

Nebraska Ethics Advisory Opinion for Lawyers  
No. 78-5

AN ATTORNEY WHO IS TEMPORARILY SUSPENDED FROM THE PRACTICE OF LAW MAY NOT ENGAGE IN ANY LAW-RELATED ACTIVITY OR BUSINESS INCLUDING SERVING AS A GUARDIAN, CONSERVATOR OR PERSONAL REPRESENTATIVE, PREPARING PLEADINGS OR DOING RESEARCH FOR OTHER LAWYERS. HE MAY, HOWEVER, CONTINUE TO MAINTAIN AN OFFICE PROVIDING THAT IT IS NOT DESIGNATED AS A LAW OFFICE AND HE MAKES USE OF IT FOR OTHER THAN LAW-RELATED ACTIVITIES.

QUESTIONS

If an attorney is temporarily suspended from practice for a period of time, what may he be permitted to do during such suspension? Is he permitted to continue as a guardian, conservator, or personal representative, or must he resign? Is he permitted to prepare pleadings or do legal research for other lawyers if he does not come in contact with the public as long as he does not hold himself out as being in the practice of law? May such suspended attorney continue to rent his office?

DISCUSSIONS

(A) General Background

1. A suspended attorney cannot practice law.

The code of professional responsibility speaks to this question very broadly. Canon 3 states that "a lawyer should assist in preventing the unauthorized practice of law." More specifically, ethical consideration 3-9 states that "it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so." This consideration is further translated into a disciplinary rule, at D.R. 3-101(B):

"A lawyer shall not practice law in a

jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

Obviously, the practice of law by a suspended attorney would be in violation of the regulations of the profession in this jurisdiction. Nevertheless, several jurisdictions have clearly stated, so as to remove all doubt, that a suspended attorney may not "practice law." Application of Koenig, 204 A.2d 33, (1964), (Conn.); State Ex. Rel. Florida Bar v. Evans, 109 So.2d 881, (1959) (Fla. S.Ct.); In Re Integration of the Bar, 5 Wis. 2d 618, 92 N.W.2d 601 (1958) (Wis. S.Ct.).

It is thus clear that the very basic rule is that a suspended attorney cannot practice law. The question becomes then what is and what is not "the practice of law."

## 2. The practice-unauthorized practice of law.

Ethical Consideration 3-5 states what a number of jurisdictions have realized when litigating questions related to suspension and disbarment, that there really is no single formulation of what does or does not constitute the practice of law:

"E.C. 3-5. 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 with 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, non-lawyers, 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."

From this ethical consideration, then, it would seem that there should only be one question to be resolved when deciding whether or not a suspended attorney has been engaging in the practice of law. That is, did or did not such attorney conduct activities involving the exercise of professional judgment. Nevertheless, most jurisdictions have formulated their own somewhat unique rules as to the definition of unauthorized practice of law, with no singular focus on the question of professional judgment. Further, this diversity of guidelines among the various jurisdictions is in line with American Bar Association Formal Opinion No. 198, 1939:

"What constitutes unauthorized practice of the law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction."

#### (B) Views Expressed by ABA Opinions

The two most relevant American Bar Association opinions seem to differentiate to some extent between the capacity of a disbarred attorney to work and the capacity of a suspended attorney to work. In both cases, however, there are some very definite restrictions placed on that attorney.

In Informal Opinion No. 7 (unpublished), from Page 134, ABA Opinions on Professional Ethics (1967), the American Bar Association stated:

"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 court."

On the other hand, in Informal Opinion No. 1079, November 20, 1968, the American Bar Association stated:

"A lawyer may not be associated with a person who is suspended from the practice of law, although such a person may work for the lawyer so long as it is clear that he 'has no contact with clients, court attaches, or proceedings."

Note, however, that in Opinion 1079 the Bar Association did lay down some specific guidelines. The opinion states that for a lawyer to share office spaces with a suspended attorney would "seem to be inappropriate"; though the sharing of a library away from all clients would probably be proper. The opinion further stated that under no circumstances would it be appropriate for a suspended attorney to refer business to another attorney, or to receive any remuneration from an attorney for any suggestions that the latter attorney look after the suspended attorney's clients during his suspension.

#### (C) Nebraska Law

The very basic law in Nebraska was laid down in 1919 in *State v. Fisher*, 103 Neb. 736, 174 N.W. 320, where the Nebraska Supreme Court essentially held that a suspended or disbarred attorney cannot do what is most obviously the practice of law. The Attorney Fisher had been suspended for one year, and during that time had admittedly engaged in a number of law office activities, including the drawing of pleadings and preparation of a case for trial in the district court. The Supreme Court rejected Fisher's claim that a suspended attorney is merely prohibited from oral participation in the trial of cases in open court, and held that "to draw pleadings and prepare a case for trial in the district court is practicing his profession in that court, whether he signs his own name or the name of some other attorney." and

is thus a violation of his suspension. The court further held that the acts of maintaining a law office which carried a sign naming him as an attorney at law, consulting with clients continually with regard to their actions pending in court, and being present when their cases were tried did in fact "constitute practicing his profession as an attorney and counselor at law", and were thus also violations of his suspension.

The most definitive and restrictive statement of the Nebraska Supreme Court as regards suspended attorneys, however, and that which must be considered controlling law in Nebraska at this time, was made in *State v. Butterfield*, 172 Neb. 645, 111 N.W.2d 543 (1961). This case involved a proceeding on an application of a suspended attorney for reinstatement; the court, per Justice Carter, held that the attorney was not entitled to reinstatement, in part because he had practiced law during, and in violation of, his suspension.

The court first noted that an all embracing definition of the term "practicing law" would be very difficult, but noted that it is generally defined as "the giving of advice or rendition of any sort of service by a person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill." The court further noted that the character of the act and not the place where it is performed would control the decision as to whether such act constituted practicing law, and that the facts as to whether a fee had been charged would not be decisive. The court also noted that a suspended lawyer, during the term of his suspension, was under the same obligation to comply with the code of professional responsibility as was an active lawyer.

Specifically, the court held that a suspended attorney could not draft a power of attorney, or prepare deeds, mortgages, releases, or income tax returns, even though he may previously have done such work in a capacity other than that of a lawyer - as a real estate broker, a notary public, an abstractor, or a loan agent:

"It seems clear to us that the doing of such

work is within the province of a lawyer to do. It is properly identified as the practice of law, whether or not it might under some circumstances be properly performed by others not admitted to the bar. An order of suspension deprives the suspended lawyer from performing any service recognized as the practice of law and which is usually performed by lawyers in the act of practice of law. It is the contention of respondent that these services were performed in his capacity as a licensed real estate broker, notary public, abstracter, and loan agent. It is not necessary for us to determine in this case if and under what circumstances others might perform such services, although not admitted to the bar. 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 a community as a lawyer, it might well be impossible to divorce two occupations closely related if the rule were otherwise. A suspended lawyer will not be heard to say that services recognized as within the practice of law were performed in some other capacity when he is called to account."

By any reasonable interpretation of this quote and this case, the prevailing law in Nebraska seems to be very restrictive, that a suspended attorney cannot during his suspension do anything which a lawyer might feasibly perform in the practice of law. Finally, it should be noted that the court further stated that the relative rarity or frequency of such acts was irrelevant:

"Even if the violations were isolated ones, and the record shows that they were not, they constitute the practice of law and are violative of the court's suspension order."

#### (D) Application of Nebraska Law to Questions

As to whether or not the suspended attorney may continue in his capacities as guardian, conservator, or personal representative, there is little in either ABA Opinions referred to which would be of any help. *State v. Fisher, supra*, is of help only insofar as it rejects the claim that a suspension merely prohibits oral participation in the trial of cases. However, *State v. Butterfield, supra*, presents in strong language which would indicate that these activities would not be proper during the suspension. Though *Butterfield* does not specifically refer to this type of activity, it basically indicates the Supreme Court's attitude that the "practice of law" which is prohibited by suspension of an attorney is any practice which requires "the use of any degree of legal knowledge or skill." The language of that case further shows that the tenor of the Supreme Court's opinion is that a suspended attorney should not, during the term of his suspension, engage in any activities which were in any considerable way related to his former practice of law, or in any way arose thereby. While it may be fairly clear that acting in a capacity of a guardian, conservator or personal representative is something that is not based solely on the use of legal skill or knowledge, and is not something that is engaged in strictly by lawyers, *Butterfield* indicates that it may well, nevertheless, be an improper activity in which a suspended attorney might engage. Insofar as it is clear that acting in the capacity of a guardian, conservator or personal representative is something that is normally done by an attorney, and especially insofar as it is clear that the persons with whom the lawyer deals when acting in these capacities knew of his status as a lawyer at the time he began in such activities, it is not advisable that the suspended attorney engage in such capacities during his suspension.

As to continuing to rent his office, it is entirely clear from *State v. Fisher, supra*, that if he did so, he could not carry a sign naming him as an attorney at law. Further, from Informal ABA Opinion No. 1079, *supra*, it would be "inappropriate" for him to share office space with another attorney. Otherwise, if all indications that

he was an attorney were removed from the premises, there is nothing to indicate that his maintaining occupancy of his office would be improper.

### CONCLUSIONS

In view of the Butterfield case, the only conclusion that can be reached under Nebraska law is that a suspended attorney may not engage in any law-related activities or business including serving as a guardian, conservator or personal representative, preparing pleadings or doing research for other lawyers.

There would be no reason why the suspended attorney cannot continue to maintain an office, but very obviously it cannot be designated as a law office and he cannot make use of it for law-related activities.

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