



The State Bar *of California*

CLOS

II.C. Waiveable Rules
08-29-21 SAGE Meeting
Open Session

WORKING GROUP

DATE: August 17, 2021

TO: Merri Baldwin, Co-Chair, SAGE

FROM: OPC Staff

SUBJECT: SAGE Consideration of Waivable Rules

Per your request, attached please find tables for the Rules of Professional Conduct and for selected provisions of the State Bar Act that categorize, for purposes of a sandbox, attorney conduct standards as those that should be required and those that may be subject to an applicant's proposal to waive or modify.

As a general proposition, OPC staff believes that the sandbox should not permit any and all attorney conduct standards to be waived or modified. Instead, certain attorney conduct standards should be required notwithstanding an applicant's approval to participate in the sandbox.

**WAIVABLE ATTORNEY CONDUCT STANDARDS
TABLE OF RULES OF PROFESSIONAL CONDUCT**

	RULE	WAIVE (W) MODIFY (M) REQUIRED (R)	NOTES
1	1.0 Purpose and Function of the Rules of Professional Conduct	R	purpose as disciplinary rules should not be altered
2	1.0.1 Terminology	R	definitions should be standardized
3	1.1 Competence	M	should not be completely waived; there should be some competence standard required
4	1.2 Scope of Representation and Allocation of Authority	M	should not be completely waived; there should be some standard addressing allocation of authority
5	1.2.1 Advising or Assisting the Violation of Law	R	involves inherently dishonest conduct
6	1.3 Diligence	M	should not be completely waived; there should be some diligence standard required
7	1.4 Communication with Clients	W, M	might be okay to waive or modify depending on the nature of the service provided
8	1.4.1 Communication of Settlement Offers	W, M	might be okay to waive or modify depending on the nature of the service provided
9	1.4.2 Disclosure of Professional Liability Insurance	W, M	might be okay to waive or modify depending on the nature of the service provided
10	1.5 Fees for Legal Services	M	should not be completely waived; there should be some standard required
11	1.5.1 Fee Divisions Among Lawyers	W, M	might be okay to waive or modify depending on the nature of the service provided
12	1.6 Confidential Information of a Client	W, M	might be okay to waive or modify depending on the nature of the service provided
13	1.7 Conflict of Interest: Current Clients	W, M	might be okay to waive or modify depending on the nature of the service provided
14	1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client	W, M	might be okay to waive or modify depending on the nature of the service provided
15	1.8.2 Use of Current Client's Information	M	should not be completely waived; there should be some standard required as this potentially involves "dark patterns"

**WAIVABLE ATTORNEY CONDUCT STANDARDS
TABLE OF RULES OF PROFESSIONAL CONDUCT**

	RULE	WAIVE (W) MODIFY (M) REQUIRED (R)	NOTES
16	1.8.3 Gifts from Clients	W, M	might be okay to waive or modify depending on the nature of the service provided
17	1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client	W, M	might be okay to waive or modify depending on the nature of the service provided
18	1.8.6 Compensation from One Other Than Client	W, M	might be okay to waive or modify depending on the nature of the service provided
19	1.8.7 Aggregate Settlements	W, M	might be okay to waive or modify depending on the nature of the service provided
20	1.8.8 Limiting Liability to Client	R	involves inherently unfair conduct
	1.8.9 Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review	W, M	might be okay to waive or modify depending on the nature of the service provided
21	1.8.10 Sexual Relations with Current Client	R	involves inherently abusive conduct
22	1.8.11 Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) (See also Rule 1.10)	W, M	might be okay to waive or modify depending on the nature of the service provided
23	1.9 Duties to Former Clients	W, M	might be okay to waive or modify depending on the nature of the service provided
24	1.10 Imputation of Conflicts of Interest: General Rule	W, M	might be okay to waive or modify depending on the nature of the service provided
25	1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees	W, M	might be okay to waive or modify depending on the nature of the service provided
26	1.12 Former Arbitrator, Mediator, or Other Third-Party Neutral	W, M	might be okay to waive or modify depending on the nature of the service provided
27	1.13 Organization as Client	W, M	might be okay to waive or modify depending on the nature of the service provided
28	1.15 Safekeeping Funds and Property of Clients and Other Persons	M	should not be completely waived; there should be some standard required

**WAIVABLE ATTORNEY CONDUCT STANDARDS
TABLE OF RULES OF PROFESSIONAL CONDUCT**

	RULE	WAIVE (W) MODIFY (M) REQUIRED (R)	NOTES
29	1.16 Declining or Terminating Representation	W, M (but (a), (c), and (e)(2) are R)	some provisions might be okay to waive or modify depending on the nature of the service provided
30	1.17 Sale of a Law Practice	(see notes)	this rule is likely inapplicable to the sandbox environment as an approved applicant would not likely be allowed to transfer the business and clients to another person or entity
31	1.18 Duties to Prospective Client	W, M	might be okay to waive or modify depending on the nature of the service provided
32	2.1 Advisor	R	involves necessary prescriptive requirement of candor and independent professional judgment
33	2.4 Lawyer as Third-Party Neutral	W, M	might be okay to waive or modify depending on the nature of the service provided
34	2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator	R	involves judicial related conduct or administration of justice duties
35	3.1 Meritorious Claims and Contentions	R	involves inherently unfair or dishonest conduct
36	3.2 Delay of Litigation	R	involves inherently unfair conduct
37	3.3 Candor Toward the Tribunal	R	involves inherently unfair or dishonest conduct
38	3.4 Fairness to Opposing Party and Counsel	R	involves inherently unfair or dishonest conduct
39	3.5 Contact with Judges, Officials, and Employees	R	involves inherently unfair or dishonest conduct
40	3.6 Trial Publicity	R	involves inherently unfair or dishonest conduct
41	3.7 Lawyer as Witness	R	involves inherently unfair or dishonest conduct
42	3.8 Special Responsibilities of a Prosecutor	(see notes)	this rule is likely inapplicable to the sandbox environment as a prosecutorial function would likely not be an eligible proposal
43	3.9 Advocate in Nonadjudicative Proceedings	R	involves inherently unfair or dishonest conduct
44	3.10 Threatening Criminal, Administrative, or Disciplinary Charges	R	involves inherently unfair conduct

**WAIVABLE ATTORNEY CONDUCT STANDARDS
TABLE OF RULES OF PROFESSIONAL CONDUCT**

	RULE	WAIVE (W) MODIFY (M) REQUIRED (R)	NOTES
45	4.1 Truthfulness in Statements to Others	R	involves inherently unfair or dishonest conduct
46	4.2 Communication with a Represented Person	M	should not be completely waived; there should be some ex parte communication standard required
47	4.3 Communicating with an Unrepresented Person	M	should not be completely waived; there should be some standard of candor to unrepresented persons required
48	4.4 Duties Concerning Inadvertently Transmitted Writings	W, M	might be okay to waive or modify depending on the nature of the service provided
49	5.1 Responsibilities of Managerial and Supervisory Lawyers	M	should not be completely waived; there should be some supervision standard required
50	5.2 Responsibilities of a Subordinate Lawyer	M	should not be completely waived; there should be some standard required that addresses a subordinate's duties
51	5.3 Responsibilities Regarding Nonlawyer Assistants	M	should not be completely waived; there should be some supervision standard required
52	5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive	(see notes)	this rule is likely inapplicable to the sandbox environment given that CTJG has approved a recommendation to exclude attorneys who are on a "not entitled to practice" status
53	5.4 Financial and Similar Arrangements with Nonlawyers	W, M	might be okay to waive or modify depending on the nature of the service provided
54	5.5 Unauthorized Practice of Law	W, M (but (a)(1) is R)	some provisions might be okay to waive or modify depending on the nature of the service provided
55	5.6 Restrictions on a Lawyer's Right to Practice	W, M (but (b) is R)	some provisions might be okay to waive or modify depending on the nature of the service provided
56	6.3 Membership in Legal Services Organizations	W, M	might be okay to waive or modify depending on the nature of the service provided
57	6.5 Limited Legal Services Programs	W, M	might be okay to waive or modify depending on the nature of the service provided
58	7.1 Communications Concerning a Lawyer's Services	M	should not be completely waived; there should be some standard required

**WAIVABLE ATTORNEY CONDUCT STANDARDS
TABLE OF RULES OF PROFESSIONAL CONDUCT**

	RULE	WAIVE (W) MODIFY (M) REQUIRED (R)	NOTES
59	7.2 Advertising	M	should not be completely waived; there should be some standard required
60	7.3 Solicitation of Clients	M	should not be completely waived; there should be some standard required
61	7.4 Communications of Fields of Practice and Specialization	R	if a lawyer who is a certified specialist is involved, then that lawyer should be required to comply; uncertified lawyers must also comply with restrictions that involve misleading communications
62	7.5 Firm Names and Letterheads	M	should not be completely waived; there should be some standard required
63	8.1 False Statement Regarding Application for Admission to Practice Law	R	involves inherently dishonest conduct
64	8.1.1 Compliance with Conditions of Discipline	R	involves discipline system/State Bar Court requirements
65	8.2 Judicial Officials	R	involves judicial related conduct or administration of justice duties
66	8.4 Misconduct	R	involves inherently unfair or dishonest conduct
67	8.4.1 Prohibited Discrimination, Harassment and Retaliation	R	involves inherently abusive or dishonest conduct
68	8.5 Disciplinary Authority; Choice of Law	R	Choice of law should be standardized
	TOTAL = 68	W, M = 27 R = 23 M = 15 other = 3	

**WAIVABLE ATTORNEY CONDUCT STANDARDS
TABLE OF STATE BAR ACT SECTIONS**

	CA STATE BAR ACT SECTION AND TITLE	WAIVE (W) MODIFY (M) REQUIRED (R)	RELATED RPC	NOTES
1	6068 Duties of Attorneys Subd. (a) re support laws	R	Rule 8.4 conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation; and certain criminal conduct	involves inherently unfair or dishonest conduct
2	6068 Duties of Attorneys Subd. (b) re maintain respect for courts & judicial officers	R	Rule 8.2 false or reckless statement concerning the qualifications or integrity of a judge Rule 8.4 conduct prejudicial to the administration of justice	involves judicial related conduct or administration of justice duties
3	6068 Duties of Attorneys Subd. (c) re counsel or maintain only actions, proceedings or defenses that are legal or just	R	Rule 1.2.1 shall not counsel a client in conduct that is criminal, fraudulent or a violation of law	involves inherently unfair or dishonest conduct
4	6068 Duties of Attorneys Subd. (d) re use only means consistent with truth & not mislead a judge or judicial officer	R	Rule 3.3 candor to a tribunal	involves inherently unfair or dishonest conduct involves judicial related conduct or administration of justice duties
5	6068 Duties of Attorneys Subd. (e) re maintain a client's confidence and secrets w/ exception for disclosure of information to prevent a criminal act of death or substantial bodily harm	W, M	Rule 1.6 confidential information of a client	might be okay to waive or modify depending on the nature of the service provided
6	6068 Duties of Attorneys Subd. (f) re to advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause	R	Rule 8.4 conduct prejudicial to the administration of justice (also, see 3 series)	involves inherently unfair or dishonest conduct involves judicial related conduct or administration of justice duties

**WAIVABLE ATTORNEY CONDUCT STANDARDS
TABLE OF STATE BAR ACT SECTIONS**

	CA STATE BAR ACT SECTION AND TITLE	WAIVE (W) MODIFY (M) REQUIRED (R)	RELATED RPC	NOTES
7	6068 Duties of Attorneys Subd. (g) re not to encourage either the commencement or continuance of an action or proceeding from any correct motive of passion or interest	R	Rule 1.2.1 shall not counsel a client in conduct that is criminal, fraudulent or a violation of law Rule 1.3 diligence Rule 1.7 conflicting relationships and interests Rule 3.10 improper threats to bring criminal, administrative or disciplinary charges	involves inherently unfair or dishonest conduct involves judicial related conduct or administration of justice duties
8	6068 Duties of Attorneys Subd. (h) re never to reject the cause of the defenseless or oppressed	R	(Compare attorney RPC 1.0 , Comment[5] re aspirational pro bono duty)	involves judicial related conduct or administration of justice duties
9	6068 Duties of Attorneys Subd. (i) re cooperate and participate in a regulatory or disciplinary proceeding against the attorney	R	(Compare Rule 8.1.1 re compliance with conditions of discipline and agreements in lieu of discipline)	involves discipline system/State Bar Court requirements
10	6068 Duties of Attorneys Subd. (j) re comply with section 6002.1 (licensee records)	R		involves discipline system/State Bar Court requirements
11	6068 Duties of Attorneys Subd. (k) re comply with all conditions of any disciplinary probation	R	Rule 8.1.1 compliance with conditions of discipline and agreements in lieu of discipline	involves discipline system/State Bar Court requirements
12	6068 Duties of Attorneys Subd. (l) re keep all agreements made in lieu of discipline	R	Rule 8.1.1 compliance with conditions of discipline and agreements in lieu of discipline	involves discipline system/State Bar Court requirements
13	6068 Duties of Attorneys Subd. (m) re respond promptly to reasonable status inquiries by clients and keep clients informed of significant developments	W, M	Rule 1.4 communication with clients	might be okay to waive or modify depending on the nature of the service provided

**WAIVABLE ATTORNEY CONDUCT STANDARDS
TABLE OF STATE BAR ACT SECTIONS**

	CA STATE BAR ACT SECTION AND TITLE	WAIVE (W) MODIFY (M) REQUIRED (R)	RELATED RPC	NOTES
14	6068 Duties of Attorneys Subd. (n) re provide copies to clients of certain documents as prescribed in the rules	W, M	Rule 1.4 communication with clients, including requests for copies of significant documents	might be okay to waive or modify depending on the nature of the service provided
15	6068 Duties of Attorneys Subd. (o) re w/in 30-days, self-report to the State Bar certain enumerated occurrences (e.g., the bringing of an indictment or information charging a felony against the attorney)	R		involves discipline system/State Bar Court requirements
16	6090.5 Attorney/Client Agreement Not to File Complaint-Cause for Discipline	R	Rule 5.6 shall not participate in offering or making an agreement that precludes the reporting of a rule violation	involves discipline system/State Bar Court requirements
17	6103.5 Communication of Written Offer of Settlement to Client	W, M	Rule 1.4.1 communication of settlement offers	might be okay to waive or modify depending on the nature of the service provided
18	6103.6 re prohibited dual compensation of a lawyer serving as trustee (incorporates by reference Probate Code sec. 15687)	W, M	(Compare Rule 1.5 re illegal fees)	might be okay to waive or modify depending on the nature of the service provided
19	6103.7 Report of Suspected Immigration Status Cause for Discipline	R	(Compare Rule 3.4 re improperly causing a witness to be unavailable; Rule 8.4 re conduct prejudicial to the administration of justice; and Rule 3.10 re improper threats to bring criminal, administrative or disciplinary charges)	involves inherently unfair or dishonest conduct involves judicial related conduct or administration of justice duties
20	6104 Appearing for Party without Authority	R	Rule 3.3 misleading a tribunal	involves inherently unfair or dishonest conduct involves judicial related conduct or administration of justice duties

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TABLE OF STATE BAR ACT SECTIONS**

	CA STATE BAR ACT SECTION AND TITLE	WAIVE (W) MODIFY (M) REQUIRED (R)	RELATED RPC	NOTES
21	6105 Permitting Misuse of Name	R	Rule 5.1 and 5.3 supervision Rule 5.5 aiding unauthorized practice	involves inherently unfair or dishonest conduct
22	6106 Moral Turpitude, Dishonesty or Corruption Irrespective of Criminal Conviction	R	Rule 8.4 conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation; and certain criminal conduct	involves inherently unfair or dishonest conduct
23	6106.1 Advocacy of Overthrow of Government	R	(Compare Rule 8.4 re certain criminal conduct)	involves inherently unfair or dishonest conduct
24	6106.2 re abusive ADA construction defect demand letters (incorporates by reference Civ. Code sec. 55.31 or 55.32)	R	Rule 1.2.1 shall not counsel a client in conduct that is criminal, fraudulent or a violation of law	involves inherently unfair or dishonest conduct involves judicial related conduct or administration of justice duties
25	6106.3 re abusive mortgage loan modification conduct (incorporates by reference Civ. Code sec. 2944.6)	R	Rule 1.1 Competence Rule 1.2.1 shall not counsel a client in conduct that is criminal, fraudulent or a violation of law Rule 1.5 illegal fees.	involves inherently unfair or dishonest conduct
26	6106.5 Insurance Claims; Fraud (incorporates by reference Ins. Code sec. 1871.4 & Penal Code sec. 550)	R	Rule 8.4 conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation; and certain criminal conduct	involves inherently unfair or dishonest conduct
27	6106.7 Professional Sports Service Contracts (incorporates by reference Miller-Ayala Athlete Agents Act, Labor Code sec. 18895)	W, M	Rule 1.5 illegal fees	might be okay to waive or modify depending on the nature of the service provided
28	6106.9 Sexual Relations Between Attorney and Client	R	Rule 1.8.10 sexual relations with client	involves inherently unfair or dishonest conduct

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TABLE OF STATE BAR ACT SECTIONS**

	CA STATE BAR ACT SECTION AND TITLE	WAIVE (W) MODIFY (M) REQUIRED (R)	RELATED RPC	NOTES
29	6125 Unlawful practice of law	W, M	Rule 5.5 unauthorized practice of law	might be okay to waive or modify depending on the nature of the service provided
30	6126 Unlawful practice of law	W, M (but (b), (c), and (d) are R)	Rule 5.5 unauthorized practice of law	some provisions might be okay to waive or modify depending on the nature of the service provided
31	6128 Deceit, Collusion, Delay of Suit and Improper Receipt of Money as Misdemeanor (Note: imposes a criminal penalty but has been used for disciplinary charges.)	R	Rule 8.4 conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation; and certain criminal conduct Rule 3.3 misleading a tribunal Rule 1.3 diligence	involves inherently unfair or dishonest conduct
32	6129 Buying Claim as Misdemeanor (Note: imposes criminal penalty.)	W, M	Rule 8.4 conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation; and certain criminal conduct Rule 1.7 conflicting relationships and interests	might be okay to waive or modify depending on the nature of the service provided
33	6130 Disbarred or Suspended Attorney Suing as Assignee (Note: no statement of penalty.)	(see notes)	Rule 8.4 conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation; and certain criminal conduct Rule 1.7 conflicting relationships and interests	this rule is likely inapplicable to the sandbox environment given that CTJG has approved a recommendation to exclude attorneys who are on a “not entitled to practice” status

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TABLE OF STATE BAR ACT SECTIONS**

	CA STATE BAR ACT SECTION AND TITLE	WAIVE (W) MODIFY (M) REQUIRED (R)	RELATED RPC	NOTES
34	6131 Aiding Defense Where Partner or Self has Acted as Public Prosecutor; Misdemeanor and Disbarment	R	Rule 1.6 confidential information of a client Rule 1.7 and 1.9 conflicting relationships and interests	involves judicial related conduct or administration of justice duties
35	6132 Law Firm Name-Removal of Name of Disciplined Attorney (Note: this code section does not include a statement of a penalty/remedy.)	R	Rules 7.1, 7.2 and 7.4 communications, advertising, and firm names Rule 5.5 aiding unauthorized practice Rule 5.3.1 employment of disbarred, suspended, resigned, or involuntarily inactive lawyers or licensed paraprofessionals	involves inherently unfair or dishonest conduct
36	6133 Supervision of Disciplined Attorney Activities by Law Firms	(see notes)	Rules 7.1, 7.2 and 7.4 communications, advertising, and firm names Rule 5.1 and 5.3 supervision Rule 5.5 aiding unauthorized practice Rule 5.3.1 employment of disbarred, suspended, resigned, or involuntarily inactive lawyers or licensed paraprofessionals	this rule is likely inapplicable to the sandbox environment given that CTJG has approved a recommendation to exclude attorneys who are on a “not entitled to practice” status
37	6146 – 6149 re MICRA and written fee agreement requirements	M (MICRA) W, M (written fee k)	Rule 1.5.2 written agreement and informed consent Rule 1.5 Illegal fees	MICRA should not be completely waived; there should be some standard required written fee K might be okay to waive or modify depending on the nature of the service provided

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TABLE OF STATE BAR ACT SECTIONS**

	CA STATE BAR ACT SECTION AND TITLE	WAIVE (W) MODIFY (M) REQUIRED (R)	RELATED RPC	NOTES
38	6157 – 6159.2 re legal advertising, including electronic media advertising and retention of copies of advertisements	W, M	Rules 7.1 – 7.6 communications, solicitation, advertising, and firm names	should not be completely waived; there should be some standard required
39	6155 & 6156 re certified lawyer referral services, including a prohibition that no attorney shall accept referrals from a service that is not registered with the State Bar	W, M	Rule 5.4(a)(4) permitted fee sharing with an authorized paraprofessional referral service	might be okay to waive or modify depending on the nature of the service provided
40	6175 – 6177 re sale of financial products to client by a lawyer acting as a fiduciary	R	Rule 1.8.1 business transactions with a client and pecuniary interests adverse to a client	involves inherently unfair or dishonest conduct
	TOTAL = 40	W, M = 12 R = 26 M = 1 other = 2		