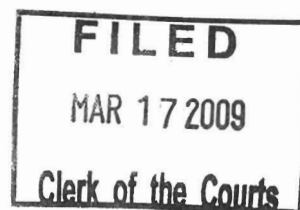


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

)
)
IN RE: EMPLOYMENT OF DISBARRED,) No. M2009-00063-SC-RL1-RL
SUSPENDED, AND DISABLED)
LAWYERS)
)
)



**OBJECTION OF THE BOARD OF PROFESSIONAL RESPONSIBILITY
TO THE PETITION**

The Board of Professional Responsibility (BPR) respectfully objects to the Tennessee Bar Association's Petition to change the rules regarding the employment of disbarred, suspended and disabled lawyers (Petition).

The American Bar Association Standing Committee on Ethics and Professional Responsibility in Informal Opinion 1434, citing to unpublished Informal Opinion 7, advised that:

An attorney should not employ a disbarred lawyer, even to do only office work and seeing no clients, because of the practical difficulty of confining his activities to an area which does not include practice of law, and because such employment would show disrespect to the courts.

The Petition seeks no change in this policy regarding disbarred lawyers and the BPR agrees that the current rule should remain in place.

However, the BPR disagrees with the proposal in the Petition that a lawyer suspended from the practice of law by the Court should be treated differently than a disbarred attorney. Suspension from the practice of law occurs by one three routes: administrative, summary and disciplinary. A lawyer may be administratively suspended from the practice of law without a hearing pursuant to Section 20.3 of Rule 9 for failure to pay the annual registration fee; for CLE non-compliance pursuant to Section 7 of Rule 21; and for failure to pay the state's Professional Privilege Tax for two consecutive years. Tenn. Code Ann. §§ 67-4-1701 – 1710. The very purpose of these administrative suspensions would be undercut if a lawyer so suspended were permitted to continue to work in an office where the practice of law is conducted. Administrative suspensions are designed to sanction a lawyer who has failed to comply with the most basic regulatory requirements for continuing to hold a valid license and the severe sanction of suspension would be substantially diminished if the suspended lawyer were permitted to work in any law office setting.

A lawyer may be summarily suspended from the practice of law pursuant to Section 4.3 of Rule 9, which requires a petition by disciplinary counsel establishing that the respondent lawyer has: 1) misappropriated client funds to his own use; 2) failed to respond to the BPR regarding a complaint of misconduct; 3) failed to substantially comply with a TLAP contract; or 4) that the lawyer poses a threat of harm to the public. Once the Court enters an order granting suspension pursuant to Section 4.3, the suspension stays in place until dissolved following a

hearing and a showing of good cause by the respondent. An attorney suspended under Section 4.3 cannot accept any new engagements and has 30 days to wind down the representation of existing clients. While some summary suspensions remain in place for only a few weeks before the respondent is able to establish an appropriate basis for dissolution, others remain in place for longer periods of time until supplanted by an Order of Enforcement following a disciplinary hearing. As in administrative suspensions, summary suspensions are imposed without a hearing and are designed to address an immediate, serious issue of lawyer misconduct that poses a serious risk of harm to the public. The effectiveness of such suspension would be diluted if the respondent lawyer were permitted to simply move to another law office setting and continuing to work without establishing the proof necessary for dissolution.

Suspension is also a form of discipline that may be imposed following the filing of a petition for discipline and a hearing, or by consent, for a violation of the Rules of Professional Conduct. Rule 9, Section 4.2. A disciplinary suspension must be for 30 days or more, but the period of suspension may not exceed five years. *Id.* In the event the suspension period is longer than one year, a respondent must petition the Court for reinstatement and demonstrate rehabilitation. Rule 9, Section 19. Second only to disbarment, suspension is a very serious form of discipline that requires the respondent attorney to comply with the requirements of Section 18 of Rule 9, including notifying clients, co-counsel adverse parties and their counsel that his privilege of practicing law has been suspended by the Court; returning client property; refunding unearned fees; withdrawing from representation, etc. This Court has made a finding in Section 18.7 that in connection with the prohibition of undertaking “any new legal matters,” the respondent “shall not maintain a presence or occupy an office where the practice of law is

conducted” and “shall take such action as is necessary to cause the removal of any indicia of lawyer, counselor at law, legal assistant, law clerk or similar title.” This finding is completely appropriate in connection with the second most serious disciplinary sanction permitted under Rule 9 and should not be disturbed.

There are sound policy reasons for imposing the current restrictions on suspended lawyers, some of which are discussed in the BPR’s Formal Ethics Opinion 83-F-50. First and foremost is the need to protect the public from being further victimized by an unethical or non-compliant lawyer. Secondly, the disciplinary sanction is enforced upon the respondent lawyer by completely segregating him from any contact with the law business. Traditionally, lawyers dressed in business suits; conducted their business in law firm offices with their name on the door; and littered their desks with legal documents and law books. Under the change in policy proposed by the Petition, a suspended lawyer will be working in the same type of setting, just not in his former office. By being permitted to work in a different law office, the suspended attorney cannot help but be mistaken by the public, the staff of the office, and the young associate attorneys of the firm as continuing to function as a lawyer. As a result, the BPR is of the view that in practicality there is no set of safeguards that can be imposed to effectively distinguish a sanctioned lawyer’s disciplinary status from the tasks the Petition proposes would be permitted in a law office setting.

Further, with all due respect to the TBA, the Petition and supporting materials are devoid of objective evidence that continuing to work in a law office setting is required in order for respondents to be able to demonstrate rehabilitation. To the contrary, rehabilitation will be

demonstrated by evidence of compliance with the conditions of any probationary period imposed as a part of the suspension; by maintaining compliance with the mandatory CLE requirements in Rule 21; or, in the case of a TLAP-related issue, by complying with the terms of the TLAP contract, which pursuant to Rule 33 App. A, Sections VI and VII, provides for consultations, referrals, peer support, monitoring, advocacy and medical treatment as the appropriate mechanisms for dealing with the lawyer's physical and mental issues. It is not apparent that the activities allowed under proposed Subsection (d), i.e., research, drafting or clerical duties, have any inherent relationship to a respondent's ability to demonstrate rehabilitation any more than performing such duties in any other business establishment would.

Finally, as to lawyers on disability inactive status, the proposed rules revisions suggested in the Petition are entirely inappropriate. In order for an attorney to be placed on disability inactive status, pursuant to Section 21.2 or 21.3 of Rule 9, the Court must determine whether the lawyer is disabled and is suffering from a mental or physical infirmity or illness. When such a determination is made, the Court enters an order that the lawyer is "incapacitated from continuing the practice of law," and such order is for an "indefinite period and until the further order of this Court." Lawyers in this status have been found by the Court to be unfit to handle client matters in any regard and they remain so until they can present medical proof to demonstrate that their infirmity or illness has been successfully resolved. The Petition does not demonstrate that working in a law office is likely to be part of any disabled lawyer's physician's treatment plan. Nor does the Petition provide any logical rationale why disabled lawyers with no disciplinary complaints pending should be treated differently than those with such pending complaints. The BPR suggests to the Court that the pendency of complaints is irrelevant to this

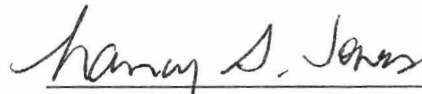
analysis since Section 21.3 requires that the lawyer's treatment for and resolution of the illness or infirmity by his medical professionals be entirely separate and apart from the disciplinary mechanisms of Rule 9.

The BPR acknowledges that after a long period of suspension on any basis, or a period of disability inactive status, the lawyer may experience return-to-work issues. These issues are more appropriately addressed by bar associations than by the proposed rules changes. The practice of law continues to be a privilege in Tennessee, not a right. Any time that privilege is taken away by the Court with one hand by issuing a suspension order, it should not be partially given back by the other hand in allowing a lawyer to still put on his suit every day and go to work in a place where the business of law is conducted.

CONCLUSION

The BPR respectfully requests that the Court deny the Petition in its entirety.

Respectfully submitted,



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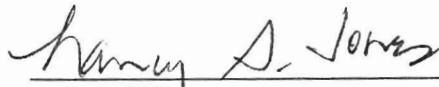
CERTIFICATE OF SERVICE

I certify I have served a copy of the foregoing, Board of Professional Responsibility's Response To Petition, by mailing a copies to the persons listed below on the 16th day of March, 2009.

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