CALIFORNIA
LAWYERS
ASSOCIATION

February 17, 2023

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

Re: Proposed New Rule of Professional Conduct 8.3 (Reporting Professional Misconduct)

Dear Trustees of the State Bar of California:

The California Lawyers Association (CLA) submits these comments in response to proposed new Rule of Professional Conduct, rule 8.3.

1. **The reporting requirement set forth in proposed rule 8.3 raises significant questions and concerns**

Under existing Rule of Professional Conduct, rule 8.4, "It is professional misconduct for a lawyer to…(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Under proposed Rule of Professional Conduct, rule 8.3, a lawyer would be required to "inform the State Bar when the lawyer has personal knowledge that another lawyer has committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects as prohibited by rule 8.4(b)." To the extent proposed rule 8.3 is aimed at violations of rule 8.4(b) it has a laudable goal. There are, however, significant differences between the two rules. We discuss below our concerns with proposed rule 8.3.

Rule 8.4 and proposed rule 8.3 operate in very different contexts. Finding a violation of rule 8.4(b) necessarily involves an adjudication and the entire process associated with that adjudication, including an investigation, opportunities to present a defense, State Bar Court proceedings, and potential review by the California Supreme Court. Proposed rule 8.3, in marked contrast, essentially requires an individual lawyer to conclude—on their own—that another lawyer has violated rule 8.4(b), i.e., that another lawyer "has committed a criminal act … as prohibited by rule 8.4(b)." Although the words in the two rules are the same, they carry a very different weight under proposed rule 8.3. Under that rule, lawyers would be leveling serious accusations against other lawyers *and* would be subject to discipline if they failed to report as required. Any such reporting requirement needs to provide clearly defined terminology.

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Although it may be relatively easy to envision situations where proposed rule 8.3 would be implicated (e.g., known theft of client funds) there are a large number of situations where the applicability of the proposed rule would be unclear at best.

Our concerns begin with the term "criminal act" in the rule. Is a "criminal act" intended to be the same as or something different from a "crime"? This is not just a matter of semantics. These terms are sometimes used with materially different meanings.

Crimes generally have two key parts, an *actus reus* (the criminal act) and a *mens rea* (the required criminal intent). The uncertainty with proposed rule 8.3 can be illustrated with one example that could easily arise. Lawyers often submit declarations under penalty of perjury. Under Penal Code section 118, a person is guilty of perjury only if the person "willfully states as true any material matter which he or she knows to be false." Would rule 8.3 trigger a mandatory reporting obligation any time a lawyer receives another lawyer's declaration under penalty of perjury that contains a false statement? The lawyer receiving the declaration would know about the act (making a false statement) but would not necessarily know if the other lawyer *willfully* stated as true any material matter they *knew* was false. What would happen if the lawyer making the statement is simply inaccurate or operating under a mistaken belief in the truth of the statement made? And how would the lawyer receiving the statement know the other lawyer's state of mind? Is proposed rule 8.3 intended to require "personal knowledge" that all elements of a crime are met before triggering a mandatory duty to report a "criminal act" under the rule? Is the proposed rule intended to encompass all crimes if codified as such in any statute (whether an infraction, misdemeanor, or felony) or only a subset of crimes?[1]

Further, despite the attempt to define "personal knowledge," there is still some ambiguity in the proposed rule. One question is what should occur if a lawyer hears from another lawyer that the latter has engaged in conduct that the former recognizes

[1] Proposed rule 8.3 refers to a criminal act "as prohibited by rule 8.4(b)." Rule 8.4, Comment [3] states that a "lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes 'other misconduct warranting discipline' as defined by California Supreme Court case law" citing *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].) Business and Professions Code section 6101(a) states that "[c]onviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension." Business and Professions Code section 6102(a) provides for suspension upon receipt of the certified copy of the record of conviction "if it appears therefrom that the crime of which the attorney was convicted involved, or that there is probable cause to believe that it involved, moral turpitude or is a felony under the laws of California, the United States, or any state or territory thereof, …" The statutes do not encompass "other misconduct warranting discipline" and the outer boundaries of this standard are uncertain. What is the intended interpretation of the scope of a "criminal act" under proposed rule 8.3, and how do we ensure that lawyers clearly understand the scope?

as being a "criminal act" (however defined or interpreted) and reflecting adversely on the second lawyer's honesty, trustworthiness, or fitness as a lawyer. Is that second-hand accounting "information based on firsthand observation gained through the lawyer's own senses" as provided under paragraph (b)? Or is it simply somebody else's retelling of an event that has already occurred? If it is deemed personal knowledge, where is the line? Is it based along the same lines as what might be admitted in terms of hearsay exceptions (for example, a party admission) or is there a different standard?

An additional question that arises under the proposed rule is the standard of proof that triggers mandatory reporting. Is an allegation enough or must the reporter have some proof or evidence supporting the conduct they are reporting to the State Bar? Is probable cause enough or must the evidence rise to a level of preponderance, clear and convincing, or beyond a reasonable doubt? Is the lawyer who would be reporting determining on their own that proof of the alleged "criminal act" meets whatever standard is applied, and how would we ensure that the reporter understands the level of proof required? If no standard of proof is defined, what prevents accusations based on bad or unreliable "personal knowledge"?

The lack of clarity in the proposed rule is further magnified by language in the Comments that does not match the language in the proposed rule. The rule itself covers reporting of a "criminal act." Comment [2] and Comment [5] both refer to reporting of "professional misconduct." The proposed rule is also entitled "Proposed Rule 8.3 Reporting Professional Misconduct." This is the title of ABA Model Rule 8.3, but that rule applies the reporting requirement to 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." (emphasis added). The ABA Model Rule is *much broader* in scope than proposed rule 8.3.[2] If proposed rule 8.3 moves forward, the language in the Comments should be changed to match the scope of the reporting requirement under the rule itself.

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[2] In its request for public comment, State Bar staff has requested comment on whether the State Bar should consider recommending that the Supreme Court adopt a new rule 8.3 that is based on ABA Model Rule 8.3. We do not believe the State Bar should consider making that recommendation. A rule based on ABA Model Rule 8.3 would necessarily encompass reporting of a "criminal act" (as prohibited by rule 8.4(b)), raising all the concerns expressed in this letter. But those concerns would be magnified given the breadth and scope of the California Rules of Professional Conduct along with all the facts, circumstances, and related interpretational issues involved in determining whether a lawyer would be required to report *any* violation of *any* rule. We appreciate that the proposed rule is narrower than ABA Model Rule 8.3, along the lines of the Illinois analogue to that rule, and is limited to reporting a *criminal act* that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Assuming any proposed Rule of Professional Conduct moves forward, we believe the narrower rule would be preferable to a rule based on ABA Model Rule 8.3.

Comment [6] in the proposed rule is also concerning. That Comment states, in part, "A failure to report may also implicate rule 8.4(a) with respect to the prohibitions against assisting, soliciting, or inducing another lawyer's ethical violation." Proposed rule 8.3 appears to require reporting of a completed "criminal act." Under what circumstances would a failure to report a completed criminal act, without more, implicate a prohibition against assisting, soliciting, or inducing a criminal act? If there are circumstances envisioned whereby a lawyer could violate both rule 8.3 by failing to report a criminal act *and* the prohibitions against assisting, soliciting, or inducing another lawyer's ethical violation, illustrative examples in the Comment would assist.

Finally, assuming a lawyer has "personal knowledge" that another lawyer has committed a "criminal act" they would then need to determine whether that criminal act "reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Although an adverse reflection on honesty or trustworthiness would be self-evident with certain criminal acts, determining whether a particular criminal act reflects adversely on the lawyer's "fitness as a lawyer" would involve application of a much more amorphous and subjective standard. Significantly, the proposed rule is not limited to reporting situations where the lawyer's criminal act occurs in connection with the practice of law, a limitation that would resolve this issue.

2. Proposed rule 8.3 would be counterproductive in many cases

As noted above, it may be relatively easy to envision certain situations where proposed rule 8.3 would be implicated. However, as a practical matter we anticipate a large number of borderline situations arising under the rule as proposed. In those situations, the rule could impede remedial measures that would serve to prevent harm to clients or others.

Lawyers benefit from open discussions with other lawyers. In many instances, good faith mistakes can be avoided and harm can be mitigated when lawyers turn to one another for input and guidance. If proposed rule 8.3 is approved, lawyers may be less likely to assist or engage with one another for fear of inviting liability resulting from a failure to report about another lawyer's conduct. Simply put, the less you know, the less potential liability you would face under rule 8.3. Ironically, this could disincentivize the most ethical lawyers, as they attempt to self-police the profession, while encouraging less ethical lawyers to simply look the other way.

We have a separate concern about the potential impact of proposed rule 8.3 on the relationship between opposing counsel in ongoing litigation and on a lawyer's own clients, particularly in borderline cases and those where the conduct in question is unrelated to the practice of law or has caused no harm to a client. Notwithstanding the

existing prohibition against threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute, unscrupulous lawyers might do exactly that under the new mandatory reporting obligation, asserting a "good faith" belief that the conduct in question is covered under rule 8.3, potentially providing protection for what may otherwise be a retaliatory, discriminatory, or harassing complaint. In addition, the rule could inadvertently serve to escalate disputes between opposing counsel, with little or no counterbalancing benefit, and further decrease civility in the legal profession.

Finally, the reporting requirement may conflict with or distract from a lawyer's fidelity and other duties toward their own client, whether dealing with conduct of another lawyer in their firm, co-counsel, or opposing counsel. The proposed rule does not account for the context of the conduct in question, the impact any reporting may have on the reporting lawyer's clients, or the timing of the required report where, for example, no clients are at risk of harm as a result of the conduct in question.

3. Paragraph (c) should specifically refer to mediation confidentiality correction

Proposed rule 8.3(c) identifies specific situations under which the rule would not require a report to the State Bar. The summary in the request for public comment notes that, in addition to the specific situations noted, a report is not required if the information is protected by other rules and laws, such as statutory mediation confidentiality. If a rule moves forward, we recommend that paragraph (c) add a specific reference to Evidence Code section 1119 (mediation confidentiality).

We appreciate your consideration of our comments.

Sincerely,

Jeremy M. Evans
President