

## UPL BY SUSPENDED ATTORNEYS

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In the past few years, several attorneys have either been disciplined or have allegations pending against them based upon their continuing to practice law after being suspended due to discipline, suspended for nonpayment of the lawyer registration fee, or having their practice restricted for failure to meet Continuing Legal Education (CLE) requirements. As a variation on a popular saying might go, “just what about the word ‘no’ don’t they understand?”

When an attorney is suspended from the practice of law for disciplinary reasons, there are some specific tasks the lawyer must perform. She must notify each current client as of the date of suspension of the order for discipline by sending the client a copy of the order and urging the client to seek substitute legal counsel. The notice must be sent by certified mail, return receipt requested, and be sent within ten days of the court’s order. The lawyer also must refund any unearned advance fees or costs, and return or transfer client files upon request.<sup>Ftn 1</sup> After that, what does the suspended lawyer do?

As has been explained in this column previously, a suspended lawyer is allowed to be employed as a paralegal or in a similar position, subject to Rule 5.8, Minnesota Rules of Professional Conduct (MRPC).<sup>Ftn 2</sup> That rule requires a hiring lawyer to notify our office, and sets out several limitations on the suspended lawyer’s activities; if he strays over those lines then he most likely engages in the unauthorized practice of law (UPL). Unauthorized practice of law violates Rule 5.5(a), MRPC, (“a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction”) and may subject the suspended attorney to further discipline or prevent or delay reinstatement to practice. The hiring attorney may also be subject to discipline. It’s relatively easy to determine when a suspended attorney crosses certain lines of unauthorized practice established in Rule 5.8, such as appearing in court on behalf of a client, or meeting alone with a client and rendering legal advice.

Such actions likely will be considered worse if the suspended lawyer is not employed by another attorney pursuant to Rule 5.8, but rather just blatantly continues to hold herself out as a licensed attorney, accepting fees from unsuspecting potential clients. Such individuals, when caught, certainly will be facing further discipline. Such UPL can be subject to criminal prosecution;<sup>Ftn 3</sup> moreover, soliciting and accepting legal fees under false pretenses may also be a violation of criminal theft by swindle statutes.

### **Not Always So Easy**

Not all acts of UPL are so clear, however. Some formerly clear lines have become blurred due to changes in the legal system itself, which now allows nonlawyers in some types of matters to perform services formerly limited to attorneys, such as acting as an advocate in various administrative proceedings such as social security disability hearings or child support matters, or acting as a mediator in one of the available ADR processes. Where is the line drawn in such areas, if at all? The Minnesota Supreme Court has stated:

Where, however, the non-lawyer acts in a representational capacity in protecting, enforcing, or defending the legal rights of another, and advises and counsels that person in connection with those rights, the non-lawyer steps over that line. Where the individual charged with unauthorized practice has had legal training, his activities are subject to even closer scrutiny . . . . We cannot accept the argument that a disbarred or suspended lawyer may engage in all activities which non-lawyers also perform. . . . A suspended lawyer may engage in some [law-related] activities if he is otherwise qualified to do so, but not if his qualifications come from having been a lawyer . . . . When professional expertise enters into the activity, and when the activity is one which is customarily performed by lawyers, then such activity is forbidden to a suspended attorney, even though under some conditions members of other professions may sometimes be allowed to perform the same acts.<sup>Ftn 4</sup>

That pronouncement predates many of today's changes in what nonlawyers are permitted to do, however—so is it still a valid distinction or to what extent? Rule 5.8(b) permits a hired/supervised suspended lawyer to appear in such proceedings with client consent. Thus, the Director's Office has not attempted to prevent other suspended lawyers from engaging in most such law-related activities that are otherwise authorized for nonlawyers generally.

Just as difficult can be issues related to advertising, firm names, and firm ownership. How soon must a suspended lawyer remove his name from a law firm sign on his firm's door or in the building directory? What about large billboard advertisements? Or a Yellow Pages advertisement that is not scheduled to be changed for almost a year? Business cards? Letterhead? All of these areas pose potential UPL issues for a suspended lawyer, her firm, or any lawyer seeking to hire the suspended attorney. Holding oneself out as a licensed attorney when such a statement is no longer true also raises issues concerning false or misleading advertising. In cases of relatively short suspensions, an unscrupulous suspended lawyer may try to "dawdle" in the hope of evading such obligations prior to reinstatement.

Some of the thorniest situations have occurred when the suspended attorney was the principal attorney in his firm, perhaps with a firm name of "Suspended Attorney & Associates." Can he sell his interest in the firm to one of the associates and then work for that individual in a nonlawyer capacity? How realistic is any oversight of the suspended lawyer likely to be? Are there limits on the compensation the suspended attorney should continue to receive in comparison to those from whom she is purportedly taking direction? These situations seem to be occurring with increased frequency, perhaps an unintended by-product of effective disciplinary enforcement resulting in more disciplinary suspensions.

Investigating some of these issues, as the Director may be required to do if complaints are received or just as part of a reinstatement petition, can create additional issues if further discipline is sought simultaneously with the attorney's petition for reinstatement. The supreme court has indicated that it would be inappropriate to unduly delay an attorney's reinstatement while mere allegations are investigated—that's certainly fair. But what about when the allegations prove legitimate and result in a petition for further discipline? If the attorney's suspension is to be extended, is there a point at which use of resources to process a futile reinstatement petition becomes wasteful? As can be seen, questions outnumber answers.

### **Nondisciplinary Restrictions**

In addition to disciplinary suspensions for misconduct, attorneys may be suspended for failing to pay their annual lawyer registration fee,Ftn 5 perhaps unintentionally, or be placed on restricted status due to failure to take or report CLE credits as required.Ftn 6 No notice to the lawyer is provided as to fee suspension; the supreme court issues an order listing the attorneys transferred to restricted status. In both situations—and whether or not actual notice occurred—continued practice of law is improper.

When an attorney with no prior discipline, or perhaps some minor, unrelated prior discipline, engages in UPL after being suspended for nonpayment of registration fees or CLE restricted, discipline may be imposed depending on the length of time involved, the number of acts of UPL involved, and whether harm was caused to clients or the legal system. Such discipline may range from a private admonition to public discipline, which most often has meant a public reprimand unless there is significant harm.<sup>Ftn 7</sup> What, then, should be appropriate discipline for an already discipline-suspended attorney who continues to practice in disregard of the supreme court's directive? The Director's Office believes it is serious misconduct and should at a minimum extend the attorney's period of suspension or even result in disbarment in particularly serious instances, or in matters in which the suspended attorney particularly flouts the court's order and the UPL standards.

### Conclusion

The lawyer discipline system occasionally struggles with those lawyers who disobey a supreme court order or administrative rule by continuing to practice law after suspension. Protecting the public from some especially determined suspended lawyers can be time-consuming and resource-intensive, but is essential to maintain respect for the disciplinary system.

### Notes

1 Rule 26, Rules on Lawyers Professional Responsibility (RLPR). The requirements generally also apply to disbarred lawyers, lawyers whose conditional admission has been revoked, and lawyers placed on disability inactive status.

2 See, Cole, "Suspended ... Hired," *Bench & Bar of Minnesota*, August 2010.

3 Minn. Stat. §481.02, subdiv. 8.

4 *In re Jorissen*, 391 N.W.2d 822, 825 (Minn. 1986).

5 Rule 2H, Rules of the Supreme Court on Lawyer Registration.

6 Rules 2M, 2U and 12B, Rules of the Minnesota State Board of Continuing Legal Education.

7 See, e.g., *In re Graham*, 744 N.W.2d 19 (Minn. 2008); *State v. Ali*, 752 N.W.2d 98 (Minn. App. 2008).