

ADVISORY ETHICS OPINION 97-11

SYNOPSIS:

An attorney who has received a disciplinary suspension imposed by the Supreme Court is subject to the continuing jurisdiction of the Professional Conduct Board and remains bound by the Code of Professional Responsibility and the Disciplinary Rules. A suspended attorney may be employed as a law clerk, paralegal, investigator or in any capacity as a lay person, by a licensed lawyer or law firm on an hourly or salaried basis, but may not share in legal fees. Such employment should be restricted to activities that are performed for the employing attorney, as opposed to direct services to clients; must be supervised by the employing attorney; and must not be activities that constitute the practice of law; nor should the employment arrangement give the appearance to the public or to clients that the suspended attorney is permitted to practice law.

The Committee on Professional Responsibility issues this Opinion after considerable discussion and debate, which reflected differences among the Committee members on the resolution of the questions presented. Moreover, neither the Disciplinary Rules, nor other rules, orders or decisions of the Vermont Supreme Court offer specific guidance on every issue. Therefore, we emphasize that this Opinion attempts to fill the gaps in the relevant authorities, offers useful guidelines to the members of the Bar and is purely advisory.

FACTS AND ISSUES PRESENTED:

An attorney who has been suspended from practicing law has requested the Committee to answer four questions concerning appropriate activities during the period of suspension:

1. May a suspended attorney “work up” a file, including legal research and factual accumulation, while in the employ of another attorney, with full disclosure of suspended status to that attorney and to that attorney's clients?
2. May a suspended attorney conduct a title search on behalf of another attorney, but not opine as to the validity of the title, or go beyond the title abstracts produced by paralegal organizations in Vermont, both in and out of law offices?
3. May a suspended attorney investigate the circumstances of a cause of action on behalf of an attorney, including interviewing witnesses and/or parties, as an investigator, identifying himself or herself as investigating the claim on behalf of a properly licensed attorney?
4. May a suspended attorney assist a licensed attorney in preparation for a deposition, attend the deposition, and thereafter discuss his or her impressions and/or analysis of the information obtained with the attorney taking the deposition or other attorneys supervising the suspended attorney's work?

Under the Vermont Bar Association Rules of the Committee on Professional Responsibility, the President of the Vermont Bar Association has also requested the Committee to address the following additional related questions:

5. Must a suspended attorney participate in Mandatory Continuing Legal Education required by DR 6-101(A)(4), during the period of suspension?
6. What are the supervisory duties of a licensed attorney who employs a suspended attorney?
7. Must a law firm in which a suspended attorney worked, either as a partner, associate or sole practitioner, delete the suspended attorney's name from the firm's letterhead during the period of the suspension?
8. If employed as a law clerk or other capacity by a lawyer or law firm during a period of suspension, may a suspended attorney have direct contact with the employer's clients or others, such as witnesses, experts, court personnel, other law firms, etc. If so, does the suspended lawyer and/or the employer have any responsibility to give notice that the former lawyer may not engage in the practice of law and may only perform certain functions?
9. May a suspended attorney work in the law office or law firm in which he or she worked prior to suspension?

DISCUSSION:

Introduction

A number of states, either by court decision or by Bar Ethics Committee, which have addressed the types of questions posed here, allow suspended attorneys to serve as paralegals, law clerks, legal assistants or investigators subject to certain conditions. We have reviewed available authorities, see, e.g., “Legal Services by Suspended Attorney,” 87 ALR3d 279 et seq., ABA/BNA Manual on Professional Responsibility, Secs. 21:8201-8204 (“Lawyers’ Aiding Unauthorized Practice of Law”), 21:8601-8614 (“Lawyer Responsibility for Nonlawyer Conduct”); and recent court opinions from Florida, Delaware and the District of Columbia, along with recent ethics opinions by the Alabama State Bar (RO-96-08), and the Bar Advisory Committee appointed by the Nebraska Supreme Court (Opinion No. 96-1).

We also take note of the recently-approved California Supreme Court Rule 1-311 (Effective Aug. 1, 1997), which details the obligations of suspended or disbarred lawyers as well as the duties of their employers, attached as an Appendix to this Opinion.

Generally, courts have looked at the activities of suspended attorneys to determine whether any given activity was an attempt to evade the legal effect of the suspension. In some instances, the courts have permitted suspended attorneys to perform law-related services for other properly licensed attorneys, including legal research, investigation, drafting of memoranda and legal briefs and pleadings, etc., as long as the work is reviewed carefully by the employer-attorney and is incorporated into a product that represents that attorney’s independent professional judgment; and for which that attorney takes full professional responsibility.

The court and ethics opinions are consistent in refusing to allow suspended attorneys to provide direct services to clients, while some allow activities that require the exercise of legal skill, training and professional knowledge, as long as the activities do not, through delegation, aid or allow the suspended lawyer to engage in unauthorized practice.¹

The more stringent jurisdictions treat both the employing attorney and the suspended attorney as though the suspended attorney were a layperson, who is not permitted to have any contact, or only limited contact, with clients; cannot give legal advice or explanations to clients; or perform any work which requires the exercise of professional judgment. In these jurisdictions, the suspended lawyer may perform essentially clerical or investigative functions. Moreover, the employing attorney must assure that his or her professional judgment is not influenced by non-lawyers who are not subject to the standards or competence requirements applicable to licensed attorneys. Thus, the more restrictive court decisions and ethics opinions refuse to permit suspended attorneys to draft, prepare or file court documents, real estate instruments, wills, powers of attorney, estate documents or similar documents, holding that such activities constitute the practice of law.

The most restrictive Bar ethics opinions from other states (Mississippi, Rhode Island, South Carolina, Kentucky, Michigan and Tennessee) hold that a suspended attorney may not be employed as a clerk or paralegal at a law firm during the period of suspension.

Other jurisdictions permit research, including legal research, initial investigations, including taking witness statements, assembling factual information for review and other work that would enable the attorney-employer to carry a given matter to conclusion through his or her “own examination, approval or additional effort.”

Every jurisdiction reviewed is consistent in prohibiting a suspended lawyer from making court appearances, signing letters or pleadings on behalf of any attorney, conveying legal advice to a client, or handling client funds.

Disciplinary Rules, Ethical Considerations and other Authorities.

DR 1-102(A)(Misconduct) states in pertinent part:

A lawyer shall not:

- (1) Violate a Disciplinary Rule.
 - (2) Circumvent a Disciplinary Rule through actions of another.
- ***
- (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

¹ See DR 3-101(A)(Aiding the unauthorized practice of law; DR 6-101(A)(3)(Neglecting a legal matter entrusted to the attorney); DR 6-102(A)(Lawyer may not attempt exoneration from or limit liability to a client for personal malpractice by shifting responsibility to another).

(5) Engage in conduct that is prejudicial to the administration of justice.

(7) Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

DR 3-101 (A) (Aiding Unauthorized Practice of Law) states:

A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

DR 2-101 (1) (Communications Concerning a Lawyer's Services) states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

DR 2-102 (Firm Names and Letterheads) states:

(A) A lawyer shall not use a firm name, letterhead or other professional designation that violates DR 2-101....

(D) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

DR 2-103(A) (Advertising) states:

(A) Subject to the requirements of DR 2-101, a lawyer may advertise services through public media...or through written communication not involving initiation of communication prohibited by DR 2-104.

EC 2-11 states:

The name under which a lawyer conducts [a] practice may be a factor in the selection process...Accordingly, a lawyer in private practice should practice only under his [or her] own name, [or] the name of the lawyer employing him [or her]....

EC 2-13 states:

In order to avoid the possibility of misleading persons with whom [the lawyer] deals, a lawyer should be scrupulous in the representation of his [or her] professional status....

DR 3-102(A)(Dividing Fees With A Nonlawyer) states:

A lawyer or law firm shall not share legal fees with a nonlawyer....

EC 3-5 states:

It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. **The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment.** Where this professional judgment is not involved, nonlawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required. (Emphasis Added).

EC 3-6 states:

A lawyer often delegates tasks to clerks, secretaries, and other lawyer persons. **Such delegation is proper if the lawyer maintains a direct relationship with [the] client, supervises the delegated work, and has complete professional responsibility for the work product.** This delegation enables a lawyer to render legal services more economically and efficiently. (Emphasis Added).

DR 6-101(A)(Failing to Act Competently) states:

A lawyer shall not:

(3) Neglect a legal matter entrusted to [the lawyer].

(4) Fail to complete twenty hours of accredited continuing legal education in a two year period as required in the Rules of the Supreme court for Mandatory Continuing Legal Education.

Rule 4 of the Permanent Rules Governing Establishment of the Professional Conduct Board and its Operation states in pertinent part:

A. The Board shall have jurisdiction over:

- (1) Any lawyer admitted in the state, including any formerly admitted lawyer with respect to acts committed prior to suspension, disbarment or transfer to inactive status, **or with respect to acts subsequent thereto which amount to the practice of law or constitute a violation of these rules or of the Code of Professional Responsibility or any rules or code subsequently adopted by the Court in lieu thereof...** (Emphasis Added)

Rule 20 D. of the **Permanent Rules** states that an attorney who has been suspended from practice for six months or longer, must file a motion with the Professional Conduct Board prior to reinstatement and has:

“the burden of demonstrating by clear and convincing evidence that he or she **has the moral qualifications, competency, and learning required for admission to practice of law in the state**, and the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest and that the respondent-attorney has been rehabilitated....” (Emphasis Added)

Canon 9 states: “A lawyer Should Avoid Even the Appearance of Professional Impropriety.” There is no specific Disciplinary Rule that applies to the facts set forth in this request, unless the requesting suspended lawyer were to be involved in the handling of client funds as part of his or her employment.²

ANALYSIS:

We note initially that the requesting attorney, although suspended from practice, remains subject to the Vermont Code of Professional Responsibility, particularly with respect to activities that might constitute the practice of law. Further, if the suspension exceeds six months, the attorney will have the burden to demonstrate that he or she has been rehabilitated.³ A suspended attorney is also subject to the authority of the Supreme Court for purposes of compliance with the terms of the suspension; and thus, if found to be practicing law, could be found in contempt in addition to being subject to further professional disciplinary sanctions.⁴

A number of factors are important to the resolution of the questions presented to this Committee:

The nature of the violation leading to the suspension, as well as the length and conditions of the suspension. It would undermine the purposes of the Disciplinary Rules and process to allow a suspended attorney to engage in the very activities which were involved in the need for discipline. On the other hand, we are mindful of the rehabilitative potential of a suspension and note the Florida Supreme Court’s observation that employment of a suspended lawyer “in a supervised status within the profession seems to us to be an almost ideal manner in which [he or she] may demonstrate during [the] suspension [the] potential for rehabilitation and maintain ...competency to practice law upon reinstatement.”⁵

The nature of the proposed employment arrangements. This includes the tasks to be performed, the plan for supervision and control, the financial compensation (fees may not be shared), the methods used to assure that no legal advice will be given, and how the employing attorney or law firm will assure that the public and clients understand that the suspended attorney is not practicing law. This last concern would be particularly important if the suspended attorney proposes to work for his or her former law firm or to continue former practice arrangements.

Whether the proposed employment arrangement will involve contacts with clients, witnesses and the public. Here again, the concern is not only whether activities will cross the line into the unauthorized practice of law, but also whether the public and clients will perceive that the suspended attorney is providing legal services reserved for properly licensed attorneys. The Delaware Supreme Court has declined to allow a suspended attorney to have the type of routine client contacts that are common for paralegals and law clerks, even under close supervision and with written disclaimers to clients.⁶ The Court permitted no direct contact with clients, witnesses, or prospective clients or witnesses. It distinguished between the responsibilities that a non-lawyer could take on, under supervision by a licensed attorney, and those activities appropriate for an attorney who had already been found to have violated the Disciplinary Rules so as to warrant suspension. It noted that

² See DR 9-102(Preserving Identity of Funds and Property of a Client).

³ See **Permanent Rules**, Nos. 4 A.1 and 20 D.

⁴ See, e.g., **In re Burton**, DC Ct. App., No. 89-SP-366 (8/28/92).

⁵ **The Florida Bar v. Thompson**, 310 So 2d 300, 87 ALR3d 272, 276 (Fla. 1975). (Employment limited to research and investigation under close supervision of employer-attorney, with no direct client contact. “Free lance” services to other lawyers and firms disapproved because of minimal supervision).

⁶ **In re Meckler**, Del. SupCt, No. 305, 1994 (12/29/95).

“[P]erception is often reality. Members of the public could encounter difficulty understanding the suspended lawyer's status if he were permitted such contacts. He had been a member of the bar for 23 years and is presumably generally known as a lawyer...This court cannot countenance conduct by a suspended lawyer that would leave the impression it is de facto permitting him to act in a manner a reasonable member of the public could believe to be the practice of law.”⁷

See also, ABA Informal Opinion 1434 (1979)(Depending upon state law definition of “practice of law,” disbarred lawyer may be precluded from performing investigative and preparation work for trials, calendar clerk for the holding or adjournment of depositions, trials and motions; noted earlier Informal Opinion No. 1 (1967) (advising lawyers not to employ disbarred attorneys for office work, even tasks that do not involve client contact because of the “practical difficulties of conforming ...activities” to areas not including practice of law and would “show disrespect to the courts.”)

The state's definition of the “practice of law.” As in most jurisdictions, Vermont has declined to supply a succinct definition of what actions constitute “the practice of law.” We have reviewed in previous Opinions,⁸ the decisions of the Vermont Supreme Court on the question; and generally note that the practice of law includes **“furnish[ing] advice or service under circumstances which imply the possession and use of legal knowledge and skill;”** and **“advice to clients and all actions taken for them in matters connected with the law.”**⁹ (Emphasis added)

CONCLUSIONS:

The Committee's opinion is that it is permissible for a suspended lawyer to be employed by another lawyer or law firm, provided that:

- (a) the employment activities are clearly restricted and closely supervised; and
- (b) such employment activities are reflected in a written memorandum. We also recommend that a copy of such memorandum be provided to the Professional Conduct Board.

The conditions recommended here form a necessary balance between the suspended lawyer's interest in gainful employment and the legal profession's obligation to ensure that such employment does not constitute the practice of law or mislead the public.

The answers to the questions posed are:

1. A suspended attorney may “work up” a file, including legal research and factual accumulation, but may not engage in activities that constitute the practice of law, while in the employ of another attorney, under the conditions recommended in this Advisory Opinion, with full disclosure of the suspended status to the employing attorney's clients and to others with which the suspended attorney may come into contact in the course of employment.
2. A suspended attorney may conduct a title search, and perform other services for and under the supervision of an employing attorney, and perform other services, under the following conditions:
 - a. The employing attorney retains full and complete professional responsibility for the title search and any opinion based upon the search;
 - b. The suspended attorney is limited to gathering factual information, searching public records, relevant legal research and other activities which are necessary to perform the search; any opinion as to title should be a recommendation to the employing attorney, who must review any work before rendering an independent professional opinion or recommendation to a client or other party; the employing attorney should not simply “rubber stamp” the suspended lawyer's work product, since the title search is a “matter entrusted” to the employing attorney, DR 3-101(A), DR 6-101(A)(3); EC 3-5,3-6.
 - c. Where it is expected that there will be direct contact between the suspended attorney and clients, and a risk of confusion as to the suspended attorney's role and status, we recommend that the employing attorney give written notice to each affected client. If a client objects, the suspended attorney should not work on matters for such client.
 - d. The suspended lawyer and the employing attorney do not represent to the client or the public, or leave the impression that the suspended attorney is practicing law, DR 1-102(A)(4)(Lawyer shall not engage in conduct involving dishonesty, deceit or misrepresentation), DR 1-102(A)(5)(Lawyer shall not engage in conduct that is prejudicial to the

⁷ Id.

⁸ See, e.g., Opinion Nos. 88-4 and 90-2.

⁹ *In re Welch*, 123 Vt. 180, 182 (1962).

administration of justice); DR 2-101(1)(False or misleading communications); EC 2-13 (Lawyers should be scrupulous in the representation of their professional status).

- e. The employing attorney must not share the fees paid by the client with the suspended lawyer, DR 3-102; although the client may be charged a separately-itemized amount for the work performed by the suspended lawyer.
- f. In order to minimize confusion or potential misrepresentation that he or she is able to practice law, the suspended lawyer should not participate in the real estate closing.

* * *

We note that the foregoing recommended conditions should apply to all activities performed by the suspended attorney.

* * *

3. A suspended attorney, under the supervision of an employing attorney, may conduct a factual investigation of a matter, including interviews of witnesses and parties, but must be identified solely as an investigator, and should not leave the impression that he or she is acting as an attorney; and should not offer opinions to clients or others as to the merits of the cause of action.
4. A suspended attorney may assist an employing attorney in preparing for a deposition, court or administrative hearing or trial by gathering relevant facts, reviewing and organizing documents, medical records and the like, and by assembling legal authorities, drafting questions, memoranda and jury instructions or other materials requested by the employing attorney. The suspended lawyer may be present at a deposition, and, subject to the approval of the presiding official or judge, at an administrative or court hearing or trial, but should not actively participate in the proceedings, except to perform routine clerical services, such as providing documents, taking notes, setting up exhibits, etc. The suspended attorney should not sit at counsel table or within the bar enclosure, but may be present in the courtroom for the limited purpose of assisting trial counsel in managing exhibits, etc.; and may discuss with the employing attorney his or her impressions or analysis of information developed at the proceedings.

The employing attorney should clearly indicate to the other participants that the suspended attorney is present solely to provide assistance as a lay person or paralegal. DR 1-102(A)(4), DR 3-101(A): Opinion No. 88-4 (Legal assistant may not represent client before Motor Vehicle Arbitration Board, since it would amount to practice of law). See also, California Rules of Professional Conduct, Rule 1-311(C), attached as Appendix.

5. A suspended attorney should participate in Mandatory Continuing Legal Education (MCLE) pursuant to DR 6-101(A)(4). While the individual's license to practice has been suspended, unlike a paralegal or legal assistant, he or she remains subject to the Vermont Code of Professional Responsibility.¹⁰ In the case of a suspension of less than six months, the lawyer must file an affidavit with the Supreme Court setting forth the manner in which the suspension order has been complied with (which should be read to include compliance with the applicable provisions of the Code of Professional Responsibility).¹¹ If the individual wishes to resume practice after the suspension, he or she must meet licensing requirements. This would appear to include any MCLE credits that the attorney would otherwise have been required to obtain during the time period of the suspension.

In the case of a suspension of longer than six months, an attorney seeking reinstatement must prove he or she has the "qualifications, competency or learning required for admission...." Thus, he or she should comply with the MCLE requirements of DR 6-101(A)(4) in the manner of any attorney who seeks license renewal.

6. The supervisory duties of a licensed attorney who employs a suspended attorney depend upon the factors noted above, as well as the conditions of the suspension imposed by the Supreme Court. The employing attorney has the ethical responsibility to assure that non-attorney employees and suspended attorney-employees do not perform activities that constitute the practice of law or mislead the public with respect to the status of such employees.

It is important to note that the questions presented here concern the activities of lawyers who have lost their privilege to practice law as sanctions for their unprofessional behavior; therefore, the obligations of the employing lawyer go beyond

¹⁰ See Permanent Rules Governing Establishment of the Professional Conduct Board and Its Operation, Rule 4 A(1).

¹¹ See Permanent Rule 20 B.

the requirements that would apply to the supervision nonlawyer assistants.¹²

The Committee also recommends that employing attorneys follow the provisions of the California Rules of Professional Conduct No. 1-311, attached as an Appendix. We base our Opinion on the Vermont Code of Professional Responsibility, since Vermont does not have a comparable Rule addressed specifically to employing attorneys. The California Rule, however, offers a reasonable model.

7. When a member or associate of a law firm, or a sole practitioner is suspended from practicing law, during the period of the suspension, the firm or practice should delete the suspended attorney's name from the letterhead or other forms of advertising which identify the firm or practice. A lawyer may "not make a false or misleading communication about the lawyer or the lawyer's services," which would occur whenever the communication "contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as whole not materially misleading...." DR 2-101(1) This applies to firm names and letterheads, DR 2-102(A), as well as to advertising, DR 2-103(A). See also, EC 2-11, EC 2-13. But see, VBA Opinion No. 79-13 (May include non-lawyer employee names, e.g., paralegals or law clerks, on letterhead if not deceptive since it "might reasonably be expected to supply information relevant to the selection of counsel").

The Committee opinion is that the inclusion of a suspended attorney's name on the firm or law practice letterhead carries too significant a risk of misleading or deceiving prospective clients and the public as to that attorney's status. We believe this safeguard is appropriate, in addition to the existing requirement in Permanent Rule 21, that suspended attorneys must notify clients and others by registered or certified mail of the suspension, and that suspensions are to be made public by Bar Counsel, under Permanent Rule 12 (Dissemination of Disciplinary Information).

8. As long as the status of the suspended attorney is made clear to those with whom he or she will have contact, and that the activities are restricted and supervised so as to preclude the practice of law, and are otherwise not deceptive or misleading, the suspended attorney may have direct contact with the employer's clients and third parties. See Discussion and Conclusions, supra, and Appendix, California Professional Conduct Rule 1-311(C) and (D).
9. We do not see a per se ethical prohibition against a suspended attorney working for the law firm where he or she had been employed at the time of the suspension. However, a law firm which continues to employ a suspended attorney assumes even more significant responsibilities to the suspended attorney's clients and to properly supervise the suspended attorney's activities. Both the law firm and the suspended attorney must take steps to assure that existing clients can distinguish between the suspended attorney's role before and after suspension. It may be advisable for the suspended attorney to occupy a different office.

If the suspended attorney is a member of a law firm that has other partners or associates who may provide continuity of representation, that firm is not ethically foreclosed from continuing to represent the suspended attorney's former clients. Nevertheless, the suspended lawyer must comply with Permanent Rule 21(D), and personally withdraw from formal representation, and may not share in any fees collected by the firm in continuing the representation of clients who may elect to stay with the firm after notification of the lawyer's suspension, Id., DR 3-102(A); the firm should designate an attorney who will assume full responsibility for the suspended lawyer's former clients, DR 3-101(A), DR 6-101(A)(3); and the suspended lawyer should only have limited, supervised contact with former clients or third parties concerning such clients' representation, in order to prevent confusion or deception and to not mislead others with respect to the suspended lawyer's status, DR 1-102(A)(4).

In the case of a sole practitioner who has been suspended, the attorney should not hold out the "firm" as being able to practice law during the period of suspension. Therefore, after compliance with the foregoing notice requirements, the suspended attorney should provide existing clients the option of seeking alternate representation in another law firm or make referrals to licensed attorneys who are competent to handle their legal matters. The suspended attorney should not make any representation to former clients that he or she will continue to represent them; however, consistent with the provisions we recommend in this opinion, the suspended attorney's employer (either another law firm or sole practitioner) may notify the clients that the suspended lawyer may perform some limited clerical, investigative or legal research work on their legal matters or work on their legal matters during the period of the suspension, DR 1-102(A)(2),(4) and (5). See also, California Professional Conduct Rule 1-311(C) (1) and (2).

¹² See, Proposed Model Rules of Professional Conduct, Rules 5.3, 5.4, 5.5; ABA/BNA Lawyers' Manual on Professional Responsibility, Sec. 21: 8201-8204 (Lawyers' Aiding Unauthorized Practice), Sec. 21: 8601-8614 (Lawyer Responsibility for Nonlawyer Personnel). See also, Vermont Bar Association Opinion No. 78-2.

The foregoing should not prevent a suspended attorney from responding to a request from another attorney, whether or not such attorney is an employer, for information that would enable the other attorney to properly represent the suspended attorney's former clients.