

# Proposed Rule 8.3 [1-120 & 1-500(B)] ‘Reporting Professional Misconduct’

(Draft #4.1, 7/3/2007)

**Summary:** Proposed Rule 8.3 permits but does not require a lawyer to report misconduct of another lawyer. It rejects the counterpart Model Rule’s mandatory reporting duty. See Introduction. The Rule also carries forward the prohibition in Bus. & Prof. Code § 6090.5 and current rule 1-500(B) against agreeing not to report violations of the Rules. See Explanation of Changes for paragraph (b).

<b>Comparison with ABA Counterpart</b>	
<b>Rule</b>	<b>Comment</b>
<input type="checkbox"/> ABA Model Rule substantially adopted <input checked="" type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input checked="" type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

Existing California Law

Rules RPC 1-120, 1-500(B)

Statute Bus. & Prof. Code 6090.5.

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

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Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption \_\_\_\_\_

Opposed Rule as Recommended for Adoption \_\_\_\_\_

Abstain \_\_\_\_\_

Approved on Consent Calendar

Approved by consensus

Minority/Position Included on Model Rule Comparison Chart:  Yes  No

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See Introduction.

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 8.3\* Reporting Professional Misconduct

December 2008

(Draft rule following consideration of public comment)

### INTRODUCTION:

1. Proposed Rule 8.3 would add new disciplinary standards not currently found in the California rules in any form. Paragraph (a) of proposed Rule 8.3 states a lawyer may, but is not required to, report misconduct of another lawyer. It thus differs from the mandatory reporting requirement in ABA Model Rule 8.3 and most states. The Commission believes that a balancing of the policies involved favors permissive reporting.
2. The Commission agrees with the concepts that the self-regulation of the legal profession requires each lawyer to be vigilant for ethical violations, and that lawyers should be encouraged to report the misconduct of other lawyers, but it believes that this standard should not be mandatory. There are several reasons for rejecting a mandatory reporting requirement. These include the following:
  3. First, mandatory reporting is inconsistent with the lawyer's duty of undivided loyalty to his or her client. This important client-protection principle is enforced more robustly in California than under the Model Rules, and the Commission supports maintaining the obligation of lawyers to focus principally on client welfare and interests. See *Flatt v. Superior Court*, 9 Cal.4th 281, 289 (1994) ["A lawyer's fiduciary duty of loyalty is to protect the client in every possible way and not to assume a position adverse or antagonistic to his or her client without the client's free and intelligent consent given after full knowledge of all the facts and circumstances. Absent such informed consent, a lawyer is precluded from assuming any relation which would prevent him from devoting the lawyer's entire energies to the client's interests."] Cf. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) [lawyer suspended who abided by client's directive not

\* Proposed Rule, Draft 4.1 (7/3/07).



*INTRODUCTION (Continued):*

to report her former counsel's misconduct]. As exemplified by Himmel, mandatory lawyer reporting compels the client to be a participant in the disciplinary process without the client's consent and even over the client's objections. The Commission considers the client loyalty issue paramount. Mandatory reporting of another lawyer's misconduct could prejudice the reporting lawyer's client, e.g., by: (i) disclosing the client's confidential information; (ii) interfering with the pursuit of the client's legitimate objectives; (iii) implicating the client in wrongdoing; and (iv) as mentioned below (see ¶. 9 of this Introduction), embroiling the client as a witness in the disciplinary proceedings.

4. Second, mandatory reporting creates the risk that lawyers will be subject to unexpected disciplinary charges because of the vagueness of the Rule 8.3 standard of a "substantial question" (Model Rule 1.0(l) defines "substantial" as "... of clear and weighty importance.").

5. Third, lawyers would be at risk of a third-party civil claim for placing a client's interests first or for arguably misunderstanding what is meant by a "substantial" question about another lawyer's honesty, trustworthiness, or fitness. In addition, California's mandatory self-reporting requirement (see Comment [3], below) avoids all the uncertainties of the Model Rule, and it has been described as a substitute for the Model Rule (See Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 Geo. J. Legal Ethics 259, 264 n.18 and accompanying text (2003).

6. Fourth, the Commission is not aware of any evidence of an underreporting of lawyer misconduct in California. To the contrary, statistics in the 2007 Report on the State Bar of California Discipline System suggest that the volume of lawyer complaints already strains the disciplinary system.

7. Fifth, the mandatory nature of the Model Rule would create a potential conflict with the duty of confidentiality the lawyer might have in another rule, such as might happen with information a lawyer were to learn while serving as a mediator. For all of these reasons, tThe Commission therefore believes that the report obligation should be permissive and left to the exercise of a lawyer's professional judgment; a lawyer's fitness to practice law is not called into question by a decision to not report another person's ethical violation. This view is implemented in proposed paragraph (a), below.

8. Georgia has adopted a version of this Rule that, like the Commission's recommendation, is permissive and not mandatory, but that also

*INTRODUCTION (Continued):*

the lawyer who makes the Rule 8.3 report [but overlooks the civil risk to a lawyer who exercises judgment to not report]; and (iii) adds an extremely limited self-reporting obligation [limited to a lawyer who is disciplined in another jurisdiction. Cf. Comment [3], below]; ~~and (iv) add a reporting obligation for the criminal prosecutor who successfully prosecutes a lawyer.~~ A number of jurisdictions have reacted to the mandatory nature of the Model Rule by excepting information learned in certain circumstances, such as by participating in a lawyer assistance program. Ohio has made a major change by limiting the duty only to unprivileged information. New York's Rule 8.3 (effective 4/1/09), like the Commission's recommendation, eliminates the duty to report on judicial misconduct. ~~The Commission has not yet studied the Kentucky proposal, of which it just recently became aware, but it intends to do so before the proposed Rules are distributed for final public comment.~~

9. In addition to the ABA concept that lawyer-self-regulation implies an obligation on all lawyers to report misconduct by other lawyers, which is mentioned above, proponents of mandatory reporting argue that lawyers often are in the best position to identify the misconduct of other lawyers. While this might be true sometimes, with most disciplinary charges, it is only the client who can be a material, competent witness against the lawyer, and the Commission believes this means that the offending lawyer's client should determine whether or not to report the misconduct; that person otherwise might be drawn into disciplinary proceedings in a way that he or she does not wish, for example, because of a desire to protect his or her confidential information. Washington and Georgia have rejected mandatory reporting and instead have permissive reporting obligation along the lines of the Commission's proposal.

10. Paragraph (b) continues the prohibition found in current California Rule 1-500(B) against agreements not to report violations. Following public comment, some revisions were made for clarity and a comment added to emphasize that this new Rule is not intended to abrogate a lawyer's obligations under California Rule 5-100 ("Threatening Criminal, Administrative, or Disciplinary Charges")

<p align="center"><u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.</p>	<p><del>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.</del></p>	<p>As discussed in detail in the Introduction, the Commission believes that a balancing of the policies involved favors permissive reporting over mandatory reporting. Therefore, the Commission recommends substitution of its proposed paragraph (a), providing for permissive reporting, for the mandatory reporting requirement in Model Rule 8.3(a).</p>
	<p><a href="#">(a) A lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act unless precluded by the lawyer's duties to a client, or a former client, or by law.</a></p>	<p>See Explanation of Changes for deleted paragraph (a) of Model Rule 8.3, above.</p>
<p>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</p>	<p><del>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.</del></p>	<p>The Model Rule expands the scope of the concept of lawyer self-regulation to include a duty to report judicial misconduct. The Commission does not agree that there is any such connection. In addition, and to a far greater extent than might be true with a lawyer's decision to report under paragraph (a), a lawyer's decision to report judicial misconduct could undermine the lawyer's ability to represent other clients in the jurisdiction, including other current clients – and this might be particularly true in California's many smaller counties. The Commission believes it would be unduly harsh to subject a lawyer to the threat of discipline for deciding not to report judicial misconduct because of concerns about how doing so might affect the lawyer's other current clients or the lawyer's self interest. It recommends the rejection of MR 8.3(b).</p>

\* Redline/strikeout showing changes to the ABA Model Rule,

<p align="center"><u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">(b) A lawyer shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these Rules.</a></p>	<p>The Commission recommends replacing Model Rule 8.3(b) with this restatement of California's statutory prohibition located at Business and Professions Code section 6090.5. The Commission is concerned that the statutory provision is difficult to locate and not well known, and the lawyer's compliance would be improved by including the provision as a Rule of Professional Conduct.</p>
<p>(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.</p>	<p><del>(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.</del></p>	<p>The Commission agrees that a lawyer should not make a report under this Rule if doing so would compromise client information, but it disagrees with Model Rule 8.3(c) because: (i) it is too narrow in referring only to confidentiality as there are other client interests that a lawyer should consider before deciding whether to report under paragraph (a); and (ii) this provision is not disciplinary in nature but rather a comment on a lawyer's appropriate reporting considerations that is better placed in a Comment. The Commission recommends the rejection of Model Rule 8.3(c) and the placement of an expanded discussion in the Comment. See proposed Comment [2].</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.3 Reporting Professional Misconduct Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.</p>	<p><del>[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.</del></p>	<p>The Commission recommends the rejection of Model Rule 8.3, Comment [1], because it is inconsistent with its recommended paragraph (a).</p>
	<p><u>[1] In deciding whether to report a violation of these Rules or the State Bar Act, a lawyer may consider among other things whether the violation raises a substantial question as to honesty, trustworthiness or fitness as a lawyer. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.</u></p>	<p>The Commission agrees with the premise of MR 8.3 that the seriousness of the other lawyer's misconduct is a proper concern in deciding whether to report that misconduct. The Commission therefore recommends the adoption of this Comment [1], which borrows that concept from MR 8.3(a), but in the form of an explanatory comment rather than in the form of a disciplinary standard. The last sentence of this Comment is taken from Model Rule 8.3, Comment [3].</p>
<p>[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.</p>	<p><del>[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.</del></p>	<p>As explained above with respect to paragraph (c), the Commission recommends replacing the reference to confidentiality with a broader discussion of pertinent concerns. The Commission's recommendation is immediately below.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.3 Reporting Professional Misconduct Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>[2] This Rule is not intended to allow a lawyer to report a violation of these Rules or the State Bar Act if doing so would: (a) violate the lawyer's duty of protecting confidential information of a lawyer's client as provided in Business and Professions Code section 6068(e) [or Rule 1.6 or 1.18]; (b) would prejudice the interests of the lawyer's client; or (c) involve the unauthorized disclosure of information received by the lawyer in the course of participating in an approved lawyer's assistance program.</u></p>	<p>See Explanation of Changes for Model Rule 8.3, Comment [2]. The bracketed references to Rules 1.6 and 1.18 are to rules concerning the confidentiality of client information that are still under consideration by the Commission.</p>
<p>[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.</p>	<p><del>[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.</del></p>	<p>For the most part, Model Rule 8.3, Comment [3], is unrelated to the Rule that the Commission recommends, and it therefore recommends the comment's removal. As already noted, the Commission recommends the addition of the fifth sentence of Model Rule 8.3, Comment [3], to its proposed Comment [1]. See Explanation of Changes concerning Comment [1], above.</p> <p>The Commission's proposed Comment [3] is on a different topic and is given and explained immediately below.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.3 Reporting Professional Misconduct Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">[3] This Rule is not intended to abrogate a lawyer's obligations to report conduct as required under the State Bar Act. (See, e.g., Business &amp; Professions Code, subdivision 6068(o).)</a></p>	<p>California is unique in the self-reporting requirement cited in this proposed Comment. Because of the relationship between proposed Rule 8.3 and the separate issue of self-reporting, the Commission believes it would be helpful to include this cross-reference.</p>
<p>[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 client-lawyer relationship.</p>	<p><del>[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 client-lawyer relationship.</del></p>	<p>Because the Commission recommends a permissive rather than a mandatory reporting requirement, it believes that Model Rule 8.3, Comment [4] would add length needlessly, and it therefore recommends its removal.</p> <p>The Commission's proposed Comment [4] is on a different topic and is given and explained immediately below.</p>
	<p><a href="#">[4] Nothing in this rule is intended to abrogate a lawyer's obligations to refrain from threatening to file administrative or disciplinary proceedings to obtain an advantage in a civil dispute in violation of Rule [5-100].</a></p>	<p>As with proposed Comment [3], the Commission believes it could be helpful to lawyers to provide this cross-reference to the Rule that prohibits lawyers from threatening administrative or disciplinary charges.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.3 Reporting Professional Misconduct Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.</p>	<p><del>[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.</del></p>	<p>Model Rule 8.3's mandatory reporting requirement creates a conflict whenever a lawyer learns in a confidential setting information that must be reported under the ABA's version of the rule. Model Rule 8.3, Comment [5] addresses one example of that kind of conflict, which is when a lawyer obtains information while participating in an assistance program for lawyers or judges. The Commission believes that this conflict does not exist under the proposed permissive Rule. Therefore, we would remove Model Rule 8.3, Comment [5] entirely. See also proposed Comment [2].</p>

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

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Alan Konig	disagree			only a mandatory reporting rule should be adopted, as that is the standard in a majority of jurisdictions	Commission not make the suggested revisions, as explained in the Introduction
2	Bar Association of San Francisco	agree if modified support			supports as drafted but suggests a new Comment [4] clarifying that Rule 5-100 is not abrogated	Commission agreed and added a new Comment [4]
3	San Diego County Bar Association	agree if modified			Comment [2] would be clearer if the was changed to use a list format  the rule also should address the reporting of judicial misconduct	Commission agreed and revised Comment [2]  Commission did not make the requested revisions, as explained in the Rule comparison chart
4	Edward Poll	disagree			Reporting rules have anomalous consequences that are contrary to the interests of clients, such as the situation in <i>In re Himmel</i> (Ill. 1988) 533 N.E.2d 790	Commission agrees with the criticism of the <i>Himmel</i> case but believes that it remains proper to encourage lawyers to report the misconduct of other lawyers so long as client interests are not prejudiced. The Commission revised the format of Comment [2], in part, to emphasize that reporting is not allowed if it would violate client confidentiality or otherwise prejudice the interests of a client
5	San Diego County Bar Association	agree if modified			Comment [2] should be revised to more clearly enumerate the circumstances where the rule does not allow the reporting of misconduct	Commission agreed and revised Comment [2]

<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

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)  
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

**Arizona:** Rule 8.3(c) retains language similar to the pre-2002 version of the ABA Model Rule, protecting information gained while serving in a lawyer assistance program that “would be confidential if it related to the representation of a client” and if confidentiality has not otherwise been waived.

**Arkansas:** Rule 8.3(d) generally exempts lawyers working with the Arkansas Lawyer Assistance Program from mandatory reporting obligations “unless it appears... that the attorney in question, after entry into the ALAP, is failing to desist from said violation, or is failing to cooperate with a program of assistance to which said attorney has agreed, or is engaged in the sale of a controlled substance or theft of property constituting a felony under Arkansas law, or the equivalent thereof if the offense is not within the State’s jurisdiction.”

**California:** The California Rules of Professional Conduct have no comparable provision.

**Connecticut** adds the following sentence to Rule 8.3(a): “A lawyer may not condition settlement of a civil dispute involving allegations of improprieties on the part of a lawyer on an agreement that the subject misconduct not be reported to the appropriate disciplinary authority.” Rule 8.3(c) tracks the pre-2002 version of ABA Model Rule 8.3(c), but Connecticut’s version also refers to Connecticut General

Statutes §51-81d(f), which governs crisis intervention assistance to attorneys.

**District of Columbia:** Rule 8.3(c) omits the phrase “or information gained by a lawyer or judge while participating in an approved lawyers assistance program.” The phrase is unnecessary because D.C. Rule 1.6(i) provides as follows:

[A] lawyer who serves as a member of the D.C. Bar Lawyer Counseling Committee, or as a trained intervenor for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Information obtained from another lawyer being counseled under the auspices of the committee... shall be treated as a confidence or secret within the terms of paragraph (b) [of Rule 1.6]. Such information may be disclosed only to the extent permitted by this rule.

D.C. Rule 1.6(j) contains parallel language regarding information that a lawyer receives in connection with service on the D.C. Bar Practice Management Service Committee (formerly known as the Lawyer Practice Assistance Committee).

**Florida:** Rule 8.3 ends by providing that “if a lawyer’s participation in an approved lawyers assistance program is part of a disciplinary sanction this limitation shall not be applicable and a report about the lawyer who is participating as part of a disciplinary sanction shall be made to the appropriate disciplinary agency.” Florida also adds Rule 8.3(d), which provides as follows:

*Limited Exception for LOMAS Counsel.* A lawyer employed by or acting on behalf of the Law Office Management Assistance Service (LOMAS) shall not have an obligation to disclose knowledge of the conduct of another member... if the lawyer employed by or acting on behalf of LOMAS acquired the knowledge while engaged in a LOMAS review of the other lawyer’s practice. *Provided further,* however, that if the LOMAS review is conducted as a part of a disciplinary sanction this limitation shall not be applicable and a report shall be made to the appropriate disciplinary agency.

**Georgia** changes “shall” to “should” in Rule 8.3(a) and (b), and replaces ABA Model Rule 8.3(c) by stating: “There is no disciplinary penalty for a violation of this Rule.” Georgia also adds a special self-reporting provision, Rule 9.1, which requires members of the Georgia Bar to notify the State Bar of Georgia of (a) all other jurisdictions in which they are admitted to practice law and the dates of admission; and (b) “the conviction of any felony or of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyers fitness to practice law, within sixty days of conviction.” Finally, Georgia adds a special Rule 9.2, regarding agreements not to report, which provides as follows:

In connection with the settlement of a controversy or suit involving misuse of funds held in a fiduciary capacity, a lawyer shall not enter into an agreement that the

person bringing the claim will be prohibited or restricted from filing a disciplinary complaint, or will be required to request the dismissal of a pending disciplinary complaint concerning that conduct.

Georgia’s Comment to Rule 9.2 provides as follows:

[1] The disciplinary system provides protection to the general public from those lawyers who are not morally fit to practice law. One problem in the past has been the lawyer who settles the civil claim/disciplinary complaint with the injured party on the basis that the injured party not bring a disciplinary complaint or request the dismissal of a pending disciplinary complaint. The lawyer is then free to injure other members of the general public.

[2] To prevent such abuses in settlements, this rule prohibits a lawyer from settling any controversy or suit involving misuse of funds on any basis which prevents the person bringing the claim from pursuing a disciplinary complaint.

**Illinois:** Rule 8.3(a) requires a lawyer to report knowledge “not otherwise protected as a confidence by these Rules or by law” that another lawyer has committed specified violations. Rule 8.3(c) provides that upon proper request of a tribunal or disciplinary authority, “a lawyer possessing information not otherwise protected as a confidence by these Rules or by law concerning another lawyer or a judge shall fully reveal such information.” Rule 8.3(d) provides the following: “A lawyer who has been disciplined as a result of a lawyer disciplinary action brought before anybody other than the Illinois Attorney Registration and Disciplinary Commission shall report that fact to the Commission.”

**Kansas:** Rule 8.3(c) adds that lawyers are “not required to disclose information” learned through participation in a

variety of self-help organizations, such as Alcoholics Anonymous.

Also, Rule 223 of the Kansas Rules Relating to Discipline of Attorneys, entitled “Immunity,” provides as follows: “Complaints, reports, or testimony in the course of disciplinary proceedings under these Rules shall be deemed to be made in the course of judicial proceedings. All participants shall be entitled to judicial immunity and all rights, privileges and immunities afforded public officials and other participants in actions filed in the courts of this state.”

**Massachusetts:** The Comment to Rule 8.3 provides as follows:

[3] While a measure of judgment is required in complying with the provisions of the Rule, a lawyer must report misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including misconduct that would constitute a “serious crime.”... Section 12(3) of Rule 4:01 provides that a serious crime is “any felony, and... any lesser crime a necessary element of which... includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit [such a crime].” In addition to conviction of a felony, misappropriation of client funds or perjury before a tribunal are common examples of reportable conduct....

[3A] In most situations, a lawyer may defer making a report under this Rule until the matter has been concluded, but the report should be made as soon as practicable thereafter. An immediate report is ethically compelled, however, when a client or third person will

likely be injured by a delay in reporting, such as where the lawyer has knowledge that another lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.

**Michigan** adds the word “significant” before “violation” in Rules 8.3(a) and (b). The duty to report is suspended if the lawyer gained the information “while serving as an employee or volunteer of the substance abuse counseling program of the State Bar of Michigan, to the extent that the information would be protected under Rule 1.6 from disclosure if it were a communication between lawyer and client.” Rule 8.3(c)(2).

**New Jersey** cuts off Rule 8.3(c) after “Rule 1.6” and adds Rule 8.3(d), which provides as follows:

Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:

(i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irremediable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and

(ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or

present violations that did not or do not pose a serious danger to clients.

**New York:** DR 1-103 provides the following:

A. A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer’s capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 that raises a substantial question as to another lawyer’s honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

B. A lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

A related statute, §499 of the New York Judiciary Law (reprinted below in our Selected New York Statutes) protects communications between a lawyer and a lawyer assistance program to the same extent as communications between attorneys and their clients.

**North Carolina:** Rule 8.3(c) provides only that Rule 8.3 “does not require disclosure of information otherwise protected by Rule 1.6,” omitting the ABA reference to a lawyers’ assistance program, but North Carolina accomplishes the same result by providing in Rule 1.6(c) that the duty of confidentiality under Rule 1.6 “encompasses information received by a lawyer then acting as an agent of a lawyers’ or judges’ assistance program... regarding another lawyer or judge seeking assistance or to whom assistance is being offered.” (Rule 1.6 also defines the term “client” to

include lawyers seeking assistance from approved lawyers’ or judges’ assistance programs.)

North Carolina also adds a Rule 8.3(d), which provides that a lawyer who has been disciplined in any state or federal court for violating that court’s Rules of Professional Conduct must “inform the... State Bar of such action in writing no later than 30 days after entry of the order of discipline.” Finally, North Carolina Rule 1.15-2(o), entitled “Duty to Report Misappropriation,” provides that a lawyer who “discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar.”

**Ohio:** Rule 8.3 provides as follows:

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer’s honesty, trust, worthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee... of a bar association... designed to assist lawyers with substance abuse or mental health problems ... shall be privileged for all purposes under this rule.

**Texas** alters Rule 8.3(c) as follows:

(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of

this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

Texas also adds a Rule 8.3(d), which makes clear that Rule 8.3 does not require disclosure of knowledge or information otherwise protected as confidential information by Texas Rule 1.05 (the Texas equivalent to ABA Model Rule 1.6) or by "any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program."

**Virginia:** Rule 8.3(b) replaces the phrase "who knows" with the phrase "having reliable information." Virginia Rule 8.3(c) provides that if a lawyer serving as a third-party neutral receives "reliable information" in that capacity about another lawyer's misconduct that would otherwise have to be reported, the lawyer/neutral "shall attempt to obtain the parties' written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority." Rule 8.3(d)--equivalent to ABA Model Rule 8.3(c)--also exempts disclosure by a lawyer who is a "trained intervenor or volunteer" for an approved lawyers' assistance committee, or who is "cooperating in a particular assistance effort," when the information is obtained "for the purposes of fulfilling the recognized objectives of the program."

Virginia also adds Rule 8.3(e), which requires a lawyer to inform the Virginia State Bar if (1) the lawyer has been disciplined by a state or federal disciplinary authority, agency

or court in any jurisdiction for violating that jurisdiction's rules of professional conduct, or (2) the lawyer has been convicted of a felony in any United States jurisdiction, or (3) the lawyer has been convicted of either "a crime involving theft, fraud, extortion, bribery or perjury," or "an attempt, solicitation or conspiracy to commit any of the foregoing offenses" in any United States jurisdiction.

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**September 18, 2009 McCurdy E-mail to Drafters (Kehr, Peck, Tuft, Vapnek), cc RRC:**

Bob Kehr & Codrafters (Peck, Tuft, Vapnek):

This message provides the assignment background materials for the new agenda items on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

**Attachments:**

- Dashboard, Draft Template (9/18/09)
- Introduction, Draft 3.1 (12/15/08)
- Rule Chart, Draft 3.1 (12/15/08)
- Comment Chart, Draft 3.1 (12/15/08)
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)

**September 22, 2009 Kehr E-mail to Drafters, cc Chair & Staff:**

Ellen, Mark, and Paul: My initial drafts of this item are attached. The Rule comparison charts was not done with our usual format of lining out the MR language the Commission rejected, but I don't have the time to redo that aspect. I have not attempted the Dashboard (how does one insert a check in a box?).

I will be out of town from later this morning through 9/26, and while I will have some internet access I won't have any other materials with me while traveling.

**Attachments:**

Introduction, Draft 3.2 (9/22/09)  
Rule Chart, Draft 3.2 (9/22/09)  
Comment Chart, Draft 3.2 (9/22/09)  
Public Comment Chart, Draft 2 (9/22/09)RLK

**September 22, 2009 KEM E-mail to Kehr:**

I think we're planning on giving the BOG the full package of materials for Batches 1, 2 and 3 at their November meeting but I could be mistaken. At any rate, I think you included the response to SDCBA's comment re reporting judicial misconduct, so we're good on the public comment chart for 8.3. It just needs a bit of reformatting but no substantive changes.

I can do a Dashboard if you like. Alternatively, here's how you check a box (we haven't been using the Word "form" function to do it; I'm not sure why, but probably because it's more trouble than it's worth and doesn't look as nice). The checked box we've been using is to simply to insert the "check box" symbol, which you should be able to find in Word by going to the Tool Bar under "Insert," then click "Symbol," then in the drop-down font menu, choose "Wingdings" (really), and it's the next to last character in the last row of the "Wingding" group. After you

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insert it once, it appears in the row of commonly-used characters and you can just choose it and click "Insert".

If you simply want to tell me what to fill in (e.g., "not controversial," etc.), I can do it. We won't be able to fill in the vote section until after the October meeting.

**September 22, 2009 Kehr E-mail to KEM:**

Thank you for the additional technical assistance and, yes, I would be delighted if you would draft the 8.3 dashboard. I don't want to be distracted from 1.7. I think 8.3 is only slightly controversial. In looking back at the public comment chart to remind myself of the number of public comments, I noticed a word was missing. Correction attached.

**September 22, 2009 KEM E-mail to Kehr, cc Staff:**

I've made the changes to the public comment chart and resorted alphabetically. See attached. I've copied Randy, Lauren & Mimi so they have the most recent draft, **2.1 (9/22/09)RLK-KEM**, but I don't think we need to circulate to the other drafters as there were no substantive changes.

I've also attached the Dashboard, **Draft 1 (9/22/09)RLK-KEM**.

**September 22, 2009 KEM E-mail to Kehr & Staff:**

I sent out a dashboard earlier this morning that was correct as far as it goes except that I had mis-named the file. I've attached the file again, this time appropriately named file. Sorry for any confusion.

If you save the earlier dashboard, named RRC - 4-400 [1-8-3], etc., please delete it.

**September 30, 2009 Kehr E-mail to Staff, cc Chair & KEM:**

I copied you on a 9/22/09 message that attached my drafts of the Rule 8.3 materials for the October agenda. I've attached the only change that has been made in any of them as I did not receive any comments from Ellen or Paul.

**KEM NOTE:** Wrong draft of the Public Comment chart was sent. See 9/22/09 KEM E-mail Kehr, cc Staff.

**KEM NOTE:** Check to make sure the agenda has the Dashboard.

**September 30, 2009 Vapnek E-mail to Drafters, cc Chair & Staff:**

I haven't heard from the drafting team on this; it's O.K. with me

**October 5, 2009 Sondheim E-mail to KEM:**

It is my recollection that when I was reviewing this rule, someone (I think you) provided me with a copy of the Illinois 8.3 and an article written by either the Chief Counsel or former Chief Counsel for the disciplinary part of the Illinois bar with regard to this rule and the Himmel case. If you were the one who sent this to me, could you do so again because I have so much material from the Commission (much of which I am trying to eliminate) that up until now I have not found these items. Also, if the Himmel case is handy I would appreciate receiving a copy of it as I do not subscribe to either Lexis or Westlaw.

**October 5, 2009 KEM E-mail to Sondheim:**

Here are the materials I sent you and Bob earlier. The article you're interested in is the Robinson article, but the others may also be of some interest.

I've also attached a copy of the *Himmel* case.

**October 7, 2009 Sapiro E-mail to RRC List:**

1. I recommend that we add to the Introduction a paragraph that points out that mandatory reporting might require disclosure of confidential information, expose the client to public embarrassment, or create the problems discussed in proposed Comment [2].
2. In paragraph 7 of the Introduction, third line, the word "report" should probably be "reporting."
3. In my copy of the Introduction, there is a gap in the wording between the last line on page 2 of 3 and the first line on page 3 of 3. I think something got dropped out.
4. In the third line from the end of paragraph 8 of the Introduction, there is a typographical error. The word "change" appears as "changest."
5. In paragraph 9 of the Introduction, I would delete the comma after the word "charges." I think that will make the sentence easier to read.
6. In the explanation of changes column for Comment [1] at page 1 of 4, in the third line, I would change the word "its" to the word "the."
7. I recommend that we rewrite proposed Comment [3]. In the beginning of our work, we continued to use the style "is not intended" as in the current rules. However, we later adopted the style that a rule "does not" alter a lawyer's obligations. I recommend that we adopt the latter style in this comment. In addition, I recommend that we make clear what Section 6068(o) requires by adding in the second line of the comment, after the phrase "to report," the phrase "the lawyer's own" before the word "conduct." Then the phrase will read ". . . to report the lawyer's own conduct . . ."
8. If this rule will come back to us after going to the Board, then my last comment should be reserved for that occasion. If this rule will come back to us for further review, I vote to send

it on to the Board. However, if this is the last time we will get to correct this rule, then I reluctantly vote “no.”

**October 7, 2009 Sondheim E-mail to RRC List:**

Since this is not a consent item, except for Jerry's nits, we will discuss his concerns at the meeting. If anyone objects to the nits, please indicate your objection by Monday, Oct. 12.

**October 7, 2009 Sondheim E-mail #1 to RRC:**

While I agree with the Commission that the ABA version of this rule is too broad and vague, I am of the view that a narrower rule can be crafted which will afford the public the protection it is entitled to from our profession.

Let me start out with simply asking if a person should hesitate to report to the police that he or she is observing a person committing a robbery. I would hope that there would be agreement that this should be reported as soon as possible. It is no different when a lawyer ascertains that another lawyer is committing a crime. This would be true even if a client is involved in the discovery of the crime so long as the lawyer reporting the crime does not disclose information protected by the attorney-client relationship.

Given the above, a rule could be drafted which requires disclosure of certain types of criminal conduct so long as protected information is not disclosed and there is an exception for other roles a lawyer may undertake such as a mediator or programs designed to rehabilitate lawyers. In essence, this is what Illinois has done. (See also Mass. comments [3] and [3A], p. 31 of the materials.) Now I know that there is concern about *In re Himmel*, cited in the Introduction. But it is clear from the facts of *Himmel* that *Himmel* assisted his client in extorting money from the lawyer who formerly represented the client and that the Illinois Supreme Court found that what needed to be disclosed by *Himmel* did not involve information protected by the attorney-client relationship. In a separate e-mail I am forwarding materials which Kevin supplied to me at my request and which I believe will assist you in understanding the *Himmel* case.

This leaves the question of whether a client should be allowed to prohibit his or her lawyer from reporting a crime. The Illinois Supreme Court stated in this regard as follows: "A lawyer may not choose to circumvent the rules by simply asserting that his client asked him to do so." I believe that when a crime has been committed public protection requires lawyers, without disclosing confidential information, to override the views of a client even though this may impact the concept of loyalty to a client.

Using the Illinois Rule as a guide, draft Rule 8.3 should be modified to provide that a lawyer is required to report unprivileged information to the Office of Trial Counsel when he or she has knowledge that another lawyer has committed a criminal act involving dishonesty, fraud, deceit or misrepresentation. (An exception can be included, as many other states have done, to encompass lawyers who act in other roles such as mediators or programs designed to rehabilitate lawyers.) Among the reasons for such modification are the following:

1. Lawyers are in positions to know when the Rules of Professional Conduct are being violated when other persons may not have such knowledge.

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2. Promptness in reporting criminal conduct may make it possible for the Office of Trial Council to prevent additional harm to the public. (Indeed, in the *Himmel* case the Illinois Supreme Court stated: "Perhaps some members of the public would have been spared from Casey's misconduct had respondent [Himmel] reported the information as soon as he knew of Casey's conversions of client funds." (Apparently Casey made similar conversions of other client funds.) As stated by Mary Robinson in one of the materials being sent to you in a separate e-mail, "Enforcing a lawyer's obligation to report enhances the public protection goals of attorney discipline." (Page 3)

3. As also explained by Ms. Robinson, enforcing the reporting rule creates a leveling effect with regard to the discipline of sole practitioners and large firms. Large firms that discover criminal conduct by a member of the firm quickly seek to make the client whole and that is the end of the matter. The sole practitioner's client is more likely to complain to the disciplinary authority. (Pages 3-4.)

I hope that some of you will join me at the meeting in the views expressed above since this is not a consent item.

With regard to the current materials relating to this rule:

As regards the dashboard--

a. I believe it is very controversial since many, if not most--**Kevin?**, jurisdictions have adopted some form of the ABA's mandatory rule.

b. If I remain in the minority, there will be a minority position in the Comparison Chart.

In the Introduction there is something missing in the top line on p. 19.

In the Commentator Chart the word "did" is missing in the first line of the RRC Response to Alan Konig.

**October 7, 2009 Sondheim E-mail #1 to RRC:**

**Attachments:**

- Mary T. Robinson, *Lawyer's Duty to Report Another Lawyer's Misconduct: The Illinois Experience*
- Thomas R. Mulroy, Jr., *An Analysis Of And Implications From The Himmel Case*
- *In re Himmel*, 533 N.E.2d 790 (Ill. 1988).

**October 8, 2009 Kehr E-mail to Sondheim, cc RRC:**

A preliminary question --- if the Commission were to make the sort of change you have suggested, so that there would be mandatory reporting at least in some circumstances, would the Rule have to go back out for public Comment?

**October 8, 2009 Sondheim E-mail to Kehr, cc RRC:**

All batch 1 through 3 rules will go out for public comment as part of the final batch. Thus making a change now does not impede the progress of the rules in these batches, but if significant changes are made when the final batch returns from public comment, it would probably require another public comment period.

**October 10, 2009 Tuft E-mail to RRC List:**

Comments on Proposed Rule 8.3:

- Introduction: In paragraph 1, change "Proposed Rule 8.3 would add" to "Proposed rule 8.3 adds."

In paragraph 3, Mandatory reporting is not inherently inconsistent with client loyalty. (see, last sentence in paragraph 3). Thus, I would change the beginning of the first sentence to read "First, mandatory reporting may be inconsistent with . . ."

Paragraph 8: The explanation of the Georgia rule is confusing. I would end the first sentence after the word, "mandatory" and rewrite the next sentence which I could not follow. The second to last sentence should be revised to more clearly state: "Ohio's rule limits the duty to providing only unprivileged information".

Paragraph 9: I do not think it follows that it is only the client who can be a material, competent witness. Doesn't that depend on the misconduct at issue? The reference to Georgia in the last sentence is repetitive of the discussion of Georgia's rule in paragraph 8.
- Rule 8.3(a): Harry's concern is worth consideration, and because it involves a fundamental issue of what our responsibilities should be as a self regulated profession, it deserves another vote by the Commission. I will observe that the rule today is narrower than it was in Illinois at the time of *Himmel* and I do not believe the situation in that case is a common enough occurrence to justify departing from the rule. On the other hand, a much more legitimate reason for not following the mandatory requirement under the Model Rule, is the fact we have a self reporting requirement under the State Bar Act. The other reasons cited in the Introduction and Explanation of Changes do not necessarily follow and tend to make us appear to be over protectionists.
- MR Paragraph (b): If it remains the Commission's decision not to include a discretionary obligation to report judicial misconduct in violation of the judicial canons, I wish to have my dissent noted for the record. One of the stated purposes of the rules is to protect the administration of justice. A lawyer who turns a blind eye to serious judicial misconduct that violates the judicial canons and does nothing is, in my judgment, violating this important objective of the rules. The only exception is if the report would compromise a client's rights. To say in the Explanation that there is no connection between self regulation and reporting judicial misconduct is contrary to jurisprudence as I understand it. The bench and bar are integral parts of the judicial branch of government and lawyers have an important role in maintaining the integrity and respect of the judicial system. There is no reason why we should not make the obligation to report known judicial misconduct discretionary as we do in paragraph (a). The reasons stated for rejecting having even a discretionary duty are not valid and, frankly, put us in an unfavorable light. Thus, I propose we include MR 8.3(b) as a discretionary duty as we do for lawyers in paragraph (a), i.e.:

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"(b) A lawyer who knows that a judge or other judicial officer has committed a violation of the Canons of Judicial Ethics 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."

If the Commission does not agree, I wish to write a dissent. The "dashboard" should reflect that San Diego Bar Association agrees we should have a rule on reporting judicial misconduct.

4. Comment [1]: I would change "may" to "should" in the first sentence to discourage lawyers from reporting technical violations (" . . . a lawyer should consider, among other things, . . .")
5. Comment [2]: Add a space after "(b)" on the sixth line.
6. Comment [3]: Conform the wording at the beginning of the sentence to the wording in Comment [3] as follows: "This Rule is not intended to . . . . Also, capitalize "Rule." Finally, change Rule 5-100 to Rule 1.8.10.
7. MR Comment [5]: The reasons for not including a version of MR Comment [5] do not follow. Since there is an exception to even a mandatory reporting requirement when a lawyer learns of a lawyer's or judge's misconduct as a result of participating in an approved assistance programs, the conflict concern does not arise. Nor would the conflict exist if reporting is discretionary and not mandatory. A revised comment that tracks our rule would provide useful guidance.
8. "Dashboard": This rule is very controversial for two reasons which should be identified: (1) mandatory v discretionary reporting and (2) reporting judicial misconduct.

**October 12, 2009 Melchior E-mail to RRC List:**

**Part AA, Rule 8.3.** Harry's note: I disagree with Harry. It is my understanding that there is no general law which requires reporting of crimes to the authorities, though of course that is a good idea and non-reporting may present its own problems. I think that we should leave the question of what to report and to whom to people's individual judgment, as I understand has always been the case in California.

P. 18:typo: p. 2 of 3, not 3 of 3

P. 18: I think that point 7 emphasizes the wrong point. It is more likely (viz., Himmel) that the lawyer would learn confidential information from a client, rather than as mediator.

p. 19: 5<sup>th</sup> line: typo: should be "change"

p. 24, proposed comment 2, line 6, "would" should be deleted, following (b).

p. 27, l. 1 : word missing: Commission did not