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On the Beach: Practical Impacts of Suspension

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Each year, the Oregon State Bar publishes a detailed disciplinary report. For the past several years, suspensions of varying length have almost always been the most common regulatory sanction. Although the numbers vary from year to year, as many as 35 Oregon lawyers have been suspended in a single year recently. Under Bar Rule of Procedure 6.1(a)(iii), suspensions can run from 30 days to five years.

Suspensions present very real issues for the lawyers involved, together with their clients, their firms and their families. In this column, we'll look at the practical impacts of suspensions that are on the short side and longer term.

Two qualifiers are in order at the outset.

First, in an era of relatively common multi-state licensing, any lawyer facing a suspension should carefully consider both the reciprocal disciplinary effect in any other jurisdiction in which the lawyer is licensed and the potential constraints that those other states may impose on law-related work during suspension. Washington RPC 5.8(b)(2), for example, generally prohibits Washington lawyers from even sharing office space with another Washington lawyer who is suspended.

Second, although our focus is on lawyers who are suspended, lawyers who may hire a suspended colleague for a law-related position—such as a paralegal—need to be acutely aware of their own responsibility for ensuring that they do not facilitate the practice of law by the suspended lawyer. RPC 5.5(a) prohibits a lawyer from assisting others in the unauthorized practice of law and Oregon lawyers have been disciplined for allowing paralegals in their employ to do just that (see, e.g., *In re Morin*, 319 Or 547, 563-64, 878 P2d 393 (1994)).

The Short Side

BR 6.3(a) and (b) succinctly summarize the duties of a lawyer when suspended. The former directs that the lawyer can no longer practice law after the effective date of suspension. The latter requires that the lawyer “immediately take all reasonable steps to avoid foreseeable prejudice to any client[.]” Read in tandem, these rules essentially require a suspended lawyer to inform all clients with active matters of the lawyer’s suspension and to transition the lawyer’s files to replacement counsel for at least the duration of the suspension (unless, with client permission to retain the file, the period of suspension is so brief that no material events are reasonably anticipated during the lawyer’s unavailability).

OSB Formal Ethics Opinion 2005-25 allows a lawyer to collect fees earned before the suspension. But, it but does not permit a replacement lawyer to share fees with a suspended lawyer for work the replacement lawyer does during the suspension because the suspended lawyer is considered a

“nonlawyer” during the suspension and RPC 5.4(a) prohibits a lawyer from sharing fees with a nonlawyer.

It is also important for a suspended lawyer not to hold himself or herself out as available to practice law. Although not involving a disciplinary suspension, the lawyer in *In re Kumley*, 335 Or 639, 75 P3d 432 (2003), was disciplined under the misrepresentation rule for listing himself as an “attorney” in the voters pamphlet when he was on inactive status, and, therefore, not available to practice law.

The Longer Term

All of the admonitions and duties applicable to a short suspension are equally applicable to a longer suspension. When the length of the suspension grows, however, economic realities force many lawyers to explore other work during the suspension. Work outside the legal field usually does not pose any problems for eventual reinstatement. Work in a law-related position, however, can pose risks even if the suspended lawyer is extremely careful.

BRs 8.3(a) and 12.9 generally permit lawyers who have been suspended for six months or less to be reinstated by executing a “compliance affidavit” (and paying a fee). Among the certifications included is a sworn statement that the lawyer “did not at any time engage in the practice of law except where authorized to do so” during the suspension. BR 8.1, in turn, requires lawyers suspended for more than six months to formally apply for reinstatement. This process requires

a similar certification and, if there is evidence to the contrary, puts the burden on the applicant to show by clear and convincing evidence that the lawyer should be reinstated (under BRs 8.12-.13 and *In re Gunter*, 344 Or 368, 371, 182 P3d 187, *modified*, 344 Or 540, 186 P3d 286 (2008)).

A suspended lawyer working, for example, as a paralegal needs to be able to demonstrate that the lawyer's activities were restricted solely to those of a paralegal and were done under the supervision of a lawyer (see OSB Formal Ethics Op. 2005-166 at 458 (on paralegal work generally); OSB Formal Ethics Op. 2005-24 (on employing a suspended lawyer as a paralegal)). A false certification in this regard in the subsequent reinstatement process exposes the lawyer not only to a host of charges relating to practicing while suspended (see, e.g., *In re Devers*, 328 Or 230, 238, 974 P2d 191 (1999)) but the potentially devastating charge of lying on the reinstatement application itself (*Id.* at 239-45 (ordering disbarment)).

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