[date], 2016

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Rule of Professional Conduct 5.3
Responsibilities Regarding Nonlawyer Assistants

Dear [Ms. Hollins]:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association ("PREC") appreciates the opportunity to comment on the draft rules of conduct (the "Proposed Rules") proposed by the State Bar's Commission for the Revision of the Rules of Professional Conduct (the "Rules Revision Commission"). Please see our letter dated ***[date]***, 2016, describing PREC and praising the efforts of the Rules Revision Commission.

PREC supports the adoption of Proposed Rule 5.3 [Responsibilities Regarding Nonlawyer Assistants] (subject to the modification stated below) and (as noted in our separate comment letter) urges the deletion of Proposed Rule 5.3.1 [Employment of Disbarred, Suspended, Resigned or Involuntarily Inactive Lawyer (current Rule 1-311)] in its entirety from the revised California Rules of Professional Conduct submitted for approval to the Supreme Court of California.

Proposed Rule 5.3(a) makes use of the phrase "managerial authority in a law firm." This phrase is not defined anywhere in this proposed rule or in Proposed Rule 1.0.1 [Terminology]. Which attorneys potentially come within the scope of this phrase is subject to many interpretations including a managing partner of a firm, a managing partner of an office of a multi-office firm, members of firm committees, attorneys managing the work of others, etc. If a lawyer is going to be held responsible under this rule, he or she should have a clear understanding that this rule applies to him/her. We recommend that the phrase "managerial authority in a law firm," as used in this proposed rule, either be defined or replaced with another, narrower phrase, in order to make clear to which specific attorneys in a law firm this proposed rule is intended to apply.

California Bus. & Prof. Code section 6125 states, "No person shall practice law in California unless the person is an active member of the State Bar." It has long been established that a lawyer who is suspended from practice and holds herself out as entitled to practice is engaged in the unauthorized practice of law and is subject to sanctions pursuant to Bus. & Prof. Code section 6126. *Cadwell. v. State Bar* (1975) 15 Cal.3d 762, 772. Current Rule 1-311 [Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member], impacts the employment of restricted California lawyers by imposing certain duties upon the active lawyer/employers; its revised version, Proposed Rule 5.3.1, has similar features. First, it defines specific allowed and prohibited activities which the restricted lawyer may perform and makes the

employing lawyer strictly liable for the former's noncompliance. Second, it imposes a reporting regime for the employing lawyer that includes written notice to clients and to the State Bar at the initiation of the employment and to the State Bar again at the employment's conclusion. There is no current rule that describes a lawyer's responsibilities with respect to the employment or retention of nonlawyers in general.

Proposed Rule 5.3 would bridge that gap. It is substantially similar to ABA Model Rule 5.3, which provides ethical guidelines for an employing lawyer's supervision of any nonlawyer, i.e. any person not currently entitled to practice law in California pursuant to section 6125. Proposed 5.3 provides an analytical framework for duties attending specific types of authority (managerial, direct, or simple responsibility for an individual person's conduct) and the knowledge and affirmative action required for full compliance. Perhaps as importantly, it can be readily applied to both traditional employment and to the use of outside and online nonlawyer services.

If adopted, Proposed Rule 5.3 would both obviate the need for, and highlight the substantial defects of, current Rule 1-311 and its proposed revision, 5.3.1. Those defects include the following:

1. Proposed Rule 5.3.1 is punitive. The purpose of disciplinary proceedings is not to punish but to protect the courts and the public. *Segretti v. State Bar of California* (1976) 15 Cal.3d 878, 887. The rule limits the activities of restricted California lawyers in ways that greatly exceed the boundaries set by *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1988) 17 Cal.4th 119 for other lawyers not admitted in California without demonstrating an enhanced risk of harm. Where the restricted lawyer is involuntarily inactive for reasons other than discipline, the punitive effect is even more pronounced.

2. Proposed Rule 5.3.1 imposes undue burdens on current practice. Strict compliance with the rule precludes the otherwise necessary and appropriate use of remote and online law-related services where the status of individual service providers cannot be ascertained. In addition, the reporting requirements are both onerous to potential employers and an unsustainable burden on the regulatory resources of the State Bar without demonstrating a commensurate risk to the public or the courts.

3. Proposed Rule 5.3.1 frustrates rehabilitation. Disciplinary proceedings are designed to rehabilitate lawyers. Segretti, 15 Cal.3rd at 891. The rule imposes significant disincentives for potential lawyer-employers to hire restricted lawyers as opposed to other nonlawyers. In so doing, the rule effectively deprives restricted lawyers of potential employment, which, in turn, impairs their ability to attain the present learning and ability in the law required for rehabilitation.

Proposed new rule 5.3 would provide valuable guidance for the use of nonlawyer assistants that is not available under the current rules and, and it would be appropriate for contemporary practice. In contrast, the proposed revision of current rule 1-311, renumbered as 5.3.1, would be rendered moot by 5.3 and is otherwise unduly burdensome to both practitioners

and regulators. Proposed rule 5.3 should be adopted, and proposed rule 5.3.1 should be deleted in its entirety.

In the event Proposed Rule 5.3.1 is not deleted, we have the following remaining comments on its current form:

Proposed Rule 5.3.1(a) (3) and (4) each use the term "member," despite the fact that that term has generally been eliminated in the proposed new rules, with the term "lawyer" being used in its place. Under these circumstances, the use of the term "member" in these subparagraphs, without reference to the term "lawyer," may lead to confusion. It is also internally inconsistent with language of subparagraph (a)(5), as well as the title of the rule, which do use the term "lawyer." To avoid this, we recommend that in subparagraphs (a)(3) and (4), the first use of the term "member" be replaced with the term "lawyer." Under this approach, subparagraph (a)(3) would read, "(3) 'Involuntarily inactive lawyer' 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)." Likewise, subparagraph (a)(4) would read, "(4) 'Resigned lawyer' means a member who has resigned from the State Bar while disciplinary charges are pending."

Finally, we read this proposed rule to prohibit a lawyer from assisting a restricted lawyer from negotiating any matter on behalf of a client. However, there are contexts (e.g., in transactional work) where attorneys appropriately work with investment bankers and business brokers in negotiating transactions. If a restricted lawyer is functioning in such a role (and not as an attorney), the transactional attorney should not be in violation of the rule. As a result, we recommend deleting the reference to "assisting".

Thank you again for the opportunity to comment on the Proposed Rules.

Very Truly Yours,