Stanford LawSchool | Deborah L. Rhode Center on the Legal Profession

Nora Freeman Engstrom
Ernest W. McFarland Professor of Law
Co-Director, Stanford Center on the Legal Profession

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 736.8891
nora.engstrom@law.stanford.edu

May 4, 2023

Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed New Rule of Professional Conduct 8.3

Dear Trustees:

We write to provide public comment on behalf of the Deborah L. Rhode Center on the Legal Profession ("Rhode Center") at Stanford Law School regarding proposed new California Rule of Professional Conduct 8.3. The Rhode Center favors adoption of a rule requiring attorneys to report misconduct, as recommended by the American Bar Association ("ABA"), contained in the Restatement (Third) of the Law Governing Lawyers § 5(3) (Am. L. Inst. 2000), and adopted by the vast majority of states.[1]

California's adoption of a duty to report is long overdue. The ABA Model Rule 8.3 was adopted in 1983, and the compulsory duty to report was incorporated into the Model Code (the Model Rule's predecessor) as early as 1970.[2] Every other state in this country has implemented some version of the Rule, most conforming to the language of Model Rule 8.3.[3] It is startling that California, home to almost 200,000 lawyers, does not have this reporting requirement.[4]

There are two significant and related issues to prioritize in considering the path forward for Rule. 8.3 in California. The first is squarely raised by the proposals circulated for comment by the Bar: what should the scope of the reporting requirement be? The second issue is perhaps

[1] The Restatement (Third) of the Law Governing Lawyers § 5(3), which was published by the American Law Institute in 2000, provides: "A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities."

[2] MODEL CODE OF PROF'L RESP. CANON 1, DR 1-103(A) (AM. BAR ASS'N 1980).

[3] Some states have declined to make the reporting requirement mandatory. *See, e.g.*, WA. RULES OF PROF'L CONDUCT R. 8.3; GA. RULES OF PROF'L CONDUCT R. 8.3.

[4] Instead, California has relied upon specific self-reporting duties. *See* CAL. BUS. & PROF. CODE § 6068. The law incorporates a duty to report others only through application of the self-reporting requirement to the attorney's firm or law corporation. *Id.*

more subtle but of high relevance and importance: how shall the state ensure enforcement of the Rule?

In evaluating these concerns, the Rule's twin purposes guide our analysis. Implementing a duty to report misconduct promotes the professional ideal of ethical competence and also actively reduces harm: after all, lawyers are often best placed to identify other lawyers' professional misconduct.[5] Determining the ideal scope and enforcement of Rule 8.3, then, is central to the Bar's collective pursuit of greater professional integrity and consumer protection.

There are currently three versions of the proposed Rule out for public comment.

One is the language found in Model Rule 8.3, which requires 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" to inform the Bar.[6] This language is also before the California legislature in the form of a bill (Senate Bill 42) that proposes inserting the ABA Model Rule into the statutory California Business and Professions Code.[7] The rule and its legislative twin contain exceptions for when the reporting would disclose confidential information under Rule 1.6 or information obtained by a lawyer participating in Bar lawyer assistance programs or their equivalent.

Another proposed version is that recommended by the State Bar's Committee on Professional Responsibility and Conduct (COPRAC) (labeled Alternative 1 in the circulated materials). This version considerably narrows the scope of what must be reported. It would require a lawyer to report, without undue delay, 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 the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."[8] Thus, not only must the reporting lawyer know of "credible evidence," but the lawyer must know that the evidence shows that the other lawyer committed certain specific wrongdoing (criminal act, fraud, violations of Rule 1.15) *and* that the wrongdoing substantially implicates the other lawyer's honesty, trustworthiness, or fitness as a lawyer.

The third version, proposed by State Bar staff (labeled Alternative 2 in the circulated materials), requires reporting, without undue delay, if the lawyer "*knows of credible evidence* that the other lawyer has committed *a criminal act* that *reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects*; or *engaged in conduct*

---

[5] Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175 (1999).

[6] MODEL RULES OF PROF'L CONDUCT R. 8.3 (emphasis added).

[7] S.B. 42, 2023-24 Leg., Reg. Sess. (Cal. 2023).

[8] CAL. RULES OF PROF'L CONDUCT PROPOSED R. 8.3, at 11 (State Bar Cal., Discussion Draft 2023), available at https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000030459.pdf.

involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property." Thus, this version retains the credible evidence requirement from Alternative 1, narrows the scope of required reporting for criminal acts to only those impacting characteristics of lawyer integrity, and expands the scope of required reporting, from just fraud and violations of Rule 1.15 to a longer list that includes fraud, dishonesty, deceit and reckless or intentional misrepresentation or misappropriation of funds.

The two California proposals contain identical exceptions: no reporting required if (1) it would disclose confidential information under Rule 1.6, privileges, or other rules/laws, including mediation confidentiality, or (2) would disclose information obtained by a lawyer participating in any substance use or mental health program.

Recommendation

The Board of Trustees should adopt the language proposed in Alternative 2. More importantly, after the Rule's adoption, the Bar must prioritize education, outreach, and enforcement to ensure that the Rule is effective.

Why We Support Alternative 2

We recommend that the Board of Trustees adopt the language of Alternative 2. It rightly encourages more reporting by lowering the scienter standard from "knows" to "knows of credible evidence." It also 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.[9]

One of the strongest critiques of Model Rule 8.3 targets the ambiguity of the language around what violations trigger the mandatory reporting requirement.[10] Alternative 2 presents a more specific enumeration of reportable conduct but is not so narrow and limited as the language proposed by Alternative 1. The specificity of the language in Alternative 2 is more conducive to both lawyers trying to determine if they must report another lawyer and to regulators in making enforcement decisions on the question of a Rule 8.3 violation (failure to report). At the same time, the language maintains deference to the reporting lawyer's professional judgment and ability to exercise discretion in determining whether the underlying behavior requires reporting.

Why We Propose Prioritizing Education, Outreach, and Enforcement

Getting the language of a California Rule 8.3 right is just the first step toward a more proactive method of identifying and addressing bad acts by Bar members. For Rule 8.3 to effectively promote the integrity of the profession and address consumer harm, lawyers need to know

---

[9] *See* Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491 (1986).

[10] *Id*. at 535–536 (observing that the Model Rule requires an "ambiguous exercise of judgment"). *See also* Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. OF LEGAL ETHICS 259, 279–82 (2003) (noting that "one major complaint about the [Model Rule] is that it is simply too ambiguous").

about their obligations under the Rule. The State Bar must have a robust educational and outreach strategy on the new Rule 8.3 to engage with current and future members of the Bar.

Beyond education and outreach, the Bar must consider an array of mechanisms to facilitate reporting and promote compliance. Historically, compliance with, and the enforcement of, Model Rule 8.3 (and its state analogs) has been spotty; inconsistent enforcement breeds disrespect for law and also means that, on the occasions when the Rule *is* enforced, the enforcement appears arbitrary, unfair, and subjective.[11] Moreover, violations will often rise to the Bar's attention only if the underlying conduct of a close colleague emerges in litigation, a professional discipline proceeding, or a criminal proceeding—which is, frequently, too little too late. The Bar should consider how to uncover underlying serious misconduct, and associated Rule 8.3 reporting failures, *before* criminal acts become public. Where Rule 8.3 investigation and action is warranted, the Bar must be willing and able to advance such proceedings and carry out any disciplinary decisions that result.

Finally, adequate resources are crucial to successfully implement and enforce the Rule. Some of those resources must be directed toward establishing a data infrastructure for claims and dispositions, as the Legal Aid Association of California (LAAC) has aptly noted.[12] As the LAAC has explained, by tracking demographic data and claim details, the Bar should monitor enforcement of Rule 8.3 and, if necessary, make adjustments to ensure that the Rule is being applied fairly and consistent with its intended purpose.[13]

Of course, Rule 8.3 is no panacea. No rule, no matter how well written, and no matter how diligently enforced, can paper over the gaps and deficiencies in the current lawyer regulatory architecture. The Bar must continue to actively investigate new ways to regulate the practice of law, including those that Bar members themselves may ferociously oppose.

We are grateful to you for considering our views in the rulemaking process.

Sincerely,

Nora Freeman Engstrom
Ernest W. McFarland Professor of Law
Co-Director, Deborah L. Rhode Center on the Legal Profession

---

[11] Greenbaum, *supra* note 10, at 272–73 (writing in 2003 and noting, at that time, there the existed only two known cases of Rule 8.3 enforcement: In re Himmel, 533 N.E.2d 790, 794 (Ill. 1990), and In re Condit, No. SB-94-0021-D (Ariz. Mar. 14, 1995)). *See also* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 856 n.242 (2011) ("[C]ompliance with Rule 8.3 is spotty; few lawyers tattle on fellow lawyers, even when misconduct is observed."); RICHARD L. ABEL, LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT 466–68 (2011) (discussing lawyers' and judges' reluctance to report lawyer misconduct).

[12] Discussion Draft 2023, *supra* note 9, at 623–24.

[13] *Id.*