

June 6, 2023

The Honorable Thomas J. Umberg
1021 O Street, Suite 6530
Sacramento, CA 95814

Re: SB 42 (Umberg) - Oppose

Dear Senator Umberg:

The California Lawyers Association (CLA) respectfully opposes SB 42, as introduced. We greatly appreciate discussions that have taken place about our concerns with this bill, and look forward to ongoing discussions to address those concerns.

SB 42 is based on ABA Model Rule 8.3, under which 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, must inform the appropriate disciplinary authority. We acknowledge that California is the only state that has not adopted some version of ABA Model Rule 8.3.

The State Bar has been actively pursuing a new Rule of Professional Conduct, rule 8.3. At its meeting on May 18 and 19, the Board of Trustees approved two alternative versions of rule 8.3 for the California Supreme Court to consider. Assuming the Supreme Court approves some version of rule 8.3, a statute would not be needed to create a California version of rule 8.3. Moreover, we believe SB 42 is too broad and lacks many of the important elements contained in the State Bar proposals.

The State Bar's Alternative 1 provides that a lawyer shall, without undue delay, inform the State Bar when the lawyer knows of credible evidence that another lawyer has committed a criminal act, engaged in fraud, or misappropriated funds or property in violation of rule 1.15 (Safekeeping Funds and Property of Clients and Other Persons) when that conduct raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

The State Bar's Alternative 2 would provide that 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.

SB 42, in marked contrast, would require a licensee of the State Bar who 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, to inform the State Bar.

The reporting obligation under SB 42 is concerning, given the breadth and scope of potential "professional misconduct" along with all the facts, circumstances, and related interpretational issues involved in determining whether an attorney would be required to report to the State Bar, based on their own conclusion that another attorney has in fact engaged in professional misconduct. In addition, although a substantial question as to an attorney's honesty or trustworthiness may be self-evident with certain misconduct, determining whether particular misconduct raises a substantial question as to an attorney's "fitness as an attorney in other respects" would involve application of a much more amorphous and subjective standard. Significantly, SB 42 is not limited to reporting situations where the attorney's misconduct occurs in connection with the practice of law or causes direct harm to a client.

Aside from the broad scope of SB 42, the bill lacks significant elements contained in both State Bar alternatives. Among other provisions, the State Bar's proposed rule 8.3:

- Makes it clear that a lawyer must report another lawyer's misconduct to the State Bar 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.
- Excludes from the duty to report conduct that would be a criminal act in another state, U.S. territory, or foreign jurisdiction, but that is not a criminal act in California.
- Does not require disclosure of information protected by mediation confidentiality.
- Explicitly provides that the duty to report is not intended to discourage lawyers from seeking counsel.

CLA raised several concerns with the State Bar's proposed rule 8.3, all of which are magnified by SB 42. In particular:

- With the new reporting requirement, lawyers could 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. Although it may be relatively easy to envision situations where any reporting obligation would be implicated (e.g., known theft of client funds) there are a large number of situations that could be unclear at best.
- The reporting requirement could impede remedial measures that would serve to prevent harm to clients or others. In many instances, good faith mistakes can be avoided and harm can be mitigated when lawyers turn to one another for input and

guidance. With a mandatory reporting requirement, 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.

- 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 (depending upon the scope of the reporting requirement) situations 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 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.
- The mandatory reporting requirement could inadvertently serve to escalate disputes between opposing counsel, with little or no counterbalancing benefit—particularly where the conduct in question has caused no harm to a client—and further decrease civility in the legal profession.
- 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.

For these reasons, CLA opposes SB 42 as introduced, but looks forward to the opportunity to discuss potential amendments to address our concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeremy M. Evans', with a stylized, flowing script.

Jeremy M. Evans
President