

Nebraska Ethics Advisory Opinion for Lawyers
No. 96-1

AN ATTORNEY MAY COMPENSATE A SUSPENDED ATTORNEY FOR LEGAL WORK PERFORMED PRIOR TO THE SUSPENSION. A SUSPENDED ATTORNEY MAY BE EMPLOYED AS A PARALEGAL AND/OR LAW CLERK IF THE EMPLOYMENT IS AT A PLACE AND IN SUCH A MANNER AS TO NOT GIVE THE APPEARANCE OF PRACTICING LAW. A SUSPENDED ATTORNEY MAY NOT BE EMPLOYED AS A PARALEGAL AND/OR LAW CLERK AT AN OFFICE WHERE HE OR SHE PREVIOUSLY SHARED OFFICE SPACE OR PRACTICED LAW. [OPINION 78-5](#) IS SO MODIFIED.

STATEMENT OF FACTS

For the past five years, attorney A has shared office space with attorney B. Attorney B was recently suspended from the practice of law in Nebraska for disciplinary reasons. Attorney A has some familiarity with the suspended attorney's files and has agreed to take over the representation of several of his former clients, at the clients' request. Prior to suspension, the attorney entered into a contingency fee arrangement with various clients and performed differing degrees of work on each of the files. Attorney A asks if he may compensate the suspended attorney for his previous work.

Also, because of attorney A's long association with the suspended attorney and the need for additional assistance to handle his increased workload, attorney A wishes to hire the suspended attorney as a legal assistant. If the suspended attorney was hired, attorney A would not give him any greater access to clients than he gives other paralegals or law clerks. If attorney A were to hire the suspended attorney, he would advise clients that the suspended attorney is not a lawyer but rather a paralegal. The suspended attorney would work under the direct supervision and control of attorney A.

APPLICABLE CODE PROVISIONS

DR 3-102 Dividing of Legal Fees with a Non-Lawyer.

(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR 3-101 Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

DISCUSSION

Division of Fees

DR 3-102 prohibits a lawyer from sharing legal fees with a non-lawyer; however, the suspension from the practice of law does not preclude an attorney from receiving compensation for legal services rendered prior to the suspension. ABA Informal Op. 628. As to disbarred attorneys, the ABA stated:

On the assumption that the disbarment of the attorneys has nothing to do with the pending litigation and that there is no reason to believe that there was professional misconduct by the referring [and disbarred

attorneys] in connection with these cases, we can see no reason why you should be under any ethical limitations of such a nature so as to prevent your seeing that the referring attorneys are compensated for the work performed....In no sense, however, should fees be divided as to work performed, if any, after disbarment. As of that time they were only laymen. Division of fees is proper only with another lawyer based on a division of services and responsibility.

Id. We see no reason why the same principles should not apply to suspended attorneys as well. See also Oregon Eth. Op. 1991-25; Florida Eth. Op. 9-3 and Michigan Op. R1-30. But, see, Texas Eth. Op. 432 for contrary view that engaging in misconduct sufficient to require disbarment or suspension constitutes voluntary abandonment of services for which attorney is not entitled to recover.

The compensation paid to a suspended attorney may include contingency fees earned by the suspended attorney prior to the suspension. Philadelphia Bar Association Advisory Opinion 86-83. The division of fees with the suspended attorney may be in proportion to the services and responsibilities rendered, but must not be related to matters which gave rise to the suspension. South Carolina Bar Opinion 21-78.

The Advisory Committee sees no ethical reason why a suspended attorney cannot be compensated for work performed prior to the suspension.

Hiring Suspended Attorney as Paralegal

In Formal Opinion [78-5](#), we determined that an attorney who is temporarily suspended from the practice of law may not engage in any law-related activity or business including, but not limited to, preparing pleadings or doing research for other lawyers. The reason for such a determination is based upon several ethical considerations including maintaining the integrity and

competence of the legal profession (Canon 1), the prevention of the unauthorized practice of law (Canon 3), and avoiding even the appearance of professional impropriety (Canon 9).

One of the few jurisdictions addressing the subject in a reported opinion and which has allowed the retention of a suspended attorney as a law clerk held that such an arrangement is permissible under the following conditions:

A suspended attorney is permitted to work as a law clerk, investigator, paralegal, or in any other capacity as a non-lawyer for a licensed attorney/lawyer if the suspended lawyer's functions are limited to work of a preparatory nature under the attorney-employer's supervision and does not involve client contact. The suspended or disbarred lawyer may not be present during conferences with clients, talk to clients directly or on the telephone, sign correspondence to them, contact them, sign pleadings, or appear in court.

In Re: Wilkinson, 834 P.2d 1356 (Kan. 1992). Under Wilkinson, any client contact would run afoul of the Code of Professional Responsibility.

The majority of jurisdictions addressing this issue have held that a suspended attorney may not be employed as a clerk or paralegal at a law firm during his term of suspension. See, Mississippi Ethics Opinion 171 (6/22/90); Rhode Island Ethics Opinion 90-12 (2/27/90) (stating such hiring would constitute professional misconduct as being prejudicial to the administration of justice); South Carolina Ethics Opinion 92-20 (7/92); Kentucky Ethics opinion E-253 (1982); Michigan Ethics Opinion C1-602 (2/27/81); Tennessee Ethics Opinion 85-F-50 (8/12/83).

The Nebraska Supreme Court has authorized a lawyer to function in a non-lawyer paralegal and/or law clerk capacity in two cases. N.S.B.A. vs. Fitzgerald, 227 Neb.

90; 416 N.W.2d 28 (1987) and N.S.B.A. vs. Garvey, 235 Neb. 737, 457 N.W.2d 297 (1990).

Both of these cases, however, involved a conditional admission of charges pursuant to Neb. Disciplinary Rule 13.

In the present situation, the lines of demarcation become even less distinct because the suspended lawyer will be performing tasks as a paralegal at a firm he was associated with at the time of his suspension. This may give the appearance of continued legal services even though the attorney has been suspended.

In *State Ex Rel. Nebraska State Bar Assn. v. Butterfield*, 172 Neb. 645, 111 N.W.2d 543 (1961), the issue before the court was whether a suspended lawyer violated his suspension by preparing deeds, mortgages, releases and income tax returns during his suspension. The court stated:

A suspended lawyer, who in connection with his law office engages in other activities, is in no different position than the active lawyer who confines himself solely to the practice of law in determining if the suspension order was violated. Where one is generally known in the community as a lawyer, it might well be impossible to divorce two occupations closely related if the rule was otherwise.

Id. at 649, 111 N.W.2d at 546. Based on *Butterfield*, therefore, attorney A's prior association with the suspended lawyer would prevent the retention of the suspended attorney as a paralegal.

CONCLUSION

An attorney may compensate a suspended attorney for legal work performed prior to the suspension. A suspended attorney may be employed as a paralegal and/or law clerk if the employment is at a place and in such a manner as to not give the appearance of

practicing law. A suspended attorney may not be employed as a paralegal and/or law clerk at an office where he or she previously shared office space or practiced law. [Opinion 78-5](#) is so modified.

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