

Ethics: Heed rules when hiring disbarred lawyers

by

**Siama Y. Chaudhary, Senior Assistant Director
Minnesota Office of Lawyers Professional Responsibility**

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Recently, a lawyer facing a period of suspension sufficient to require that he petition for reinstatement (generally, more than 90 days; Rule 18, Rules on Lawyers Professional Responsibility), began asking questions about the activities he could perform while suspended in a “paralegal” capacity at the firm where he worked prior to his suspension. His line of questioning was insightful, and it was obvious that he did not want to find himself in trouble again with the Office of Lawyers Professional Responsibility.

The director’s office has started to see an increase in file openings related to lawyers who have employed suspended or disbarred lawyers, but have failed to comply with the Rules of Professional Conduct. In May, an article was published in the Star Tribune about the rising number of lawyers who have been disbarred, suspended, publicly reprimanded or placed on probation. In fact, as the article noted, public discipline decisions may set a record this year, many of which will see attorneys disbarred or suspended. So, this is a good time to review not only the responsibilities of the suspended or disbarred lawyer, but of the potential employer as well.

Rule 5.8(b), Minnesota Rules of Professional Conduct (MRPC), sets forth various restrictions on the activities of a suspended, disbarred or involuntarily inactive lawyer employed in a legal, but non-lawyer, capacity (e.g., a paralegal or law clerk). Although the rule includes involuntarily inactive lawyers, the focus of this article is suspended and disbarred lawyers.

Prohibited activities include rendering legal advice or consultation to a client; appearing on behalf of a client in any hearing or proceeding unless the rules of the tribunal involved permit representation by non-lawyers and the client has been informed of the lawyer’s license status; appearing as a representative of a client at a deposition; negotiating any matter on behalf of a client with third parties; handling client funds; and engaging “in activities that constitute the practice of law.”

The Minnesota Supreme Court has stated that:

The line drawn between the work of a law clerk and an attorney is a fine one. The composition and preparation of legal documents by one not authorized to practice law for approval and signature by an attorney does not ordinarily constitute the unauthorized practice of law. As long as the legal assistant's work is of a preparatory nature only, such as legal research and investigation, such that the work merges with the work of a supervising attorney, it is not considered to be the practice of law. Where, however, the non-lawyer acts in a representative 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.

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

The onus of Rule 5.8, MRPC, is on the hiring lawyer, not on the suspended or disbarred lawyer. The suspended or disbarred lawyer is certainly subject to professional discipline for engaging in the unauthorized practice of law pursuant to Rule 5.5, MRPC, which will undoubtedly affect that lawyer's ability to be reinstated. But, the hiring lawyer is also subject to professional discipline if she employs and aids a suspended or disbarred lawyer to engage in the above-mentioned restricted activities.

Furthermore, hiring lawyers are subject to professional discipline for failing to notify the Office of Lawyers Professional Responsibility of their employment relationship with a suspended or disbarred lawyer. Rule 5.8(d), MRPC, states:

Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, or disability inactive lawyer, the lawyer shall serve upon the Office of Lawyers Professional Responsibility written notice of the employment, including a full description of such a person's current license status.

A Rule 5.8(d), MRPC, notice also must state that the suspended or disbarred lawyer shall not be employed to perform any of the aforementioned prohibited activities. At the end of their employment relationship, the hiring lawyer is required under Rule 5.8(e), MRPC, to "promptly serve upon the Office of Lawyers Professional Responsibility written notice of the termination."

In deciding whether to grant a reinstatement petition, the court may consider whether the lawyer has engaged in (permissible) law-related activities while suspended or disbarred. This factor helps determine whether the lawyer has maintained the legal competence necessary to resume the practice of law.

Therefore, while suspended and disbarred lawyers are encouraged to maintain ties with the legal profession to aid in the reinstatement process, they should take care to avoid

engaging in the unauthorized practice of law. Lawyers employing suspended or disbarred lawyers should take care to comply with the notice requirements of Rule 5.8, MRPC, and to ensure that the suspended or disbarred lawyer is acting within the parameters of the rule as well.