

REINSTATEMENT . . . DENIED

By

Martin A. Cole, Director

Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (September 2008)

When negotiating with an attorney in a public disciplinary matter, there are definite lines of demarcation between levels of discipline. The lines between a public reprimand and suspension, between a suspension requiring a reinstatement petition and a suspension without, or between suspension and disbarment, act as clear hurdles that must be overcome in order to reach a stipulated disposition. Perhaps the line most frequently discussed, once the parties agree that a suspension is warranted, is whether the attorney will be required to petition for reinstatement from suspension.

Rule 18, Rules on Lawyers Professional Responsibility (RLPR), sets out the requirements and procedures to be followed for a disbarred or suspended lawyer to be reinstated to the practice of law. Lawyers seeking to be reinstated from disability status also are subject to the rule.[Ftn 1](#) A significant aspect of Rule 18 is that suspensions of more than 90 days are subject to a reinstatement petition, investigation by the Director's Office, and an evidentiary hearing before a Lawyers Board panel. The petitioner must present clear and convincing evidence, the nature of which can vary depending on the disposition of the original proceeding.[Ftn 2](#) Attorneys suspended for 90 days or fewer, on the other hand, are required only to file an affidavit of compliance.

Obviously the length of time involved in the reinstatement process increases significantly if a petition and hearing are required. Depending upon the level of cooperation from the petitioner, the reinstatement process realistically takes on average 4-8 months, usually on top of the period of suspension actually imposed.[Ftn 3](#)

On the Rise

In the years preceding 2005, on average 3-4 reinstatement hearings were held each year before panels of the Lawyers Professional Responsibility Board. Since 2005, that number has increased on average to six per year, and there currently are seven petitions pending before panels this year. In part, that reflects the fact that there has been an increase in the number of suspensions requiring a reinstatement hearing. It likely also reflects that lawyers generally seek to practice to an older age than in the past, and thus foresee a longer career still ahead of them if they can attain reinstatement.

Additionally, at least in my opinion, reinstatement petitions also have increased in the past four years because lawyers may believe their chances of success in a reinstatement proceeding have increased. This belief seems to have begun after the Minnesota Supreme Court reinstated David Anderley in 2005.[Ftn 4](#) Anderley was disbarred for misappropriation of funds that led to his criminal conviction. Prior to Anderley's petition, no Minnesota attorney had been reinstated to the practice of law following such misconduct. The following year, the Court reinstated Sharon Ramirez, another lawyer disbarred for misappropriation with a criminal conviction.[Ftn 5](#)

The perception may have been born that reinstatement from suspension or disbarment was no longer quite as impossible a task as may have been previously presumed. Especially if the lawyer rightly or wrongly perceived that their initial misconduct was not as heinous as that of those recently reinstated, or if they had not studied these cases to determine the extent of and types of evidence those two lawyers had presented in order to convince the Court of their rehabilitation,[Ftn 6](#) they might have been inspired to give it a try.

Currently, two disbarred and five suspended lawyers have petitions for reinstatement pending before Lawyers Board panels. One suspended lawyer's petition recently was denied by the Supreme Court,[Ftn 7](#) and another suspended lawyer's petition is under advisement by the Supreme Court. In both of these latter instances, the panel recommended denial of the petition. One was challenged by the petitioner and the other initially as well, but then later that attorney withdrew his challenge. Another petition from a suspended lawyer presently is under advisement by a panel and may be recommended for denial as well. In the past three years, six other petitions for reinstatement have been denied or withdrawn following either the Director's investigation revealing facts that could preclude reinstatement or an adverse panel recommendation.

Has there been a shift in direction of Board panels in regard to reinstatement? Are they imposing more stringent standards since the Anderley and Ramirez matters? I believe not. Rather, the unique facts of these more recent cases and the steps taken, or more often not taken, by these particular petitioners have led to the recommendations that reinstatement be denied. While the original misconduct of these individuals may not have been as egregious as in disbarment matters, their conduct while suspended and preparation for a possible return to practice were not as exemplary as the Court found in those matters in which reinstatement was allowed. These recommendations reveal just how well prepared and unique Anderley and Ramirez were. Those two were exceptions and not a new norm.

Possible Rule Changes

The increase in reinstatement matters has resulted in review of the reinstatement process by the Lawyers Board. There is pending before the Minnesota Supreme Court a petition to amend the Rules on Lawyers Professional Responsibility, which contains proposed amendments to Rule 18 (Reinstatement) from the Lawyers Board along with one sought by the MSBA. On an administrative level, the Court is being

asked to raise the fee for filing a petition for reinstatement to \$500 (it is currently \$300) to match the fee charged by the Board of Law Examiners to initial bar applicants. The petition also asks that the current requirement that a copy of the petition be served upon the Bar Association president be eliminated. The MSBA has requested this change; it does seem to reflect an antiquated perception of the practice of law. The Court also is being asked to codify the Director's practice of publishing notice of reinstatement petitions and seeking comment, and of providing immunity protection to those who may respond.

Finally, the Court is asked to amend the part of Rule 18 requiring disbarred lawyers to take and pass the full bar examination as a condition for reinstatement. At present, an attorney may petition and go through the entire reinstatement process, including a hearing, briefing, and oral argument before the Supreme Court, without first taking and passing the exam. Such an attorney then can only be conditionally readmitted pending successful completion of the full bar exam.^{Ftn 8} There is no identified time limit placed upon the attorney, however, nor a limit to the number of attempts that may be made. Thus, it is possible that such an attorney never will be fully reinstated, yet the system expended considerable resources investigating the attorney's petition and conducting the hearing process. This seems unnecessarily wasteful. The proposed amendment will require a disbarred attorney seeking reinstatement in the future to successfully pass the bar exam before being eligible to apply for reinstatement. The Court will hear argument on these proposed rule changes this fall.

Conclusion

Reinstatement remains a very real possibility for those who take the time to prepare themselves, first during the period of suspension or disbarment and then for the reinstatement process. Experienced counsel can often assist with the latter. As recent decisions have shown, reinstatement should never be assumed as being automatic, and if a petitioner is not ready the petition will be denied.

Notes

1 A petition to amend the Rules on Lawyers Professional Responsibility, discussed *infra.*, will extend some of the requirements also to attorneys seeking reinstatement following resignation.

2 For example, attorneys who claimed chemical or psychological mitigation in their disciplinary proceedings will need to establish their recovery; attorneys suspended for repeated neglect of client files will need to show what procedures they will follow to prevent similar misconduct should they be reinstated, etc.

3 In some instances the attorney is allowed to file a petition for reinstatement shortly before the period of suspension expires.

4 *In re Reinstatement of Anderley*, 696 N.W.2d 380 (Minn. 2005).

5 *In re Reinstatement of Ramirez*, 719 N.W.2d 920 (Minn. 2006).

6 For a discussion of the evidence often needed to achieve reinstatement, see Wernz, "Character, Fitness & Redemption: Measuring Fitness to Practice," *Bench & Bar of Minnesota*, October 2007.

7 *In re Reinstatement of Mose*, A07-0437 (Minn.S.Ct., August 7, 2008).

8 *In re Reinstatement of Ramirez*, 719 N.W.2d 920, 926 (Minn. 2006).