

**June 9, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:**

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

**ASSIGNMENT SUBMISSION DEADLINE:** The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15<sup>th</sup> has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15<sup>th</sup> comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

**LIST OF ASSIGNED RULES** (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

**1.0.1** (Agenda Item III.B)

**1.7** (Agenda Item III. J) Co-Lead w/Mohr

1.8.7 (Agenda Item III.S)  
1.16 (Agenda Item III.DD)  
8.3 (Agenda Item III.VVV)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

**Attached:**

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - KEHR - DFT1 (06-09-10).pdf  
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM.doc  
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).pdf  
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).doc  
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.pdf  
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.doc  
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.pdf  
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.doc  
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.pdf  
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.doc  
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).pdf  
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).doc

**June 14, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:**

Bob,

Additional comments in opposition or recommending modifications have been received for the following rules previously assigned and updated commenter tables are attached. The comment compilations for these rules are attached, and have also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

1.7 (Agenda Item III. J) Co-Lead w/Mohr (NOTE: We haven't added the synopsis for the Bradley Paulsen comment to the commenter chart yet, but will do so soon.)

**1.8.7 (Agenda Item III.S)  
8.3 (Agenda Item III.VVV)**

If the drafters prepared and shared with staff an updated public commenter chart with proposed RRC responses, we have tried to use that version for this updated assignment. Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT1.1 (06-14-10).doc  
RRC - 3-310 [1-8-7] - Public Comment Complete - REV (06-14-10).pdf  
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.1 (06-14-10)RLK-KEM-AT.doc  
RRC - 3-310 [1-7] - Public Comments Complete - REV (06-14-10).pdf  
RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1.1 (6-14-10).doc  
RRC - 1-120 [8-3] - Public Comment Complete - REV (06-14-10).pdf

**June 14, 2010 Kehr E-mail to Drafters (Peck, Tuft & Vapnek), cc Chair & Staff:**

Ellen, Mark, and Paul: I am forwarding Lauren's message with the Rule 8.3 attachments b/c Ellen was not copied on it. I also have attached a revised draft of the commenter chart in which I've followed Kevin's convention of highlighting in yellow all new or revised language.

Although the S.D. comment is a resubmission of its earlier letter, I have rewritten the RRC Response b/c I don't think the prior version was accurate. You will see my change by comparing XDFT 1.1 and 1.2.

The O.C. comment is interesting. It is, in substance, that the Rule's standard of fitness for office might suggest to a lawyer that the standard is high, and that judicial misconduct in a single matter might not rise to that level. Given that the purpose of proposed Rule 8.3(c) is to encourage reporting, I think that O.C. has a point. Harry is fond of asking what harm the change could do, and I don't see any. The broadening caused by the new language seems apparent to me, and I think requires no explanation.

Comments? Suggestions?

***Attached:***

RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1.2 (06-14-10).doc  
RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1.1 (06-14-10).doc  
RRC - 1-120 [8-3] - Public Comment Complete - REV (06-14-10).pdf

**June 15, 2010 Peck E-mail to Drafters, cc KEM:**

I agree with Bob's proposed change.

**June 15, 2010 Difuntorum E-mail to RRC:**

Commission Members:

More public comments keep arriving. Here's another one that you can begin addressing. It is from the State Bar Law Practice Management and Technology Section. The 9 rules addressed in the letter and the responsible lead drafters and codrafters are listed below. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions in response to the public comments received. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

1.1 = VAPNEK (Peck, Ruvolo)  
1.5 = VAPNEK (Ruvolo)  
1.16 = KEHR (Foy, Melchior)  
5.1 = TUFT (Martinez, Peck)  
4.4 = MARTINEZ/TUFT  
7.3 = MOHR (Julien, Ruvolo)  
8.3 = KEHR (Peck, Tuft, Vapnek)  
8.4.1 = PECK (Martinez)  
8.5 = MELCHIOR (Lampert, Peck)

**Attached:**

RRC - 1-400 [7-3] - 06-15-10 LPMT [Hoffman] Comment.pdf  
RRC - [4-4] - 06-15-10 LPMT [Hoffman] Comment.pdf  
RRC - 1-310X [5-1] - 06-15-10 LPMT [Hoffman] Comment.pdf  
RRC - 3-700 [1-16] - 06-15-10 LPMT [Hoffman] Comment.pdf  
RRC - 3-110 [1-1] - 06-15-10 LPMT [Hoffman] Comment.pdf  
RRC - 4-200 [1-5] - 06-15-10 LPMT [Hoffman] Comment.pdf  
RRC - 1-100 [8-5] - 06-15-10 LPMT [Hoffman] Comment.pdf  
RRC - 2-400 [8-4-1] - 06-15-10 LPMT [Hoffman] Comment.pdf  
RRC - 1-120 [8-3] - 06-15-10 LPMT [Hoffman] Comment.pdf

**June 16, 2010 Kehr E-mail to Drafters, cc Chair, Difuntorum, McCurdy & Lee:**

Ellen, Mark, and Paul: OCTC has commented on Rule 8.3. Here is my reply, which should be added to the comments I made in my 6/14/10 email (with which Ellen agreed by way of her email late last night).

OCTC's only Rule 8.3 comment is that Comments [1], [3], and [4] are more appropriate for treatises, law review articles, and ethics opinions.

- I have no strong feeling about Comment [1]. I suppose it was intended as part of the encouragement to report lawyers when not obligated to do so, but if so it adds little and I think could be removed.
- Comment [3] is an important cross-reference. Particularly given the vastly increased complexity of the proposed rules, I think these cross-references should be used wherever possible.

- Comment [4] addresses what might be an obvious point, but one that is important enough not to be assumed. I would keep it.

I think that is everything. Any comments or suggestions?

**June 16, 2010 Kehr E-mail to Drafters, cc Chair, Difuntorum, McCurdy, Lee & KEM:**

Ellen, Mark, and Paul: I now have had the opportunity to look at the Hoffman letter. I won't try to summarize it, which I don't think can be done easily as it raises most of the arguments made against mandatory reporting during the Commission's deliberations plus a couple of new ones. I also won't try to provide the counter arguments here in the limited time available. I will need to do this for the commenter chart after our agenda deadline. Despite my sympathy with the views expressed, I do see two important errors in the letter. One is that it confuses knowledge of an act (I heard X solicit a bribe) with the separate issue of whether I can predict whether X will be convicted of a crime for having committed that act (or even be prosecuted). I've tried to find some way of explaining this in a Comment, but I find their argument so far fetched that I can't think of a way of making the point without seeming fatuous. The second is that it overlooks paragraph (d), which makes reporting secondary to the lawyer's performance of the duties owed to the lawyer's client or former client.

On balance, I do not recommend making any change in rule 8.3 or its Comment as a result of this comment letter.

Comments? Suggestions?

**June 16, 2010 Kehr E-mail to Drafters, cc Chair, Difuntorum, McCurdy & Lee:**

Ellen, Mark, and Paul: OCTC has commented on Rule 8.3. Here is my reply, which should be added to the comments I made in my 6/14/10 email (with which Ellen agreed by way of her email late last night).

OCTC's only Rule 8.3 comment is that Comments [1], [3], and [4] are more appropriate for treatises, law review articles, and ethics opinions.

- I have no strong feeling about Comment [1]. I suppose it was intended as part of the encouragement to report lawyers when not obligated to do so, but if so it adds little and I think could be removed.
- Comment [3] is an important cross-reference. Particularly given the vastly increased complexity of the proposed rules, I think these cross-references should be used wherever possible.
- Comment [4] addresses what might be an obvious point, but one that is important enough not to be assumed. I would keep it.

I think that is everything. Any comments or suggestions?

**June 16, 2010 Vapnek E-mail to Drafters, cc Chair & Staff:**

I don't know if I will have time to review but will try; I haven't done any of my own assignments. I can't find the Hoffman letter; it's not on the Google website that is supposed to have all the comments.

**June 16, 2010 Difuntorum E-mail to Vapnek, cc Drafters, Chair & Staff:**

Attached is the Hoffman letter (a.k.a, Law Practice Management & Technology Section letter). It was sent out by email last night. Due to the number of comments received, there is a little delay in updating the google site.

**Attached:**

RRC - 1-120 & 1-500B [8-3] - 06-14-10 LPMT (Hoffman) Comment.pdf

**June 16, 2010 Peck E-mail to Kehr, cc Drafters, Chair & Staff:**

I am against the reporting requirement, but I agree that unless there is a wide spread opposition to it, no change should be made. We simply do not have time to re-hash the same arguments that resulted in the prior vote. So go ahead with your plan, Bob.

**June 16, 2010 Vapnek E-mail to Drafters, cc Chair & Staff:**

I have had an opportunity to read the entire letter. I think we have made a careful choice in (a) and nothing Hoffman says leads me to change my mind. Also even if marijuana possession in a Federal complaint would be a felony, it does not raise any question as to the lawyer's honesty, etc. Also, having reread In re Himmel not so long ago, I now realize that Himmel wasn't the poor slob who followed his client's wishes and got screwed for doing so as he has been portrayed. Anyway, I vote that we not make any change in the rule as it stands now.

**June 16, 2010 Tuft E-mail to Kehr, cc Drafters, Chair & Staff:**

I agree.

**June 16, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:**

Bob,

You may already be aware of these, but I just realized I didn't note the following comments in my earlier message to you. I'm really sorry, I know how difficult all of this must be to keep up with, especially under the time-constraints we're giving you. . . .

**1.0.1** (Agenda Item III.B) – **ALSO:** OCTC; and, Zitrin/Law Professors (comment sent by Randy's 6/15/10 e-mail)

**1.7** (Agenda Item III.J) – Co-Lead w/Mohr – **ALSO:** OCTC; and, Zitrin/Law Professors (comment sent by Randy's 6/15/10 e-mail)

**1.8.7** (Agenda Item III.S) **ALSO:** OCTC (comment sent by Randy's 6/15/10 e-mail)

**RRC – Rule 8.3 [1-120 & 1-500(B)]  
E-mails, etc. – Revised (6/21/2010)**

**1.16** (Agenda Item III.DD) **ALSO:** OCTC (comment sent by Randy's 6/15/10 e-mail)  
**8.3** (Agenda Item III.VVV) **ALSO:** Law Practice Management & Technology Section (comment sent by Randy's 6/15/10 e-mail)

Fingers crossed that you have already picked up on these comments.

**June 21, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:**

Bob,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

**If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22<sup>nd</sup>.**

***Attached:***

RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-21-10).doc  
RRC - [5-7] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)-RD.doc  
RRC - 3-310 [1-8-6] - Public Comment Chart - By Commenter - XDFT2 0(6-21-10)ML.doc  
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc  
RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 4-210 [1-8-5] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

**June 22, 2010 Kehr E-mail to Difuntorum & McCurdy, cc Drafters, Chair & Staff:**

Proposed public comment chart attached.

***Attached:***

RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML-RLK.doc

**Rule 8.3 Reporting Professional Misconduct.  
[Sorted by Commenter]**

TOTAL = 4 Agree = 1  
Disagree = 1  
Modify = 2  
NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Law Practice Management and Technology Section, State Bar ("LPMT")	D	Yes	(a)	<p>LPMT recommends that the mandatory reporting requirement be removed for the following reasons and offer alternative language to ¶(a) and to ¶(b) to conform it to the proposed changes to ¶(a).</p> <p>The State Bar should not predicate a rule on the assumption that a lawyer should be able to "know" when a "felonious criminal act" has been committed. We assume that Proposed Rule 8.3(a) is not directed to those circumstances in which the accused lawyer has been convicted of a felony, yet no one has notified the State Bar of that conviction. The RRC has recognized the importance of the principle that only a jury can "know" whether someone has committed a felonious criminal act noting that before recognizing that unlawful conduct has occurred, a tribunal of competent jurisdiction shall have first adjudicated the allegation of unlawful conduct and found that such unlawful conduct occurred. (Compare Proposed rule 8.3(a) with Proposed rule 8.4.1(c) and Comment [3]. Note also that Proposed Rule 8.4.1 concerns adjudication of allegations generally emanating from a <i>civil</i> complaint.</p>	The Commission disagrees and did not make the requested change, which the Commission believes evidences confusion between committing an act and being convicted of a crime. If for example, a lawyer knows that another lawyer has solicited a bribe, the lawyer should say so without regard to whether the other lawyer ever is prosecuted for the act or convicted, events that might not occur for any number of reasons that could be immaterial to professional discipline. The Commission also doesn't believe that differences between the laws of different jurisdictions or an individual lawyer's lack of sophistication in the nuances of criminal law present any risk of discipline to lawyers under the proposed mandatory reporting requirement of paragraph (a).

<sup>1</sup> A = AGREE with proposed Rule      D = DISAGREE with proposed Rule      M = AGREE ONLY IF MODIFIED      NI = NOT INDICATED

**Rule 8.3 Reporting Professional Misconduct.  
[Sorted by Commenter]**

TOTAL = 4 Agree = 1  
Disagree = 1  
Modify = 2  
NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>A verdict in a civil matter requires a much lower standard of proof than the standard implicated by the context to which Proposed Rule 8.3 would apply, namely guilt beyond a reasonable doubt on a <i>criminal</i> felony charge.). The typical lawyer may be expected to know other types of rules or principles, but knowledge of criminal law should not be imputed to all lawyers. A lack of certainty could result because CA may treat certain acts as felonies but federal law does not, or vice versa (e.g., attorney conviction for a drug offense raises substantial questions re the lawyer’s fitness, but whether possession of a certain quantity of marijuana is a felony – or even a crime – in CA depends on who arrests him. A lawyer – who has not committed any offense – should not risk being charged with a violation of the Rules of Professional Conduct because the State Bar alleges that he or she knew or should have known (beyond a reasonable doubt) that:</p> <ol style="list-style-type: none"> <li>1. Another lawyer committed a specific act.</li> <li>2. The criminal law of California and/or of the United States has deemed commission of</li> </ol>	

**Rule 8.3 Reporting Professional Misconduct.  
[Sorted by Commenter]**

TOTAL = 4 Agree = 1  
Disagree = 1  
Modify = 2  
NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>that act a felony.</p> <p>3. There are no surrounding circumstances or defenses that would lessen the seriousness of the offense.</p> <p>4. A jury would reach the same conclusion.</p> <p>Although we laud the Commission's goal, it may be proposing a solution where the problem - if it exists – is <i>de minimus</i>.</p> <p>The mandatory nature of the reporting requirement could prejudice the client and damage the attorney-client relationship by compelling the client to be a participant in the disciplinary process without the client's consent and even over the client's objections.</p> <p>For the foregoing reasons, we recommend that Proposed Rule 8.3(a)&amp;(b) and Comments [1]-[3] be amended as follows:</p> <p>(a) A lawyer <del>who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall</del> may, but is not required to, inform the appropriate disciplinary authority <del>that another lawyer has committed a felonious</del></p>	<p>Because of the client-protection standard of proposed paragraph (d), the Commission does not believe that the otherwise mandatory reporting requirement of paragraph (a) presents any risk to clients.</p>

**Rule 8.3 Reporting Professional Misconduct.  
[Sorted by Commenter]**

TOTAL = 4 Agree = 1  
Disagree = 1  
Modify = 2  
NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p><a href="#">criminal act.</a></p> <p>(b) <del>Except as required by paragraph (a), a</del> A lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.</p> <p><u>COMMENT</u></p> <p>[1] In deciding whether to report another lawyer's violation of these Rules or the State Bar Act <del>that is not required by paragraph (a),</del> a lawyer should consider, <del>[insert comma]</del> among other things, <del>[insert comma]</del> whether the violation raises a substantial question as to <del>another</del> lawyer's honesty, trustworthiness, <del>[insert comma]</del> or fitness as a lawyer.</p> <p>[2] This Rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. See, e.g., Business and Professions Code section 6068(o). <del>In addition, a lawyer is not obligated to report a felonious criminal act under paragraph (a) committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against</del></p>	

**Rule 8.3 Reporting Professional Misconduct.  
[Sorted by Commenter]**

TOTAL = 4 Agree = 1  
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Modify = 2  
NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p><del>self-incrimination.</del> In addition, under paragraph (a), a lawyer should not report a felonious criminal act committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.</p> <p>[3] Even if a lawyer is permitted <del>or required</del> to report under this Rule, the lawyer must not threaten to file criminal, administrative, <del>[insert comma]</del> or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.</p>	
4	Office of Chief Trial Counsel ("OCTC")	A	Yes		OCTC believes that Comments [1], [3] and [4] are more appropriate for treatises, law review articles, and ethics opinions.	The Commission disagrees and has not made the requested changes. It believes that Comment [1] provides useful guidance, that Comment [3] provides rule cross-reference that is particularly important given the increased complexity of the proposed rules as compared with the current California rules, and that Comment [4] addresses what might be an obvious point but one that is important enough not to be assumed.
2	Orange County Bar Association ("OCBA")	M	Yes		OCBA agrees with paragraph (c), which states that a lawyer who knows that a judge or other adjudicative officer has committed a violation of applicable rules of judicial conduct that raises a substantial question as to that	The OCBA comments says, in substance, that the MR language in proposed paragraph (c) – that a lawyer knows “that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s

**Rule 8.3 Reporting Professional Misconduct.  
[Sorted by Commenter]**

TOTAL = 4 Agree = 1  
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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>person's fitness for office may, but is not required to, report the violation to the appropriate authority. The OCBA recommends, however, that the words "or to hear a matter" be added after the phrase "fitness for office," as "fitness for office" appears to be too restrictive a term and would not include situations where the judge or judicial officer has acted or threatens to act improperly on only one occasion and only on a specified matter, but may still be otherwise fit for office.</p>	<p>fitness for office" – might be read narrowly by some lawyers as requiring any over-all conclusion about the judge's qualities in general that might limit reporting for a single known act of misconduct. Because the purpose of paragraph (c) is to encourage reporting of judicial misconduct, the Commission agrees with OCBA and has made the change it suggested.</p>
1	San Diego County Bar Association	M	Yes		<p>Comment [2] would be clearer if it was changed to use a list format.</p> <p>The rule also should address the reporting of judicial misconduct.</p>	<p>Commission agreed and revised Comment [2].</p> <p>The draft does so in paragraph (c). As explained in the Rule comparison chart, the Commission recommends that judicial reporting be permissive rather than mandatory to assure that client interests remain paramount.</p>

## **Rule 8.3 Reporting Professional Misconduct** (Commission's Proposed Rule – Clean Version)

- (a) A lawyer who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall inform the appropriate disciplinary authority.
- (b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.
- (c) A lawyer who knows that a judge or other adjudicative officer has committed a violation of applicable rules of judicial conduct that raises a substantial question as to that person's fitness for office may, but is not required to, report the violation to the appropriate authority.
- (d) This Rule does not authorize a lawyer to report misconduct if the lawyer is prohibited from doing so by the lawyer's duties to a client, a former client or by law. Such prohibitions include, but are not limited to, the lawyer's duty not to disclose (i) information otherwise protected by Rule 1.6, Rule 1.9, or Business and Professions Code section 6068(e); (ii) information gained by a lawyer or judge while participating in an approved lawyers assistance program; (iii) information gained during a mediation; (iv) information subject to a confidential protective order; or (v) information otherwise protected under laws governing fiduciaries.
- substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.
- [2] This Rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. See, e.g., Business and Professions Code section 6068(o). In addition, a lawyer is not obligated to report a felonious criminal act under paragraph (a) committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.
- [3] Even if a lawyer is permitted or required to report under this Rule, the lawyer must not threaten to file criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.
- [4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the lawyer-client relationship.
- [5] A lawyer may not be a party to or participate in offering or making an agreement that would violate Business and Professions Code section 6090.5.

### **COMMENT**

- [1] In deciding whether to report another lawyer's violation of these Rules or the State Bar Act that is not required by paragraph (a), a lawyer should consider among other things whether the violation raises a