

**Rule 5.3.1 Employment of Disbarred,
Suspended, Resigned, or Involuntarily Inactive Lawyer
(Proposed Rule Adopted by the Board on March 9, 2017)**

- (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 §§ 6007, 6203(d)(1), or California Rule of Court 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.)

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.3.1
(Current 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” and “restricted lawyer” is defined. Other changes include the deletion of all the Discussion sections of the current rule except for language that clarifies 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. Three states 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 bar rule that similarly requires an employing attorney to serve upon the Alaska

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.

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

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

Nine states 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 states have no rule or regulation addressing law-related activities of disbarred, suspended, resigned or involuntarily inactive attorneys.

Post-Public Comment Revisions

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." With this change, the Board voted to adopt the proposed rule.

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

(a) For purposes of this rule:

* * * * *

(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.

* * * * *

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

Final Modifications to the Proposed Rule

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.

COMMISSION REPORT AND RECOMMENDATION: RULE 5.3.1 [1-311]

Commission Drafting Team Information

Lead Drafter: Toby Rothschild

Co-Drafters: James Ham, Tobi Inlender

I. CURRENT CALIFORNIA RULE

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

(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) “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 9.31; and
- (3) “Resigned member” means a member who has resigned from the State Bar while disciplinary charges are pending.

(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:

- (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 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:
- (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 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.
- (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.
- (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.
- (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.

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].)

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).

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*.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20, 2017

Action: Recommend Board Adoption of Proposed rule 5.3.1 [1-311]

Vote: 14 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed rule 5.3.1 [1-311]

Vote: 11 (yes) – 0 (no) – 0 (abstain))

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 5.3.1 [1-311] Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer

(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 §§ 6007, 6203(d)(1), or California Rule of Court 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.)

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-311)

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

(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(~~ed~~(1)), or California Rule of Court 9.31; ~~and~~(d);

(~~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~~an ~~disbarred, suspended, resigned, or involuntarily inactive member~~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 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 ~~member~~lawyer 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.
- (Dd) Prior to or at the time of employing, associating in practice with, or assisting a person* the ~~member~~lawyer knows* or reasonably should know* is ~~an disbarred, suspended, resigned, or involuntarily inactive member, the member~~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 ~~disbarred, suspended, resigned, or involuntarily inactive member~~ineligible person will not perform such activities. The ~~member~~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 ~~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 ~~with~~by the client.

- (Ee) A ~~member~~lawyer 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*.~~

V. RULE HISTORY

The rule was originally conceived and recommended by the State Bar's Board Committee on Discipline in 1993. Rule 1-311 is intended to address public protection and disciplinary enforcement concerns by (1) preventing a licensed member from acting as a screen behind which a former member could continue practicing law, (2) disclosing to the client the former member's role in the client's matter, (3) delineating the kinds of activities in which an employed but former member is permitted to engage, and (4) requiring notice to the State Bar of the former member's employment and termination.

Rule 1-311 regulates the employing/associating attorney, rather than the disbarred, suspended, resigned, or involuntarily inactive lawyer. This is because the State Bar does not have disciplinary jurisdiction over former members who have been disbarred or who have resigned from the State Bar. As such, the rule only imposes duties on the employing lawyer and not the employed, disciplined lawyer and does not address, regulate or limit the activities in which a disbarred, suspended, resigned, or voluntarily

inactive lawyer, acting alone, might engage. (See “Request that the Supreme Court of California Approve Proposed Rule 1-311 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation,” December 1995, at pages 2-3.)

Current rule 1-311 became operative on August 1, 1996. It was amended in 2008 but those amendments were non-substantive changes that updated the cross-references to several renumbered California Rules of Court contained in the rule.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016
(In response to 90-day public comment circulation):**

1. OCTC supports this rule and its Comments.

Commission Response: No response required.

- **State Bar Court:** No comments were received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. Two comments agreed with the proposed rule, one comment disagreed, one comment agreed only if modified. During the 45-day public comment period, one public comment was received, and that commenter disagreed with the proposed rule. Public comment synopsis tables, with the Commission’s responses to each public comment, are provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Unauthorized Practice of Law. Aspects of rule 1-311 overlap with the regulation of the unauthorized practice of law in California. (See, e.g., rule 1-311(B) restricting the provision of legal advice to a client.) Other California laws prohibit the unauthorized practice of law in California. Among these other laws are Business and Professions Code section 6125 et. seq. stating that perpetrators are guilty of a misdemeanor punishable by a fine, imprisonment, or both. Unauthorized practice of law may also be enforced under laws prohibiting unfair competition. (See: *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, applying the Unfair Competition Act, Business and Professions Code sections 17200 – 17208. See also: Opinion of the California Attorney General No. 93-303 (August 30, 1993).) Similar to the policy underlying rule 1-311, rule 1-300(A) prohibits a lawyer from aiding any person or entity in the unauthorized practice of law. See also, Business and Professions Code section 6133 providing that a law firm employing an attorney who has resigned, or who is under

actual suspension from the practice of law, or is disbarred, shall not permit that attorney to practice law or hold himself or herself out as being available to practice law, and shall supervise any other duties of the disciplined lawyer.

Court Orders in Disciplinary Proceedings. Under Rule of Court 9.20, the Supreme Court may include in an order disbaring or suspending a member of the State Bar, or in accepting his or her resignation, a direction that the member must: (1) notify all clients about the discipline or resignation and the consequent inability to practice law; (2) deliver to clients their files and property and refund any unearned fees; (3) notify any co-counsel; and (4) notify any opposing counsel. Rule 1-311 similarly requires certain notices (to clients and to the State Bar) but the obligation is imposed on the attorney who is employing or professionally associating with a disbarred, suspended, resigned, or involuntary inactive member.

See Section V. on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614 [152 Cal.Rptr.3d 16]
- *In the Matter of Tamir Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920
- *In re White* (2004) 121 Cal.App.4th 1453 [18 Cal.Rptr.3d 444]
- *In re the Marriage of Bianco* (2013) 221 Cal.App.4th 826 [164 Cal.Rptr.3d 785]

B. ABA Model Rule Adoptions

There is no corresponding ABA model rule. Several states have related rules, sometimes in the Rules of Professional Responsibility and sometimes in Bar rules or other contexts.

Three jurisdictions have adopted a rule of professional conduct similar to current rule 1-311 in that they require the employing lawyer to provide notice when employing a suspended or disbarred lawyer: Colorado, Maryland, and Minnesota. Alaska incorporates a bar rule that similarly requires an employing lawyer to serve upon the Alaska Bar Association written notice of the employment of a disbarred, suspended, resigned, or involuntarily inactive lawyer.

Seven jurisdictions prohibit suspended or disbarred lawyers 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 lawyer 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). Other states in this

category are Florida, Louisiana, New Mexico, North Carolina, Virginia, Washington, and Wyoming.)

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

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. No substantive changes to the rule are recommended. The recommended changes to the rule proper and the deletion of current Discussion text are not intended to be substantive changes to the current rule or changes a lawyer's duties under the current rule. The changes are intended to clarify and streamline the existing rule.

B. Concepts Rejected (Pros and Cons):

1. Specify whether notice to State Bar of hiring is available to the public or not.
 - Pros: More information available to the public about disbarred, suspended, resigned or involuntarily inactive lawyers.
 - Cons: Not a disciplinary issue and therefore not appropriate for Rules of Professional Conduct.
 - Status of such lawyers is already available on the website;
 - Any affected clients are given notice by the hiring lawyer;
2. Require disbarred, suspended, resigned or involuntarily inactive lawyer to give notice of employment to the State Bar, either along with or in addition to hiring lawyer giving such notice.
 - Pros: State Bar has more information about such lawyers.
 - Cons: Notice of employment is already given by the hiring lawyer.
 - Gathering additional data, which is possibly useful to the State Bar, is not a disciplinary issue and therefore inclusion of requirement is not appropriate for Rules of Professional Conduct.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. No changes in duties/substantive changes are recommended to the current rule.

D. Non-Substantive Changes to the Current Rule:

1. Proposed paragraph (a)(3) – Code cites corrected.
2. Throughout the rule, substituted the phrase “associate in practice” for “associate professionally with” and substituted “assist” for “aid.”
3. Added to the proposed rule a definition of “member” that is the same as the existing definition of “member” in current rule 1-100(B)(2).
4. Deleted all of the current rule Discussion except for the current language that clarifies a hiring lawyer’s obligation to give notice to a client when the client is an organization
5. Various conforming language changes to implement the use of the terms, “associate in practice with” and “ineligible person.”
6. Current rule draft uses the term “ineligible person” as opposed to “ineligible person.”

E. Alternatives Considered:

1. The Commission considered but rejected the concept of expanding the scope of the rule to include the same or similar restrictions on members with regard to disbarred, suspended, resigned or involuntarily inactive lawyers *from non-California jurisdictions*.
 - Pros: If the concerns for client protection require notice to clients of California lawyers who are ineligible to practice, similar concerns should require notice of the hiring of non-California disbarred or suspended lawyers.
 - Cons: Both the research required of the hiring attorney and the enforcement requirements on the State Bar would be more extensive than the benefits would justify. Limiting the rule to California lawyers who are ineligible to practice keeps it within the scope of authority of the State Bar and the core focus of the rule.
2. The Commission considered but rejected the concept of recommending the retention of current rule 1-311 without any revisions pursuant to OCTC’s recommendation. (See Section V, above.)
 - Pros: This rule is not controversial and there is no need to change it.
 - Cons: The recommended rule makes no substantive changes to the rule. It merely updates the rule with clearer language to make compliance easier. It also eliminates unnecessary Comments.

3. The Commission considered but rejected the concept of using the term “restricted lawyer” rather than “ineligible person.”
 - Pros: The term “restricted lawyer” denotes that activities as a lawyer are limited and controlled.
 - Cons: The term “restricted lawyer” is at best a confusing misnomer and at worst a trap that might lead a law firm to improperly hold-out an ineligible person by using the word “lawyer.”
4. The Commission considered but rejected the concept of recommending the complete deletion of the entirety of current rule 1-311. This recommendation was recorded in the form of a written dissent from a Commission member.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Eaton submitted a written dissent. See attached for the full text of the dissent and the Commission’s response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 5.3.1 [1-311] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.3.1 [1-311] in the form attached to this Report and Recommendation.

**Commission Member Dissent, Submitted by Daniel Eaton,
on the Recommended Adoption of Proposed Rule 5.3.1**

I believe that Rule 1-311, dealing with the employment of disempowered attorneys by members of the Bar, should be dropped from the revised Rules of Professional Conduct. The one piece of the rule worth saving should be moved to Rule 1-300. Keeping the rule retains an unnecessary non-conformity with the professional rules in effect in the preponderance of the states. Lawyers who employ disempowered attorneys don't need it to know how such sidelined members of the Bar may be engaged. State Bar prosecutors don't need it to be able to pursue discipline for employing attorneys who assist disempowered practice attorneys in practicing law. And disempowered attorneys don't need a rule not even directed at them to know what they may and may not do while they are sidelined. I respectfully dissent in principle from the Commission's retention of 1-311.

"The Rules of Professional Conduct are intended not only to establish ethical standards of members of the bar, but also designed to protect the members of the public." (*Ames v. State Bar* (1973) 8 Cal.3d 910, 917, citations omitted, rejecting disciplined attorney's contention that consent of client or the fairness of an attorney-client transaction rendered professional conduct rule regulating such a transaction in operative.) The first principle of this Commission's Charter from the State Bar Board of Trustees captures that declaration: "The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection of the public." (Commission Charter, Principle 1.)

Principle 3 of the Commission's Charter directs the analysis of whether a particular existing Rule should be revised and, if so, how: "The Commission should begin with the current Rules and focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, **unnecessary** differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to promote a national standard with respect to professional responsibility issues **whenever possible**." (Emphasis added.)

Rule of Professional Conduct 1-311 is entitled "Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member." It was adopted by the California Supreme Court in 1996 over the dissent of Justice Joyce Kennard. The Rule has six subparts. Paragraph (A) defines the terms "employ," "involuntarily inactive member," and "resigned member." Paragraph (B), the core of the Rule, sets out six tasks the employing member of the Bar may not employ a disempowered attorney to do on behalf of the employing member's clients. Subparagraph 6 of this paragraph has the catchall prohibition on employing such an attorney to "[e]ngage in activities which constitute the practice of law." Paragraph (C) identifies three non-exhaustive types of "research, drafting or clerical activities" the employing attorney may employ a disempowered lawyer to do. Paragraph (D) requires the employing attorney to serve a written notice of the employment of the disbarred attorney on the State Bar, listing the prohibited

activities in paragraph (B) and confirming that the disempowered attorney is not being employed to perform any of those activities. Paragraph (D) also requires the employing attorney to serve a similar written notice on each client on whose matter the disempowered attorney will work before or at the time the disempowered attorney begins to work on the client's matter and further requires the employing attorney to retain that notice for two years with proof that it was served. Paragraph (E) expressly allows the employing attorney, without notifying clients or the Bar, to hire the disempowered attorney exclusively to do such support services as typing, catering, reception, and maintenance. Paragraph (F) requires the employing member to notify the Bar when the services of the disempowered attorney are terminated.

The substance of Rule 1-311 is not found in the ABA Model Rules and is not found in the professional rules of 46 other states. The continued presence of Rule 1-311 in the California Rules of Professional Conduct is an unnecessary non-conformity with the rules used by the preponderance of the states. The essence of the Rule would remain in Business and Professions Code § 6133: "Any attorney or any law firm, partnership, corporation, or association employing an attorney who has resigned, or who is under actual suspension from the practice of law, or is disbarred, shall not permit that attorney to practice law or so advertise or hold himself or herself out as practicing law and shall supervise him or her in any other assigned duties. A willful violation of this section constitutes a cause for discipline." This provision was enacted in 1988. It captures all of paragraph (B) of the existing rule. Indeed, by requiring the employing attorney to supervise the disempowered attorney in the latter's assigned duties, § 6133 appropriately goes beyond what is required by Rule 1-311. It is not clear that the continued presence of this Rule, with a limited exception addressed below, adds anything to the ability of the State Bar to prosecute those who would employ a disempowered attorney to practice law. And yet there it is.

Paragraph (B) is not necessary to tell the disempowered attorney and an attorney who would employ him what he may do. It is useful to repeat that Rule 1-311 is not directed at the disempowered attorney at all, only to the attorney who would employ him or her. Even without this Rule, the law is clear for both employer and employee that a disempowered attorney may not in any way, shape, or form practice law or be employed to do so. Period. Subparagraphs 1-5 of Paragraph (B) add nothing to subparagraph 6, which in turn adds nothing to Rule 1-300. Subparts 1-5 may confuse the practitioner seeking guidance, who may understandably assume that the activities listed in those subparts comprise some special category of activities that are not quite the practice of law prohibited by subpart 6. What it means to "practice law" has been ably handled by the courts, including the State Bar Review Department. (See e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128 (collecting cases); *Farnham v. State Bar* (1976) 17 Cal.3d 605; *Estate of Condon v. McHenry* (1998) 65 Cal.App.4th 1138, 1142-1143.) That is where those looking for guidance on this question, both the disempowered attorney and the one who would employ him or her, should turn, not the Rules of Professional Conduct.

It may be argued that Paragraphs (C) and (E) are still important because they guide the employing attorney in assigning the disempowered attorney appropriate tasks and thereby encourage the rehabilitation of the disempowered attorney. There are at least two responses to that argument.

First, it should be self-evident that not all roads to vocational redemption for the disempowered lawyer lead through a law office. For one thing, seven states prohibit suspended or disbarred lawyers from engaging in any law-related activities, a bar that presumably does not preclude those lawyers' rehabilitation through other means. There are other ways for a disempowered lawyer to carry the heavy burden of demonstrating the "exemplary" behavior "over a meaningful period of time" required for reinstatement. (*In re Gossage* (2000) 23 Cal.4th 1080, 1097.) That is why any defense of this Rule on the ground that its elimination would make the disempowered lawyer altogether unemployable makes no sense. The omission of these provisions would not even make the disempowered lawyer less employable since anyone at all may perform the tasks that are listed in Paragraphs (C) and (E), and there is nothing in the Rules that says that a disempowered lawyer may not be employed by an active lawyer at all.

Second, a disciplinary rule, the violation of which may lead to punishment of the employing attorney, is an odd place to set out a purported rehabilitating mechanism that gives no positive incentive to the employing attorney to help the wayward, sidelined attorney. In any event are the Rules of Professional Conduct, given their purpose, really the place to advance even such a noble end?

All of that said, I would not discard Rule 1-311 in its entirety. The requirement that the employing attorney provide contemporaneous written notice to clients on whose matters the disempowered is being engaged to work serves the purpose of these Rules to protect the public, especially the public consisting of clients. The same could be said I suppose of a rule requiring written notice to a client of anyone convicted of criminal fraud to work on their matters. I would transfer this part of the Rule to Rule 1-300 (A), addressing the unauthorized practice of law.

Rule 1-300 (A) reads: "A member shall not aid any person or entity in the unauthorized practice of law." One of three other states that have such a rule, Colorado, places the substance of the current Rule 1-311 under its rule prohibiting an attorney to assist others in the unauthorized practice of law. (See, Colorado Rule 5.5.) Rule 5.5 also is the ABA Rule addressing the unauthorized practice of law. Annotations under Rule 5.5. as it has been adopted in other states deal with the same kind of conduct as addressed in Rule 1-311. See e.g., *Ky. Bar Ass'n v. Unnamed Attorney* (Ky. 2006) 191 S.W.3d 640 (Lawyer disciplined for employing suspended lawyer and telling clients that employee was not practicing law for "health" and other reasons.) I would make the client notification provision of Rule 1-311 new Paragraph (B) of Rule 1-300 and make what is now Paragraph 1-300(B) a new Paragraph 1-300(C).

But that is the only part of Rule 1-311 that I would keep. The Commission learned from the Office of Chief Trial Counsel that lawyers who have employed disempowered

attorneys have filed over 1,000 written notices of having done so with the State Bar under this Rule. Impressive, but what ethical purpose does that really serve? Violation of the written notice provision gives the Bar an additional ground to punish a lawyer who has assisted a disempowered attorney in the practice of law. But the employing attorney is subject to discipline for that under Rule 1-300 anyway. And what of the lawyer who employs a disempowered attorney to perform non-legal tasks without serving the written notice with the Bar? In that case, violation of the notice furnishes a unique ground to seek discipline of the unwary employing lawyer. In my view, the provision requiring written notice to the Bar gives rise to what is essentially either redundant discipline or it is a trap for the unwary. Either way, it should go.

Yes, we start with the Rules as they exist, but our mandate goes beyond that. I regret that we have missed a rare opportunity to eliminate an unnecessary non-conformity with the rules prevailing in the vast majority of the states. I respectfully dissent.

**Commission’s Response to Dissent Submitted by Daniel Eaton
on the Recommended Adoption of Proposed Rule 5.3.1**

Proposed Rule 5.3.1 retains, without substantive change, the provisions of current rule 3-111. The dissent argues that this rule should be dropped from the rules, rather than being continued.

Rule 3-111 was adopted by the Supreme Court in 1996. The Court reconsidered the rule in 2008, revising it, but retaining it in the Rules. As noted by the dissent, the charge of the Commission is to “begin with the current Rules...” Rule 3-111 has provided guidance both to the employing attorney and to the ineligible person (a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive) as to how to comply, and transparency to clients. It also provides an opportunity for the ineligible person to work in a law office to assist their rehabilitation and potential reinstatement. These benefits are continued in the proposed rule

The Commission concluded that retaining this rule was useful to protect the public and to provide guidance for attorneys employing ineligible persons, and should be retained.