

Dain R. Birkley, J.D.

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Daniel Evan Eaton, Esq.
Seltzer Caplan McMahon Vitek
750 B St #2100
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Re: Dissent to Recommended Adoption of Proposed Rule 5.3.1.

Dear Mr. Eaton:

I want to express my deepest gratitude for your well-reasoned and thoughtful dissent to the Recommended Adoption of Proposed Rule 5.3.1. That anyone cared enough to take the time to analyze and advocate against this harsh and extremely punitive rule is heartening. Perhaps, there is some hope that this rule, which prevents many experienced, well trained and highly skilled former bar members from earning a living, may finally be understood as being, for all practical purposes, an economic death sentence. Apparently, the public comment period has passed, but should you have a chance for further input, I hope that the content of this letter can aid your advocacy.

The issues raised in your dissent are valid, and your recommendation, that all but paragraph (b) of Rule 5.3.1 be deleted, should be adopted. As a "Restricted lawyer" who has struggled to find employment despite a long and successful career in the law, I can attest that the draconian impact of Rule 5.3.1 is not the result of paragraphs (a), (b), (c), (e), or (f). As you point out, except for (b), those provisions are redundant and superfluous. Your accurate synopsis of the mandates of paragraph (d) explains why Rule 5.3.1 effectively ends a restricted lawyer's chances for future employment.

It is not problematic that a potential employer must file the State Bar form advising of the pending employment of a restricted lawyer. Rather, it is the notice requirement that positively and instantly ends job possibilities. As a shareholder of a substantial firm, consider the cost of implementing paragraph (d) mandating that every client in your office on whose matter the restricted lawyer might work must be informed that you have hired a restricted attorney might work on their file, and what the restricted attorney will not do. The costs are the attorney time drafting the letter, the time of the staff to print the letters, the time of the staff to prepare envelopes and mail them, the cost of postage, the staff cost of collecting and obtain the proofs of service, and the cost of records management. If a law firm such as yours has 300 clients, the cost is in the thousands of dollars.

The justification for this onerous requirement, that every client should have the right to refuse to have a restricted lawyer work on the file, is cynical and thoughtless. Consider State Farm Insurance. The hundreds of local defense files from throughout the Bay area are handled by the in-house legal department, Phillip M. Anderson and Associates. Paragraph (d) would require the notification of hundreds of "clients" against whom a claim has been filed before the restricted lawyer could begin work. Those types of clients do not care who handles their files so long as they receive the proper defense and coverage. The State Bar ethics hotline has issued an opinion to my attorney that every file in the State Farm's in-house counsel's office must receive the Rule 5.3.1 (d) notification. Is it any wonder that even though I was outside, retained litigation counsel for State Farm for almost 20 years that I get hired as a paralegal? If a restricted lawyer were to be employed by PG&E in a rate modification matter, is PG&E required to notify every consumer of services that a restricted attorney could be working on their case? It is enigmatic that a group whose professional mission in life is to achieve justice can be so blind to the injustice inflicted by this rule.

There has been a recent movement for criminal justice reform. The error of automatically imposing lengthy prison sentences just because the crime involved crack cocaine is now understood. Rule 5.3.1 is the parallel to the mandatory sentencing for crack cocaine. The Rule is applied to every "Restricted lawyer" equally, whether the underlying reason for restriction involved misconduct in the practice of law or not, whether the crime was morally reprehensible or not, whether the offender has been fully paid his debt to society and been rehabilitated or not, and whether the offender might have been adjudged to have lead an upright life and blameless life qualifying for a Certificate of Rehabilitation. This rule lumps all restricted lawyers into the legal world's equivalent of a "basket of deplorables."

These restrictions are especially cynical in the light of the approved practice of outsourcing legal work to foreign countries where the research and writing are done by non-lawyers. The rationale, as stated by your own San Diego Bar Association, for allowing outsourcing is that the work must be approved by a member of the bar before submission. Yet when you raised this same argument in support of changing Rule 5.3.1, it was ignored. Does it make sense to bar a former member of the bar, who may have a record of years of competent work as an attorney, from performing legal work that foreign non-lawyers are approved to perform? The only reasonable explanation is that the State Bar would rather punish a restricted attorney than promote the quality of legal services provided the client. Over and above the penalty that a restricted attorney has paid in loss of freedom and assets, Rule 5.3.1 (d) effectively renders restricted attorneys unemployable and robs them of their right to earn a living for life. Rule 5.3.1 (d) is not just.

Thank you for your efforts.

Very truly yours,

Dain R. Birkley, J.D.