

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-311

Lead Drafter: Toby Rothschild
Co-Drafters: Mayor Aja Brown, James Ham
Meeting Date: May 29-30, 2105

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

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(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*.

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II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below.

The vote taken by the drafting team on this motion was 2 in favor and 1 not voting.

III. PROPOSED RULE (CLEAN)

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 **or associate professionally with** another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

[(2) Bob Kehr recommends adding a definition of "member," if "member" will be a term used in this rule and if "member" otherwise is replaced with "lawyer" throughout the other Rules; however, it probably would work to use "lawyer" instead of "member" in this Rule.]

(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 9.31(d); and

(4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.

(B) A member **shall not employ 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

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(6) Engage in activities **that** constitute the practice of law.

(C) A member **may employ 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 **or aiding** 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 **or aiding** 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 by the client.

(E) A member may, without client or State Bar notification, employ **or aid** 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) **When the member no longer employs or aids** the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

Discussion:

[1] For discussion of the activities that constitute the practice of law, see ***Birbrower, Montalbo, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 127-131, 70 Cal.Rptr. 2d 304, 308-310; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; *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. Sipper***

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(1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960]; and *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363].)

[2] Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed on the **client's matter** by the disbarred, suspended, resigned, or involuntarily inactive member. **If the client is an organization, the member shall serve the notice required by paragraph (D) on its highest authorized officer, employee, or constituent overseeing the particular engagement.** (See rule 3-600.)

[3] Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 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], 9.44 [Registered foreign legal counsel], 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing temporarily in California as part of litigation], and 9.48 [non-litigating attorneys temporarily in California to provide legal services] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.

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

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 **or associate professionally with** another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) Bob Kehr recommends adding a definition of "member," if "member" will be a term used in this rule and if "member" otherwise is replaced with "lawyer" throughout the other Rules; however, it probably would work to use "lawyer" instead of "member" in this Rule.

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

(3)(4) "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:

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- (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.

(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
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(E) A member may, without client or State Bar notification, employ or aid 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,

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typing or transcription, or other similar support activities.

(F) ~~Upon termination of~~When the member no longer employs or aids the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

Discussion:

[1] For discussion of the activities that constitute the practice of law, see *Birbrower, Montalbo, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 127-131, 70 Cal.Rptr. 2d 304, 308-310; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; *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. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960]; and *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].~~

[2] Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed on the client's matter by the disbarred, suspended, resigned, or involuntarily inactive member ~~on the client's matter~~. ~~If a member's~~the client is an organization, ~~then the member shall serve the written~~ notice required by paragraph (D) ~~shall be served upon the~~on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600.)

[3] Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 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], ~~and~~ 9.44 [Registered foreign legal counsel], 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing temporarily in California as part of litigation], and 9.48 [non-litigating attorneys temporarily in California to provide legal services] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.

V. PUBLIC COMMENTS SUMMARY

N/A

VI. OCTC / STATE BAR COURT COMMENTS

- Jayne Kim, OCTC, April 20, 2015: "OCTC does not recommend any revisions to rule 1-311."

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VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

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 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, and Minnesota. Alaska incorporates a bar rule that similarly requires an employing attorney to serve upon the Alaska Bar Association written notice of the employment of a disbarred, suspended, resigned, or involuntarily inactive attorney.

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). Other states in this category are Florida, Louisiana, New Mexico, North Carolina, Virginia, Washington, and Wyoming.)

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

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

Concepts Accepted (Pros and Cons):

- No substantive changes to the rule are recommended.

Concepts Rejected (Pros and Cons):

- 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 members.
 - Cons: Not a disciplinary issue and therefore not appropriate for Rules of Professional Conduct.
 - Status of such lawyers already available on the website;
 - Any affected clients are given notice by the hiring lawyer;
- Require disbarred, suspended, resigned or involuntarily inactive member 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.

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- **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.

- Delete first paragraph of discussion.
 - **Pros:** Definition of practice of law is very complex, and any listing like this is likely to be both over-inclusive and under-inclusive.
 - **Cons:** The practice of law must be defined to allow enforcement consistent with due process requirements. Cases give lawyers a place to go to understand what is intended in defining the “practice of law.”

Changes in Duties/Substantive Changes to the Current Rule:

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

Non-Substantive Changes to the Current Rule:

- §(A) (2) – Code cites corrected
- §(D) – “with” changed to “by”
- §(F) – Add the words “employment of the” to reflect that it is the employment of the disqualified lawyer that is being terminated.
- Discussion ¶1 – Add citation to Birbrower case, with pin cite to the discussion of the definition of the practice of law.
- Discussion ¶3 – Add the titles of the Rules of Court sections cited and add Rule 9.43.

Alternatives Considered:

- Should the rule be expanded to include the same restrictions on members with regard to disbarred, suspended, resigned or involuntarily inactive lawyers from other jurisdictions?

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues.

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X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Toby Rothschild

- 4/23/15: Memo to drafting team, Kevin and Randy setting out 3 issues and attaching a draft revised rule. The three issues identified were public posting of hiring notice, notice to the bar by the disqualified lawyer as well as the hiring lawyer, and deletion of the first paragraph of the discussion section.
- [Date]: Email Comment

Jim Ham

- 4/29/15: Response to 4/23 memo. Responded that we should not post the hiring notice and should not delete the discussion paragraph. Not decided on the reporting by the disqualified lawyer.
- 5/4/15: Follow-up to 4/29 email. Further analysis of the issues.
- 5/5/15: Follow-up to 5/4 email. Further analysis of issues 2 and 3.
- 5/5/15: Follow-up email. Questions public protection rationale of the entire rule.
- 5/5/15: Analysis of the considerations on each of the three issues.

Robert Kehr

- 5/19/15: The word "member" is used but not defined in your proposal. That would work if the same term is used and defined elsewhere in the Rules, but it would not work if "member" is changed to "lawyer" as did the first Commission. The first Commission in its Rule 5.3.1 therefore included a definition of "member" as Rule 5.3.1(a)(2). The alternative would be to use "lawyer" in this Rule even if "member" is changed to "lawyer" for the balance of the Rules. I think the first Commission got this slightly wrong b/c it did not use the word "member" by itself, and the subject of the Rule was referred to as "lawyer". This will need to be thought through depending the terminology the Commission adopts.

Randall Difuntorum

- Comment on the three issues. In addition, recommends adding the *Birbrower* case to the string cite in the discussion.

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XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

The Drafting Team recommends that the Commission adopt rule 1-311 in the form stated above.

Proposed Resolution:

RESOLVED: That the Commission adopts proposed amended rule 1-311 as set forth in this report.

XII. DISSENTING POSITION(S)

None

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]