



The State Bar *of California*

# The Duty to Report Misconduct: Proposed New Rule of Professional Conduct 8.3


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# Presentation Overview

1. Discuss history of rule 8.3 consideration by the State Bar.
2. Describe the events leading to the proposed rule.
3. Discuss alternative proposed rules.
4. Discuss ABA Model Rule 8.3 and other jurisdictions' rule 8.3.
5. Review resolutions for Board approval.






## 2010: Board Does Not Adopt Rule 8.3

- The First Rules Revision Commission (RRC1) recommended adoption of proposed rule 8.3.
- Rule would have created duty to report felonious criminal act that raised a substantial question as to that lawyer's honesty, trustworthiness or fitness—a narrower requirement than is currently proposed.





## 2010: Board Does Not Adopt Rule 8.3

- The Board of Governors (now Trustees) did not recommend adoption of a rule 8.3.
- Two concerns:
  1. Burden on lawyers to determine whether misconduct would constitute a felony.
  2. A mandatory reporting rule was the wrong public policy for California.





# 2016: Commission Does Not Recommend Rule 8.3

- The Second Rules Revision Commission (RRC2) did not recommend a version of rule 8.3.
- Four concerns:
  1. Difficulty to determine what is a substantial question as to the lawyer's honesty, trustworthiness, or fitness as an attorney.
  2. Potential for conflict between a lawyer and their client.
  3. Potential for conflicts with a lawyer's duty of loyalty.
  4. Inconsistency with Code of Judicial Ethics Canon 3D(2) (requires a judge to take "appropriate corrective action," which *may* include reporting to the State Bar).



## ABA Model Rule 8.3

### Requires:

- A lawyer has a duty to report where the lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.
- A lawyer has a duty to report where the lawyer knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office.

### Exceptions:

- Does not require disclosure of:
  - Information protected by confidentiality (rule 1.6), or
  - Information gained by a lawyer while participating in an approved lawyers assistance program.



## Board Chair Directs COPRAC to Consider Rule

- On November 17, 2022, Board of Trustees chair directed COPRAC to prepare a proposal for a new Rule of Professional Conduct addressing a lawyer's duty to report misconduct. Chair Duran requested COPRAC to prepare a proposal because California is the only state without a version of rule 8.3 and in light of the Girardi investigation. COPRAC was directed to consider:
  - American Bar Association (ABA) Model Rule 8.3,
  - Variations of Rule 8.3 in Effect in Other Jurisdictions, and
  - Past Consideration of a Version of Rule 8.3 by the State Bar.
- In December 2022, Senator Umberg introduced Senate Bill 42, reinforcing the Board's request that a rule 8.3 be reconsidered.
- Staff asked that COPRAC expedite providing the proposed rule to the Board at its March 2023 meeting.



## Alternative 1

### Misconduct that must be reported:

- A lawyer must, without undue delay, report another when the lawyer knows of credible evidence that the other lawyer has:
  - Committed a criminal act,
  - Engaged in fraud, or
  - Misappropriated funds or property in violation of rule 1.15

if the conduct raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.





## Alternative 2

### Misconduct that must be reported:

- A lawyer must, without undue delay, report another when the lawyer knows of credible evidence that the other lawyer has:
  - Committed a criminal act that reflects adversely on that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; or
  - Engaged in conduct involving:
    - Dishonesty,
    - Fraud,
    - Deceit, or
    - Reckless or intentional misrepresentation or misappropriation of funds or property.



# Requirements Proposed in Both Alternatives



## **Duty to report based on knowledge of credible evidence:**

A lawyer must have actual knowledge of credible evidence of misconduct. Knowledge may be inferred from circumstances.



## **Lawyer must report without undue delay:**

As soon as lawyer reasonably believes reporting will not cause material prejudice or damage to their client or a client of their firm



A lawyer may report other violations of the Rules of Professional Conduct or State Bar Act in addition to what must be reported.



## **Exceptions to required reporting for:**

- Information gained in substance use/mental health program
- Information protected by confidentiality, privilege, other rules or laws



## Two Alternatives

### Alternative 1 and Alternative 2

- Identical **except** paragraph (a) – the type of misconduct that must be reported
- Alternative 1 is narrower in what must be reported than Alternative 2



# Alternatives Compared to ABA Model Rule and Other Jurisdictions' Rules

ABA Model Rule 8.3 and 47 Other Jurisdictions	CA Proposed Rule 8.3 – Alternative 1	CA Proposed Rule 8.3 – Alternative 2
<p><b>Requires reporting of:</b></p> <ul style="list-style-type: none"><li>Any violation of the Rules of Professional Conduct that raises substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.</li></ul>	<p><b>Requires reporting of:</b></p> <ul style="list-style-type: none"><li>Criminal acts,</li><li>fraud, or</li><li>misappropriation of funds or property in violation of rule 1.15</li></ul> <p>If the conduct raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.</p>	<p><b>Requires reporting of:</b></p> <ul style="list-style-type: none"><li>Criminal act that reflects adversely on that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; or</li><li>Conduct involving<ul style="list-style-type: none"><li>Dishonesty,</li><li>Fraud,</li><li>Deceit, or</li><li>Reckless or intentional misrepresentation or misappropriation of funds or property.</li></ul></li></ul>



## Alternatives Compared to ABA Model Rule and Other Jurisdictions' Rules – Continued

	ABA Model Rule 8.3 and Most Jurisdictions	CA Alternative 1 and Alternative 2
<b>Knowledge Standard:</b>	Require reporting if a lawyer knows of misconduct.	Require reporting of a lawyer knows of credible evidence of misconduct.
<b>Exceptions to Duty to Report:</b>	No reporting required if: <ul style="list-style-type: none"><li>• Would disclose confidential information protected by rule 1.6.</li><li>• Information obtained by a lawyer participating in a State Bar lawyer assistance program or equivalent.</li></ul>	No reporting required if: <ul style="list-style-type: none"><li>• Would disclose confidential information protected by rule 1.6, privileges, or other rules or laws, including mediation confidentiality.</li><li>• Information obtained by a lawyer participating in any substance use or mental health program.</li></ul>



# Next Steps



Issue for a 45-day public comment period.

Continue to work with Senator Umberg's staff.



Possible Board approval of proposed rule 8.3 at May 2023 meeting.



If approved by the Board, proposed rule 8.3 submitted to California Supreme Court for adoption.



# Resolutions





## Request to Issue Alternatives for Public Comment

Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur in the proposed action on the Committee on Professional Responsibility and Conduct's proposed new Rule of Professional Conduct 8.3, passage of the following resolution is recommended:

**RESOLVED**, that the Board of Trustees, sitting as the Regulation and Discipline Committee, authorizes staff to make available for public comment, for a period of 45 days, the Committee on Professional Responsibility and Conduct's proposed new rule 8.3 of the California Rules of Professional Conduct with staff revisions as provided in Attachment A;

**FURTHER RESOLVED**, that the Board of Trustees, sitting as the Regulation and Discipline Committee, authorizes staff to make available for public comment, for a period of 45 days, the expanded proposed new rule 8.3 of the California Rules of Professional Conduct as provided in Attachment B; and it is

**FURTHER RESOLVED**, that this authorization for release of public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new Rule of Professional Conduct.

