

Proposed Rule 5.3.1

“Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member”

(Draft #5, 10/18/09)

Summary: Proposed Rule 5.3.1 places restrictions on the employment of disbarred, suspended, resigned or involuntarily resigned members of the State Bar. There is no ABA counterpart to this Rule. It carries forward current California rule 1-311, with changes that for the most part are not substantive and reflect adherence to the Model Rule format.

Comparison with ABA Counterpart	
Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input checked="" type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input checked="" type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

Statute

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total– votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 2

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

A Commission minority opposed adoption of the rule as unduly onerous and as restricting the possible rehabilitation of disciplined lawyers.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.3.1* Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

October 2009

(Draft rule revised following consideration of public comment)

INTRODUCTION:

There is no ABA Model Rule counterpart to proposed Rule 5.3.1. Proposed Rule 5.3.1 amends current California Rule 1-311 and continues the restrictions on a lawyer's employment of a disbarred, suspended, resigned, or involuntarily inactive member.

The Commission determined not to make substantive changes to the disciplinary standards in the existing rule because there is no ABA counterpart and the rule was adopted by the Board of Governors and approved by the Supreme Court relatively recently notwithstanding considerable opposition – the current rule was approved by the Supreme Court in 1996 and amended in 2008. The 2008 amendments were non-substantive changes that updated cross-references to several rules of court.

Proposed Rule 5.3.1 retains current rule 1-311 largely intact. The changes are not substantive and reflect adherence to ABA format. The only substantive change is to paragraph (d), providing that the notice served on the State Bar (whenever a lawyer employs a disbarred, suspended, resigned, or involuntarily inactive member) “may” be made available to the public.

Both the current rule and the proposed Rule are intended to foster client protection by preventing a licensed lawyer from acting as a screen behind which a disbarred, suspended, resigned, or involuntarily inactive lawyer effectively could continue practicing law. To the extent the Rule permits a disbarred, etc., lawyer to work in a law firm, it also fosters client control over the engagement by requiring the employing lawyer to notify the client of the disbarred, etc., lawyer's role.

* Proposed Rule, Draft 5 (10/18/09).

INTRODUCTION (continued):

Minority: A minority of the Commission takes the position that this Rule inhibits legitimate efforts to rehabilitate disbarred or suspended lawyers who have to demonstrate an ability to practice. The minority further notes that the Rule does not distinguish between lawyers who have been disciplined for conduct that suggests that they are a threat to the public and those who are not, for example, a lawyer who has forgotten to pay bar dues.

The minority notes that lawyers may employ others who are not subject to the proscriptions of this Rule. For example, a lawyer may employ without restriction a convicted felon who has never been admitted to practice law. That felon may be hired as a secretary, paralegal, or law clerk, with no notice to the bar. So long as the lawyer and the former lawyer do not deceive clients, the public, or others about the status of the former lawyer, the bar should not so burden the former lawyer that he or she finds it difficult or impossible to obtain legitimate employment that permits rehabilitation.

The minority contends this Rule is not needed to prevent a former, disciplined lawyer from practicing law, from forming a partnership with a lawyer, or from being hired to perform legal services by new or former clients. Those acts are prohibited by other rules and by the State Bar Act. Former lawyers should not be treated as pariahs, who cannot perform tasks that any other nonlawyer may lawfully perform, except under restrictions that make such employment burdensome and unlikely.

<p align="center">No Comparable ABA Model Rule (Text provided is current California Rule 1-311)</p>	<p align="center">Commission's Proposed Rule* (Redline/strikeout showing changes to the current California Rule 1-311)</p>	<p align="center">Explanation of Changes to California Rule 1-311</p>
<p>(A) For purposes of this rule:</p> <p>(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;</p> <p>(2) "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(c), or California Rule of Court 958(d); and</p> <p>(3) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.</p>	<p>Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member</p> <p>(a) For the purposes of this Rule:</p> <p>(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;</p> <p>(2) "Member" means a member of the State Bar of California.</p> <p>(2)(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</p> <p>(4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.</p>	<p>See Introduction for a general note on the changes in the proposed Rule. As noted in the Introduction, the changes for the most part are not substantive and merely reflect adherence to ABA format or correction of typographical errors in the current rule.</p> <p>The substitution of "6203(d)(1)" for "6203(c)" in subparagraph (a)(3) corrects a citation error in the current rule.</p> <p>The added language in paragraph (d) that the "State Bar may make such information available to the public" is a substantive change and is intended to obviate a possible restriction on disclosure in the interests of protecting the public.</p> <p><u>Note on the use of "lawyer" vs. "member".</u> In keeping with the style of the ABA Model Rules, the Commission has, throughout its proposed rules, substituted "lawyer" for the term "member [of the State Bar]." Nevertheless, "member" and "resigned member" remain defined terms in proposed Rule 5.3.1 as those terms are applied to the former lawyer employee. As with current rule 1-311, the proposed Rule is limited to the employment of disciplined former members of the State Bar of California.</p>

* Proposed Rule 5.3.1, Draft 5 (10/18/09). Redline comparisons are to current rule 1-311.

<p align="center">No Comparable ABA Model Rule (Text provided is current California Rule 1-311)</p>	<p align="center">Commission's Proposed Rule* (Redline/strikeout showing changes to the current California Rule 1-311)</p>	<p align="center"><u>Explanation of Changes to California Rule 1-311</u></p>
<p>(B) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client:</p> <p>(1) Render legal consultation or advice to the client;</p> <p>(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;</p> <p>(3) Appear as a representative of the client at a deposition or other discovery matter;</p> <p>(4) Negotiate or transact any matter for or on behalf of the client with third parties;</p> <p>(5) Receive, disburse or otherwise handle the client's funds; or</p> <p>(6) Engage in activities which constitute the practice of law.</p>	<p>(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:</p> <p>(1) Render legal consultation or advice to the client;</p> <p>(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;</p> <p>(3) Appear as a representative of the client at a deposition or other discovery matter;</p> <p>(4) Negotiate or transact any matter for or on behalf of the client with third parties;</p> <p>(5) Receive, disburse or otherwise handle the client's funds; or</p> <p>(6) Engage in activities which constitute the practice of law.</p>	<p>See Explanation of Changes for paragraph (a).</p>

<p align="center">No Comparable ABA Model Rule (Text provided is current California Rule 1-311)</p>	<p align="center">Commission's Proposed Rule* (Redline/strikeout showing changes to the current California Rule 1-311)</p>	<p align="center"><u>Explanation of Changes to California Rule 1-311</u></p>
<p>(C) A member 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:</p> <p>(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;</p> <p>(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</p> <p>(3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.</p>	<p>(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:</p> <p>(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;</p> <p>(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</p> <p>(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.</p>	<p>See Explanation of Changes for paragraph (a).</p>

<p align="center"><u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-311)</p>	<p align="center"><u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 1-311)</p>	<p align="center"><u>Explanation of Changes to California Rule 1-311</u></p>
<p>(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member 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 member 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 member 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 member's employment with the client.</p>	<p>(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.</p>	<p>See Explanation of Changes for paragraph (a).</p>

<p align="center">No Comparable ABA Model Rule (Text provided is current California Rule 1-311)</p>	<p align="center">Commission's Proposed Rule* (Redline/strikeout showing changes to the current California Rule 1-311)</p>	<p align="center">Explanation of Changes to California Rule 1-311</p>
<p>(E) A member 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.</p>	<p>(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.</p>	<p>See Explanation of Changes for paragraph (a).</p>
<p>(F) Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.</p>	<p>(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.</p>	<p>See Explanation of Changes for paragraph (a).</p>
<p><i>Discussion:</i></p> <p>For discussion of the activities that constitute the practice of law, see Farnham v. State Bar (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; Bluestein v. State Bar (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; Baron v. City of Los Angeles (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; Crawford v. State Bar (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; People v. Merchants Protective Corporation (1922) 189 Cal. 531, 535 [209 P. 363]; People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and People v. Sipper (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)</p>	<p>Comment</p> <p>For discussion of the activities that constitute the practice of law, see Farnham v. State Bar (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; Bluestein v. State Bar (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; Baron v. City of Los Angeles (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; Crawford v. State Bar (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; People v. Merchants Protective Corporation (1922) 189 Cal. 531, 535 [209 p. 363]; People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and People v. Sipper (1943) 61 Cal.App.2d Supp. 844 [142 p.2d 960].)</p>	<p>The Commission recommends the deletion of Discussion paragraph 1 to current rule 1-311 as the issue of what constitutes “practice of law” is beyond the scope of these Rules of Professional Conduct.</p>

<p align="center">No Comparable ABA Model Rule (Text provided is current California Rule 1-311)</p>	<p align="center">Commission’s Proposed Rule* (Redline/strikeout showing changes to the current California Rule 1-311)</p>	<p align="center"><u>Explanation of Changes to California Rule 1-311</u></p>
<p>Paragraph (D) is not intended to prevent or discourage a member 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 member's client is an organization, then the written notice required by paragraph (D) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600.)</p>	<p>[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 highest <u>duly</u> authorized officer, employee, or constituent overseeing the particular engagement. (See 3-600 Rule 1.13.)</p>	<p>See Explanation of Changes for paragraph (a). The substitution of “rule 1.13” for “rule 3-600” conforms the citation to the rule number assigned to current rule 3-600 under the new rules numbering system that tracks the Model Rules. The substitution of “duly” for “highest” conforms this Rule to the language used in proposed Rule 1.13.</p>
<p>Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 983, 983.1, 983.2, and 988 of the California Rules of Court, or any local rule of a federal district court concerning admission <i>pro hac vice</i>.</p>	<p>[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 <i>pro hac vice</i>], 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 <i>pro hac vice</i>.</p>	<p>See Explanation of Changes for paragraph (a). The cross-references have been revised to reflect the Judicial Council's recent reorganization and renumbering of the California Rules of Court, to add references to multijurisdictional practice rules, and to provide parenthetical descriptions of the scope of the referenced rules.</p>

Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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 ~~information contained in~~ State Bar may make such ~~notices shall be~~ 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] ~~For discussion of the activities that constitute the practice of law, see Rule 5.5, comment [4].~~
- [21] 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 highest duly authorized officer, employee, or constituent overseeing the particular engagement. (See Rule ~~{~~1.13~~}~~.)
- [32] Nothing in this Rule shall be deemed to limit or preclude any activity engaged in pursuant to Rules 9649.45 [registered legal services attorneys], 9659.46 [registered in-house counsel] 9669.47 [attorneys practicing law temporarily in California as part of litigation], 9679.48 [non-litigating attorneys temporarily in California to provide legal services], 9839.40 [counsel *pro hac vice*], 983.19.41 [appearances by military counsel], 983.29.42 [certified law students], 983.49.43 [out-of-state attorney arbitration counsel program] and 9889.44 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.

Rule ~~1-311~~5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

(Comparison of the Current Proposed Rule to Current California Rule)

- (a) ~~(A)~~ For the purposes of this ~~rule~~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) ~~(2)~~ "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~~(ed)~~(1), or California Rule of Court ~~9-31~~958(d); and
 - (4) ~~(3)~~ "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.
- (b) ~~(B)~~ A ~~member~~lawyer shall not employ, associate professionally with, or aid a person the ~~member~~lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the ~~member's~~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) ~~(C)~~ A ~~member~~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 ~~active member~~lawyer who will appear as the representative of the client.
- (d) ~~(D)~~ Prior to or at the time of employing a person the ~~member~~lawyer knows or reasonably should know is a disbarred, suspended, resigned, or

involuntarily inactive member, the ~~member~~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 (Bb) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The ~~member~~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 ~~member~~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 ~~member's~~lawyer's employment withby the client.

~~(e)~~(E) A ~~member~~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)~~(F) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the ~~member~~lawyer shall promptly serve upon the State Bar written notice of the termination.

Discussion:

~~For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation*~~

~~(1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)~~

COMMENT

[1] Paragraph (Dd) is not intended to prevent or discourage a ~~member~~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 ~~member's~~lawyer's client is an organization, then the written notice required by paragraph (Dd) shall be served upon the highestduly authorized officer, employee, or constituent overseeing the particular engagement. (See ~~rule 3-600~~Rule 1.13.)

[2] Nothing in ~~rule 1-314~~this Rule shall be deemed to limit or preclude any activity engaged in pursuant to ~~rules~~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. ~~(Added by Order of Supreme Court, operative August 1, 1996. Amended by order of the Supreme Court, operative July 11, 2008.)~~

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*.

STATE VARIATIONS – CA RULE, NO ABA COUNTERPART

California Rule 1-311 Threatening Criminal, Administrative, or Disciplinary Charges

SELECTED STATES THAT HAVE RULES SIMILAR TO CALIFORNIA RULE 1-311

Minnesota

RULE 5.8: EMPLOYMENT OF DISBARRED, SUSPENDED, OR INVOLUNTARILY INACTIVE LAWYERS

(a) For purposes of this rule “employ” means to engage the services of another, including employees, agents, independent contractors, and consultants, regardless of whether any compensation is paid.

(b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know has been disbarred, suspended, or placed on disability inactive status by order of the court to do any of the following on behalf of the lawyer’s client:

(1) render legal consultation or advice to the client;

(2) appear on behalf of the client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer, unless the rules of the tribunal involved permit representation by nonlawyers and the client has been informed of the lawyer’s suspension, disbarment, or disability inactive status;

(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 that constitute the practice of law.

(c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, or disability inactive lawyer to perform research, drafting, clerical, or similar activities, including but not limited to:

(1) performing legal work of a preparatory nature for the active lawyer's review, such as legal research, gathering information, and drafting pleadings, briefs, and other similar documents;

(2) directly communicating with the client or third parties regarding matters such as scheduling, billing, updates, information gathering, and confirmation of receipt or sending of correspondence and messages; or

(3) accompanying an active lawyer to a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active 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, or disability inactive lawyer, the lawyer shall serve upon the Office of Lawyers Professional Responsibility written notice of the employment, including a full description of such person's current license status. The notice shall state that the suspended, disbarred, or disability inactive lawyer shall not be employed to perform any of the activities prohibited by paragraph (b).

(e) Upon terminating the employment of the disbarred, suspended, or disability inactive lawyer, the employing lawyer shall promptly serve upon the Office of Lawyers Professional Responsibility written notice of the termination.

Louisiana

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW (EXCERPT)

* * * * *

(e)(1) A lawyer shall not:

(i) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment, or any person the attorney knows or reasonably should know is an attorney who has permanently resigned from the practice of law in lieu of discipline; or

(ii) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a suspended attorney, during the period of suspension, unless first preceded by the submission of a fully executed employment registration statement to the Office of Disciplinary Counsel, on a registration form provided by the Louisiana Attorney Disciplinary Board, and approved by the Louisiana Supreme Court.

SELECTED STATE ETHICS OPINIONS

Washington

Formal Opinion 184 (1990)

<http://www.wsba.org/lawyers/ethics/formalopinions/184.htm>

Massachusetts

Massachusetts Supreme Judicial Court Rule 4:01, Section 17(7)

<http://www.mass.gov/obcbbo/rule401.htm#Actions>

Mississippi

Opinion No. 96 (1984)

http://www.msbar.org/ethic_opinions.php?id=353

South Carolina

Ethics Advisory Opinion 92-20

Q: Can a S.C. law firm/attorney hire a non-S.C. Bar member, who was formerly an attorney in another state and was disbarred from practice in that state, to do legal research and other paralegal work? [A: NO]

http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=333

Ethics Advisory Opinion 82-14

A suspended lawyer may be paid a legal fee for work done in a case prior to the suspension but may not receive any compensation for work done on the case following the suspension; and cannot assist the lawyer who takes over the case on a non-paid basis.

http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=86

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

TOTAL = 4 **Agree = 2**
Disagree = 2
Modify =
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			Support as drafted.	No action needed.
2	Los Angeles County Bar Association	D			The rule should be abandoned because it effectively precludes any disbarred or suspended lawyer from working in any capacity in the law.	Commission disagreed. The Los Angeles County Bar Association is incorrect in stating that current rule 1-311, on which proposed Rule 5.3.1 is based, precludes a disbarred, etc., lawyer from working in the law. Rather, the current and proposed rules provide a roadmap for employing such lawyers that protects the public. Accordingly, the State Bar has taken the position that this Rule is important in promoting public protection.
3	San Diego County Bar Association	A			Support as drafted.	No action needed.
4	San Francisco, Bar Association of	D			Information regarding employment of a disbarred, suspended, resigned, or involuntarily inactive lawyer should not be made public as that would drastically limit opportunities for rehabilitation.	Commission modified the rule to delete the language saying that the State Bar "shall" make such information public and added language saying that the State Bar "may" make the information public.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED