

May 4, 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 the request for input on alternatives for a proposed new Rule of Professional Conduct, rule 8.3. In our comments below, we address (1) issues that are common to both Alternative 1 and Alternative 2; (2) issues that are unique to each Alternative; and (3) overarching concerns, as addressed in CLA's February 17, 2023 letter on the initial proposal for new rule 8.3, which remain unresolved by the revised proposal.

- **Alternative 1 and Alternative 2**

The reporting obligation under both Alternative 1 and Alternative 2 would be triggered when a lawyer “knows* of credible evidence” that another lawyer has engaged in reportable conduct. The asterisk then refers in the footnote to the definition in rule 1.0.1(f): “‘Knowingly,’ ‘known,’ or ‘knows’ means actual knowledge of the fact in question. A person’s* knowledge may be inferred from circumstances.” Given the definition of “knows” (actual knowledge of the fact in question) the use of the phrase “knows of credible evidence” is potentially confusing. Is “credible evidence” the same as a “fact”? If it is, using “knows” by itself would seem to suffice. If “credible evidence” is not the same as a “fact,” what is “credible evidence” intended to cover? Actual knowledge of credible evidence of a fact (or hearsay evidence of a fact) appears to be one step removed from actual knowledge of the fact, and not the same as actual knowledge of the fact itself.

Beyond this general concern, a single piece of credible evidence in isolation should not be the basis for triggering the reporting requirement. For example, if a reliable witness shares with a lawyer precise and credible details about the conduct of

another lawyer that, if accurate, would result in reportable misconduct, that evidence alone may be sufficient to compel a reporting obligation, assuming it constitutes actual knowledge of the fact in question. But a single piece of credible evidence should not be considered in isolation. For example, what if numerous other reliable witnesses share with the lawyer credible evidence that contradicts the first witness? The language in both Alternative 1 and Alternative 2 suggests that the lawyer has a reporting obligation (due to the single piece of credible evidence) notwithstanding the lawyer's reasonable conclusion (based on overwhelming credible evidence to the contrary) that no such reportable conduct has occurred.

Second, since "credible" is a subjective term, two lawyers may have differing opinions as to what constitutes "credible evidence." As a result, we believe the reference to "credible evidence" should be modified or deleted. As noted above, because the proposed rule uses the term "knows" (which is defined in rule 1.0.1(f) to include knowledge inferred from circumstances), the rule could simply refer to knowledge of reportable conduct (as specified in the rule) rather than knowledge of "credible evidence" of such conduct.

Third, we do not believe a lawyer who reasonably believes that reportable misconduct has already been brought to the attention of the State Bar should be subject to discipline for failing to again report such misconduct. For example, if a dozen lawyers working on a matter witness reportable misconduct, and one of them states to the others that they will inform the State Bar of such misconduct, it is neither reasonable nor necessary to discipline the 11 other lawyers for not doing so.

Finally, proposed paragraph (c) in both Alternative 1 and Alternative 2 provides: "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 crime in California." As noted in our February 17, 2023 letter, we are concerned with the term "criminal act" in the proposed rule, and whether a "criminal act" is intended to be the same as or something different from a "crime." These terms are sometimes used with materially different meanings. Using both "criminal act" and "crime" in paragraph (c) compounds the potential confusion that could arise.

- **Alternative 1**

With respect to Alternative 1, we believe the qualification at the end of paragraph (a) ("when that conduct raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects") should not apply to known

violations of rule 1.15. If a lawyer knows that another lawyer has misappropriated funds or property in violation of rule 1.15, such conduct should be reported even if such conduct does not raise a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

- **Alternative 2**

With respect to Alternative 2, we believe a lawyer should not be required to report "conduct involving dishonesty...deceit, or reckless or intentional misrepresentation" unless such conduct is moved to clause (1) such that it is qualified by "reflects adversely on that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Similarly, we believe misappropriation of funds or property should be tied to a violation of rule 1.15 (as provided in Alternative 1). Without these changes, knowledge of relatively insignificant, non-criminal conduct unrelated to the practice of law—such as a lawyer intentionally misrepresenting to an acquaintance that they are five years younger than their actual age (intentional misrepresentation), or picking an apple from a neighbor's tree (misappropriation of property)—would create a reporting obligation.

Second, although Comment [4] defines the term "substantial," the term is not used in Alternative 2 (although it is used in Alternative 1). We think the use of such term in Alternative 1 (i.e., "when that conduct raises a substantial question...") is preferable to the standard used in Alternative 2 (i.e., "reflects adversely"), which could include relatively trivial conduct.

- **Overarching concerns with proposed rule 8.3**

We have several overarching concerns, as discussed in detail in our February 17, 2023 letter on the initial proposal for new rule 8.3. We highlight below some of CLA's more significant concerns that remain unresolved by the revised proposal.

First, under all versions of the proposed rule, the requirement to report would be triggered when a lawyer "knows" something. Even if Alternative 1 or Alternative 2 were modified to refer to knowledge of reportable conduct rather than knowledge of "credible evidence" of such conduct, we still have concerns.

As noted above, under rule 1.0.1(f) "[k]nowingly," "known," or "knows" means "actual knowledge of *the fact* in question." (emphasis added). Although it may be relatively easy to envision situations where any reporting obligation would be implicated by knowledge of certain facts (e.g., known theft of client funds) most forms of

misconduct that would trigger such an obligation involve more than mere “facts” in isolation. An example provided in our February 17 letter is the lawyer who receives another lawyer’s declaration under penalty of perjury that contains a false statement. The lawyer receiving the declaration would “know” about the “fact” of making a false statement, but would not necessarily know if the other lawyer willfully stated as true any material matter they knew was false and was therefore liable for perjury (or any other form of misconduct).

We recently learned of another example that illustrates this same issue. In this case, Attorney A testified under penalty of perjury at a deposition that Attorney B had met with Attorney A prior to his deposition and asked him to lie during the deposition. Attorney B later claimed he did not tell Attorney A to lie in his deposition, and that Attorney A was lying about their conversations prior to the deposition. Attorney C has direct knowledge of all of these “facts” but Attorney A and Attorney B cannot both be correct. Would Attorney C have an obligation to report Attorney B for suborning perjury of Attorney A? Would Attorney C have an obligation to report Attorney A for lying under oath? If Attorney C does not report either attorney (or both attorneys), would Attorney C violate rule 8.3?

Ultimately, proposed rule 8.3 would essentially require an individual lawyer to conclude—on their own—that another lawyer has engaged in certain misconduct (however specified under the different versions of the proposed rule) without 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.

Second, a mandatory reporting requirement could have an adverse impact on the relationship between opposing counsel in ongoing litigation and on a lawyer’s own clients, particularly in borderline cases and situations where the conduct in question is unrelated to the practice of law or has caused no harm to a client.

Third, 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 with a mandatory reporting requirement, or go beyond the threat and actually report to the State Bar, with the reporting requirement potentially providing protection for what may otherwise be a retaliatory, discriminatory, or harassing complaint.

Fourth, the mandatory reporting requirement could inadvertently serve to escalate disputes between opposing counsel, with little or no counterbalancing benefit—

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particularly where the conduct in question has caused no harm to a client—and further decrease civility in the legal profession.

Finally, given potential discipline for failing to report, we anticipate that lawyers may be overly cautious and overreport. This could result in a flood of complaints to the State Bar, with investigations and other actions that follow, increasing the workload and drawing State Bar resources away from what could be much more significant cases involving direct harm to clients.

We appreciate your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Evans', with a large, stylized initial 'J' and a long, sweeping horizontal stroke at the end.

Jeremy M. Evans
President