

LOSS OF LICENSE: Rules Governing Suspension or Disbarment

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I. WHAT TO DO WHEN YOU HAVE JUST BEEN SUSPENDED OR DISBARRED

The vast majority of lawyers will never face suspension or disbarment. But for the minority who do, proper navigation of the procedural requirements for suspension or disbarment is critical. Failure to do so may result in a contempt action or bar counsel's opposition to the lawyer's eventual petition for reinstatement.

This article is addressed to lawyers who face these issues. Note that these requirements also apply if you are placed on disability inactive status under Supreme Judicial Court Rule 4:01 § 13 or if you have resigned under § 15. Note also that these requirements take effect if you have been administratively suspended for more than 30 days, whether for failure to cooperate with bar counsel or for failure to register and pay dues.

If you are facing suspension, first and foremost, read Supreme Judicial Court Rule 4:01, § 17. The rule sets forth all the steps you will be required to take when the suspension order is entered. The order of suspension or disbarment will typically incorporate the requirements of the rule, but may have additional terms. A suspension or disbarment is effective thirty days after the entry of the order unless otherwise ordered by the court. A temporary suspension order is effective immediately.

Once the order issues, you will have 14 days to accomplish a variety of tasks. Get started as soon as possible.

Requirements of S.J.C. Rule 4:01§ 17 and Orders of Suspension or Disbarment:

Within **fourteen days** of the entry of the order you must:

- file a notice of withdrawal with every court, agency, or tribunal in which you are counsel of record.
- resign all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary.
- provide notice to all clients and to all wards, heirs, and beneficiaries that you have been suspended or disbarred and that you are disqualified from acting as a lawyer after the effective date of the order. If important dates are imminent (court hearings, statute of limitations, appeal deadlines, etc.) call attention to those circumstances.
- provide notice that you have been suspended or disbarred to counsel for all parties (or, in the absence of counsel, the parties themselves) in pending matters.
- make each client's file available to the client or to new counsel selected by the client. See Mass. R. Prof. C. 1.15A and 1.16(e).

- close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds. S.J.C. Rule 4:01, § 17 (1)(g).
- refund any unearned retainers paid in advance by the client (you should also send all hourly clients a final bill.)

All the notices described above must be sent by certified mail, return receipt requested, unless otherwise ordered by the SJC.

Within **twenty-one days** after the entry date of the order:

- file with bar counsel the required comprehensive “affidavit of compliance” attaching copies of notices and schedules, as described in your order and in S.J.C. Rule 4:01, § 17(5). Bar counsel will send you the forms and a model affidavit upon your suspension or disbarment. Make sure to read the affidavit carefully, choose which subsection of paragraph 2 is applicable to your circumstances (and cross out the subsection that does not pertain), and attach all required documentation.
 - retain a copy of everything you filed with bar counsel.
 - file with the clerk of the SJC for Suffolk County, a copy of the affidavit of compliance, a list of all jurisdictions in which you are admitted to practice, and a street address where you can be reached.

Within **thirty days** after the entry date of the order:

- Cease all forms of practice.

II. WHAT TO DO AND WHAT NOT TO DO WHILE YOU ARE SUSPENDED OR DISBARRED

A. Do Not Practice Law or Engage in Paralegal Work

Rule 4:01, sec. 17 is strictly construed. There is no exception under which you may represent family members or a corporation that is controlled by you, or provide *pro bono* legal services, although you of course may appear for yourself. Attorneys who practice law while suspended may face contempt charges. Your period of suspension may be increased if a court finds that you have practiced while suspended. See S.J.C. Rule 4:01, § 17(8); *Matter of Kafkas*, 451 Mass. 1001, 2016. You will also jeopardize your chances of reinstatement.

You are prohibited from engaging in paralegal work or working for an attorney, as an employee or otherwise, in any capacity (including secretary, receptionist, clerk, etc.) until you have completed the term of your suspension and have applied for and received court approval to do so. See S.J.C. Rule 4:01, § 17(7) and § 18(3). Subsequent to the expiration of a term suspension, four years after an order of indefinite suspension or seven years after an order of disbarment or accepted resignation, you may file a motion with the SJC seeking permission to work as a paralegal.

Prior to filing such a motion, you should locate an attorney in good standing who is willing to employ you and who has been apprised of your status and familiarized herself with the disciplinary order. Once you have located such a lawyer, contact bar counsel for instructions. Bar counsel requires that the supervising attorney submit an affidavit in which she presents a specific plan for supervising the applicant, and agrees to certain other terms, including that the applicant not have direct contact with clients and not handle any client funds.

The SJC has construed the term “paralegal” to include certain related jobs, such as title examiner (*Matter of Eastwood*, 10 Mass. Att’y Disc. R. 70, 77) and has also ruled that any preparation of documents for filing in court, even if signed by the client, constitutes the “practice of law” or paralegal work. *Matter of Kafkas*, 451 Mass. 1001 (2008); *Opinion of the Justice*, 289 Mass. 607, 612 (1935)

B. Take and Pass the MPRE

If you have been suspended for a period of six months and a day or longer you must take and pass the Multi-State Professional Responsibility Examination before you will be readmitted. See S.J.C. Rule 4:01, § 18(10)(b). In Massachusetts, the examination is given three times per year. You should ascertain the dates of the examination as soon as possible so that you have time to register, prepare and take the examination before you become eligible for reinstatement. Consult the Massachusetts Board of Bar Examiners website, <http://www.mass.gov/bbe/>

C. Comply With Any Conditions of Your Suspension

Some suspension orders contain specific conditions of reinstatement, such as participation in an educational program designated by bar counsel or restitution to a client. If your order contains such conditions, make plans to comply as soon as possible. In some instances, the Client Security Board (CSB) may have issued a monetary award to one or more clients harmed by your misconduct. If this is the case, you will be notified. The CSB expects you to reimburse it for the amounts paid and will oppose your reinstatement if you have not done so.

D. Only Collect Fees and Partnership Shares Earned Prior to Suspension

If you earned fees prior to your suspension, but did not collect those fees, it is permissible to collect the fees while you are suspended or disbarred. You may take legal action to collect an unpaid fee, but you may only represent yourself individually in such an action; you may not represent a partnership or LLC.

You may recover fees under a contingent fee agreement or on a *quantum meruit* basis “unless the penalized misconduct was... related to the case in which the services were rendered and for which a fee is sought and impaired the value of the client's cause of action or otherwise imperiled the client's right to relief.” *Kourouvacilis v. American*

Federation of State, County and Municipal Employees, 65 Mass.App.Ct. 521, 532 (2006). If it is a matter on which you were the referring attorney and for which you have no further responsibilities or obligations, a referral fee agreement, entered into with written client consent prior to the loss of license, may still be valid.

If you were a member of a law firm or LLP, you may collect the partnership or shareholder distribution shares attributable to a time period in which you were still licensed.

E. Do Not Handle Client Funds

You may not sign any client checks, handle any client funds or enter into any new fee agreements, including any referral agreements with other attorneys, while you are suspended or disbarred. And you should be removed as a signatory to any law firm IOLTA or trust accounts.

F. Non-Legal Work

You may, of course, engage in non-legal work. Be careful, however, not to venture into areas that come very close to the practice of law or paralegal work. Disbarred and suspended lawyers may be barred from engaging in work in which they utilize their lawyering skills or serve their former clients, even if non-lawyers are allowed to perform those tasks. In *Matter of Bott*, 462 Mass. 430 (2012) the SJC held that the following considerations are relevant to determining whether mediation or other activities that do not constitute the practice of law when performed by nonlawyers may, in the context of bar discipline cases, nevertheless constitute legal work when performed by a lawyer: (1) whether the type of work is customarily performed by lawyers as part of their legal practice; (2) whether the work was performed by the lawyer prior to suspension, disbarment, or resignation for misconduct; (3) whether, following suspension, disbarment, or resignation for misconduct, the lawyer has performed or seeks leave to perform the work in the same office or community, or for other lawyers; and (4) whether the work as performed by the lawyer invokes the lawyer's professional judgment in applying legal principles to address the individual needs of clients.

If you have concerns as to whether a given undertaking is permissible, seek advance clarification from the SJC. See, *Matter of Bott*, supra.

G. Stationery, Cards, Telephone Lines, E-Mail & Websites

You may not use or distribute stationery, cards or other written materials in which you hold yourself out to be a practicing attorney. The same is true of your telephone voice mail recording, e-mail, websites or other electronic communications. Along the same lines, you should not use the titles “Esq.” or “Attorney.” as both imply that you are a lawyer.

If you were practicing in a partnership or association with other attorneys, your name must be removed from letterhead, websites, and other promotional materials while you are suspended.

H. Malpractice Insurance and Registered Address

If you have malpractice insurance, consult with your agent or a company representative about the advisability of maintaining or discontinuing your coverage. It is also a good idea to update your home address with the registration division of the BBO so that you are reachable while you are suspended or disbarred.

III. Reinstatement (without hearing)

If you have been suspended for up to one year you may seek reinstatement without a reinstatement hearing. Such reinstatements are referred to as “automatic” but are not entirely so. Before being reinstated you must file an affidavit with the S.J.C in compliance with S.J.C. Rule 4:01, secs. 18(1)(a) and (b).

The rule requires attorneys who have been suspended one year or less to file with the Court and bar counsel an affidavit stating that the lawyer has: i) fully complied with the requirements of the suspension order, ii) paid any required fees and costs and iii) repaid any amount due to the Client Security Board. Lawyers who have been suspended for *more than six months* must also take and pass the Multi-State Professional Responsibility Examination. The required affidavit is **in addition to** the Affidavit of Compliance the lawyer must file after complying with the suspension order.

Bar counsel is permitted to file an objection to “automatic” reinstatement (see 4:01, sec. 18 (1)(c)), and will do so under unusual circumstances. For instance, bar counsel might object to reinstatement if there is evidence that the lawyer continued to practice while suspended or where bar counsel learns while the lawyer is suspended of previously unreported misconduct by the lawyer before the suspension.

If you have been suspended for a year and a day or longer or where the court has explicitly made a reinstatement hearing a condition of reinstatement, you may wish to begin preparation well in advance of your eligibility. Reinstatement hearings are beyond the scope of this article, but bar counsel suggests that you review Supreme Judicial Court Rule 4:01, § 18; Rules of the Board of Bar Overseers, §§ 3.61-3.67; and the reinstatement questionnaire included as an appendix to the Board rules, <http://www.mass.gov/obcbbo/BBORules.pdf>. It is also a good idea to review some Massachusetts case law on reinstatements to help you understand what a hearing panel will be considering when you do seek reinstatement. See, e.g. *Matter of Daniels*, 442 Mass. 1037 (2004); *Matter of Tatel*, 23 Mass. Atty Disc. R. 724 (2007); *Matter of McCarthy*, 23 Mass. Atty Disc. R. 469 (2007); *Matter of Weiss*, 747 Mass 1001 (2016).

IV. Frequently Asked Questions

Q. I have several matters that are virtually concluded. May I complete them after the order enters?

A. During the period between the entry date of the order and its effective date, you may complete matters that were pending. SJC Rule 4:01, § 17(3). However, you have to be both realistic and fair to your clients. If there is any chance that you will not be able to complete a matter in thirty days, or if rushing the matter to conclusion is not in the client's interests, the client should be alerted to locate successor counsel.

Q. My suspension order entered yesterday. Today, a new client has offered me \$10,000 to make one court appearance that will take place before the effective date of my suspension. May I accept it?

A. No, you may not accept any new retainer or new matter after the entry of the order. SJC Rule 4:01, § 17(3)

Q. I have no clients and no bank accounts and I do not serve as a fiduciary. Do I have to file an affidavit of compliance?

A. Yes, you must file an affidavit. In the form affidavit you can indicate that you have no clients and do not serve as a fiduciary.

Q. I have been suspended for only six months. Can I hand my entire practice over to another lawyer while I am suspended, with the understanding that I will take all of the clients back when I am reinstated?

A. No. You are required to withdraw from all representation upon your suspension and your clients have the right to select new counsel. You may recommend an attorney competent to handle the case, and the client may accept or reject your recommendation. (You are not entitled to a referral fee in such circumstances.) You cannot, however, inform your clients that a designated attorney will represent them during your absence, and that you will resume the representation upon your return.

Q. I have been suspended for several months. A lawyer to whom I referred a personal injury case several years ago has just notified me that he has settled it. Under our agreement, I am entitled to one-third of his one-third contingent fee. May I accept it?

A. Although your suspension voids the fee agreement, you ;Yes, assuming that you entered into the agreement while you were licensed, you may accept the fee.

Q. While I am suspended I intend to be in close touch with my partner and office staff concerning the ongoing cases of my former clients. Is that okay?

A. No. You may not run your practice while you are suspended. You may not have any involvement whatsoever in representation of any client while you are suspended. You can and should, of course, answer any questions that the client or successor counsel may have as to the status of the case or the work that was done prior to your suspension.

Q. A check arrived after the effective date of my suspension made out to me and a client jointly. May I endorse the check? If not, what should I do with it?

A. Either the check can be returned to the maker, with a request that it be voided and a substitute check be made payable and sent to the client (or the client and successor counsel) or you can endorse the check over to the client and send it to the client or successor counsel. In either instance, you may also send the client or successor counsel an invoice for any fees and expenses you are due. You cannot negotiate the check, even with the client's endorsement.

Q. I am a co-trustee of a family trust established by my parents of which my nieces and nephews are the sole beneficiaries. My entire family knows that I have been suspended. Do I have to resign as co-trustee?

A. Yes, there is no exception for fiduciary positions involving family members. You must resign unless you seek and receive authorization from the Supreme Judicial Court to remain as trustee. .