

Lee, Mimi

**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Monday, November 23, 2009 8:53 AM  
**To:** Marlaud, Angela  
**Cc:** Robert L. Kehr; Ellen Peck; Mark Tuft; Paul Vapnek; Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr G  
**Subject:** RRC - 8.3 [1-120 & 1-500(B)] - V.D. - December 11-12, 2009 Agenda Materials  
**Attachments:** RRC - 1-120 & 1-500B [8-3] - Dash, Intro, Rule, Comment, Redline, Clean, PubCom-COMBO - DFT5 (11-22-09).pdf

Angela:

Please use this e-mail as the cover memo for this Agenda Item.

To save a little time, I've attached the following (w/ many thanks to Randy for the initial post-RAC meeting drafts):

A single, scaled PDF file that includes the following documents for the Rule:

1. Dashboard, Draft 5 (11/22/09)RLK-KEM-RD;
2. Introduction, Draft 4.4 (10/20/09)RLK-RD-KEM-RD-HBS;
3. Rule Chart, Draft 5 (11/16/09);
4. Comment Chart, Draft 5 (11/16/09);
5. Rule 8.3, Draft 5 (11/16/09), redline, compared to MR 4.1 (7/2/07);
6. Rule 8.3, Draft 5 (11/16/09), clean.
7. Public Comment Chart, Draft 3 (10/16/09)RLK-KEM.

**A few notes** (we've highlighted any changes that are being suggested):

1. Dashboard: The only changes are to the draft reference under the title and the inclusion in the summary of the provision Randy and I have added at Michael Marcus' suggestion to also require the reporting of a felony to the appropriate law enforcement agency. That is the only substantive change from the previous draft, which we submitted w/ other Batch 1, 2 & 3 rules to RAC, but which was tabled before discussion.
2. Introduction: Date change, reference to new language in rule.
3. Rule Chart: Addition to Explanation for paragraph (a).
4. Comment Chart: Change to Comment [3] and addition of 1 word to the Explanation for same.

5. Draft 5 (11/16/09), redline. Self-explanatory.
6. Draft 5 (11/16/09), clean. Self-explanatory.
6. No change to the public comment draft.

To avoid confusion over what should be included in the agenda mailing, I'll send on the underlying Word documents later.

Please let me know if you have any questions. Thanks,

Kevin

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

(Draft #5, 11/16/2009)

**Summary:** Proposed rule 8.3 adds new permissive and mandatory reporting standards, including a requirement that a lawyer report to the State Bar **and the appropriate law enforcement agency** 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

(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 Adoption of the Rule

Vote (see tally below)

Favor Rule as Recommended for Adoption 6  
Opposed Rule as Recommended for Adoption 3  
Abstain 1

Approved on Consent Calendar

Approved by consensus

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

(See Introduction.)

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## Stakeholders and Level of Controversy

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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

November 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 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 **and the appropriate law enforcement 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:

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\* **Proposed Rule 8.3, Draft 5 (11/16/09).**

- 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 , 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 which under the Commission's proposed rule is a permissive standard.

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 <del>violation of the Rules of Professional Conduct</del> <u>felonious criminal act</u> that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer <del>in other respects,</del> shall inform the appropriate <del>professional</del> <u>disciplinary authority and the appropriate law enforcement</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. <u>This mandatory reporting standard requires that a report be made to a disciplinary and a law enforcement authority as both authorities would have jurisdiction to take action to prevent or rectify the reported misconduct.</u> 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>

\* Proposed Rule 8.3, Draft 5 (11/16/09), 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>(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</del>c) 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 <del>the judge's</del><u>that person's</u> fitness for office <del>shall inform</del><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>
<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>e</del>d) This Rule does not <del>require disclosure</del> <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 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></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><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 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><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 (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 5 (11/16/09).

<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><a href="#">[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 &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>[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. 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>
	<p><a href="#">[3] This Rule does not abrogate a lawyer's obligations to refrain from threatening to file criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.</a></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 <b>criminal</b>, 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>[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 general permissive standard for most rule violations and only a limited mandatory reporting requirement for felonious criminal acts, it believes that Model Rule 8.3, Comment [4] is unnecessary and, if adapted it would need to be substantially revised to address such issues as a criminal defendant's right to effective representation.</p> <p>The Commission's proposed Comment [4] is on a different topic and is explained immediately below.</p>
	<p><a href="#">[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.</a></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 [4] 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><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>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

[Draft 5, 11/16/09, redline, compared to DFT4.1 (7/3/07)]

- (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- and the appropriate law enforcement authority.<sup>1</sup>
- (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 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 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.
- [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, subdivision 6068(o).)
- [3] This Rule does not abrogate a lawyer's obligations to refrain from threatening to file criminal, administrative or disciplinary proceedings charges to obtain an advantage in a civil dispute in violation of Rule 3.10.<sup>2</sup>
- [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.

<sup>1</sup> This rule was tabled by RAC at its November 12, 2009 meeting. RAC ran out of time to discuss this rule and the rule is expected to be discussed at RAC's January 7, 2009 meeting. RAC Chair Michael Marcus invited the Commission to consider this revision. The rationale for including a duty to report to a law enforcement authority, as well as a disciplinary authority, is that both authorities would have jurisdiction to take action that might prevent or rectify the narrow category of lawyer misconduct that is covered by the mandatory rule, namely a lawyer's felonious criminal act.

<sup>2</sup> This revision updates the comment language to reflect the change in paragraph (a) that now addresses reports to a law enforcement authority. As the concept of a "criminal" report is being added, the word "charges" is being substituted for "proceedings." "Charges" is the word used in current Rule 5-100.



### **Rule 8.3 Reporting Professional Misconduct (Draft 5, 11/16/09)**

- (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 and the appropriate law enforcement 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 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 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.

[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, subdivision 6068(o).)

[3] This Rule does not abrogate a lawyer's obligations to refrain from threatening to file criminal, administrative or disciplinary charges 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.  
[Sorted by Commenter]**

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

No.	Commenter	Position <sup>1</sup>	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 made the suggested revision as to the reporting of certain criminal acts, as explained in the Introduction.
4	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 in part 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 and that mandatory reporting of felonious criminal acts that raise a substantial question about a lawyer's honesty and fitness to practice is appropriate. The Rule expressly states, however, 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], but moved the subject of the Comment into the Rule itself.  Commission included a provision for discretionary reporting of judicial misconduct. .
5	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] and placed it in the Rule itself.
2	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], which refers to Rule 3.10, the number assigned current rule 5-100 in the proposed Rules.

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED