



The State Bar of California

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

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Events Leading to Proposed Rule 8.3

Board directs action on proposed rule

- On November 17, 2022, Chair Duran directs COPRAC to prepare a proposal for a new Rule of Professional Conduct addressing a lawyer's duty to report misconduct.

SB 42 Introduced

- In December 2022, Senator Umberg introduced Senate Bill 42, reinforcing the Board's request that a rule 8.3 be reconsidered.

COPRAC drafts proposed rule 8.3

- COPRAC drafts proposed rule 8.3, issues proposal for 30-day public comment period and holds a public hearing.
- Following revisions, COPRAC approves proposed rule 8.3 for submission to Board of Trustees in March 2023.

Alternatives issued for public comment

- Board issues Alternative 1 (COPRAC version) and Alternative 2 (staff version) for 45-day public comment period.
- Staff also requests input on public preference for Alternative 1, Alternative 2, Model Rule 8.3, or no version of rule 8.3.



Alternatives Compared to Model Rule 8.3

ABA Model Rule 8.3	CA Proposed Rule 8.3 – Alternative 1	CA Proposed Rule 8.3 – Alternative 2
<p>Requires reporting of:</p> <ul style="list-style-type: none">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.	<p>Requires reporting of:</p> <ul style="list-style-type: none">Criminal acts,fraud, ormisappropriation of funds or property in violation of rule 1.15 <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>Requires reporting of:</p> <ul style="list-style-type: none">Criminal act that reflects adversely on that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; orConduct involving<ul style="list-style-type: none">Dishonesty,Fraud,Deceit, orReckless or intentional misrepresentation or misappropriation of funds or property.



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



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.

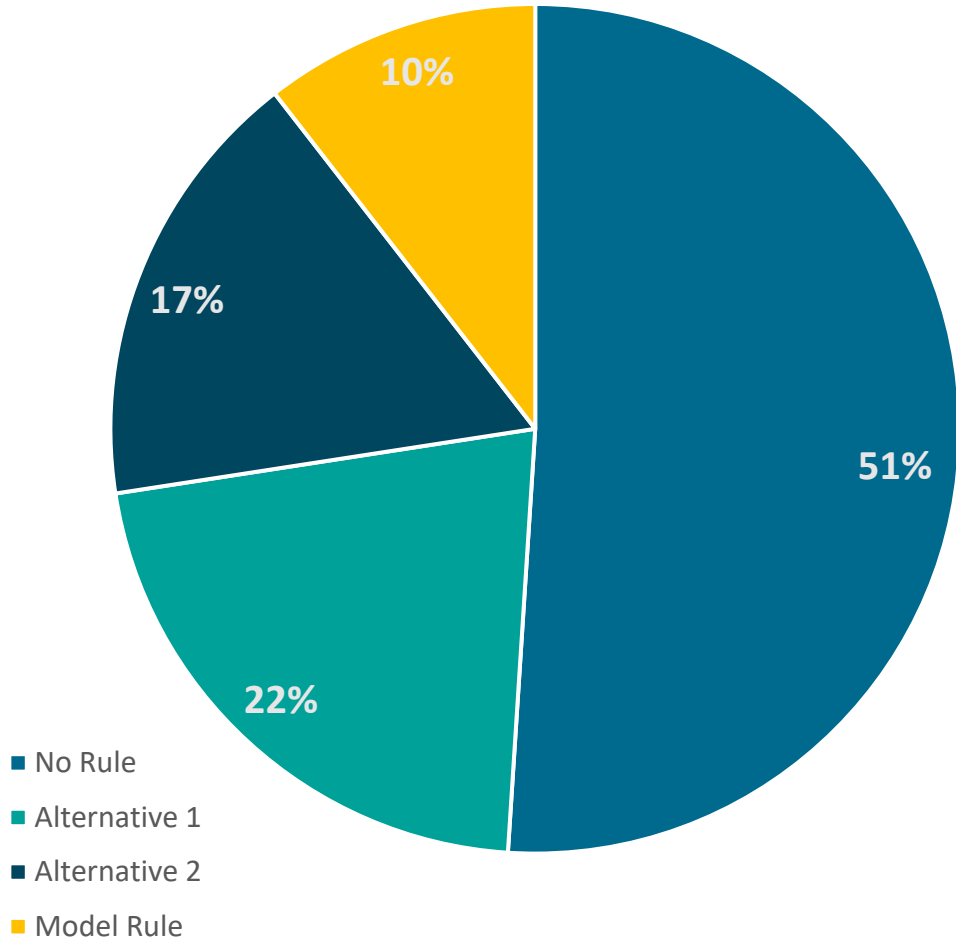


Exceptions to required reporting for:

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



Overview of the Public Comments Received

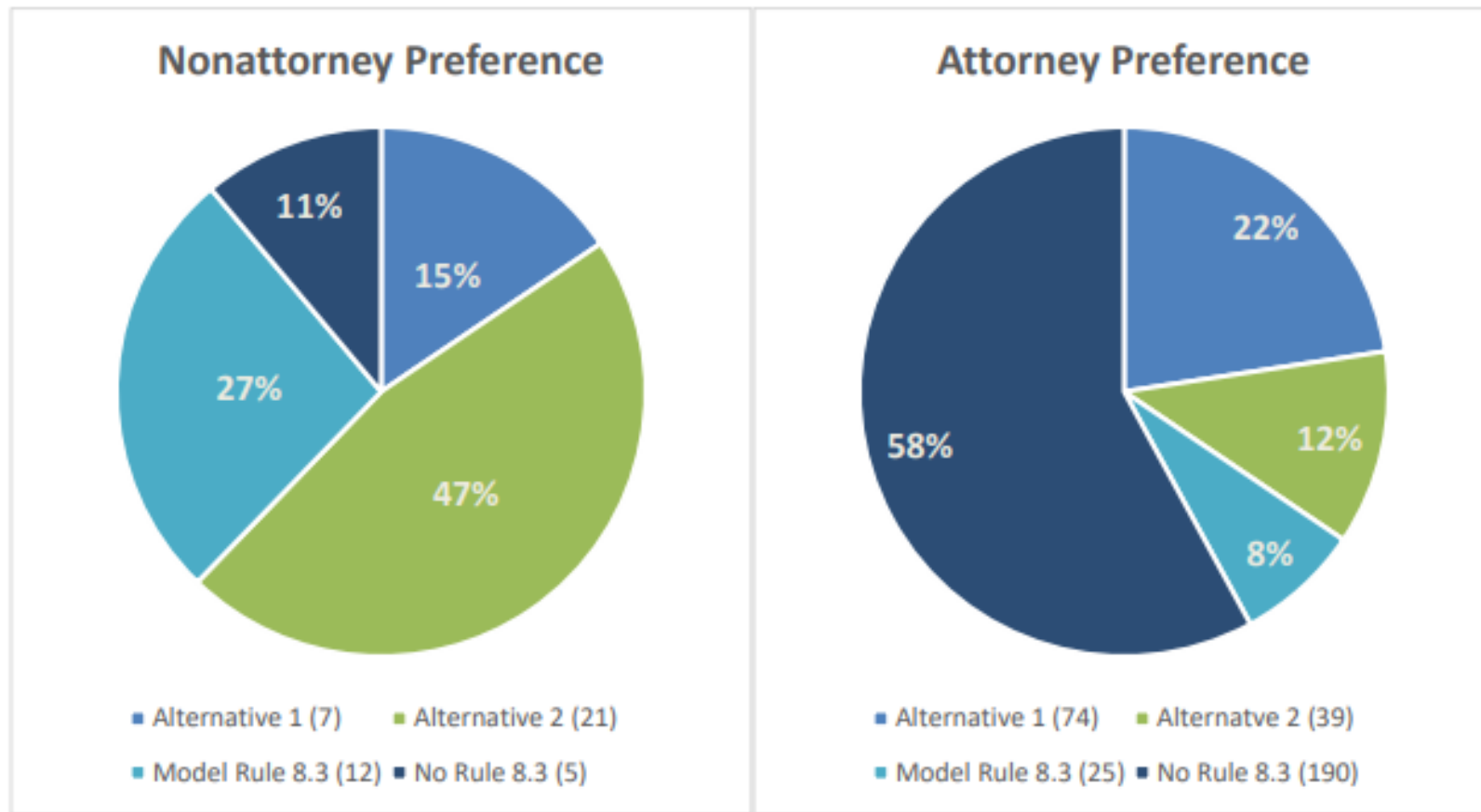


- The State Bar received 390 public comments on the proposals. Majority of commenters disagreed with moving forward with any version of rule 8.3.
 - 199 prefer no version of rule 8.3
 - 190 attorneys, 5 nonattorneys, 4 decline to state
 - 84 prefer **Alternative 1**
 - 74 attorneys, 7 nonattorneys, 3 decline to state
 - 66 prefer **Alternative 2**
 - 39 attorneys, 21 nonattorneys, 6 decline to state
 - 41 prefer **Model Rule 8.3**
 - 25 attorneys, 12 nonattorneys, 4 decline to state



Attorney vs. Nonattorney Preferences

390 comments: 328 were provided by attorneys, 45 from nonattorneys, and 17 from individuals who declined to state whether they are an attorney



- Nonattorney commenters:
 - 89% want a version of rule 8.3, and prefer Alternative 2, Model Rule 8.3, then Alternative 1 descending order.
- Attorney commenters:
 - 58% do not want any version of rule 8.3, and then prefer Alternative 1, Alternative 2, and Model Rule 8.3 in descending order.



Summary of Opposing Positions

- Rule will be weaponized, particularly against attorneys of color, women, and solo and small firm attorneys
 - Should be able to report anonymously
 - Should have exceptions to reporting based on threats of retaliation
- Reaction to May/ Lazar Reports and the handling of complaints against Thomas Girardi
- Will “open the floodgates” for complaints and negatively impact the discipline system
- Will not protect the public or enhance public trust in the legal profession. Instead it will:
 - Increase public harm by discouraging lawyers from seeking ethical guidance and assistance from their colleagues
 - Inhibit the lawyer-client relationship
 - Take lawyers away from helping their clients to respond to unfounded State Bar complaints
 - Embroil the complaining lawyer and State Bar in civil cases
 - Increase the cost of professional malpractice insurance that will be passed onto clients through higher fees
- There are better ways to promote public protection, such as through education on professional responsibility obligations for attorneys and on how to report attorneys for the general public



Summary of Support Positions

- Lawyers have a moral duty to report misconduct, and are in a better position to know about lawyer misconduct
- A rule will create a heightened disincentive for engaging in misconduct since it is more likely that the State Bar will be notified
- Will help a lawyer who wants to report because it is required, removing the discretion
- Rejected the “California is unique” argument raised by opponents, observing that bad actors are bad actors and should be reported
- Existing rules and statutes can be enforced to discourage weaponization



Summary of Positions on Alternatives and Model Rule 8.3

- **Proponents of Alternative 1:**

- Appropriately limited to egregious conduct/ less likely to be weaponized
- Easier to follow than Alternative 2 or Model Rule 8.3

- **Proponents of Alternative 2:**

- Appropriately more broad than Alternative 1 and more narrow than Model Rule 8.3 to limit reporting to conduct that results in client and public harm
- Addresses the varieties of misconduct that can occur in different types of practice areas, beyond those in which an attorney directly handles money

- **Proponents of Model Rule 8.3:**

- Should be adopted for uniformity and consistency with other jurisdictions
- Best serves public protection





Board Questions at March Meeting

- **How to Comply with Rule 8.3:**
 - Lawyers will continue to use the same form for filing complaints
 - Lawyer-filed complaints already tracked and staff will explore other ways to further track complaints filed under the rule 8.3 reporting obligation, if adopted.
- **Potential Discipline for Violation of Rule 8.3:**
 - Standard 2.19 applies
 - Discipline could vary from a private reproof up to a three-year suspension
 - Depends on factors surrounding the misconduct





Board Questions at March Meeting

Potential Increase in Complaint Volume:

- States that track lawyer-filed complaints report that they are 3-9% of total complaints
- Currently, California receives 3-4% of all complaints from lawyers



Recommendation of Alternative 2

- Protection of the public . . . Shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions.” (Bus. & Prof. Code, § 6001.1.)
- Alternative 2 strikes a balance
 - Requires a lawyer to report misconduct that is most likely to result in harm to a client or third party
 - Allows for the discipline system to not be overwhelmed with the mandatory reporting of every violation of a Rule of Professional Conduct.
 - Exceptions to the duty to report in the rule and comment section address many of the concerns of commenters



Changes to paragraph (c) and Comment [3]

- Paragraph (c): For purposes of this rule, “criminal act” as used in paragraph (a) excludes conduct that would be a criminal act in another state, United States territory, or foreign jurisdiction, but not a ~~criminal act~~ **crime** in California.
- Comment [3]: The duty to report without undue delay under paragraph (a) requires the lawyer to report as soon as the lawyer reasonably believes* the reporting will not cause material prejudice or damage to the interests of a client of the lawyer or a client of the lawyer’s firm. The lawyer should also consider the applicability of other rules such as rules 1.4 (the duty to communicate), ~~and~~ 1.7(b) (material limitation conflict), **5.1 (responsibilities of managerial and supervisory lawyers), and 5.2 (responsibilities of a subordinate lawyer).**



Resolutions



Request to Adopt Alternative 2 of Proposed Rule 8.3

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

RESOLVED, following notice and publication for comment, that the Board of Trustees, sitting as the Regulation and Discipline Committee, recommends that the Board of Trustees adopts proposed new Rule 8.3 of the Rules of Professional Conduct, as set forth in Attachment A; and it is

FURTHER RESOLVED, that staff is directed to submit the proposed new rule 8.3 to the Supreme Court of California with a request that the rule be approved, together with a request that if approved, the new rule be made operative on an expedited basis.

