MEMO

III. A. **Rule 1-311 (Employment of Disbarred, Suspended, Resigned or Involuntarily Inactive Member**

Meeting Date **June 26, 2015**

Drafting Team **Rothschild (L), Brown, James, Ham**

At the Commission's May 29-30, 2015 meeting, a straw poll was taken on a recommendation to include lawyers who have been disciplined outside of California. The result was: 11 (yes) – 4 (no) – 1 (abstain).

The rule 1-311 drafting team has prepared a revised rule draft in consideration of the straw poll and recommends that the Commission adopt the revised rule.

Included in this agenda are the following:

- Proposed rule 1-311 DFT5.1 (06-08-15) – CLEAN
- Proposed rule 1-311 DFT5.1 (06-08-15) – CLEAN w-notes
- Redline of proposed rule 1-311 DFT5.1 (06-08-15) cf. DFT 4.1
- Redline of proposed rule 1-311 DFT5.1 (06-08-15) cf. CAL rule
- Dan Eaton Dissent

The 1-311 Report and Recommendation from the May 29-30th meeting can be view or downloaded at: http://board.calbar.ca.gov/Agenda.aspx?id=11052&tid=0&show=10000972.

Rule 1-311 [5.3.1] Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer (Commission's Proposed Rule – Clean Version)

(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 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.

(5) "Restricted lawyer" means:

(i) a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive, or

(ii) a lawyer who is not a member and is currently disbarred or suspended from the practice of law in a United States state, jurisdiction, possession, territory or dependency.

(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 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 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 professionally with, or assisting a person the lawyer knows or reasonably should know is a restricted lawyer, 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 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 with, or assist a restricted lawyer 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 with, or assists the restricted lawyer, the lawyer shall promptly serve upon the State Bar written notice of the termination.

Comments:

[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].)

[2] Paragraph (D) is not intended to prevent or discourage a lawyer from fully discussing with the client the activities that will be performed on the client's matter by the restricted lawyer. 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 3-600 [1.13].)

[3] This rule shall not 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*.

Rule 1-311 [5.3.1][1]Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer (Commission's Proposed Rule – Clean Version)

(a) For purposes of this rule:

(1) "Employ" means to engage the services of[2] 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 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.

(5) "Restricted lawyer"[3] means:

(i) a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive, or[4]

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[1] The use of 5.3.1 assumes that the commission will have a rule 5.3.

[2] Per discussion during 5/29-30/15 meeting, the term "associate professionally with" has been withdrawn from the definition of "employ" because "associate professionally with" can concern relationships that are dissimilar to employment or independent contract status, e.g., co-counsel. The term has been returned to its location in current rule 1-311. One member of the drafting team would strike this concept from the rule. See Jim Ham email of 6/4/15.

[3] One member of the drafting team believes the term should be "restricted person". See Jim Ham email of 6/6/15.

[4] Per discussion at the 5/20-30/15 meeting, the adverb "currently" had been added to limit the rule's application to only those lawyers who hire a currently restricted lawyer.

(ii) a lawyer who is not a member [5] and is currently disbarred or suspended from the practice of law in a United States state, jurisdiction, possession, territory or dependency.[6]

(b) A lawyer[7] shall not employ, associate in practice with,[8] or assist[9] a person the lawyer knows or reasonably should know is a restricted lawyer 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;

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[5] The clause "who is not a member" is included to clarify that the rule is not intended to apply to lawyers who have dual admissions in California and another jurisdiction, and have been disbarred or suspended in the other jurisdiction. The concern is avoid the rule being triggered before such a lawyer has been provided due process in a reciprocal discipline proceeding.

[6] Separate subparagraphs have been broken out to better signal that there are two general categories of lawyers who are "restricted" under the rule: both members of the State Bar and lawyers from other jurisdictions. One member of the subcommittee would have the rule apply only to California restricted lawyers, not those from other jurisdictions. See Jim Ham email of 6/2/15.

[7] A suggestion was made during the 5/29-30/15 meeting to apply the rule to lawyers authorized to practice law in California, e.g., under Rule of Court 9.45 (registered legal services attorney) or 9.46 (registered in-house counsel). Such an application would have required defining "lawyer" specifically to include such persons within the rule. The Drafting Team decided not to include a definition of "lawyer" in this Rule. First, lawyers authorized under 9.45 or 9.46 should not be a problem. In the former situation, a registered legal services lawyer would not be a hiring lawyer, given the close supervision that is required under Rule 9.45. Second, a registered in-house counsel who might hire another lawyer has a single client and does not raise the same public protection concerns the rule is intended to address.

[8] This language is substituted for "associate professionally with" to clarity that it covers co-counsel and similar relationships, but not bar associations and other kinds of "professional" associations. One member of the drafting team would exclude this concept entirely, and limit the rule to employ (as defined) and assist. See Jim Ham email of 6/4/15.

[9] The word "assist" has been substituted throughout the rule to conform it to the term the Commission approved for rule 1-300 [5.5].

(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 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;

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(d) Prior to or at the time of employing, associating professionally with, or assisting a person the lawyer knows or reasonably should know is a restricted lawyer, 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 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 with, or assist a restricted lawyer 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.

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Comments:

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[2] Paragraph (D) is not intended to prevent or discourage a lawyer from fully discussing with the client the activities that will be performed on the client's matter by the restricted lawyer. If the client is an organization, the lawyer shall serve the notice required by

[10] One member of the drafting team would delete this comment.

paragraph (D) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600 [1.13].)

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Jim Ham email to drafting team 6/2/15:

I suppose one of the difficulties we face here is that this rule attempts to regulate UPL prohibitions and UPL conduct to the extent possible through rules designed to regulate the conduct of practicing attorneys, the breach of which constitutes grounds for attorney discipline.

Regulating who can work in a law office, and under what terms and conditions, is a matter of public protection, but the same is true for doctor's offices, aerospace plants, banks and other institutions.

Perhaps there is a rationale for limiting this rule to "members" of the California Bar and those authorized to practice here who are bound by these rules, even though such a rule is under inclusive. That may be the limit of what can be accomplished through this type of rule.

Jim Ham email to drafting team 6/4/15:

My view is that “professionally associate with” should be deleted from the draft because (a) it is too vague and ambiguous to be included in a disciplinary rule and would be challenged as void for vagueness if an attempt was made to discipline a lawyer based on this dubious language; and (b) it is never used anyway.

Jim Ham email to drafting team 6/6/15:

Regarding your comment number 1, is "restricted person" better, since a disbarred person is not a lawyer?

Rule 1-311 [5.3.1] [1]Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive ~~Member~~Lawyer
(Redline Comparison of the Proposed Rule to Meeting Draft from May 29-30)

(a) For purposes of this rule:

(1) "Employ" means to engage the services of ~~or associate professionally with~~ [2]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.]~~"Member" means a member of the State Bar of California.

~~(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 §§ 6007, 6203(d)(1), or California Rules of Court, rule 9.31(d).

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~~(3)~~ (ii) a lawyer who is not a member [5] and is currently disbarred or suspended from the practice of law in a United States state, jurisdiction, possession, territory or dependency.[6]

(b) A ~~member~~ lawyer[7] shall not employ, associate in practice with,[8] or ~~aid~~ assist[9] a person the ~~member~~ lawyer knows or reasonably should know is a ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer to perform the following on behalf of the ~~member's~~ lawyer's client:

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(5) Receive, disburse or otherwise handle the client's funds; or

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(c) A ~~member~~lawyer may employ, associate in practice with, or ~~aid~~ assist a ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer 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.

(d) Prior to or at the time of employing, associating professionally with, ~~–~~or ~~aiding~~ assisting a person the ~~member~~ lawyer knows or reasonably should know is a ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer,

the ~~member~~ lawyer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer 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 aiding~~ 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 by the client.

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~~(f)~~ When the ~~member~~ lawyer no longer employs, associates with, or ~~aids~~ assists the ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer, the ~~member~~ lawyer shall promptly serve upon the State Bar written notice of the ~~termination.~~

~~Discussion~~Comments**:**

[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

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[2] Paragraph (D) is not intended to prevent or discourage a ~~member~~ lawyer 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~~restricted lawyer. If the client is an organization, the ~~member~~ lawyer shall serve the notice required by paragraph (D) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600 [1.13].)

[3] ~~Nothing in rule 1-311 shall be deemed to~~This rule shall not limit or preclude any activity engaged in pursuant to rules 9.40 [c~~C~~ounsel *pro hac vice*], 9.41 [a~~A~~ppearances by military counsel], 9.42 [c~~C~~ertified law students], 9.43 [o~~O~~ut-of-state attorney arbitration counsel], 9.44 [r~~R~~egistered 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*.

[10] One member of the drafting team would delete this comment.

Rule 1-311 [5.3.1] Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive ~~Member~~Lawyer
(Redline Comparison of the Proposed Rule to Current California Rule)

~~(A)~~(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.

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(5) ~~A~~"Restricted lawyer" means:

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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;

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(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.

~~(D)~~(d) Prior to or at the time of employing, associating professionally with, or assisting a person the ~~member~~lawyer knows or reasonably should know is a ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer, the ~~member~~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 (B) and state that the ~~disbarred, suspended, resigned, or involuntarily inactive member~~restricted lawyer 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~~client's specific matter. The ~~member~~lawyer 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.

~~(E)~~(e) A ~~member~~lawyer may, without client or State Bar notification, employ ~~a disbarred, suspended, resigned~~, associate with, or ~~involuntarily inactive member~~assist a restricted lawyer whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

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

~~**Discussion**~~

Comments:

[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.* 363].) ~~*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~~lawyer from fully discussing with the client the activities that will be performed ~~by the disbarred, suspended, resigned, or involuntarily inactive member~~ on the ~~client's~~client's matter~~.~~ by the restricted lawyer. If ~~a member's~~the client is an organization, ~~then~~ the ~~written~~lawyer shall serve the 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~~.)~~ [1.13].)

~~Nothing in~~[3] This rule ~~1-311~~ shall ~~be deemed to~~not 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.~~44~~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*.

DISSENT OF DANIEL E. EATON FROM THE INCLUSION OF RULE 1-311 IN THE REVISED RULES

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.

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