



# The State Bar of California

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CLOSING

II.G. Disbarred Attorneys  
08-11-21 CTJG Meeting  
Open Session

WORKING GROUP

**DATE:** August 4, 2021

**TO:** Closing the Justice Gap Working Group

**FROM:** Scope Subcommittee

**SUBJECT:** II.G. Discussion and Possible Action on a Subcommittee Recommendation Concerning Sandbox Participation of Lawyers who are Not Entitled to Practice Law

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For Closing the Justice Gap Working Group August 11, 2021 meeting agenda item II.G. – Discussion and Possible Action on a Subcommittee Recommendation Concerning Sandbox Participation of Lawyers who are Not Entitled to Practice Law, the Scope Subcommittee will present the recommendation set forth below for action by the Working Group. The background for this recommendation is provided in the attached memoranda.

Recommendation:

**Anyone who is an ineligible person under the definition of [rule 5.3.1](#) of the California Rules of Professional Conduct, in any state or jurisdiction, is ineligible to participate in the sandbox in any form.**



# The State Bar of California

## OFFICE OF PROFESSIONAL COMPETENCE

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Date: May 21, 2021

To: Scope Subcommittee Members

From: Toby Rothschild and Andrew Tuft

Subject: II.A. Participation of a Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer in the Sandbox

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At the March 26, 2021 meeting, the Scope subcommittee considered whether, and to what extent, a disbarred lawyer may participate in the delivery of legal services provide by a sandbox entity. The subcommittee discussed the following options: (1) prohibit a disbarred lawyer from participating in any way in the sandbox; (2) prohibit a disbarred lawyer from providing legal services, managing the work of those providing legal services, or owning more than 10% of any sandbox entity; or (3) permit a disbarred, suspended, resigned, or involuntarily inactive lawyer to participate in a sandbox entity only if the participation is in compliance with Rule of Professional Conduct 5.3.1 [Employment of Disbarred, Suspended, Resigned,<sup>1</sup> or Involuntarily Inactive Lawyer].

The memo describes the regulatory structure of rule 5.3.1 and options for the subcommittee to consider concerning a disbarred, suspended, resigned, or involuntarily inactive lawyer participation with a sandbox entity.

### **RULE OF PROFESSIONAL CONDUCT 5.3.1 [EMPLOYMENT OF DISBARRED, SUSPENDED, RESIGNED, OR INVOLUNTARILY INACTIVE LAWYER]**

In order to understand the regulatory structure of rule 5.3.1, it is helpful to briefly observe how California law differentiates between “active” and “inactive” licensees and the statutory

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<sup>1</sup> Rule 5.3.1(a)(4) defines “resigned member” as “a member who has resigned from the State Bar while disciplinary charges are pending.”

requirement for attorneys or law firms to supervise attorneys who they employ that have resigned, or have been suspended or disbarred.

Under Business and Professions Code section 6125, “no person shall practice law in California unless the person is an active licensee of the State Bar.” Active licensees are “all persons admitted and licensed to practice law in (California) except justices and judges of courts of record during their continuance in office.” Bus. & Prof. Code § 6002. Every State Bar licensee is an “active” licensee unless they voluntarily or involuntarily become inactive, are suspended or disbarred, or resign (with or without disciplinary charges pending). See also, Business and Professions Code section 6133 which provides 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.

Based on the foregoing, if the Scope subcommittee recommends a policy on a “disbarred” attorney’s participation in the sandbox, then that recommendation should clarify whether “disbarred” is narrowly limited to the precise meaning of that term, or if it is intended to be broader and encompass other similarly situated attorneys. This might include: lawyers who are presently suspended;<sup>2</sup> lawyers who have been enrolled involuntarily inactive;<sup>3</sup> and lawyers who have resigned from the State Bar with charges pending.<sup>4</sup>

Rule 5.3.1 imposes duties on lawyers who employ, associate in practice with, or assist a person the lawyer knows is “ineligible”<sup>5</sup> to practice law. These duties include, prior to or at the time of employing the ineligible person, serving upon the State Bar written notice of the employment, including a full description of the ineligible person’s current status with the State Bar. In

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<sup>2</sup> A lawyer may be suspended for a violation of the rules (see Bus. & Prof. Code § 6077 [For a willful breach of any of these rules, the State Bar has the power to . . . recommend to the Supreme Court the suspension from the practice of law . . . ] or for other conduct (see, e.g., rule 9.22 of the Rules of Court [Under Family Code section 17520, the State Bar is authorized to transmit to the Supreme Court on an annual basis the names of those licensees listed by the State Department of Social Services as delinquent in their payments of court-ordered child or family support with a recommendation for their suspension from the practice of law.])).

<sup>3</sup> See Bus. & Prof. Code § 6007 regarding the various circumstances that may give rise to an order enrolling a lawyer involuntarily inactive. For example, this section provides, in part, that: “The State Bar Court shall also enroll a licensee of the State Bar as an inactive licensee in each of the following cases: (1) A licensee asserts a claim of insanity or mental incompetence in any pending action or proceeding, alleging his or her inability to understand the nature of the action or proceeding or inability to assist counsel in representation of the licensee.”

<sup>4</sup> See Bus. & Prof. Code § 6126(b) which, in part, provides that: “Any person who has . . . resigned from the State Bar with charges pending, and thereafter practices or attempts to practice law, advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime. . . .”

<sup>5</sup> Rule 5.3.1(a)(5) defines “ineligible person” as “a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.”

addition, the lawyer must serve written notice upon each client on whose specific matter the ineligible person will work. When the lawyer no longer employs the ineligible person, the lawyer must “promptly serve upon the State Bar written notice of the termination.”

## **PROHIBITED ACTIVITIES**

A lawyer who is employing, associating in practice with, or assisting an eligible person shall not permit the ineligible person to perform certain activities. These activities include:

- Rendering legal consultation or advice to the client;
- Appearing on behalf of a client in a hearing or proceeding before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner or hearing officer;
- Appearing as a representative of the client at a deposition or other discovery matter;
- Negotiating or transacting any matter for or on behalf of the client with third parties;
- Receiving, disbursing or otherwise handling the client’s funds; or
- Engaging in activities that constitute the practice of law.

## **PERMITTED ACTIVITIES**

A lawyer who is employing, associating in practice with, or assisting an eligible person may allow the ineligible person to perform research, drafting or clerical activities, as follows:

- Legal work of a preparatory nature, including legal research, assembling data and other necessary information, drafting pleadings, briefs and other similar documents;
- Communicating directly with clients or third parties regarding scheduling, billing, updates, sending or confirming receipt of correspondence and messages; or
- Attending a deposition or other discovery matter with an active lawyer for the limited purpose of providing clerical assistance to the active lawyer who is appearing on the client’s behalf.

The Rules Revision Commission believed that this rule serves a valuable public protection benefit as well as provides an opportunity for ineligible persons to work in a law office (within the parameters established by the rule) and to assist with their rehabilitation and potential reinstatement to active status. See, [Executive Summary](#) for Proposed Rule of Professional Conduct 5.3.1.

## OPTIONS FOR THE SUBCOMMITTEE TO CONSIDER

At the last subcommittee meeting, it appeared consensus was reached that lawyers who are disbarred, suspended, resigned with charges pending, or are involuntarily inactive should be precluded from any ownership or managerial position with an approved sandbox entity. If the Scope Subcommittee desired to require compliance with rule 5.3.1 in order for a disbarred, suspended, resigned, or involuntarily inactive lawyer to participate in the sandbox as limited by the rule, one option could be to have the sandbox applicant answer whether they are employing such person. If the answer is yes, the applicant would have to attest to employing an active California licensee who would agree to comply with rule 5.3.1 for purposes of the ineligible person's employment with the sandbox entity. For the occurrence where a lawyer employed by an approved sandbox entity later becomes disbarred, suspended, resigns, or involuntarily inactive, consideration could be given to creating a supplemental report form where the sandbox entity would have to provide notice to the regulator of this occurrence and compliance with rule 5.3.1, if applicable.

Other options include: (1) prohibiting a disbarred, suspended, resigned, or involuntarily inactive lawyer from participating in any way in the sandbox; (2) prohibiting a disbarred, suspended, resigned, or involuntarily inactive lawyer from any ownership or managerial position in the sandbox; or, (3) prohibiting a disbarred, suspended, resigned, or involuntarily inactive lawyer from providing legal services, managing the work of those providing legal services, or owning more than 10%<sup>6</sup> of any sandbox entity.

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<sup>6</sup> See Utah Office of Legal Services Innovation, Innovation Office Manual at page 9 stating, in part, that: "the [Utah Supreme Court] determined disbarred lawyers present a high degree of risk of consumer harm;" and that applicants to the Sandbox must confirm that no disbarred lawyers own or control "more than 10% interest in the entity."



# The State Bar of California

## OFFICE OF PROFESSIONAL COMPETENCE

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Date: July 6, 2021

To: Scope Subcommittee Members

From: Toby Rothschild and Andrew Tuft

Subject: II.A. Policy Recommendation re Participation of a Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyers, or Those Convicted of a Felony, in the Sandbox

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### **POLICY RECOMMENDATION RE PARTICIPATION OF A DISBARRED, SUSPENDED, RESIGNED, OR INVOLUNTARILY INACTIVE LAWYERS, OR THOSE CONVICTED OF A FELONY, IN THE SANDBOX**

#### **FOR ATTORNEYS**

Disbarred attorneys are prohibited from practicing law in California pursuant to both a Supreme Court order and state law unless and until they are reinstated by the Supreme Court (see, Bus. & Prof. Code § 6117). The sandbox should not create an alternative to the well-established standards and procedures for a disbarred attorney to seek reinstatement (including Rule 5.445 of the Rules of Procedure of the State Bar of California that states the burden of proof that a disbarred attorney must satisfy to become reinstated). The sandbox rules should match the current law regarding the practice of law by disbarred attorneys. Lawyers who are involuntarily inactive, or who resign with charges pending, are subject to the same restrictions as disbarred attorneys. The same should hold true in the sandbox.

Because the participants in the sandbox are involved in the practice of law, such attorneys should not be involved with a sandbox participant. The only exception to the complete ban would be to allow disbarred attorneys to participate under the supervision of an active attorney to perform those tasks permitted by California Rule of Professional Conduct 5.3.1(c).

Suspended attorneys present a different issue, as the suspension is temporary. The statutory and regulatory restrictions on disbarred attorneys also apply to suspended attorneys. The prohibition should apply only during the term of the suspension.

A felony conviction by an attorney should not be treated differently than for others. If the conviction results in a disbarment or suspension, the provisions governing those actions should apply. If the attorney is reinstated, the conviction should not be automatically disqualifying.

#### **FOR NON-LAWYERS**

A felony conviction of a participant in a sandbox entity should not automatically prohibit the applicant's participation. The nature and timing of the conviction should be considered as part of a background check/character and fitness review.