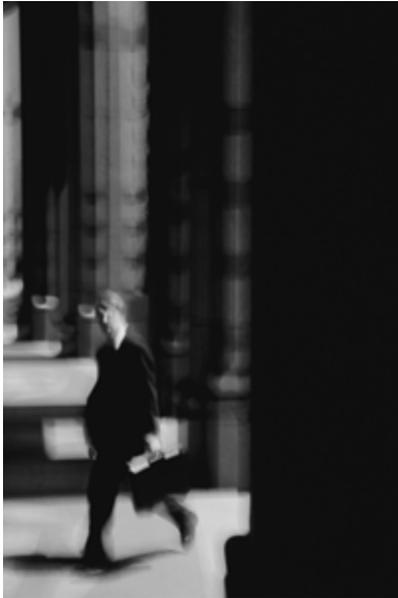


Off the Team, but Not Out of the Game: Disbarred and Suspended Attorneys Practicing as Paralegals



By Stephen R. Bough and Rebecca A. Cull

In most states, attorneys who have been suspended and even disbarred for unethical conduct are permitted to work as paralegals. In effect, they've been kicked off the team, but they're not out of the game.

Because there is no bright line separating much of the work performed by paralegals from that performed by attorneys, some disbarred and suspended attorneys come dangerously close to crossing the line into unauthorized practice of law.

In fact, allowing disbarred and suspended attorneys to practice as paralegals condones unethical behavior by not adequately disciplining it. It's a practice that puts the public at risk when they seek competent ethical representation, and it creates negative perceptions of the legal profession.

This article addresses the current law regarding disbarred and suspended attorneys practicing as paralegals, the problems that arise from such practice and suggestions for change.

Current Law

The majority of states allow disbarred and suspended attorneys to work as paralegals. However, a clear trend reveals that more and more states are realizing the problems that arise from allowing this practice to continue.

Three distinct approaches have been taken by states to address the problem: a total ban on working as a paralegal; a ban with exceptions when permission is sought; and allowing disbarred and suspended attorneys to be employed as paralegals, but placing limits on the tasks they may perform.

Total Ban

Only six states, Illinois, Massachusetts, New Jersey, Rhode Island, South Carolina and Wisconsin, prohibit disbarred and suspended attorneys from being employed as paralegals. In addition, West Virginia is considering a ban on such employment.

Wisconsin's rule prohibiting suspended attorneys from practicing as paralegals is an excellent example of a total ban rule:

A suspended or disbarred attorney may not engage in the practice of law or in any law work activity customarily done by law students, law clerks or other paralegal personnel, except that he or she may engage in law-related work for a commercial employer not itself engaged in the practice of law.

(SCR 22.26(2); *In the Matter of Disciplinary Proceedings Against Weber*, 579 N.W. 2d 229 (Wisc. 1998)). This rule is clear, enforceable and most importantly, it protects the public.

Illinois has a similar rule, the rationale for which was succinctly stated by the Illinois Supreme Court in *In re Kuta*, 427 N.E. 2d 136, 140 (Ill. 1981), as follows:

The line of demarcation between the work that a paralegal or a law clerk may do and those functions that can only be performed by an attorney is not always clear and distinct. The opportunity for a disbarred or suspended attorney who is serving as a paralegal or a law clerk to violate that line of demarcation is too great and too inviting. Also, the public is not aware of the differences between the work of a paralegal and that of an attorney. For a disbarred attorney to be seen performing what the public may perceive as legal functions can only lessen the public's regard for the effectiveness of our attempt to discipline errant attorneys, and would foment the belief that the public is not being protected from unethical attorneys.

See also: Massachusetts, SJC Rule 4:01, BBO, § 17(7); New Jersey, *Re Stoldt*, 37 NJ 364 (1962), R. R. 1:18-- 2(b); Rhode Island, Ethics Advisory Opinion 93-28 (May 1993); South Carolina, Ethics Advisory Opinion 92-20 (July 1992), Rule 413 SCAR; and West Virginia, Robert M. Martin, Jr., *The Golden Age of Paralegals and Risk Managers; Acceptance, Appreciation and Shared Goals*, 9 NOV. W. Va. Law. 18).

Ban with Exceptions

Currently, one state, Massachusetts, places a ban on disbarred and suspended attorneys practicing as paralegals, with one exception.

The exception allows disbarred or suspended attorneys to seek permission from the governing body to work as a paralegal after serving five years of their suspension or disbarment. (SJC Rule, 4:01, BBO §§ 17 (7) (8) See also, Jerry Cohen, *Appropriate Dispositions in Cases of Lawyer Misconduct*, 82 Mass. L. Rev. 295, 302 (1997)).

Without specific permission, suspended or disbarred attorneys may not be employed by a law firm in any capacity. The Massachusetts rule allows for rehabilitation of an attorney who demonstrates that he or she has reformed and deserves the opportunity to make a living. However, although disbarment is a much harsher sanction than suspension, the Massachusetts rule does not make a distinction between the two.

Because a suspended attorney's actions are generally less reprehensible than those of a disbarred attorney, it may be argued that only suspended attorneys should be allowed to re-enter the profession through employment as paralegals.

Working as a paralegal after five years of exemplary conduct may be a legitimate means for suspended attorneys to demonstrate to the bar that they have reformed and should be considered for reinstatement. On the other hand, if a state's disciplinary counsel makes the determination that a lawyer should lose his/her license to practice, the public should be able to trust that no portion of legal representation will be handled by a disbarred attorney.

Limits on Employment

Of the states that allow disbarred and suspended attorneys to be employed as paralegals, nearly all place limits on the tasks they may perform. (See *In the Matter of Frabizzio*, 508 A.2d 468 (Del. 1986); *The Florida Bar v. Thomson*, 310 So.2d 300 (Fl. 1975); *Wilson v. State Bar of Georgia*, 132 F.3d 1422 (11th Cir. 1998); and *In Re Wilkinson*, 834 P.2d 1356 (Kan. 1992) See also, David Rand, Jr., Nature of Legal Service or Law-Related Service which may be Performed for Others by Disbarred or Suspended Attorneys, 87 A.L.R. 3d 279 (1978)).

Among the most common are prohibitions that seek to prevent disbarred or suspended attorneys from practicing law, holding themselves out to be authorized to practice law or otherwise violating their disciplinary orders.

Most courts interpret the prohibition against practicing law to include giving legal advice, filing legal documents and making appearances in court or at pre-trial hearings and depositions. Some states go further and prohibit all client contact, whether in person, in writing, or by phone.

Disbarred and suspended attorneys have typically been allowed to perform activities that are preparatory in nature, requiring the disbarred or suspended attorney to work under the supervision of a practicing attorney. Accordingly, duties such as investigation, research, and document preparation, such as briefings and pleadings, are typically allowed.

Problems with Allowing Disbarred Attorneys to Practice as Paralegals

Allowing disbarred and suspended attorneys to practice as paralegals generates public disillusionment with the legal profession, dilutes the punishment of disbarred and suspended attorneys, and creates problems of enforcement for state and local bar associations.

First, and most important, the public's perception of the legal profession is diminished when a suspended attorney performs paralegal tasks.

When the public witnesses a disciplined attorney appearing to continue to engage in the practice of law, the integrity and good name of the profession are at stake. As members of one of the few professions that is self-regulated, lawyers should hold precious the privilege of practicing law and demand the highest ethical standards. In accordance, the profession must be free from the perception that unethical behavior goes unpunished.

Second, allowing disbarred and suspended attorneys to practice as paralegals dilutes their punishment. Disbarment is an act of the court suspending an attorney's licence to practice law. Disbarment is reserved for serious violations of an ethical and criminal nature.

"A judgment disbaring an attorney implies that he is unfit to be trusted in the duties of his profession and that it is unlikely that he can rehabilitate himself to return to the profession." (CJS, §§ 116 supra). Allowing disbarred attorneys to work as paralegals minimizes the severity of their acts and fails to adequately punish them for their grave wrong.

Finally, allowing disbarred and suspended attorneys to practice as paralegals creates problems of enforcement for state bar associations.

Unless the suspended attorney blatantly engages in the unauthorized practice of law by signing pleadings or appearing in court, disciplinary counsel are faced with the almost impossible task of deciding the exact point he/she goes from being a paralegal performing acceptable preparatory work to the unauthorized practice of law.

Suggestions for Change

If the legal profession is to maintain its position as an honorable and ethical calling, it is absolutely necessary to regulate employment of suspended and disbarred attorneys by the legal community. Disbarred attorneys must be prohibited from ever seeking employment in the legal profession, as six states have already done.

However, because of the marked distinction between suspension and disbarment, it is in the best interest of the profession to promote rehabilitation of suspended attorneys. If the suspended attorney is to return to the legal profession, he/she must be able to maintain competency.

This can be accomplished by adoption of a rule like Massachusetts', which allows suspended attorneys to seek permission from the governing body to work as a paralegal after serving five years of their suspension. (SJC Rule, 4:01, BBO §§ 17 (7) (8)).

Permitting employment as paralegals, without client contact, and requiring attendance at continuing legal education courses serves the dual purpose of discipline and rehabilitation. In addition, the five year hiatus bolsters the public's perception of the credibility of the profession's disciplinary process. (See *In Re Schelly*, 446 N.E.2d 236, 239 (Ill. 1983)).

The following proposed rule is based on the above suggestions. It achieves the goal of banning disbarred attorneys from practicing as paralegals, while leaving an opportunity open for suspended attorneys to rehabilitate themselves:

(1) A disbarred or suspended attorney may not engage in the practice of law or in any law work activity customarily done by law students, law clerks or paralegals.

(2) After a period of five years, a suspended attorney may seek permission from the chief disciplinary counsel to seek employment in the legal profession. Permission will only be granted if the suspended attorney has complied with all the conditions of suspension and has demonstrated exemplary conduct indicative of reinstatement. In the event that permission is granted, the suspended attorney shall not have any contact with the clients of the office either in person, by telephone or in writing.

To persuade adoption of a rule banning disbarred attorneys from practicing as paralegals on the state level, the disciplinary counsel for the state bar is usually the best place to begin.

The support of this organization is generally central to the amendment of ethical rules. Additionally, state and local bar organizations typically have an ethics committee whose recommendations often carry great weight and whose support can be vital to reforming the current law.

On a national level, the American Bar Association (ABA) has developed the Model Rules for Professional Conduct. The ABA's policy regarding employment in the legal profession following suspension or disbarment is found in Rule 27(G) of the ABA Model Rules of Procedure for Disciplinary Proceedings, which "prohibits any suspended or disbarred lawyer from maintaining a presence or occupying an office where the practice of law is conducted."

An effort to expand the rule to include a prohibition on employment of disbarred attorneys working as paralegals should start with lobbying of the ABA's Standing Committee on Ethics and Professional Conduct.

Affiliates of the ABA -- recognized local bar associations -- are allowed to bring resolutions to this committee. Bringing a resolution to the committee through these channels is the best way to obtain a national prohibition on employment of disbarred attorneys as paralegals.

Conclusion

The practice of law is a great and noble calling. As a profession, we must govern our peers and ensure that ethical boundaries are not breached.

In fairness to the public, disbarred attorneys must be permanently prohibited from employment in law offices. Suspended attorneys must serve their punishment, and then they should be allowed to rehabilitate themselves by practicing as paralegals.

Suspended and disbarred attorneys, disciplinary counsel, and the profession deserve clear rules that protect the public, allow for easy enforcement and preserve the integrity of the profession.

Changing the ethical rules on a state-wide basis is difficult. Changing the rules nationwide is almost impossible. However, it is imperative that we move for adoption of such a rule. Doing so ensures disbarred attorneys are off the team and completely out of the game.

WHAT ARE YOU DOING ABOUT IT?

After reading the article by Rebecca Cull and Stephen Bough on prohibiting disbarred and suspended attorneys from practicing as paralegals, what will you do about it?

NFPA is a grass-roots organization called to action by its members; it is not driven by policy decisions of the board of directors. If you feel action should be taken by your professional organization, you have several choices:

Contact your local association and ask that it present an agenda topic at the Spring Convention in April in New Orleans. The deadline for submitting agenda topics is February 1, 1999. Agenda topics must include a summary of the topic for discussion and recommendations for action.

If you are a member, submit an agenda topic yourself. For information on how to proceed, contact your region director. For the west coast, the e-mail is ldir@paralegals.org; for the midwest, use lldir@paralegals.org; for the southeast, llldir@paralgals.org; and for the northeast, contact lvdir@paralegals.org

If you feel this issue is more of a local (state) matter and that your association should act at that level, contact it. If you don't know how to reach the local association, see page 35 for e-mail addresses.

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