



Supreme Court of Wisconsin

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September 29, 2010

Clerk of Supreme Court
ATTN: Carrie Janto, Deputy Clerk
P.O. Box 1688
Madison, WI 53701-1688

RE: Rule Petition 10-04 – Establishing Standards and Procedures for Permanent Revocation

Dear Ms. Janto:

By letter dated September 14, 2010, Commissioner Rich requested that the Preliminary Review Committee (“PRC”) respond to the following questions regarding Rule Petition 10-04:

- 1. The petition states that the proposed amendment is modeled on Louisiana’s rule. Please advise the court why the Louisiana rule was selected as a model and how this rule differs from other state rules permitting permanent revocation.**

The PRC modeled Rule Petition 10-04 on the Louisiana Disciplinary Rule, LA SUP. CT. DISC. R. XIX, §§ 10(A)(1) and 24(A), and Appendix E, because Appendix E to the Louisiana Disciplinary Rule suggests express criteria guiding the court’s discretion in determining whether or not permanent revocation is warranted. Express criteria also notifies the bar of the factors the court will consider in deciding particular cases.

Currently, seventeen states recognize permanent disbarment or revocation as a potential sanction for attorney misconduct: one state by statute; six states by judicial decision; and ten states by rule.

By statute, **New York** recognizes a provisional form of “permanent disbarment” upon proof of a conviction of “any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.” MCKINNEY’S JUDICIARY LAW § 90(4)(a). However, subsection 5 of this statute also grants the court the power to vacate or modify a debarment order upon proof of reversal of the judgment of conviction, or a pardon. *In Re Sugarman*, 62 A.2d 166, 167, 409 N.Y.S.2d 224, 226 (1978).

Supreme Courts of the following six states have recognized and have meted “permanent disbarment” as a sanction for egregious misconduct by an attorney, usually, but not necessarily involving felonious misconduct:

- **Arizona:** *In Re Smith*, 168 Ariz. 357, 359, 813 P.2d 722, 724 (1991)(abandoning clients);
- **Kansas:** *In Re Anthony P. Russo*, 244 Kan 3, 765 P.2d 166 (1988)(*per curiam*) (conspiracy to carry on prostitution and bribery in Kansas in violation of the Kan.Stat.Ann. §§ 21-3512, 3513 and 3901 by traveling and causing travel in interstate commerce, and by using and causing the use of facilities in interstate commerce, including wire communication facilities, in violation of 18 U.S.C. § 1952);
- **Michigan:** *State Bar of Michigan v. Block*, 383 Mich. 384, 175 N.W.2d 769 (1970) *affirming on other grnds* 9 Mich. App. 698, 707-708, 158 N.W.2d 49, 54-55 (Ct App. 1968)(declaring that Michigan Court possesses inherent power and authority under M.C. L.A. § 600.907 to order permanent disbarment for certain misconduct, particularly, for diversion of client trust funds);
- **Oklahoma:** *Oklahoma Bar Ass’n v. Gassaway*, 2008 OK 60 ¶ 85, 196 P.3d 495, 511(six grievances each involving findings of breach of multiple rules on multiple counts, including obtaining signature of a judge by fraud, forgery, and procuring sexual favors from a client);
- **Pennsylvania:** *In re Romaine Phillips*, 569 Pa. 195, 801 A.2d 1208 (2002)(*per curiam*)(underlying misconduct not specified); *Matter of Costigan*, 541 Pa. 459, 469, 664 A.2d 518, 523-524 (1995)(criminal conviction arising from mishandling of estate: theft, theft by deception, theft by diversion of funds, criminal conspiracy and aiding in the consummation of a crime); and,
- **South Carolina:** *In Re Ramsey*, 279 S.C. 29, 301 S.E. 2d 470 (1983)(*per curiam*) (conspiracy to distribute marijuana and cocaine and distribution of cocaine.)

Ten states recognize “permanent disbarment / revocation” by court rule:

- **Alabama:** ALABAMA RULES OF DISCIPLINARY PROCEDURE 8(a);
- **California:** STATE BAR PROCEDURE RULE 662(c);
- **Florida:** WEST’S F.S.A. BAR RULES 3-5.1(f) and 3-7.10(n)(1);
- **Indiana:** INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS RULE 23§ 3(a);
- **Kentucky:** SUP. CT. RULE 3.380;
- **Louisiana:** LA SUP. CT. DISC. R. XIX, §§ 10(A)(1) and 24(A), and Appendix E;
- **Mississippi:** STATE BAR DISCIPLINE RULES 12(a),(c);
- **New Jersey:** NEW JERSEY RULES OF COURT 1:20-15A(1);
- **Ohio:** GOV. BAR RULE V(6)(c); and,
- **Oregon:** OREGON STATE BAR RULE 6.1(a)(vi) & (d).

Of the states recognizing permanent revocation/disbarment as a potential sanction for attorney misconduct by rule, only Florida, Louisiana and Mississippi state criteria guiding the court’s discretion. *Compare* WEST’S F.S.A. BAR RULES 3-5.1(f)(disbarment, whether temporary or permanent, is the presumed sanction for theft); LA SUP. CT. DISC. R. XIX, §§ 10(A)(1) and 24(A), and Appendix E *with* MISSISSIPPI STATE BAR DISCIPLINE RULE 12(c)(misconduct an essential element of which also is a felony criminal offense).

The PRC suggests that Louisiana’s Rule provides a practical, readily administrable, but fairly comprehensive set of suggested factors. *Compare* LA SUP. CT. DISC. R. XIX, §§ 10(A)(1) and 24(A), and Appendix E.

2. **Please provide any information you have on the number of permanent revocations that are imposed in Louisiana or in other states each year. Does permanent revocation truly preclude the attorney from ever seeking readmission to the state bar?**

Responding to the first question:

The ABA Center for Professional Responsibility (“CPR”) responded to a PRC inquiry advising that the CPR has not compiled statistics on the number of permanent revocations ordered by any jurisdiction.

Keith Sellen of the Office of Lawyer Regulation reports that he posed the first question to his counter-parts in those states advising him that permanent revocation/disbarment is a recognized sanction, or reviewed reports from those jurisdictions. Mr. Sellen reported as follows:

- Arizona provided citations to nine cases between 1930 and 1993.
- Florida reported 30 cases during fiscal years 2006 to 2009.
- Indiana reported that permanent revocation is not often ordered.
- A search of Kentucky’s discipline website revealed 9 cases from 1999 to 2002, and none thereafter.
- Louisiana has imposed permanent revocation approximately 70 times during the first 8 years under its rule.
- Maine reported that permanent revocation has been ordered only once.

Mr. Sellen notes that although the question whether permanent revocation “truly precludes readmission” has not been posed, the plain text of the rules indicates that permanent revocation precludes readmission.

- 3. The memorandum in support of the petition states that “Petitioner envisions that the sanction would be reserved for cases involving exceptionally egregious misconduct and harm.” Is this standard adequately reflected in the language of the proposed criteria for cases warranting revocation? For example, proposed SCR 21.16(1m)(a)(ii)(3) provides that permanent revocation may be sought in a revocation case involving “lack of cooperation in and contempt for the disciplinary process.” Would failure to appear in a disciplinary proceeding warrant application of these criteria?**

Proposed SCR 21.16(1m)(a)(ii) ¹ calls for “*a pattern of misconduct evincing...*”, among other instances of misconduct, “lack of cooperation (with) and contempt for the disciplinary process...”

The PRC intends that SCR 21.16(1m) applies only after the Court has determined that revocation to some degree is warranted, and notes that the disciplinary cases involving

¹ Proposed Rule before Legislative Bureau Restatement.

“exceptionally egregious misconduct and harm” usually entail multiple instances of misconduct qualifying under one or more of (1)-(6) of proposed subparagraph SCR 21.16(1m)(a)(ii).

In deciding whether or not to order permanent revocation, the Court may consider whether an unexcused failure to appear and participate in a disciplinary hearing in the context of all other evidence warranting revocation as an initial sanction also justifies permanent revocation in the particular matter.

- 4. Comments from the Legislative Reference Bureau are enclosed for your review. Please respond to the comments with any amendments you deem necessary.**

The Legislative Reference Bureau’s proposed revisions are acceptable to the PRC.

- 5. Additional comments**


In addition to responding to the above-inquiries, the PRC offers the following comments:

The primary purpose of all professional discipline is the protection of the public, the courts, and the legal profession. *In re Crandall*, 2008 WI 112, ¶ 22, 314 Wis. 2d 33, 45-46, 754 N.W.2d 501, 507-508. Further, the severity of professional discipline in a particular case is a function of “the seriousness of the misconduct, the need to protect the public, the courts and the legal system from repetitive misconduct, as well as the need to deter other attorneys from engaging in similar misconduct.” *In Re Arthur*, 2005 WI 40, ¶ 78, 272 Wis. 2d 583, 613, 694 N.W.2d 910, 925.

As a number of courts have recognized, “certain ethical, moral, or criminal violations may be so serious as to require permanent disbarment”, *In Re Anthony R. Russo*, 244 Kan. 3, 4-5, 765 P.2d 166, 167 (1988)(citing cases). The PRC believes that declining to recognize even the possibility of permanent revocation as a proper sanction forecloses the Court from discharging its primary societal roles: (1) to dispense justice appropriate to the circumstances, and (2) to properly supervise subordinate courts and all judicial system officers.

Further, the PRC believes that the potential general deterrent effect of permanent revocation as a possible proper sanction for certain egregious attorney misconduct justifies recognizing the sanction without more: if *any* misconduct is deterred as a result, the sanction will have served its purpose.

Respectfully submitted,


Edward A. Hannan
Chairperson