# HOW DID WE GET HERE?

GAIL VASTERLING[1]

ON JUNE 23, 2020, THE SUPREME COURT OF MISSOURI HELD A LAWYER IN CRIMINAL CONTEMPT AND ORDERED THE LAWYER BE REMANDED BY THE COURT MARSHAL TO BE TRANSPORTED INTO THE CUSTODY OF THE COLE COUNTY SHERIFF.

There, the lawyer was ordered to serve a sentence of 30 days in the Cole County jail and pay a $21,000 fine to the Court clerk.

How did we get here?

**Background**

On April 1, 2019, the Supreme Court of Missouri suspended the lawyer's license under Rule 5.24[2] and ordered him to comply in all aspects with Rule 5.27, which outlines actions the lawyer must take following an order imposing disbarment or suspension.[3] Among the requirements of Rule 5.27 are: refraining from accepting any new retainer or case; withdrawing from pending matters; and, within 15 days, notifying all clients of the disbarment or suspension, refunding unearned fees, and notifying opposing counsel in pending litigation of the disbarment or suspension.

Shortly after the order of suspension, the Office of Chief Disciplinary Counsel (OCDC) began receiving reports regarding the lawyer's activities. The reports indicated that the lawyer was informing clients he would continue to work on their cases and was taking money from new clients and attempting to hide this fact by having them sign employment agreements that he backdated to a date prior to his suspension. The OCDC filed a motion for criminal contempt and sanctions, alleging the lawyer was willfully disobeying the Court's suspension order by continuing to hold himself out as a lawyer authorized to practice law and engaging in deceptive practices to hide his violations of the Court's order. The Court, after issuing a show cause order, appointed a special master to conduct a hearing, receive evidence, and report findings and conclusions to the Court.

**The special master's findings**

After a two-day hearing, the special master issued a report. The Supreme Court of Missouri adopted the findings and incorporated them into its judgment of criminal contempt.

The special master found that the lawyer knew of the court's April 1, 2019, Order of Interim Suspension since his office assistant printed it out and gave it to him, and that he received a copy through the mail. However, the lawyer did little to indicate he was winding down his practice of law.

Instead, the lawyer entered into new fee agreements, accepted money from clients, and backdated the new fee agreements to a date preceding his interim suspension. Client funds received by the lawyer following his interim suspension totaled more than $20,000. There was no evidence that these funds were for work performed prior to the lawyer's suspension.

In addition, following his interim suspension, the lawyer held himself out as lawyer for the respondent in a divorce matter, at no point informing opposing counsel that his license to practice law had been suspended. He corresponded with opposing counsel as if he were the respondent's attorney, agreed to a continuance, and suggested language for the divorce decree. When the opposing counsel requested the lawyer formally enter his appearance so that his appearance date and signature block could be added to the documents they had been negotiating, the lawyer informed opposing counsel that his client would now represent himself.

Over two months after the Court's suspension order, the investigator from the OCDC made an unannounced visit to the lawyer's office. The office was open and had signs that had the lawyer's name followed by "Attorney at Law." The office was filled with files, boxes, furniture, office equipment, filing cabinets, and wall hangings. The lawyer's wife told the investigator that he was "meeting with a client." Upon learning from the client that she had paid the lawyer that day, the investigator instructed the lawyer to return the $1,000 in cash that he had received from the client. He reluctantly returned the funds but told the client he "would still be able to help them." The client was not aware that the lawyer's license to practice law had been suspended. The fee agreement with the client stated that work was to be performed by the lawyer with associate counsel. The lawyer told the OCDC investigator the name of the associate counsel in question, but the associate counsel denied agreeing to represent clients and stated he did not authorize the lawyer to enter into fee agreements or collect client funds on his behalf.

The Circuit Court of Clay County ordered the appointment of trustees to take control of the lawyer's cases, pursuant to Rule 5.26.[4] In accordance with that rule and the Clay County order, the trustees requested the lawyer turn over all client files in his possession so they could examine them and return the files to clients. The lawyer informed the trustees that the files in his office were all he had and that he did not have a storage unit for files. Despite records showing several new fees and active cases, the files at his office were old and no longer active. When a trustee found a contract for a storage unit, the lawyer acknowledged the existence of the unit and said it contained 40-50 boxes of files. However, the storage unit only contained three to five boxes of files, and these files were not post-2016 files. To protect the lawyer's clients,

the trustees forwarded office mail and phone away from him and changed the locks on the office. Soon after the trustees began handling incoming calls from the lawyer's office number, the calls stopped. He had transferred the office calls to his personal line.

**The Supreme Court of Missouri**

Among his arguments to the Supreme Court of Missouri, the lawyer asserted that the order suspending his license did not specifically state that he should not practice law. Although he acknowledged that the order required him to comply with Rule 5.27, he asserted that, assuming he practiced law without a license, he could only be charged with one or more misdemeanors for violation of § 484.020 RSMo (practicing law without a license). He argued that contempt was not an available remedy.

The Court disagreed and held that his conduct constituted contempt of its suspension order.

**Other contempt cases**

In a criminal contempt action, the movant has the burden of proof beyond a reasonable doubt. The elements of criminal contempt are actual knowledge of a court order on the part of the defendant and willful conduct in violation of its terms.[5] "Direct evidence of criminal content is rarely obtainable and more frequently must be inferred from the evidence of defendants' conduct."[6]

Obviously, this case is extreme. Although rarely used, criminal contempt is an option when legal action is necessary to "protect and ensure the dignity of the courts and the authority of their decrees."[7] Here, the Court believed the judgment of criminal contempt was appropriate because the lawyer "knowingly violated this Court's suspension order by continuing to practice law well after April 1, 2019, and failing to comply with Rule 5.27's suspension procedures."[8]

In other jurisdictions, lesser actions taken by suspended and disbarred lawyers have also resulted in contempt judgments. For example, courts have held disbarred lawyers in contempt for sending letters threatening suit on someone's behalf and signing those letters as "personal attorney" or "lawyer."[9] A court also considered it contempt for a disbarred lawyer to act as an advocate in a deposition and appear at a pretrial conference.[10] And a court judged it criminal contempt when a disbarred lawyer continued to maintain an escrow account, represented himself as an attorney-at-law, and failed to comply with disbarment notification requirements until served with contempt motions.[11]

All practice areas are represented in contempt actions. A disbarred probate lawyer was found in contempt for preparing a deed and two wills on forms designating himself as an attorney-at-law and failing to remove the designation of attorney-at-law under his name in his office directory.[12] A suspended lawyer was judged in contempt for holding himself out as a lawyer and preparing an agreed change of child custody document for a couple.[13] A suspended immigration lawyer entered into contracts to obtain immigration papers for individuals' relatives, using contract language which read that she guaranteed she would "use all of [her] experience and knowledge of the law to try to obtain the desired results." She also used a letterhead that implied she was with a law firm. The court found that the individuals who entered into these contracts believed that they were dealing with a lawyer and a law firm and convicted the lawyer of criminal contempt.[14]

**Failed arguments**

Lawyers facing criminal contempt have offered a wide variety of arguments to avoid punishment.

In a version of a "no harm, no foul argument," a suspended lawyer, who failed to advise a prospective client that he was not authorized to practice law and allowed the client to believe he would provide legal assistance, asserted that he should not be found in contempt because he rendered no services and charged no fee.[15] The court found the argument untenable: "Having permitted and encouraged the 'client' to believe that he was authorized to and would give her legal assistance, the respondent cannot be heard to say that his conduct was excusable because he did not do that which he would have been obliged to do, under the circumstances, had he been authorized to practice law."[16] Instead, the court found that the lawyer injured the prospective client and cast doubt on the integrity of the profession.[17]

Suspended and disbarred lawyers do not escape contempt charges by simply refraining from signing the pleadings if they actually do the work of a lawyer. Courts have determined that the lawyers who signed the papers and entered appearances were acting as "front men" or were maneuvered and controlled by the lawyer.[18] In some situations, the name of another lawyer was used but without that lawyer's knowledge or consent.[19] And drafting a civil complaint for the client's signature is no different – it still may result in a finding of contempt.[20]

Finally, a lawyer's assertion that he or she had no intent to defy the court's order may not preclude a contempt judgment. If the violations are undenied, the denial of intent is a question of fact to be decided after hearing the evidence.[21] As one court faced with this argument concluded:

> Respondent asserts that he believed in good faith that maintaining an office where he was held out to be an attorney, using a letterhead describing himself as an attorney, counseling clients as to legal matters, negotiating with opposing counsel about pending litigation, and fixing and collecting fees for services rendered by his associate, did not constitute the practice of law. If so, in the opinion of the court such a belief demonstrates as much as anything his present unfitness to practice law.[22]

**Proceed with caution**

So, what work within the legal field can a suspended or disbarred lawyer engage in without risking a contempt judgment?

This issue also impacts inactive lawyers, who may wonder about limits on their conduct. In a recent informal opinion,[23] the Legal Ethics Counsel responded to a retired lawyer's question regarding work as a paralegal. While first noting that there is no "retired" enrollment status in Missouri, Legal Ethics Counsel stated that whether a lawyer whose license is inactive working as a paralegal constitutes the unauthorized practice of law "is a question of fact outside the scope of the Rules of Professional Conduct." The Legal Ethics Counsel added that the judiciary is the "sole arbiter of what constitutes the practice of law." The informal opinion stated that "[g]enerally, a lawyer who is not permitted to practice law because the lawyer's license is inactive is permitted to do law-related work that a nonlawyer, such as a paralegal, is

permitted to perform." But it advised the exercise of caution: "It can be difficult for an experienced lawyer to refrain from providing legal services, even when the lawyer's title is that of legal assistant or paralegal."[24]

This difficulty is heightened if the lawyer is hired to work as a paralegal by his or her former firm. In such a case, some former associates may be reluctant to supervise the lawyer, and clients may not understand the lawyer's new role. Supervising lawyers "must make certain that no one is misled into believing that the disbarred attorney is anything other than a non-attorney. Special care must be taken that the disbarred attorney does not cross the line into giving legal advice."[25] This special care is critical as Rule 4-5.5 prohibits lawyers from assisting non-lawyers in the unauthorized practice of law.

For guidance on fact-specific questions on this issue (or other ethics issues), lawyers can seek an informal opinion from the Legal Ethics Counsel at https://mo-legal-ethics.org/for-lawyers/requesting-an-informal-advisory-opinion/.

**Endnotes**

1 Gail Vasterling is a staff counsel at the Office of Chief Disciplinary Counsel in Jefferson City.

2 Rule 5.24 allows the OCDC to request an interim suspension upon receipt of evidence demonstrating that there is probable cause to believe that a lawyer is guilty of professional misconduct and that the lawyer poses a substantial threat of irreparable harm to the public. The OCDC filed an Information for Interim Suspension due to the lawyer's failure to maintain a client trust account and repeated instances of misappropriation of client funds, totaling tens of thousands of dollars. The filing also set forth the lawyer's prior discipline, including six admonitions, a reprimand, and a stayed suspension.

3 Rule 5.27 provides:

Orders imposing disbarment or suspension shall be effective 15 days after entry unless the Court sets a different effective date. Between the entry date of the order and its effective date, the disbarred or suspended lawyers:
(1) Shall not accept any new retainer or act as lawyer for another in any new case or legal matter of any nature, and
(2) Shall withdraw from representation in pending matters in a manner that will minimize any material adverse effect on the clients' interests.
(b) Within 15 days after the effective date of an order of disbarment or suspension, the lawyer shall:
(1) Deliver the lawyer's license to practice law to the clerk of this Court or file an affidavit that the license has been lost or destroyed;
(2) Notify all clients in writing and any counsel in pending matters that the lawyer has been disbarred or suspended if such notice was not made pursuant to Rule 5.27(a)(2);
(3) In the absence of co-counsel, notify all clients, if such notice was not made pursuant to Rule 5.27(a)(2), to make arrangements for other representation, calling attention to any urgency in seeking the substitution of another lawyer;
(4) Deliver to all clients being represented in pending matters any papers or other property to which they are entitled or notify them and any co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property;
(5) Refund any part of any fees paid in advance that have not been earned;
(6) Notify opposing counsel in pending litigation or, in the absence of such counsel, the adverse parties, if such notice was not made pursuant to Rule 5.27(a)(2), of the lawyer's disbarment or suspension and consequent disqualification to act as a lawyer after the effective date of such discipline;
(7) File with the court, agency or tribunal before which the litigation is pending a copy of the notice to the opposing counsel or adverse parties;
(8) Keep and maintain a record of the steps taken to accomplish the foregoing; and
(9) File proof with this Court and the chief disciplinary counsel of complete performance of the foregoing.

4 The Office of Chief Disciplinary Counsel wishes to recognize the extraordinary work of the volunteer trustees, Angela Williams, Micki Buschart, Kathleen Irish, and Carlos Hernandez, who tried and eventually succeeded in taking over the lawyer's practice.

5 *State ex rel. Girard v. Percich*, 557 S.W.2d 25, 36 (Mo. App. 1977).

6 *Ramsey v. Grayland*, 567 S.W.2d 682, 691 (Mo. App. 1978).

7 *In re Bell*, No. SC97784, at 1-2 (*citing Teefey v. Teefey*, 533 S.W.2d 563, 566 (Mo. banc 1976).

8 *Id.* at 2.

9 *See In re Page*, 257 S.W.2d 679 (Mo. banc 1953); *In re Fletcher*, 107 F2d 666, 667 (D.C. Cir. 1939).

10 *The Florida Bar v. Riccardi*, 304 So.2d 444, 445 (Fla. 1974).

11 *Matter of Apollon*, 233 A.D.2d 95, 98 (N.Y. App. Div. 1997).

12 *Board of Overseers of the Bar v. Murphy*, 607 A.2d 530, 531 (Me. 1992).

13 *Matter of Contempt of Lustina*, 683 N.E.2d 236, 237-38 (Ind. 1997).

14 *In re Ryan*, 823 A.2d 509, 510-11 (D.C. 2003).

15 *In re Hawkins*, 503 P.2d 95, 97 (Wash. 1972).

16 *Id.* at 97.

17 *Id.*

18 *In re Burton*, 614 A.2d 46, 48 (D.C. 1992); *State v. Schumacher*, 519 P.2d 1116, 1128 (Kan. 1974).

19 *Matter of Szendy*, 244 A.D. 49, 51 (N.Y. App. Div. 1935).

20 *Matter of Powell*, 658 N.E.2d 572, 574 (Ind. 1995).

21 *In re Perrello*, 291 N.E.2d 698, 700-01 (Ind. 1973).

22 *State v. Schumacher*, 519 P.2d 1116, 1128 (Kan. 1974).

23 Pursuant to Rule 5.30, The Legal Ethics Counsel issues opinions to lawyers for their own guidance involving an existing set of facts. The summaries provided by The Legal Ethics Counsel are to be used only for general guidance and are not binding.

24 Mo. Informal Advisory Op. 2020-02.

25 Mo. Informal Advisory Op. No. 960228.