



The State Bar of California

Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) For 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, subdivision (d)(1), or California Rules of Court, rule 9.31(d);
 - (4) “Resigned member” means a member who has resigned from the State Bar while disciplinary charges are pending; and
 - (5) “Ineligible person” means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.
- (b) A lawyer shall not employ, associate in practice with, or assist a person* the lawyer knows* or reasonably should know* is an ineligible person 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 that constitute the practice of law.
- (c) A lawyer may employ, associate in practice with, or assist an ineligible person 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 lawyer in attending 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, associating in practice with, or assisting a person* the lawyer knows* or reasonably should know* is an ineligible person, 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 ineligible person will not perform such activities. 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, associating with, or assisting 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, associate in practice with, or assist an ineligible person 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) When the lawyer no longer employs, associates in practice with, or assists the ineligible person, the lawyer shall promptly serve upon the State Bar written* notice of the termination.

Comment

If the client is an organization, the lawyer shall serve the notice required by paragraph (d) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 1.13.)

**NEW RULE OF PROFESSIONAL CONDUCT 5.3.1
(Former Rule 1-311)
Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 1-311 (Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member) in accordance with the Commission Charter. There is no counterpart to rule 1-311 in the ABA Model Rules. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of the Commission’s evaluation is proposed rule 5.3.1 (Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member).

Rule As Issued For 90-day Public Comment

Current rule 1-311 governs the employment activities of certain lawyers who are not entitled to practice law, specifically disbarred, suspended, resigned, or involuntary inactive members who work in law offices. The rule imposes duties on an attorney employing, or professionally associating with, a lawyer who is not entitled to practice. These duties include a requirement to give notice to both the State Bar as well as to each client on whose specific matter such person will work. The notice to the State Bar ensures that the bar can provide oversight while the notice to client ensures greater transparency by giving the client an opportunity to object to the restricted attorney working on his or her case. In proposed rule 5.3.1, the Commission made no substantive changes to current rule 1-311. The Commission reasoned that having this rule serves a valuable public protection benefit as well as provides an opportunity for the restricted attorney to work in a law office (within the parameters established by the rule) and to assist with his or her rehabilitation and potential reinstatement to active status.¹

The non-substantive changes proposed were intended to clarify, update and streamline the existing rule. Throughout the rule, conforming language changes include: the phrase “associate in practice” is substituted for “associate professionally with” the word “assist” is substituted for “aid.” In addition, as initially circulated for 90-day public comment, the term “restricted lawyer” was defined. (See “Proposed Rule as Amended by the Board of Trustees on November 17, 2016,” below.) Other changes include the deletion of all the Discussion sections of the current rule except that a single comment has been retained to clarify a hiring lawyer’s obligation to give notice to a client when the client is an organization.

National Background – Adoption of Rule Addressing Law-related Activities of Disbarred, Suspended, Resigned or Involuntarily Inactive Attorneys

As there is currently no ABA Model Rule counterpart to the current or proposed California rules on this topic, this section reports on the adoption of a similar rule in other United States’ jurisdictions. Four jurisdictions have adopted a rule of professional conduct similar to current rule 1-311 in that they require the employing attorney to provide notice when employing a suspended or disbarred attorney: Colorado, Maryland, Minnesota, and Alaska. Alaska incorporates a state bar rule that similarly requires an employing attorney to serve upon the

¹ One member of the Commission submitted a written dissent disagreeing with the Commission’s threshold determination that the current rule should be retained. The full text of the dissent is attached to this summary.

Alaska Bar Association written notice of the employment of a disbarred, suspended, resigned, or involuntarily inactive attorney.²

Seven jurisdictions prohibit suspended or disbarred attorneys from working in law-related activities: Idaho, Illinois, Indiana, Massachusetts, New Jersey, South Carolina, and Washington.

Nine jurisdictions partially restrict the work of suspended or disbarred lawyers in law-related activities in their rules of professional conduct. For example, Georgia and Hawaii prohibit a suspended or disbarred attorney from contacting another lawyer's clients "either in person, by telephone or in writing." (See, Georgia Rule of Professional Conduct 5.3(d) (Responsibilities Regarding Nonlawyer Assistants); and Hawaii Rule of Professional Conduct 5.5(c) (Unauthorized Practice of Law.))³

Finally, twenty jurisdictions have no rule or regulation addressing law-related activities of disbarred, suspended, resigned or involuntarily inactive attorneys.

Revisions Following 90-Day Public Comment Period

After consideration of comments received in response to the initial 90-day public comment period, the Commission, the Commission made no changes to the text of the rule or the comments.

Proposed Rule as Amended by the Board of Trustees on November 17, 2016

After public comment, the Commission's proposed rule was considered by the Board of Trustees at its meeting on November 17, 2016. The Board specifically evaluated the Commission's defined term "restricted lawyer" and substituted the term with "ineligible person." This was done to avoid any unintended inference that a disbarred or resigned member remains a person who should be designated as a "lawyer."

The redline strikeout text below shows the changes made by the Board:

(a) For purposes of this rule:

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(5) "~~Restricted lawyer~~ineligible person" means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.

² See, Colorado Rule of Professional Conduct 5.5; Maryland Rule of Professional Conduct 5.3; and Minnesota Rule of Professional Conduct 5.8; Alaska Bar Rule 15(c): Employment of Disbarred, Suspended or Resigned Attorney. Maryland and Minnesota require notice to be served upon the state bar, while Colorado requires written notice to be provided to the client.

³ Other states partially restricting the employment of suspended or disbarred members include: Florida (Rule of Discipline 3-6.1), Louisiana (Rule of Professional Conduct 5.5(e)), New Mexico (Rule of Professional Conduct 16-505(B) and (C)), North Carolina (Rule of Professional Conduct 5.5(e) and (f)), Virginia (Rule of Professional Conduct 5.5 (a) and (b)), Washington (Rule of Professional Conduct 5.8(b)), and Wyoming (Rules of Professional Conduct 8.4(g)).

- (b) A lawyer shall not employ, associate in practice with, or assist a person* the lawyer knows* or reasonably should know* is ~~a restricted lawyer~~ an ineligible person 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 that constitute the practice of law.
- (c) A lawyer may employ, associate in practice with, or assist ~~a restricted lawyer~~ an ineligible person 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 lawyer in attending 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, associating in practice with, or assisting a person* the lawyer knows* or reasonably should know* is ~~a restricted lawyer~~ an ineligible person, 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 ~~restricted lawyer~~ ineligible person will not perform such activities. 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, associating with, or assisting 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, associate in practice with, or assist ~~a restricted lawyer~~ an ineligible person 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) When the lawyer no longer employs, associates in practice with, or assists the ~~restricted lawyer~~ ineligible person, the lawyer shall promptly serve upon the State Bar written* notice of the termination.

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With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule. A member of the Commission submitted a dissent to this rule that can be found following the Report and Recommendation.

The Board adopted proposed rule 5.3.1 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as submitted by the State Bar to be effective November 1, 2018.

**Rule ~~5.3.1-4-311~~ Employment of Disbarred,
Suspended, Resigned, or Involuntarily Inactive ~~Member~~Lawyer
(Redline Comparison to the California Rule Operative Until October 31, 2018)**

- (Aa) For 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;
 - (~~23~~) “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, subdivision (e)(1), or California ~~Rule~~Rules of Court, rule 9.31(d);~~and~~
 - (~~34~~) “Resigned member” means a member who has resigned from the State Bar while disciplinary charges are pending;~~and~~
 - (5) “Ineligible person” means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.
- (Bb) A ~~member~~lawyer shall not employ, associate ~~professionally in practice~~ with, or ~~aid~~assist a person* the ~~member~~lawyer knows* or reasonably should know* is ~~a disbarred, suspended, resigned, or involuntarily inactive member~~an ineligible person 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~~client’s funds; or
 - (6) Engage in activities ~~which~~that constitute the practice of law.
- (Cc) A ~~member~~lawyer may employ, associate ~~professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member~~in practice with, or assist

an ineligible person 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 memberlawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active memberlawyer who will appear as the representative of the client.
- (Dd) Prior to or at the time of employing, associating in practice with, or assisting a person* the memberlawyer knows* or reasonably should know* is ~~a disbarred, suspended, resigned, or involuntarily inactive member, the member~~an ineligible person, the lawyer shall serve upon the State Bar written* notice of the employment, including a full description of such ~~person's~~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~~ineligible person will not perform such activities. The memberlawyer shall serve similar written* notice upon each client on whose specific matter such person* will work, prior to or at the time of employing, associating with, or assisting such person* to work on the ~~client's~~client's specific matter. The memberlawyer shall obtain proof of service of the ~~client's~~client's written* notice and shall retain such proof and a true and correct copy of the ~~client's~~client's written* notice for two years following termination of the ~~member's~~lawyer's employment ~~with~~by the client.
- (Ee) A memberlawyer may, without client or State Bar notification, employ ~~a disbarred, suspended, resigned, or involuntarily inactive member, associate in practice with, or assist an ineligible person~~ 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.
- (Ff) ~~Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member~~When the lawyer no longer employs, associates in practice with, or assists the ineligible person, the lawyer shall promptly serve upon the State Bar written* notice of the termination.

DiscussionComment

~~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].)~~

~~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~~if the client ~~is an organization, then the written~~lawyer shall serve the ~~notice required by paragraph (Dd) shall be served upon the~~on its ~~highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600~~1.13.~~)~~

~~Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 9.40, 9.41, 9.42, and 9.44 of the California Rules of Court, or any local rule of a federal district court concerning admission pro hac vice.~~