment should not be considered permanent in every case and one disbarred should not be considered irredeemable,"Ftn 4 it has also stated that "while a court should be slow to disbar . . . it should be even more cautious in readmitting an attorney to a position of trust."Ftn 5 After the requisite time--which may be many years, if ever, for disbarment, an indeterminate number of years for an indefinite suspension, or a specific period of time for other suspensions--the applicant must petition for reinstatement by serving both the director and the president of the Minnesota State Bar Association. Following a panel hearing,Ftn 6 a hearing is held before the Supreme Court unless otherwise ordered by the Court. A hearing may be held before a referee by an order of the Court as an alternative under Rule 14,Ftn 7 but as a practical matter the Court has not chosen this option.

The focus is on the petitioner's past conduct ("the seriousness of the offenses which originally caused the disbarment, the length of time since the misconduct, the presence of physical or mental illness susceptible to change and the intellectual qualifications of the applicant")Ftn 8 and present state of mind. Contrary to the author's assertion, the burden of proof on the petitioner is clear and convincing evidence (which is not "virtually identical" to "beyond a reasonable doubt"). Petitioner must show that he has "undergone such a moral change as now to render him a fit person to enjoy the public confidence and trust once forfeited."Ftn 9

Proof of moral change includes demonstrating the "present ability to adhere to the strict code of professional morality."Ftn 10 While it is true that such a showing may be difficult to make and harder yet to ascertain, it is not a requirement of obsequiousness or subservience or "the ability and willingness to give the impression that all rules, of every kind and nature whatsoever, regardless of where derived, are sacred," as the author states.Ftn 11 Let us remember that suspension and disbarment proceedings are not commenced arbitrarily; the attorney in question must first substantially violate the Rules of Professional Conduct. Given such malfeasance, it is reasonable to require the petitioning attorney to show he is a changed man, for the protection of the public and the reputation of our profession is at stake.Ftn 12

A RESPONSE

The criticisms included in the article may be summarized as follows: (a) the author's inability to "receive a practical understanding of what I was up against" including the time frame involved; (b) general criticism of lawyers' failure to "take care of our own"; (c) criticism of the Director's Office for failing to believe that "all lawyers are always good and decent people"; (d) criticism of the panel members of the Lawyers Professional Responsibility Board for not showing enough "affection for the profession or its practitioners"; and (e) outrage at the need to demonstrate "moral change," suggesting that reinstatement is a game, best played by servile automatons.Ftn 13

In order to respond to such a view of the disciplinary process in our state, one must return to the beginning steps in the process. A review of the Rules of Lawyers Professional Responsibility and a call to a practitioner knowledgeable in the area will generally give an attorney under investigation "a practical understanding" of the proceedings. Delay in the proceedings is often occasioned by the failure of the petitioner to provide requested information needed before a recommendation can be made to a panel. Often this is due to the same behavior that led to problems for the lawyer in the first place, *i.e.*, neglect and

procrastination. Indeed, this office could accelerate the process but in doing so, lessen the petitioner's chances for reinstatement, due to lack of information provided to the Court.

The rank and file of the bar, that is the lawyers who allegedly do not take care of their own, do in fact accomplish this quite well, but not perhaps in the manner the author had in mind. Hundreds have volunteered over the years to act on our district ethics committees, investigating complaints, volunteering their time and their expertise. Many more have volunteered many hours as board members, hearing panel cases and responding conscientiously. These men and women are not insensitive to the pressures inherent in the practice of law. They are well-aware of the sacrifices and hard work required to become a lawyer. If they do not react the way some lawyers cited for discipline would have them react, this is perhaps a result of their disappointment in the lawyer's conduct and in the lawyer's attitude. Attitude *is* important; being honestly contrite is far removed from being subservient or manipulative. It is in the interest of the entire legal profession and the public that the attorney seeking reinstatement understands the seriousness of his previous actions or he is a likely candidate to re-offend.^{Ftn 14} The Court has recognized this need for moral change for over a half a century, with good reason.

The attitude of the members of the bar towards the disciplinary process, and in particular the perception of the legal profession towards the workings of this office, is very important to the members of my staff and to the members of the Lawyers Professional Responsibility Board. None of us take our role lightly. Each case before us is different and receives our attention and consideration, and we do our best to be equitable as we proceed. We serve the public interest, but this mandate is not in conflict with our goal of serving lawyers as well; giving advisory opinions is but one way our office tries to prevent trouble later.

We are well-aware that all of us are imperfect and make mistakes. We are not the enemy of the profession; we seek not to intimidate but to be worthy of respect. Legitimate criticism will make each of us do our job better. Inaccuracies and unfair portrayals only continue to perpetuate an idea that those of us in the disciplinary system are righteous or sanctimonious. On the contrary, we are just like each of you, proud of our profession and doing our best to make sure we are worthy of that pride.

NOTES

¹ Porter, "Tips for Lawyers Going Through Suspension," *The Hennepin Lawyer*, (September 1997) p.20.

² Reinstatement cases and procedures are seldom discussed. There have been no Bench & Bar articles on the topic in recent years and one national legal publication refers to reinstatement as the "Stealth Plane of the Disciplinary Process." *The National Law Journal* (August 12, 1996) p.A17.

³ § 18(f), RLPR, provides for reinstatement by affidavit for suspensions of 90 days or less.

⁴ *In re Swanson*, 343 N.W.2d 662, 664 (Minn. 1984).

⁵ *In re Smith*, 19 N.W.2d 324, 326 (Minn. 1945).

⁶ § 18(a), RLPR. The director investigates and reports conclusions to a panel which then "may" conduct a hearing but in any case "shall" make a recommendation which is served on petitioner and provided to the Court. §§18(b) and (c), RLPR.

⁷ § 18(e), RLPR, outlines the general requirements for reinstatement including bar examinations, fulfilling CLE requirements, and satisfying subrogation claims held by the Client Security Board.

⁸ In re Swanson, 343 N.W.2d at 664.

⁹ In re Hanson, 454 N.W.2d 924, 925 (Minn. 1990) (citations omitted).

¹⁰ Matter of Peterson, 274 N.W.2d 922, 926 (Minn. 1979).

¹¹ Porter, id. at 22.

¹² Mr. Porter's suspension was "based upon charges of falsification of will documents, false swearing under oath, misappropriation of client funds, and mismanagement of trust accounts." In re Reinstatement of Porter, 472 N.W.2d 654, 655 (Minn. 1991).

¹³ Porter, id., 20, 21, 22.

¹⁴ It is also in the interests of the public that readmission be an open process. A survey of all 50 states showed that eight states (Florida, Kentucky, Maryland, Nevada, New York, Pennsylvania, South Carolina and Wyoming) continue to restrict public access to readmission records and the "ability of the average . . . consumer to find out the full truth about a readmitted lawyer." Davis, "Bar Readmissions Cloaked in Secrecy," The National Law Journal (August 12, 1996) p.A17.