



**Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member.  
[Sorted by Commenter]**

**TOTAL = 4    Agree = 3  
Disagree = 0  
Modify = 1  
NI =**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [1]	<p>intends to expand the scope of paragraph (b)(2) beyond that of the other subsections to paragraph (b). The OCBA seeks clarification.</p> <p>Comment [1] refers back to paragraph (d), and states that "Paragraph (d) is not intended to prevent or discourage a lawyer from fully discussing with the client the activities that will be performed by the disbarred . . . member on the client's matter." This Comment implies that paragraph (d) otherwise could be read as preventing or limiting a lawyer's ability to discuss with his client the status of the disbarred, etc., lawyer. Paragraph (d), however, expressly requires a lawyer to provide written notice to his client of the status of the disbarred, etc, lawyer. Thus, as written, Comment [1] is confusing. We recommend that the first sentence of Comment [1] be modified to read as follows: "Paragraph (d) is not intended to provide an exhaustive description of the information to be conveyed to the client or to otherwise limit the scope of any discussions between the lawyer and the client, but rather is intended to provide a minimum description of information that must be conveyed upon the employment of a disbarred, suspended, resigned, or involuntarily inactive member."</p>	

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4	Office of Chief Trial Counsel	A	Yes	5.3.1(d)	<p>OCTC generally supports this rule.</p> <p>However, OCTC recommends splitting subparagraph (d) into two parts, (d)(1) and (d)(2), to make it easier to read and understand.</p> <p>A Comment should also refer lawyers to section 6132 regarding the responsibilities of any lawyer or law firm that employs a suspended or disbarred attorney.</p>	No response required.

**June 9, 2010 McCurdy E-mail to Lamport, cc Chair, Vice-Chairs & Staff:**

Stan,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

**ASSIGNMENT SUBMISSION DEADLINE:** The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15<sup>th</sup> has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15<sup>th</sup> comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

**LIST OF ASSIGNED RULES** (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

**1.5.1** (Agenda Item III.H)

1.8.1 (Agenda Item III.K)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

**Attached:**

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - LAMPORT - DFT1 (06-09-10).pdf  
RRC - 2-200 [1-5-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-300 [1-8-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 2-200 [1-5-1] - Rule - PCD [9.1] (10-13-09) - CLEAN-LAND.pdf  
RRC - 2-200 [1-5-1] - Rule - PCD [9.1] (10-13-09) - CLEAN-LAND.doc  
RRC - 3-300 [1-8-1] - Rule - PCD [15] (12-15-09) - CLEAN-LAND.pdf  
RRC - 3-300 [1-8-1] - Rule - PCD [15] (12-15-09) - CLEAN-LAND.doc

**June 14, 2010 McCurdy E-mail to Lamport, cc Chair, Vice-Chairs & Staff:**

Stan,

A new comment in opposition or recommending modifications has been received for the following rule and an updated commenter table is attached. The comment compilation for this rule is attached, and has also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

**5.3.1 (Agenda Item III.CCC)**

The assignment deadline for these rules is the same as the earlier assignments -- **5:00 pm on Wednesday, June, 16, 2010.**

**Attached:**

RRC - 1-311 [5-3-1] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc  
RRC - 1-311 [5-3-1] - Public Comment Complete - REV (06-14-10).pdf

**June 16, 2010 McCurdy E-mail to Lamport, cc Chair, Vice-Chairs & Staff:**

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your

review. The Google site should be up-to-date shortly (<http://sites.google.com/site/commentsrrc/byrule> ).

**1.5.1** (Agenda Item III.H) - OCTC (sent with Randy's 6/15/10 e-mail)

**1.8.1** (Agenda Item III.K) - 3 Comments: **Balin/Dilworth (attached)**; OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

**2.1** (Agenda Item III.GG) - 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

**3.6** (Agenda Item III.PP) – 2 Comments: **LA Public Defender-Michael Judge (attached)**; and, OCTC (sent with Randy's 6/15/10 e-mail)

**5.3.1** (Agenda Item III.CCC) – 1 Comment: OCTC (sent with Randy's 6/15/10 e-mail)

**NOTE:** As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

RRC - 5-120 [3-6] - 06-14-10 LAPD (Judge) Comment.pdf

RRC - 3-300 [1-8-1] - Balin-Dillworth Comment.pdf

**June 17, 2010 Lamport E-mail to Difuntorum, cc RRC:**

I am not recommending any changes to this Rule.

We received two new comments. OCTC supports the rule, but would like paragraph (d) split into two parts to make it easier to understand. OCTC also would like a reference in the Comments to B&P Code section 6132. I took a stab at revising paragraph (d) as suggested and found it did not work well because the two notice requirements have different time references. It works better as one paragraph than two. Section 6132 relates to removing the from a law firm's name and other materials the name of a lawyer who has been disbarred and resigned with charges pending. It seems to me the statute and the Rule are dealing with different situations. The Rule deals with employing a suspended, disbarred or resigned lawyer, while the statute deals with a lawyer who is in a firm at the time of disbarment or resignation. While the Rule could apply to a lawyer who in employed by a firm at the time of suspension or disbarment, I don't think that is the primary focus of the Rule and citation to the statute in the Comment is a tangent.

**RRC – Rule 5.3.1 [1-311]  
E-mails, etc. – Revised (6/21/2010)**

We also received a comment from OCBA. OCBA wants clarification of the "reasonably should know" standard. They want a statement that if the lawyer's status is shown on the State Bar website, a lawyer reasonably should know about the lawyer's status. While I think the commenter's conclusion is correct, I don't think we should put it in the Comment. We would be referring to today's technology and information that may change over time. I don't think we should be putting things in Comments that we would have to update over time as information and technology evolve.

The OCBA comment also requested clarification of the phrase "a client" in (b)(2) when the rest of the subparts of (b) refer to "the client." The commenter wonders whether the Commission intends a broader application of the client reference in (b)(2) than in the rest of (b). I think the reference to "a client" is correct and the intent to assure that the suspended, disbarred or resigned lawyer is not appearing in court for any client. The rest of (b)(2) supports the breadth of the subpart. I don't think a change is necessary. We can clarify the intent to the commenter through our response to the comment.

The OCBA comment also would like Comment [1] revised. OCBA maintains that the Comment implies that paragraph (d) could be read as preventing a lawyer from discussing the status of the suspended, disbarred or resigned lawyer, but that nothing on the face of paragraph (d) would preclude a lawyer from discussing the ineligible lawyer's status. The OCBA comment proposes language that I don't think is accurate. While I think OCBA makes an interesting point from an academic perspective, I think the Comment's purpose (to make sure lawyers are aware that they can talk to their client's about the ineligible lawyer's status and role) is clear and does not need to be changed.

**June 21, 2010 McCurdy E-mail to Lamport, cc Chair, Vice-Chairs & Staff:**

Stan,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

**If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22<sup>nd</sup>.**

***Attached:***

RRC - 1-311 [5-3-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 5-120 [3-6] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc  
RRC - 1-110 [8-1-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-300 [1-8-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)-LC.doc  
RRC - 2-200 [1-5-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

**Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member**  
**(Commission's Proposed Rule – Clean Version)**

- (a) For the purposes of this Rule:
  - (1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;
  - (2) "Member" means a member of the State Bar of California.
  - (3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(d)(1), or California Rule of Court 958(d); and
  - (4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.
- (b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the lawyer's client:
  - (1) Render legal consultation or advice to the client;
  - (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
  - (3) Appear as a representative of the client at a deposition or other discovery matter;
  - (4) Negotiate or transact any matter for or on behalf of the client with third parties;
  - (5) Receive, disburse or otherwise handle the client's funds; or
  - (6) Engage in activities which constitute the practice of law.
- (c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:
  - (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
  - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
  - (3) Accompanying an active member in good standing of the bar of a United States state in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the lawyer who will appear as the representative of the client.
- (d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall serve upon the State Bar written notice of the employment, including a full description of

such person's current bar status. The written notice shall also list the activities prohibited in paragraph (b) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The State Bar may make such information available to the public. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the lawyer's employment by the client.

- (e) A lawyer may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (f) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall promptly serve upon the State Bar written notice of the termination.

#### COMMENT

- [1] Paragraph (d) is not intended to prevent or discourage a lawyer from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a lawyer's client is an organization, then the written notice required by paragraph (d) shall be served upon the duly

authorized officer, employee, or constituent overseeing the particular engagement. See Rule 1.13.

- [2] Nothing in this Rule shall be deemed to limit or preclude any activity engaged in pursuant to Rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel] 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel *pro hac vice*], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program] and 9.44 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.