

## SUSPENDED . . . HIRED?

By  
Martin A. Cole, Director  
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (August 2010)

You've gone and got yourself suspended (or worse, disbarred<sup>Ftn 1</sup>) for committing some serious misconduct! You've been suspended by the Minnesota Supreme Court for a period longer than 90 days, such that you are required to apply for reinstatement, undergo an investigation by the Director's Office, and appear for a reinstatement hearing before a panel of the Lawyers Professional Responsibility Board, which will make a recommendation to the supreme court concerning your possible return to the practice of law.<sup>Ftn 2</sup>

You notify all your clients of your suspension; you notify opposing counsel and courts; you return unearned advance fees and client files upon request (or forward these items to successor counsel).<sup>Ftn 3</sup> You do everything required. Must you then just wait until you are eligible to apply for reinstatement?

Of course, you likely need to continue to earn an income during your period of suspension, yet the only skill you may have is performing legal services—it's what you've been doing for years now. The last nonlegal (not illegal!) job you may have had was waiting tables in undergraduate school. But when you're suspended, you are supposed to stop practicing, right? After all, isn't that what being suspended means? Stop practicing law?—yes; stop working in the legal field?—not necessarily.

### REINSTATEMENT CATCH-22?

Ironically, one of the areas that a Lawyers Board panel and the supreme court may look at when considering whether to grant reinstatement is whether the petitioner has engaged in any law-related employment while suspended or disbarred—not just to see if the person engaged in UPL (unauthorized practice of law) but more as indicating whether the petitioner has maintained legal competence.<sup>Ftn 4</sup> For example, an attorney was denied reinstatement in 2008 in part because he failed to convince the court of his continued competence to resume the practice of law. An important factor in the court's

analysis was the petitioner's lack of law-related employment during the period of his suspension.Ftn 5 The court contrasted the petitioner's lack of law-related employment with other reinstatements in which the attorney successfully established competence, despite a lengthy suspension, due to having worked in a law office as a paralegal or in a support staff capacity while suspended.Ftn 6

Yet a lawyer who obtains law-related employment and then engages in UPL while suspended not only will not be reinstated, but often faces additional discipline. For example, a suspension was extended because the suspended lawyer executed a will and negotiated on behalf of a former client while employed as a paralegal while suspended.Ftn 7 And any licensed attorney who knowingly "fronts" for a suspended lawyer's UPL may face public discipline as well.Ftn 8

So, a suspended or disbarred lawyer likely needs (or certainly will benefit from) law-related employment in order to establish her competency for reinstatement, but she must not engage in the unauthorized practice of law while suspended. How should this work?

### **EMPLOYMENT LIMITATIONS & OPPORTUNITIES**

Rule 5.8, Minnesota Rules of Professional Conduct (MRPC), was created in 1999 to deal with this very issue. It is entitled, "Employment of Disbarred, Suspended or Involuntarily Inactive Lawyers." First, the rule authorizes the hiring of a suspended or disbarred lawyer by another lawyer or law firm, but then sets clear boundaries for the types of tasks that a suspended or disbarred lawyer may perform on behalf of the hiring lawyer's clients.Ftn 9 A suspended or disbarred lawyer may:

- (1) perform work for the active lawyer's review, such as legal research, gathering information, and drafting pleadings, briefs, and other similar documents;
- (2) directly communicate with a client or third party regarding only matters such as scheduling, billing, updates, information gathering, and confirmation of receipt or sending of correspondence and messages; or
- (3) accompany an active lawyer to a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer;

but a suspended or disbarred lawyer may not:

- (1) render legal advice to a client;
- (2) appear on behalf of the client in any hearing or proceeding unless the rules of the tribunal involved permit representation by nonlawyers and the client has been informed of the lawyer's license status;
- (3) appear as a representative of the client at a deposition;
- (4) negotiate or transact a matter on behalf of a client with third parties; or
- (5) handle client funds.

Rule 5.8 also imposes a reporting obligation on the hiring lawyer, both at the beginning of the employment and at the termination of employment. At the outset, the hiring attorney must inform the Director's Office that the suspended or disbarred lawyer is being employed and affirmatively state that the person will not be permitted to perform any of the prohibited tasks noted above. Then, written notice also must be provided promptly to the Director's Office if the employment is terminated, whatever the reason.<sup>Ftn 10</sup> Minnesota's rule has no counterpart in the American Bar Association (ABA) Model Rules of Professional Conduct.

### **SHOULD YOU DO THIS?**

Not surprisingly, attorneys who choose to hire a suspended or disbarred lawyer in a nonlawyer capacity most often are individuals who knew the suspended lawyer well prior to the public discipline. Likely they are familiar with the attorney's abilities and limitations, generally trust the person, and desire to help her during a difficult time. However altruistic, this can be a two-edged sword: the hiring attorney may indeed help someone in need and hopefully provide some lawyer-quality work on behalf of clients at a reduced rate in return; the danger of course is that the suspended or disbarred lawyer will overstep the required limitations. Supervision is the key. There may be a tendency to feel that the person, usually an experienced lawyer before suspension, doesn't need close watching. Already being a friend of the person also may make it difficult to impose the required limitations and meaningfully supervise the person's activities.

As a result, some states have taken the step of not authorizing suspended or disbarred lawyers to be employed by their former firm, based upon the likelihood that no meaningful supervision will occur (prior experience may have proved it to be true).<sup>Ftn 11</sup> Similar restrictions might be appropriate where a suspended attorney is to

be employed by an attorney-spouse, -parent or -child. This would be similar to the Director's Office restriction that does not allow a probation supervisor to be an associate or relative. While Minnesota has not imposed such additional restrictions on suspended lawyers to date, the concern certainly has existed in a small number of situations.

The decision to hire a suspended or disbarred lawyer should be a difficult one. On the one hand, the attorney has already committed misconduct sufficiently serious to warrant such a sanction. Thus, there are risks. Is the individual rehabilitated such that it is wise to employ her? Does your malpractice carrier agree? Beware of allowing the unauthorized practice of law. On the other hand, such attorneys are often experienced and capable of performing tasks even beyond those of a law clerk or paralegal, if properly supervised. Rule 5.8 has created a framework; close supervision is still the key.

#### Notes

1 For how to get suspended or disbarred, *see* Cole, "55 Ways to Lose Your License," *Bench & Bar of Minnesota* (August 2009).

2 *See* Rule 18(a) – (d), Rules on Lawyers Professional Responsibility (RLPR).

3 Rule 26(a) – (d), RLPR.

4 Some states do not allow suspended lawyers to be employed as paralegals, or require that they not do so for the first six months (or some other period) of their suspension.

5 *In re Reinstatement of Mose*, 754 N.W.2d 357, 364-66 (Minn. 2008). It was relevant that Mose's suspension was based in part upon his incompetent representation of clients and that he had been out of practice for over 16 years when applying for reinstatement.

6 The court especially pointed to *In re Reinstatement of Jellinger*, 728 N.W.2d 917 (Minn. 2007), and *In re Reinstatement of Kadrie*, 602 N.W.2d 868 (Minn. 1999) as examples of lawyers who maintained competence while suspended by working for another lawyer.

7 *In re Ray*, 452 N.W.2d 689 (Minn. 1990). Mr. Ray later was disbarred for his continued UPL, when no longer employed by another attorney. *In re Ray*, 610 N.W.2d 342 (Minn. 2000).

8 *See, e.g., In re Markert*, 446 N.W.2d 170 (Minn. 1989); *In re Fraley*, 709 N.W.2d 624 (Minn. 2006).

9 Rule 5.8(a), (b) and (c), MRPC.

10 Rule 5.8(d) and (e), MRPC.

11 *See, e.g.,* Nebraska State Bar Assn. Op. 06-6 (September 2006) (suspended lawyer may not be employed by the firm with which he formerly practiced).