

Proposed Rule 8.3 [1-120 & 1-500(B)] “Reporting Professional Misconduct”

(Draft #6, 12/14/09)

Summary: Proposed rule 8.3 adds new permissive and mandatory reporting standards, including a requirement that a lawyer report to the State Bar when 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. Permissive reporting standards are imposed for general lawyer misconduct and for judicial misconduct by judges and other adjudicative officers. In the place of current California Rule 1-500(B), a proposed rule comment provides a cross reference to the broader prohibition in existing Business and Professions Code §6090.5.

Comparison with ABA Counterpart	
Rule	Comment
<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

Statute

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

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption of the Rule

Vote (see tally below)

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 2

Abstain 0

Approved on Consent Calendar

Approved by consensus

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

(See Introduction.)

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

See Introduction. The proposed rule includes limited mandatory reporting of certain lawyer misconduct.

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.3* Reporting Professional Misconduct

December 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 8.3 adds new disciplinary standards concerning a lawyer reporting the misconduct of another member of the legal profession that are not currently found in the California rules or the State Bar Act. The new disciplinary standards include one limited mandatory reporting standard and two permissive reporting standards. (i) Paragraph (a) of proposed Rule 8.3 states that 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 *must* inform the appropriate disciplinary authority. (ii) Paragraph (b) states that, except *as required by paragraph (a)*, a lawyer *may, but is not required to*, report misconduct of another lawyer. Paragraph (c) 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 person's fitness for office *may, but is not required to*, report the violation to the appropriate authority. The proposed Rule thus differs from the broad mandatory reporting requirements as to both lawyer and judicial misconduct that are found in ABA Model Rule 8.3 and most states. The Commission believes that a balancing of the policies involved favors permissive reporting for most misconduct, but a limited mandatory reporting standard for certain egregious criminal acts that, if not remedied, are most likely to cause substantial harm to the public and might remain under the radar for a significant period of time or perhaps forever, during which time additional substantial public injury may occur.

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 has concluded that a balanced approach to reporting misconduct is more appropriate than establishing a single standard that subjects all misconduct to possible mandatory reporting. There are several reasons for this approach. These include the following:

* Proposed Rule 8.3, Draft 6 (12/14/09).

- a. First, a limited mandatory reporting standard for certain, egregious criminal acts is consistent with the concept of self-regulation. Such acts are more likely to result in substantial harm to the public and mandating their reporting will offer additional public protection not present in the existing California rules. A broad mandatory reporting rule, however, would be 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 their professional efforts primarily on client welfare and interests. See *Flatt v. Superior Court* (1994) 9 Cal.4th 281, 289 ["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 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. Broadly mandating 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.
- b. Second, 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.
- c. Third, a rule that broadly mandates reporting, similar to the Model Rule, would create a potential conflict with statutory duties of confidentiality a lawyer might have in another role, such as might happen with information a lawyer were to learn while serving as a mediator. For all of these reasons, the Commission believes that any broad reporting 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 not to report another person's ethical violation. This view is implemented in the proposed rule that includes permissive reporting for most misconduct and a limited mandatory reporting standard for certain egregious criminal acts.

Georgia has adopted a version of the reporting rule which expressly states that a lawyer cannot be disciplined under it. Kentucky has addressed some of the weaknesses in Model Rule 8.3 in its new Rule (effective 7/15/09) that: (i) adds an immunity provision for the lawyer who makes the Rule 8.3 report [but overlooks the civil risk to a lawyer who exercises judgment to not report]; and (ii) adds an extremely limited self-reporting obligation [limited to a lawyer who is disciplined in another jurisdiction. Cf. Comment [3], below]. 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's rule limits the duty to providing only unprivileged information. New York's Rule 8.3 (effective 4/1/09) eliminates the duty to report on judicial misconduct. For reasons explained in the comparison chart, the Commission's proposed rule permits but does not require the reporting of judicial misconduct.

In addition to the Model Rule concept that lawyer-self-regulation implies an obligation on all lawyers to report misconduct by other lawyers, which is mentioned above, proponents of broad 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 this means that in most circumstances, 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.

The prohibition found in current California Rule 1-500(B) against agreements not to report violations has been incorporated into this Rule by clarifying in Comment [5] that lawyers may not be a party to or participate in offering or making an agreement that would violate Business and Professions Code section 6090.5, which provides broader prohibitions on such agreements. 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").

Minority. A minority of the Commission dissents from the mandatory reporting requirement in the proposed Rule. The minority contends that mandatory reporting issues often arise in the midst of representing a client. The experience in jurisdictions with mandatory reporting is that when reporting occurs in this context, the innocent client often suffers. Reporting can lead to disputes among the lawyers representing clients in a matter. It can lead to a change in counsel and corresponding continuances or inability to complete a pending settlement as well as other situations in which the innocent client bears the cost. Mandatory reporting does not protect clients in these situations and elevates the protection of non-clients over the legitimate interests of clients.

<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>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct <u>felonious criminal act</u> 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 <u>disciplinary</u> authority.</p>	<p>As discussed in detail in the Introduction, the Commission is recommending a balanced approach of both permissive and limited mandatory reporting, rather than setting a single standard that subjects all misconduct to possible mandatory reporting. Proposed paragraph (a) states the limited mandatory reporting obligation imposed for egregious criminal acts. This mandatory standard requires that a report be made to a disciplinary authority that would have jurisdiction to take action on the reported misconduct. The Introduction notes the minority view that opposes the mandatory reporting obligation.</p>
	<p>(b) <u>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.</u></p>	<p>See above Explanation of Changes for paragraph (a). Proposed paragraph (b) states the general permissive reporting standard for violations of the Rules or the State Bar Act that are not felonious criminal acts subject to mandatory reporting under paragraph (a).</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>(bc) A lawyer who knows that a judge <u>or other adjudicative officer</u> has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's <u>that person's</u> fitness for office shall inform <u>may, but is not required to, report the violation to</u> the appropriate authority.</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 agrees that there may be situations where a lawyer's report of judicial misconduct would be beneficial for the client and provide public protection; however, the Commission also 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. Accordingly, proposed paragraph (c) states a permissive standard for reporting judicial misconduct.</p>

* Proposed Rule 8.3, Draft 7 (01/07/10). Redline/strikeout showing changes to the ABA Model Rule, RRC - 1-120 & 1-500B [8-3] - Compare - Rule Comment Explanation - DFT6.1 (01-07-10)

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct</p>	<p style="text-align: center;"><u>Commission's Proposed Rule</u> Rule 8.3 Reporting Professional Misconduct</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></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>(ed) This Rule does not require—disclosure of <u>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 <u>Business and Professions Code section 6068(e)(1), Rule 1.6, or Rule 1.9; (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.</u></u></p>	<p>Similar to Model Rule 8.3(c), the Commission agrees that a lawyer should not make a permissive report under paragraphs (b) and (c) of the proposed Rule if doing so would compromise client information, but it disagrees with the Model Rule because it is too narrow in referring only to confidentiality as there are other client interests that a lawyer should consider before deciding whether to make a permissive report.</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>[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>The Commission recommends the rejection of Model Rule 8.3, Comment [1], because it is inconsistent with its recommended balanced approach of including a limited mandatory reporting standard egregious criminal acts and a general permissive reporting standard for other misconduct.</p>
	<p><u>[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 substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.</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).</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>[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>As explained above with respect to paragraph (d), the Commission recommends replacing the reference to confidentiality with a broader discussion of pertinent concerns. Given the importance of these concerns, they are addressed in the rule rather than in a comment to the rule.</p>

* Proposed Rule 8.3, Draft 6 (12/14/09).

<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>[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 & 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.</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. Also included in this Comment is an express statement that a lawyer is not required to report another lawyer's misconduct under paragraph (a) if that report would constitute a relinquishment of the reporting lawyer's privilege against self-incrimination.</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>[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>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. The limited mandatory reporting standard relates to felonious criminal acts not mere rule violations.</p> <p>The Commission's proposed Comment [3] is on a different topic and is given and explained immediately below.</p>

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	<p>[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.</p>	<p>As with proposed Comment [2], the Commission believes it could be helpful to lawyers to provide this cross-reference to the Rule that prohibits lawyers from threatening criminal, administrative or disciplinary charges.</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>[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>Proposed Comment [4] adopts language of the Model Rule counterpart.</p>
	<p>[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.</p>	<p>Current California Rule 1-500(B) provides that a member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules. The Commission recommends replacing the substance of this current rule with the cross reference in proposed Comment [5] to California's statutory prohibition located at Business and Professions Code section 6090.5. The statutory prohibition subsumes the prohibition in current California Rule 1-500(B) and also prohibits related misconduct not found in the current rule (e.g., a prohibition against improperly agreeing to withdraw a State Bar complaint). Rather than perpetuating the overlap of topics, the Commission is recommending a cross reference to the broader statutory prohibition.</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>[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>See above explanation of paragraph (d) of the rule. Model Rule 8.3's general 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.</p> <p>To the extent this conflict might manifest under either the proposed permissive or limited mandatory reporting standard in the Commission's proposed rule, the Commission has included, in the rule itself, paragraph (d) that resolves the conflict by favoring confidentiality.</p>

Rule 8.3 Reporting Professional Misconduct

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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) ~~(a) 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 unless precluded by the lawyer's duties to a client, or a former client, or by law.~~
- (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.~~
- (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 Business and Professions Code section 6068(e)(1), Rule 1.6, or Rule 1.9; (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.

COMMENT

- [1] In deciding whether to report ~~a~~another lawyer's violation of these Rules or the State Bar Act that is not required by paragraph (a), a lawyer ~~may~~should consider among other things whether the violation raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.
- [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 violate the lawyer's duty of protecting confidential information of a lawyer's client as provided in Business and Professions Code section 6068, subdivision (e), or would prejudice the interests of the lawyer's client, or would involve the unauthorized disclosure of information received by the lawyer in the course of participating in an approved lawyer's assistance program.~~
- [3] This Rule ~~is~~does not ~~intended to~~ abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. (See, e.g., Business & Professions Code, subdivision 6068(o).)
- [3] This Rule does not 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 3.10.
- [4] 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.

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

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.

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

TOTAL = 5 Agree = 1
Disagree = 2
Modify = 2
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Konig, Alan	D			Only a mandatory reporting rule should be adopted, as that is the standard in a majority of jurisdictions.	Commission did not make the suggested revisions, as explained in the Introduction.
2	Poll, Edward	D			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.
3	San Diego County Bar Association	M			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	San Diego County Bar Association	M			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].
5	San Francisco, Bar Association of	A			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].

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED