



The State Bar of California

OPEN SESSION AGENDA ITEM 60-1 MAY 2023

DATE: May 18, 2023

TO: Members, Board of Trustees
Sitting as the Regulation and Discipline Committee

FROM: Erika Doherty, Program Director, Office of Professional Competence

SUBJECT: Proposed Rule of Professional Conduct 8.3 (Reporting Professional Misconduct): Request for Adoption

EXECUTIVE SUMMARY

At the [March 16, 2023](#), meeting of the Board of Trustees sitting as the Regulation and Discipline Committee (RAD), RAD issued two options for new, proposed rule 8.3 of the Rules of Professional Conduct for a 45-day public comment period. Any version of rule 8.3 would require a lawyer to report another lawyer if the lawyer knows that other lawyer has engaged in certain prohibited conduct in violation of the Rules of Professional Conduct.

At the direction of the Chair of the Board of Trustees, the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC) prepared Alternative 1, a narrower recommendation, which would require a lawyer to report another that commits a criminal act, engages in fraud, or misappropriates funds or property in violation of rule 1.15. Such conduct is only required to be reported if it raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

Staff prepared an expanded option, Alternative 2, which would require reporting of the same misconduct as Alternative 1, plus dishonesty, deceit, and reckless or intentional misrepresentations. Alternative 2 does not have a qualifier that the misconduct must raise a "substantial question" as to a lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects" to require reporting. However, a lawyer is only required to report another lawyer for a criminal act that "reflects adversely" on that lawyer's honesty, trustworthiness, or fitness as a lawyer.

As part of the public comment, staff also asked for input on whether the commenters preferred Alternative 1, Alternative 2, no version of rule 8.3, or American Bar Association Model Rule 8.3 (Model Rule 8.3), which is broader than either Alternative, and requires reporting of any 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 and has fewer exceptions to the duty to report.

The State Bar received 390 public comments on the proposals, 328 of which were submitted by attorneys and attorney organizations. 199 of the commenters, 190 of which are attorneys, prefer that no version of rule 8.3 be adopted. Of the commenters who supported a version of rule 8.3, 84 support Alternative 1, 66 support Alternative 2, and 41 support Model Rule 8.3.

After reviewing the comments and considering conversations with key stakeholders on this matter, staff recommends that RAD and the Board approve Alternative 2 of proposed Rule of Professional Conduct 8.3, and direct staff to submit proposed new rule 8.3 to the California Supreme Court for adoption.

BACKGROUND

At the [November 17, 2022](#), Board of Trustees meeting, Chair Duran assigned COPRAC to prepare a proposal for a new Rule of Professional Conduct addressing a lawyer's duty to report the misconduct of another lawyer.¹ At its January 13, 2023, meeting, COPRAC voted to issue a draft of proposed rule 8.3 for a 30-day public comment period and to hold a public hearing to receive comment. At the March 16, 2023, RAD meeting, staff presented COPRAC's version of proposed rule 8.3 as Alternative 1. Staff also presented an alternative, expanded option for proposed rule 8.3, Alternative 2. RAD authorized staff to issue both alternative proposed rules for a 45-day public comment, and staff also sought input on whether the commenters preferred Alternative 1, Alternative 2, Model Rule 8.3,² or no version of rule 8.3.

¹ The Board charges COPRAC with addressing matters involving legal ethics, including studying and recommending changes to the Rules of Professional Conduct. (See Bus. & Prof. Code, § 6077; State Bar Board Book, Section 4.12 & Appen. B.) In consideration of its proposal, Chair Duran asked COPRAC to consider Model Rule 8.3, other jurisdictions' versions of rule 8.3, and past consideration of a version of rule 8.3 in California by the State Bar's Commission for the Revision of the Rules of Professional Conduct. A history of past consideration of rule 8.3 in California is provided in the [March Board item](#) (see pages 2-3).

² As reported in the March 16, 2023, Board item, 47 jurisdictions have adopted a duty to report misconduct that is substantially similar to the duty to report set forth in Model Rule 8.3: where a "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." A few of the jurisdictions have clarified that the duty to report is limited to violations of the rules within the jurisdiction. Three jurisdictions, Alabama, Illinois, and Michigan have narrowed the type of misconduct that must be reported. Georgia has a version of rule 8.3 that is substantially similar to Model Rule 8.3; however, there is no disciplinary penalty for a violation of the rule. Staff unintentionally omitted in its March memo the fact that Washington's Rule 8.3 does not require mandatory reporting of misconduct, and instead states that a lawyer "should" report.

Proposed Rule 8.3 – Alternative 1	Proposed Rule 8.3 – Alternative 2
<p>Requires reporting of:</p> <ul style="list-style-type: none"> • Criminal acts, • fraud, or • misappropriation 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; or • Conduct involving <ul style="list-style-type: none"> ○ Dishonesty, ○ Fraud, ○ Deceit, or ○ Reckless or intentional misrepresentation or misappropriation of funds or property.

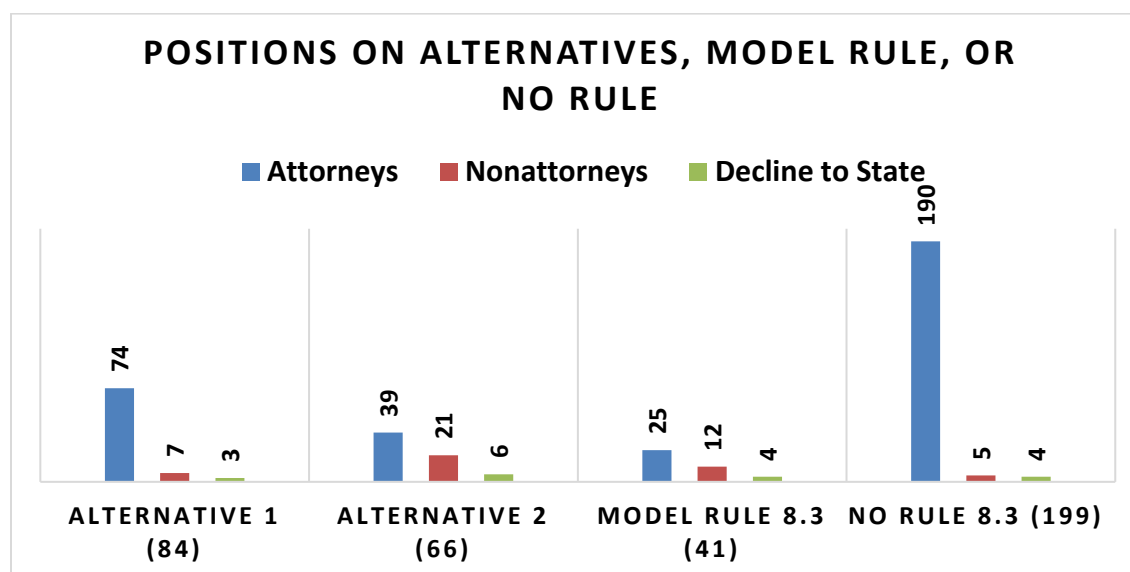
At the same time that the Alternatives for proposed rule 8.3 are progressing at the State Bar, [Senate Bill 42](#), introduced by Senator Umberg, is pending in the legislature. The bill would establish a statutory duty to report attorney misconduct by adding section 6090.8 to the Business and Professions Code. At this writing, the bill is substantially the same as Model Rule 8.3, and would require a licensee to report to the State Bar if the licensee “knows that another licensee has engaged in professional misconduct that raises a substantial question as to that licensee’s honesty, trustworthiness, or fitness as an attorney in other respects.” State Bar staff is engaged in conversations with Senator Umberg’s staff, and Senator Umberg has been updated on the progress of proposed rule 8.3 by his staff and Chair Duran.

DISCUSSION

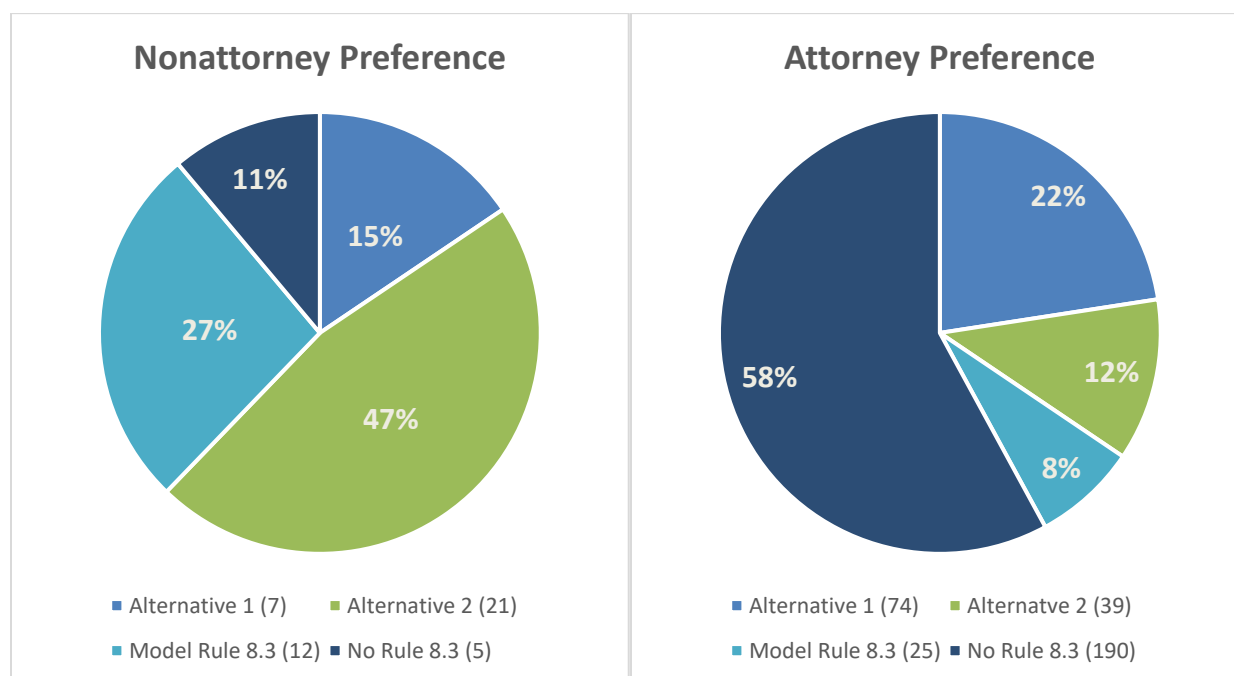
OVERVIEW OF THE PUBLIC COMMENTS RECEIVED

The State Bar received 390 public comments on the proposals.³ Of the 390 commenters, 199 prefer no version of rule 8.3, 84 prefer Alternative 1, 66 prefer Alternative 2, and 41 prefer Model Rule 8.3.

³ The public comments are accessible [here](#).

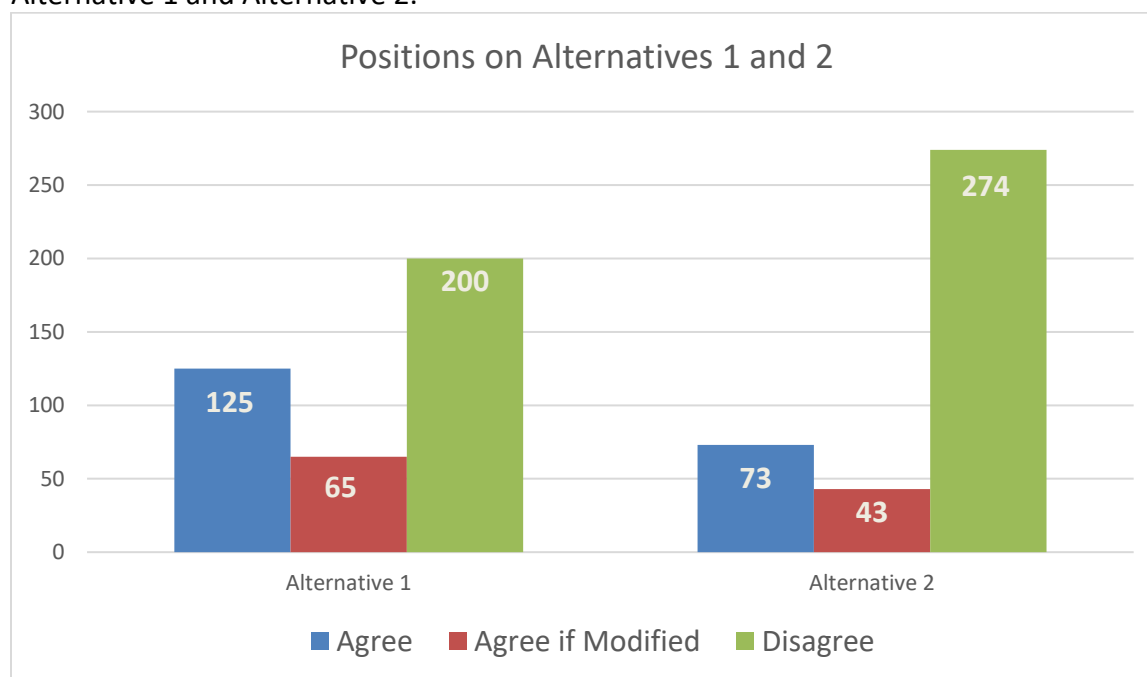


The State Bar made significant efforts to solicit public comment from nonattorneys, but received very few comments. Of the comments received, 328 were provided by attorneys, 45 from nonattorneys, and 17 from individuals who declined to state whether they are an attorney.⁴ 89 percent of nonattorney commenters want a version of rule 8.3, and prefer Alternative 2, Model Rule 8.3, then Alternative 1 descending order. Attorney commenters do not want any version of rule 8.3, and then prefer Alternative 1, Alternative 2, and Model Rule 8.3 in descending order.



⁴ Commenters self-identified whether they were attorneys, nonattorneys, or commenting on behalf of an organization. Within the comments, 11 commenters indicated their comments were made on behalf of an organization.

Each commenter also indicated their agreement, agreement if modified, or disagreement with Alternative 1 and Alternative 2.



Most commenters indicated their position on the rule, but many did not provide additional comment to explain the rationale for their position.

General Comments Against Any Version of Rule 8.3

Of those who believe that no version rule 8.3 should be adopted, most stated that any version of the rule will decrease civility and be weaponized in litigation, particularly by opposing counsel. Some commenters stated that although rule 8.3 exists in other jurisdictions, California has a uniquely strong client focus with heightened protections for client confidentiality and strong commitment to the duty of loyalty. These commenters believe that any version of the proposed rule would run afoul of this client-focused philosophy and inhibit the lawyer-client relationship. Moreover, even if other states with a rule 8.3 have not seen negative effects that opponents to the rule are concerned with, those in opposition point out that it is not clear that the rules have produced positive results or were necessary. A few commenters also suggested that the rule requires compelled speech that would violate the First Amendment.

Some commenters, including the California Association of Black Lawyers, are particularly concerned that rule 8.3 will be disproportionately weaponized against attorneys of color, women, and solo and small firm attorneys. Similarly, some commenters recommended that further protections, such as the ability to report anonymously, and exceptions be added based on threats of retaliation for filing complaints.

Opponents to the rule also stated that it is merely a reaction to the Girardi matter, and that it will not protect the public or enhance public trust in the legal profession. Instead, some commenters stated that the rule could actually increase public harm because it could

discourage lawyers from seeking ethical guidance and assistance from their colleagues, and would take time away from helping their clients to respond to unfounded State Bar complaints. These commenters also caution that lawyers who file complaints and the State Bar will be forced to be witnesses in more civil cases. Additionally, they fear that this rule could increase the cost of professional malpractice insurance as unfounded complaints will be reported to insurance providers, thereby increasing the cost of insurance which would be passed onto clients through higher fees.

Commenters also stated that 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. They stated that any version of rule 8.3 will “open the floodgates” for complaints, negatively impact the discipline system and the Office of Chief Trial Counsel (OCTC), and that the State Bar should focus its resources on the complaints it already receives from clients, the public, and attorneys who choose to report misconduct.

General Comments on Both Alternatives

Seven commenters who expressed a preference for Alternative 1 or Alternative 2 support including paragraph (c) in any version of rule 8.3. Paragraph (c) would exempt from mandatory reporting conduct that would be a criminal act in another state, United States territory, or foreign jurisdiction, but not a criminal act in California.

Another commenter stated that the exceptions to reporting override the intent of the rule to promote public protection, and a different commenter stated that the exception for information gained in a substance use or mental health treatment program should be removed.

Support for Alternative 1 Over Alternative 2

Proponents of Alternative 1 stated that it appropriately limits the required reporting to conduct that is egregious. Commenters in support also stated that Alternative 1 is easier to follow, addresses violations that can be proven and are clear, and limits the negative consequences of a duty to report on the lawyer-client relationship. Commenters who prefer Alternative 1 stated that Alternative 2 is too subjective and is more likely to be weaponized, points that were also reflected in COPRAC’s rationale for limiting Alternative 1 to criminal acts, fraud, and misappropriation.

Support for Alternative 2 or Model Rule 8.3 Over Alternative 1

There were common themes among commenters who supported Alternative 2 and Model Rule 8.3. Many indicated that lawyers have a moral duty to report misconduct, and that clients often will not know about misconduct when lawyer might. They also stated that Alternative 2 will create a higher disincentive for engaging in misconduct since there is a higher likelihood of being reported. Some stated that a duty to report will help a reporting lawyer because reporting would be required and would remove the discretion as to whether the lawyer should report a colleague. Several of these commenters also rejected the “California is unique” argument raised by opponents, observing that bad actors are bad actors and should be reported. They noted that existing rules and statutes already prohibit threatening to report

(rule 3.10) and false and malicious reporting (Bus. & Prof. Code § 6043.5), and can and should be enforced to discourage weaponization of the rule.

Support for Alternative 2

Proponents of Alternative 2 stated that Alternative 1 is too narrow, and that misconduct that is attributable to many other aspects of the practice of law beyond criminal acts, fraud, and misappropriation equally indicate an attorney lacks fitness to practice and can result in client and public harm. An example provided by OCTC in its initial public comment is useful. A lawyer knows that the opposing lawyer has received settlement funds and also made a false statement to their client that such funds have not been received. Under Alternative 1, the lawyer would not have to report the opposing lawyer because the lawyer does not know of credible evidence of the opposing lawyer's misappropriation. Under Alternative 2, the lawyer would have to report because the lawyer knows of credible evidence that the opposing lawyer engaged in dishonesty, deceit, and intentional misrepresentation.

Commenters also stated that Alternative 2 will better address the varieties of misconduct that can occur in different types of practice areas, beyond those in which an attorney directly handles money. In support for Alternative 2 over Model Rule 8.3, several commenters stated that Alternative 2 is better narrowed to protect against conduct that results in client and public harm. The Stanford Law School Deborah L. Rhode Center on the Legal Profession stated that, compared with Model Rule 8.3, Alternative 2 "provides more specific language outlining the underlying bad acts giving rise to the reporting requirement, which should increase both understanding of, and compliance with, the Rule, as well as the Bar's ability to enforce against noncompliance."

Support for Model Rule 8.3

Supporters of Model Rule 8.3 stated that Alternative 2 comes close to Model Rule 8.3, so the rule should go one step further and be identical to the Model Rule. They stated that the rule should be adopted for uniformity and consistency with other jurisdictions, that it best serves public protection, and that lawyers should be accountable for any violation of the Rules of Professional Conduct.

Public Comments Suggesting Modifications to Proposed Alternatives

A few of the commenters provided specific recommended revisions to both proposed Alternatives. The following section describes these commenter-proposed revisions and staff's recommendations regarding the proposals.

Changes to the Knowledge Standard that Creates a Duty to Report – Not Recommended

The California Lawyers Association (CLA) recommends that the "knows of credible evidence" standard in Alternatives 1 and 2 creating a lawyer's duty to report be revised because it is confusing. CLA suggests changing the standard to "knows," which is defined in rule 1.0.1(f) and "means actual knowledge of the fact in question. A person's* knowledge may be inferred from the circumstances." Staff does not recommend this modification. COPRAC originally proposed

that a duty to report be limited to “personal knowledge” of conduct, which the COPRAC ultimately determined to be too narrow based on initial public comment and in furtherance of public protection. However, COPRAC did not recommend, and staff agrees, that the knowledge standard should be more limited than the “knows” standard in rule 1.0.1(f). The higher standard is intended to address concerns that the duty to report will be weaponized and only require reporting when a lawyer possesses sufficient knowledge for OCTC to investigate the conduct.

Clarification Regarding Criminal Acts that Must be Reported – Recommended

CLA also advises against using both the term “crime” and “criminal act” in the proposed rule, stating that the terms can have materially different meanings. Staff agrees with this recommendation and recommends replacing “crime” with “criminal act” in paragraph (c) to clarify that the duty to report a criminal act excludes conduct that would not be a criminal act in California.

Revisions to Comment [3] Regarding Applicability of Other Rules – Recommended

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee (LACBA-PREC) recommends that Comment [3] be amended to cross-reference rule 5.2(b), which addresses the responsibilities of subordinate lawyers. Staff agrees with this recommendation in part, and further recommends cross referencing rules 5.2 in its entirety, as well as rule 5.1 (Responsibilities of Managerial and Supervisory Lawyers), to clarify that the obligations imposed by both of these rules also apply to the duty to report in proposed rule 8.3.

Reporting Where a Lawyer Knows the Conduct was Already Reported – Not Recommended

CLA and LACBA-PREC recommend adding an exception to the duty to report to if the lawyer knows the conduct of another lawyer has already been reported to the State Bar or that the lawyer’s conduct is already the subject of a State Bar investigation. These commenters state that there is no reason to require multiple complaints regarding the same misconduct and that, without this exception, the discipline system will be flooded with complaints. Staff does not recommend this revision. There is a benefit to receiving complaint information from multiple attorneys who may have varied information about possible misconduct. Staff has consulted with the Chief Trial Counsel who confirms that his office is capable of and experienced in analyzing multiple complaints against the same individual.

Retroactivity of Rule 8.3 – Not Recommended

CLA and LACBA-PREC recommend that, if adopted, rule 8.3 should not apply retroactively to require a lawyer to report the conduct of another lawyer if that conduct occurred prior to the effective date of the rule. These commenters were concerned that if rule 8.3 applies to conduct occurring prior to the effective date of the rule, there would be an overwhelming number of complaints filed that would negatively impact OCTC’s limited resources and, in turn, hinder public protection. Staff does not recommend this revision. Limiting the duty to report to conduct occurring after the rule’s effective date will not best serve public protection. Staff recognizes that there could be a higher volume of complaints initially; however, this would also

mean that lawyers have known of credible evidence that other lawyers have committed criminal acts, engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation, or misappropriated funds or property and not reported it. If lawyers have been holding onto such information, it should be reported so that action can be taken on credible evidence of a violation of the Rules of Professional Conduct that are most associated with client and public harm.

ADDITIONAL INFORMATION REQUESTED BY RAD AT THE MARCH 16, 2023, MEETING

During the discussion regarding proposed rule 8.3 at the March 16, 2023, meeting, RAD asked staff to provide additional information at this meeting on the following topics:

How a Lawyer Will Report to Comply with Rule 8.3

Staff recommends that attorneys report misconduct under rule 8.3 using the standard complaint form, and does not recommend an alternative process or system for such reporting. OCTC already tracks whether a complaint is filed by a lawyer. Staff will explore other ways to further track complaints filed under the rule 8.3 reporting obligation, if adopted.

Potential Discipline for a Rule 8.3 Violation

Title IV of the Rules of Procedure of the State Bar sets forth the Standards for Attorney Sanctions for Professional Misconduct, which establish a level of discipline based on the type of misconduct.⁵ Certain Standards address specific types of misconduct; however, Standard 2.19 applies to violations of a rule or rules that are not otherwise specified in the Standards. Standard 2.19 would apply for a violation of rule 8.3, and discipline could vary from a private reproof up to a three-year suspension. The level of discipline would also require an examination of other factors surrounding the misconduct, including any other discipline for which the lawyer is found culpable, any prior record of discipline, as well as aggravating and mitigating circumstances.

Concerns about Increase in Complaint Volume and Fiscal Impact

RAD asked staff to provide more information regarding the number of complaints filed in other jurisdictions under their versions of rule 8.3 to better understand whether adoption of a version of rule 8.3 will lead to a significant increase in the number of complaints submitted to OCTC. Staff surveyed several states, requesting information regarding the number of complaints filed by lawyers in furtherance of their obligations under rule 8.3 or other data regarding lawyer-filed complaints.⁶

⁵ These Standards are adopted by the Board to promote consistent and uniform application of discipline. They are not binding on the California Supreme Court, but the Court will not reject a recommendation for discipline based on the Standards unless the Court has “grave doubts as to the propriety of the recommended discipline.” (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92.)

⁶ Staff contacted Arizona, Colorado, the District of Columbia, Florida, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, Texas, and Washington.

Illinois has the most data of any jurisdiction surveyed, and has a rule that is substantially similar to Alternative 2 in terms of what conduct must be reported. In 1988, the Illinois Supreme Court issued the first disciplinary decision regarding rule 8.3. (*In re Himmel* (Ill. 1988) 533 N.E.2d 790.). The Court ordered a lawyer, Mr. Himmel, suspended for one year for failing to report the misconduct of another lawyer who formerly represented Mr. Himmel's client and misappropriated the client's settlement funds, even though the client directed Mr. Himmel to not report the misconduct.⁷ Illinois started tracking lawyer-filed complaints in the year following the *Himmel* decision. In the year before the Illinois Supreme Court publicly disciplined Mr. Himmel, there were 154 lawyer filed complaints. In the year after the *Himmel* decision, the lawyer-filed complaints rose to 922. From 1988 to 2020, lawyers filed 8.7 percent of all complaints in Illinois (17,271 out of 199,187). More significantly, from 1992–2020, lawyer-filed complaints made up 23 percent of the complaints that lead to formal discipline charges against the lawyer that was reported on, likely because such complaints relate to more egregious and provable misconduct.⁸

Texas recently started tracking lawyer-filed complaints based on claims that lawyers were weaponizing the discipline system. From 2019–2021, Texas received 22,527 complaints. Texas tracked whether the complaint was lawyer-filed by examining the complaint itself, and reports that 636 (less than 3 percent) were filed by lawyers.⁹

Some states provided more anecdotal information based off of general complaint data. For example, the Maryland version of rule 8.3 was adopted effective July 1, 2016, and the number of complaints increased slightly in 2017. However, the number of complaints filed in 2017 was similar to other, prior years, and the average number of complaints in the four years prior to adoption of rule 8.3 was higher than the average number of complaints received after adoption. Maryland also estimated that the number of all lawyer-filed complaints is less than 5 percent of filed complaints, and that lawyer-filed complaints who file with reference to rule 8.3 as the basis for the complaint is even lower. Similarly, Colorado's current version of rule 8.3 was adopted effective January 1, 2008, and their 2009 Annual Report did not suggest a big increase in the number of complaints following rule adoption. Florida reported more generally that the quantity of lawyers reporting other lawyers compared with the total number of complaints is low. Washington has a discretionary reporting requirement, and reported that 1-3 percent of complaints are lawyer-filed. Of the other states that responded, many indicated that they do not track specific data on rule 8.3 or lawyer-filed complaints.

⁷ Mr. Himmel was hired to collect the client's unrecovered settlement funds from the former lawyer. Instead, Mr. Himmel negotiated an agreement in which the former lawyer would pay the client a higher amount and, in turn, Mr. Himmel would receive a larger fee, in exchange for Mr. Himmel agreeing to not initiate any criminal, civil, or attorney disciplinary action against the former lawyer based on the misappropriation. If such conduct had occurred in California, Mr. Himmel would have violated existing Business and Professions Code section 6090.5, which prohibits agreements that preclude filing a complaint. The conduct also would violate either Alternative 1 or Alternative 2 of rule 8.3.

⁸ Staff wishes to thank James Grogan, Adjunct Professor at Loyola University Chicago School of Law for his tremendous assistance in gathering this information.

⁹ The Texas State Bar stated that the 636 lawyer-filed complaints do not include complaints filed a client's name or Texas State Bar initiated complaints based on anonymous complaints by lawyers. They indicated that these instances are uncommon.

These numbers of attorney complaints are consistent with the current number of lawyer-filed complaints in California, which make up 3-4 percent of the total complaints in the last 4 years.

Complaint filed by:	2019	2020	2021	2022
Attorney	384 (3%)	347 (3%)	407 (3%)	510 (4%)
Nonattorney	13,225 (97%)	11,957 (97%)	11,533 (97%)	12,376 (97%)
Total	13,609	12,304	11,940	12,886

Based on existing information regarding lawyer-filed complaints in California with no rule 8.3 reporting requirement, and lawyer-filed complaints in other jurisdictions with a rule 8.3 reporting requirement, it is difficult to anticipate the fiscal impact that adoption of rule 8.3 will have on OCTC and the State Bar. However, except for a temporary increase in reporting in Illinois based on discipline for a rule 8.3 violation, not the adoption of rule 8.3, there is no evidence in other jurisdictions to suggest that there would be a significant increase in complaint filing or cost to OCTC.

STAFF RECOMMENDS APPROVAL OF ALTERNATIVE 2

Staff recommends that Alternative 2 of rule 8.3 be approved by the Board and submitted to the California Supreme Court for adoption, with minor changes to paragraph (c) and Comment [3], as previously described. Staff recognizes that there are numerous public comments indicating that no version of rule 8.3 should be adopted or that Alternative 1, the narrowest version of the rule, should be adopted. However, the State Bar's highest priority is protection of the public. (Bus. & Prof. Code, § 6001.1.) Alternative 2 best accomplishes this goal by requiring a lawyer to report of misconduct that is most likely to result in harm to a client or third party while also allowing for the discipline system to not be overwhelmed with the reporting of every violation of a Rule of Professional Conduct.

Additionally, Alternative 2 includes exceptions to the duty to report that address many of the concerns raised by those opposing any version of rule 8.3. These exceptions include the ability to delay reporting if reporting would materially prejudice or damage a client's interest, which is consistent with protection of client confidentiality and the duty of loyalty. Alternative 2 also addresses concerns about weaponization by cross-referencing the authorities that prohibit threatening to file a complaint for advantage in a civil dispute (rule 3.10), and criminal penalties for filing false or malicious complaints (Bus. & Prof. Code, § 6043.5). Importantly, the proposed rule also helps to protect the lawyer who must report by cross-referencing Business and Professions Code section 6094, which provides statutory civil immunity for reporting. Finally, the rule should not dissuade a lawyer from seeking help with an ethics concern; the rule provides an exception to the duty to report for a lawyer who is consulted with or retained to

represent another lawyer whose conduct is in question or consulted in a professional capacity by a lawyer who is inquiring about their duty to report. It also exempts lawyers from reporting if they learn information about another lawyer while providing advice or assistance to a state or local bar association ethics hotline.

FISCAL/PERSONNEL IMPACT

Addressed above.

AMENDMENTS TO RULES OF PROFESSIONAL CONDUCT

This agenda item requests Board adoption of proposed new rule 8.3 of the California Rules of Professional Conduct.

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

d. 2. Develop strategies to effectively investigate and prosecute attorneys who commit misconduct, regardless of the nature of their practice, including attorneys in large organizations and firms.

RECOMMENDATIONS

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 adopt proposed new Rule 8.3 of the Rules of Professional Conduct, as set forth in Attachment A.

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees, upon recommendation of the Board of Trustees, sitting as the Regulation and Discipline Committee, adopt 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.

ATTACHMENTS LIST

- A.** Proposed Rule 8.3 (Clean)
- B.** Proposed Rule 8.3 (Redline Showing Changes from Public Comment Version)
- C.** Public Comments on Alternatives 1 and 2 of Proposed Rule 8.3, accessible [here](#)

Proposed Rule 8.3 Reporting Professional Misconduct

- (a) A lawyer shall, without undue delay, inform the State Bar when the lawyer knows* of credible evidence that another lawyer has:
- (1) committed a criminal act that reflects adversely on that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; or
 - (2) engaged in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation or misappropriation of funds or property.
- (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) 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 in California.
- (d) This rule does not require or authorize disclosure of information gained by a lawyer while participating in a substance use or mental health program, or require disclosure of information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.8.2; mediation confidentiality; the lawyer-client privilege; other applicable privileges; or by other rules or laws, including information that is confidential under Business and Professions Code section 6234.

Comment

[1] This rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required by these rules or the State Bar Act. (See, e.g., rule 8.4.1(d) and (e); Bus. & Prof. Code, § 6068, subd. (o).)

[2] The duty to report under paragraph (a) is not intended to discourage lawyers from seeking counsel. This rule does not apply to a lawyer who is consulted about or retained to represent a lawyer whose conduct is in question, or to a lawyer consulted in a professional capacity by another lawyer on whether the inquiring lawyer has a duty to report a third-party lawyer under this rule. The duty to report under paragraph (a) does not apply if the report

* "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's* knowledge may be inferred from circumstances. (Rules Prof. Conduct, rule, 1.0.1(f).)

* "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive. (Rules Prof. Conduct, rule, 1.0.1(d).)

would involve disclosure of information that is gained by a lawyer while providing advice on legal ethics issues as a member of the State Bar Ethics Hotline.

[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).

[4] 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.

[5] Information about a lawyer's misconduct or fitness may be received by a lawyer while participating in a substance use or mental health program, including but not limited to the Attorney Diversion and Assistance Program. (See Bus. & Prof. Code, § 6234.) In these circumstances, providing for an exception to the reporting requirement of paragraph (a) of this rule encourages lawyers to seek treatment through such programs. Conversely, without such an exception, lawyers 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.

[6] In addition to reporting as required by paragraph (a), a report may also be made to another appropriate agency. A lawyer must not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of rule 3.10.

[7] A lawyer may also be disciplined for participating in an agreement that precludes the reporting of a violation of the rules. See rule 5.6(b) and Business and Professions Code section 6090.5.

[8] Communications to the State Bar relating to lawyer misconduct are "privileged and no lawsuit predicated thereon may be instituted against any person." See Business and Professions Code section 6094; but see Business and Professions Code section 6043.5 with respect to criminal penalties for false and malicious reports or complaints.

Proposed Rule 8.3 Reporting Professional Misconduct

- (a) A lawyer shall, without undue delay, inform the State Bar when the lawyer knows* of credible evidence that another lawyer has:
- (1) committed a criminal act that reflects adversely on that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; or
 - (2) engaged in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation or misappropriation of funds or property.
- (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) 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 in California.
- (d) This rule does not require or authorize disclosure of information gained by a lawyer while participating in a substance use or mental health program, or require disclosure of information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.8.2; mediation confidentiality; the lawyer-client privilege; other applicable privileges; or by other rules or laws, including information that is confidential under Business and Professions Code section 6234.

Comment

[1] This rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required by these rules or the State Bar Act. (See, e.g., rule 8.4.1(d) and (e); Bus. & Prof. Code, § 6068, subd. (o).)

[2] The duty to report under paragraph (a) is not intended to discourage lawyers from seeking counsel. This rule does not apply to a lawyer who is consulted about or retained to represent a lawyer whose conduct is in question, or to a lawyer consulted in a professional capacity by another lawyer on whether the inquiring lawyer has a duty to report a third-party lawyer under this rule. The duty to report under paragraph (a) does not apply if the report

* "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's* knowledge may be inferred from circumstances. (Rules Prof. Conduct, rule, 1.0.1(f).)

* "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive. (Rules Prof. Conduct, rule, 1.0.1(d).)

would involve disclosure of information that is gained by a lawyer while providing advice on legal ethics issues as a member of the State Bar Ethics Hotline.

[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), 1.7(b) (material limitation conflict), 5.1 (responsibilities of managerial and supervisory lawyers), and 5.2 (responsibilities of a subordinate lawyer).

[4] 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.

[5] Information about a lawyer's misconduct or fitness may be received by a lawyer while participating in a substance use or mental health program, including but not limited to the Attorney Diversion and Assistance Program. (See Bus. & Prof. Code, § 6234.) In these circumstances, providing for an exception to the reporting requirement of paragraph (a) of this rule encourages lawyers to seek treatment through such programs. Conversely, without such an exception, lawyers 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.

[6] In addition to reporting as required by paragraph (a), a report may also be made to another appropriate agency. A lawyer must not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of rule 3.10.

[7] A lawyer may also be disciplined for participating in an agreement that precludes the reporting of a violation of the rules. See rule 5.6(b) and Business and Professions Code section 6090.5.

[8] Communications to the State Bar relating to lawyer misconduct are "privileged and no lawsuit predicated thereon may be instituted against any person." See Business and Professions Code section 6094; but see Business and Professions Code section 6043.5 with respect to criminal penalties for false and malicious reports or complaints.