

*The Enright Inn of Court Presents*  
**A New Era of Reporting  
to the State Bar**

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1

New Rule of  
Professional  
Conduct 8.3

2

## Rule 8.3(a) – Duty to Report

A lawyer shall, without undue delay, inform the State Bar, or a tribunal\* with jurisdiction to investigate or act upon such misconduct,

when the lawyer knows\* of credible evidence that another lawyer has committed

- a criminal act or
- conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation or
- misappropriation of funds or property

that raises a substantial\* question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

3

## Rule 8.3(b) – Other Violations

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.

4

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 would not be a criminal act in California.

## Rule 8.3(c) – Criminal Act

5

## Rule 8.3(d) - Exceptions

This rule does not require or authorize disclosure of information

- information gained by a lawyer while participating in a substance use or mental health program, or
- 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.

6

## Rule 8.3 – Comment 2 – Seeking Counsel is Protected

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 would involve disclosure of information that is gained by a lawyer while participating as a member of a state or local bar association ethics hotline or similar service.

7

## Rule 8.3 – Comment 6 – State Bar or Other Tribunal

The rule permits reporting to either the State Bar or to "a tribunal\* with jurisdiction to investigate or act upon such misconduct." A determination whether to report to a tribunal,\* instead of the State Bar, will depend on whether the misconduct arises during pending litigation and whether the particular tribunal\* has the power to "investigate or act upon" the alleged misconduct. Where the litigation is pending before a non-judicial tribunal,\* such as a private arbitrator, reporting to the tribunal\* may not be sufficient.

If the tribunal\* is a proper reporting venue, evidence of lawyer misconduct adduced during those proceedings may be admissible evidence in subsequent disciplinary proceedings. (Caldwell v. State Bar (1975) 13 Cal.3d 488, 497.) Furthermore, a report to the proper tribunal\* may also trigger obligations for the tribunal\* to report the misconduct to the State Bar or to take other "appropriate corrective action." (See Bus. & Prof. Code, §§ 6049.1, 6086.7, 6068.8; and Cal. Code of Jud. Ethics, canon 3D(2).)

8

## Rule 8.3 – *Com. 3 - Undue Delay, Communications and Conflicts*

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

- Rule 1.4 (the duty to communicate),
- Rule 1.7(b) (material limitation conflict),
- 5.1 (responsibilities of managerial and supervisory lawyers), and
- 5.2 (responsibilities of a subordinate lawyer).

9

## Rule 8.3 – *Comment 4 Substantial Question*

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" question refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

10

**Rule 8.3 –  
Comment 1 –  
Duty to Self  
Report  
Preserved**

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.l(d) and (e); Bus. & Prof. Code, § 6068, subd. (o).)

11

**Self  
Reporting:  
Main  
Categories**

**SR-3. Reportable Actions, Reported by Self  
Main Categories**

Type	Description
Summary: All Reportable Actions, Reported by Self	Sum of all cases listed below.
Three or more malpractice lawsuits filed within 12 months (6068, subd.(o)(1))	Self-reported multiple lawsuit cases.
Judgment in civil case for fraud, misrepresentation, gross negligence, etc. (6068, subd.(o)(2))	Self-reported judgment cases.
Judicial sanctions imposed (6068, subd.(o)(3))	Self-reported sanction order cases.
Felony indictment (6068, subd.(o)(4))	Self-reported conviction matters with a felony charge.
Conviction of felony, or misdemeanor related to practice of law (6068, subd. (o)(5))	Self-reported conviction matters with a convicted status.
Discipline by professional agency or licensing board (6068, subd.(o)(6))	Self-reported discipline in other jurisdiction cases.
Reversal of judgment based on misconduct, gross incompetence, etc. (6068, subd. (o)(7))	Self-reported reversals of judgment case.
Settlement or judgment for fraud, misrepresentation, gross negligence, etc. (6086.8, subd. (c))	Self-reported insurance claims.

12

## Rule 8.3 – *Com. 5*

### *Exceptions for Treatment/ Diversion*

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.

13

## Rule 8.3 – *Comment 7*

A report under this rule to a tribunal\* concerning another lawyer's criminal act or fraud\* may constitute a "reasonable\* remedial measure" within the meaning of rule 3.3.(b).

14

**Rule 8.3 –  
Comment 8 –  
Threatening  
Violates Rule  
3.10**

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.**

15

## Rule 8.3 – *Comment 9*

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 Bus. & Prof. Code, § 6090.5.)

§ 6090.5

(a) It is cause for suspension, disbarment, or other discipline for any licensee, whether acting on their own behalf or on behalf of someone else, whether or not in the context of litigation to solicit, agree, or seek agreement, that:

(1) Misconduct or the terms of a settlement of a claim for misconduct shall not be reported to the State Bar.

(2) A complainant shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the State Bar.

(3) The record of any action or proceeding shall be sealed from review by the State Bar.

(b) This section applies to all agreements or attempts to seek agreements, irrespective of the commencement or settlement of a civil action.

16



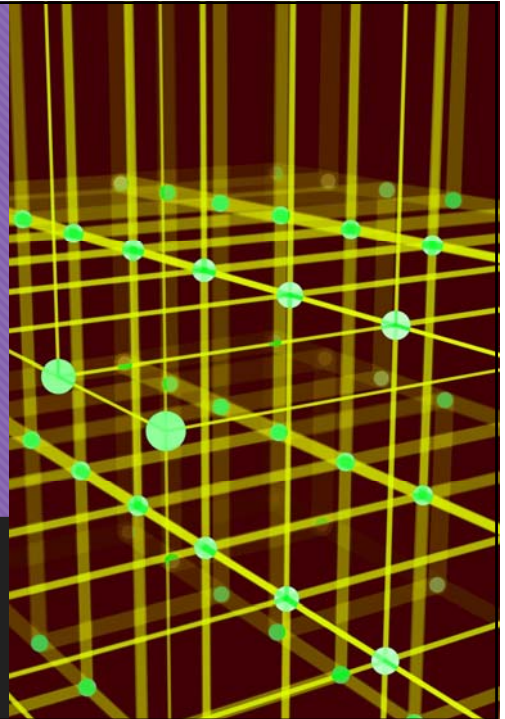
## Rule 8.3 – *Comment 10 – Penalties for False Complaints*

Communications to the State Bar relating to lawyer misconduct are "privileged, and no lawsuit predicated thereon may be instituted against any person." (Bus. & Prof. Code, § 6094.)

However, lawyers may be subject to criminal penalties for false and malicious reports or complaints filed with the State Bar or be subject to discipline or other penalties by offering false statements or false evidence to a tribunal.\* (See rule 3.3(a); Bus. & Prof. Code, §§ 6043.5, subd. (a), 6068, subd. (d).)

17

## Hypothetical #1



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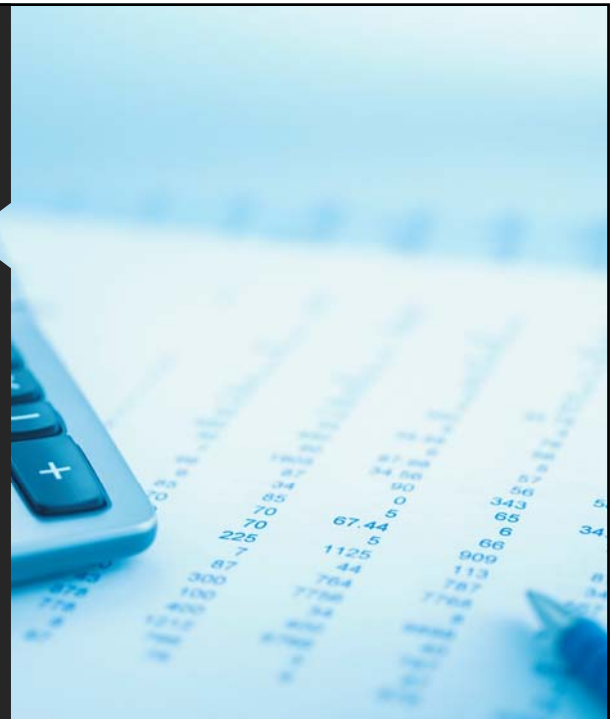
## The Missing Settlement Payment



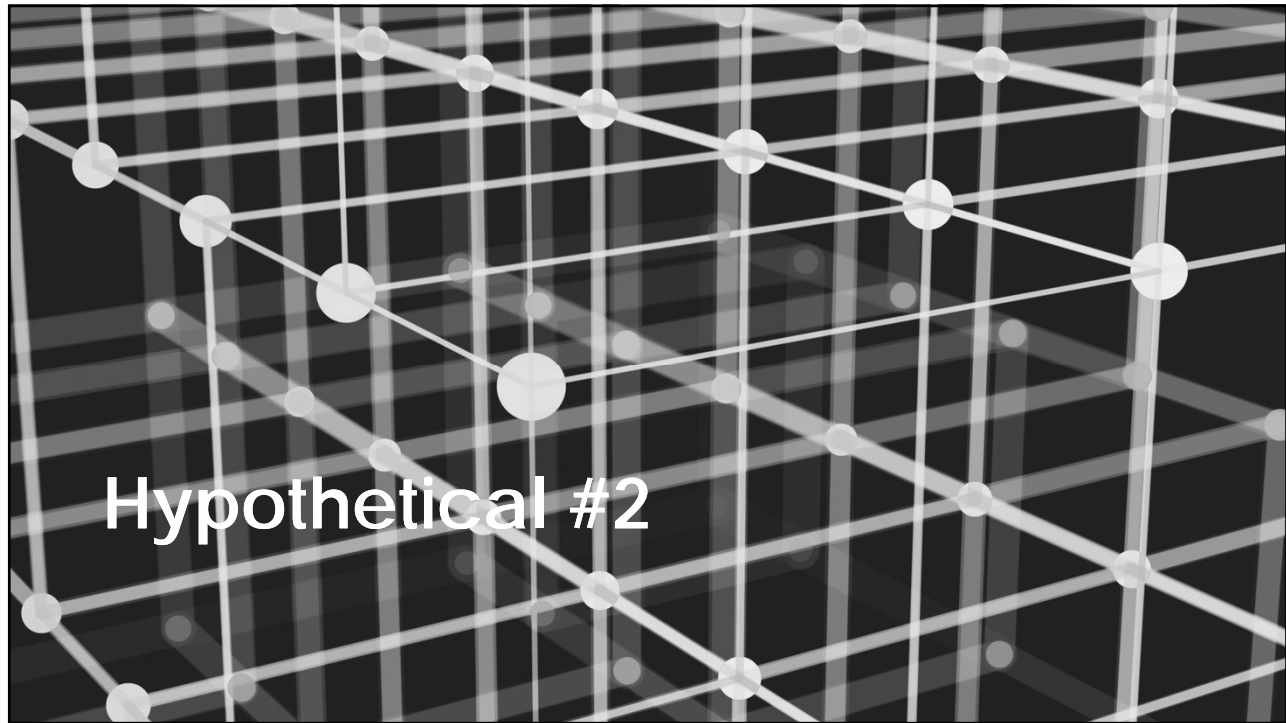
- Attorney Alex represented Plaintiff Paul in a personal injury lawsuit against Defendant Dan. Attorney Barbara represented Defendant Dan
- Defendant Dan called his attorney, Barbara, to say that he was receiving direct calls from Plaintiff Paul about a missed settlement payment. "What is going on?!" asked Dan. "I made that payment three months ago!"
- Indeed, Barbara had sent the settlement check to Attorney Alex three months ago. Perplexed, Barbara called Alex to inquire what was going on.
- Alex picked up the phone and acknowledged that he had received the check but told Barbara that he had not been able to distribute the funds due to issues pertaining to lienholders and Medicare.

19

- When Barbara asked why the amounts not subject to the lien had not been distributed to plaintiff Paul, Attorney Alex gave a convoluted answer about how the liens, including the Medicare lien, potentially exceeded the amount of the settlement, and how there were further delays in calculating distributions.
- Concerned, Barbara mentioned the situation to another attorney friend over lunch. The friend commented that he had heard that Alex was having serious cash flow issues and was potentially facing eviction from his office space.
- In the interim, Plaintiff Paul contacted Defendant Dan again, and said that his attorney Alex had told him that Defendant Dan never sent the settlement funds. Paul passed information onto Barbara.
- Is Barbara required to report Alex? Are there additional steps that Barbara should take before making a report?




20



21

- Attorney Angelique represented Client Carrie in a divorce proceeding. Attorney Balthasar represented the husband, Harold, in the same divorce proceeding.
- Harold and Carrie were on friendly terms, and Harold told Carrie in one of their conversations that Balthasar was not responding to him, despite multiple calls and emails.
- Client Carrie conveyed this information to Attorney Angelique, who in turn reached out to Balthasar to touch base on the status of the negotiations and to gently explore why Attorney Balthasar was not communicating with his own client Harold.



22

- ❑ Angelique left three or four messages for Balthasar with no return call. Two weeks later, Angelique received an email from Balthasar's assistant, indicating that Balthasar had been going through "some personal issues" and the assistant did not know when Balthasar would be able to return Angelique's calls.
- ❑ In the interim, Harold contacted Carrie again and said that he wanted to settle the property division issues, but that Balthasar was MIA.
- ❑ Is Angelique required to report Balthasar? Are there additional steps that Angelique should take before making a report?



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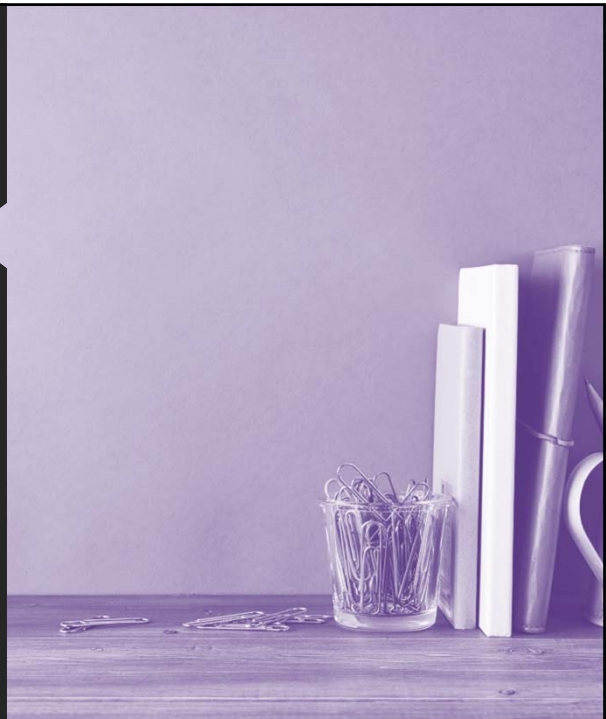
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- ❑ Plaintiff Priscilla and Defendant Dean are parties in a federal court lawsuit involving certain patent rights.
- ❑ Dean, through his counsel Attorney Hannah, has propounded a series of document requests on Priscilla, through her counsel, Attorney Axelrod.
- ❑ When Plaintiff Priscilla did not respond to the discovery, Attorney Hannah filed a motion to compel on behalf of her client Defendant Dean. The motion sought \$50,000 in sanctions against both Priscilla and Axelrod.
- ❑ The Court issued an order granting the motion, characterizing the lack of response to the document request as "bad faith" and "in serious and blatant violation of federal discovery rules, as well as the standing orders of the Court." Sanctions were imposed jointly and severally against Priscilla and Axelrod in the amount of \$20,000.
- ❑ Defendant Dean was very angry that he had to pay to file a motion to compel and that he did not recover his full out-of-pocket cost for doing so - and he told his attorney Hannah this.



25

- ❑ A few days after the order was issued, Attorney Axelrod called Attorney Hannah, apologized for the lack of response and promised full written responses without objections, as well as the responsive documents. Axelrod also indicated that the sanctions would be paid in full by the deadline.
- ❑ Is Hannah required to report Axelrod?



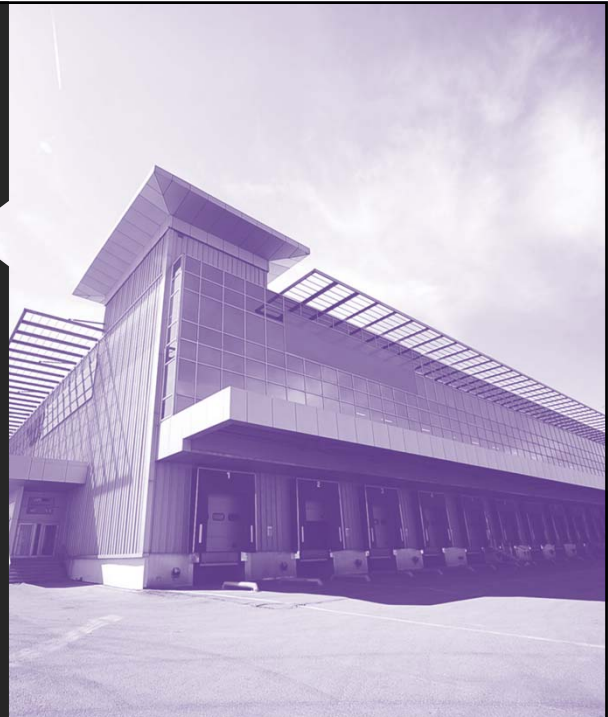
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## Hypothetical #4

27

- ❑ Attorney Penelope worked for the Office of the City Attorney in Cedarwood City. Penelope was a junior city attorney who was required to give regular reports on all issues to her supervisor.
- ❑ Attorney Penelope was given a file to further investigate and prosecute as appropriate. A local women's rights organization reported to the police that it captured a man spray painting the words "A woman's place is in the kitchen!" on the side of its building. From the video, the women's organization identify the perpetrator as Attorney Orin, who had an office just down the street from the women's organization.
- ❑ Penelope viewed the surveillance video and agreed that it looked like Attorney Orin, but was only 90% sure.



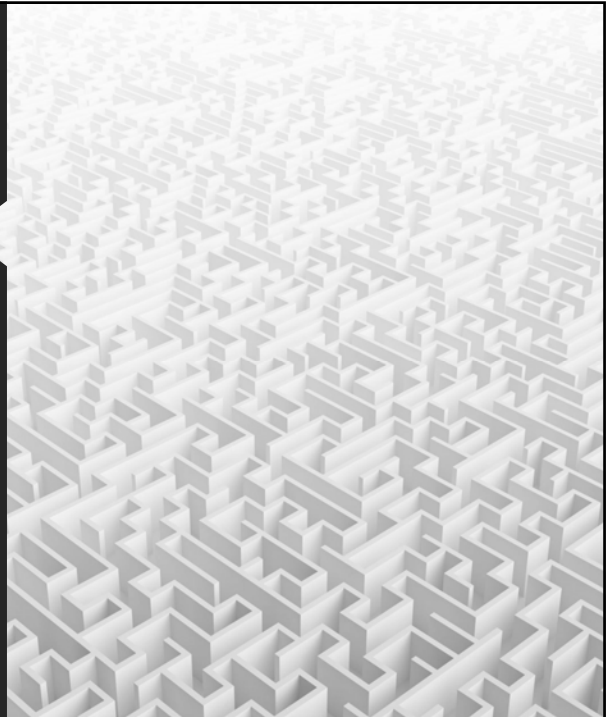
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- Penelope decided that she needed to report Attorney Orin to the State Bar under rule 8.3, because she had credible evidence of a criminal act. She told her supervisor that she was going to do so, and her supervisor told her that office policy prohibited such reporting.
- Was indeed Penelope required to report Attorney Orin? What should Penelope do in light of the instruction from the supervisor? Is Penelope required to report her supervisor for the instruction not to comply with what she felt for her duties under 8.3?



29

## Hypothetical #5

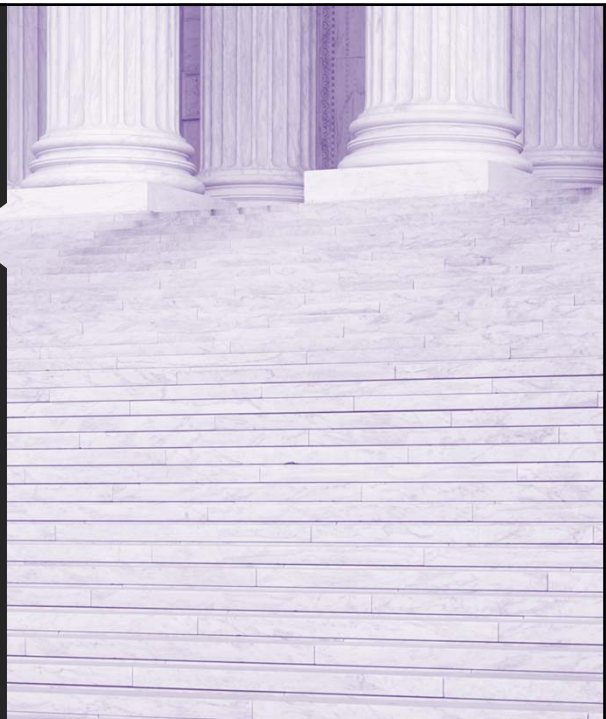


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- ❑ Plaintiff Persephone and Defendant Damien were embroiled in contentious Superior Court litigation regarding ownership interests in a commercial real estate venture. Persephone was represented by Attorney Bob.
- ❑ Enraged that he was being sued by Persephone, Damien decided to hire a PI to do surveillance on both Persephone and Bob to see what the PI could dig up.
- ❑ Damien's PI followed Bob one evening and videotaped him leaving a bar weaving and falling down, before getting in his car and driving away.

31

- ❑ Damien shared the video with his attorney, Attorney Nathan. Nathan reviewed R. 8.3 and decided to report Bob to the judge hearing the Superior Court case regarding the ownership interests in the commercial real estate venture.
- ❑ Attorney Nathan filed a pleading entitled "Mandatory Report" with the court and lodged the video.
- ❑ Was Attorney Nathan required to report Bob? If so, did Attorney Nathan do the right thing by making the report with the court?



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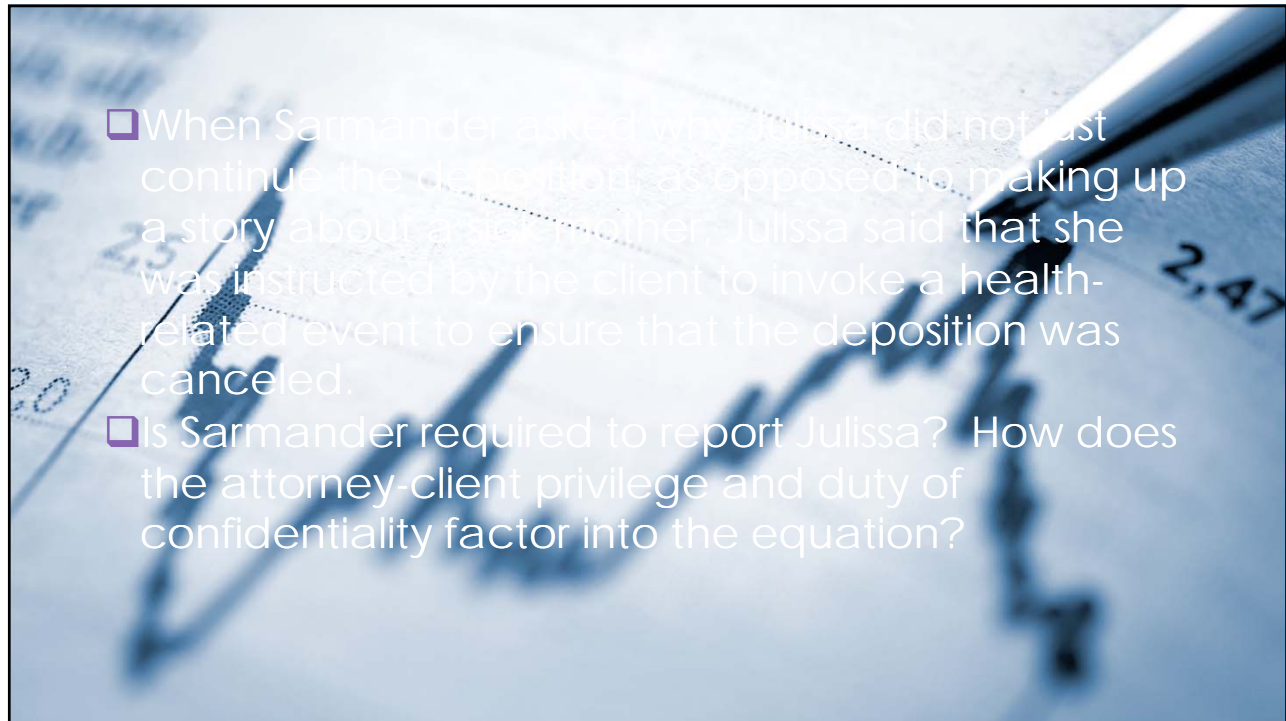


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- Attorney Julissa and Attorney Sarmander work together in the same law firm. Julissa was a partner, and Sarmander was a junior associate.
- Attorney Julissa was scheduled to take a deposition, and, the day before the deposition, emailed opposing counsel to say that her mother had fallen ill and that she would need to delay the deposition.
- Sarmander stopped by Julissa's office to say that he was sorry that her mother was ill and to offer his support.
- Julissa explained that her mother was not actually ill, but that the client had requested that the deposition be delayed so that a particular motion could strategically be filed prior to the deposition.



34



- When Sarmander asked why Julissa did not just continue the deposition, as opposed to making up a story about a sick mother, Julissa said that she was instructed by the client to invoke a health-related event to ensure that the deposition was canceled.
- Is Sarmander required to report Julissa? How does the attorney-client privilege and duty of confidentiality factor into the equation?

35



36

- ❑ Attorney Trevor and Attorney Maven work together to negotiate a contract between their clients. The negotiation broke down over a few of the final terms before signature. The attorneys and their clients decided to take the matter to confidential mediation to see if a neutral could help them work out the final terms.
- ❑ In the course of the mediation, which lasted two days, Attorney Trevor and Attorney Maven had a lot of time to talk, and Attorney Trevor told Maven that he had had a serious drinking problem for a decade, but that he was getting help from the State Bar's Lawyer Assistance Program – and that he was optimistic that it would help him become sober.



37

- ❑ The mediation was successful, and the contract was signed. Trevor and Maven went out to lunch, and Maven asked how the Lawyer Assistance Program was working out for Trevor.
- ❑ Trevor admitted to Maven that he had fallen off the wagon, and, not knowing what else to do, lied to the leaders of the program about it. He said that he was deeply embarrassed but was committed to doing better. He said that he in fact *had* to do better, because the drinking was impacting his ability to represent clients.
- ❑ Is Maven required to report Trevor to the State Bar? What are Maven's considerations in making the determination?



38



Thank you for your time  
Questions?  
Heather L. Rosing,  
[hrosing@klinedinstlaw.com](mailto:hrosing@klinedinstlaw.com)

JUN 21 2023

S280290

ADMINISTRATIVE ORDER 2023-06-21-02

Jorge Navarrete Clerk

IN THE SUPREME COURT OF CALIFORNIA Deputy

EN BANC

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APPROVAL OF RULE 8.3  
OF THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT

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On June 2, 2023, the court received a request from the State Bar of California to approve a version of rule 8.3 of the California Rules of Professional Conduct. The request is granted.

Proposed Alternative 2 of rule 8.3 of the California Rules of Professional Conduct is approved as modified by the court.

The approved rule is set forth in the Attachment and is effective August 1, 2023.

It is so ordered.

GUERRERO

\_\_\_\_\_  
*Chief Justice*

CORRIGAN, J.

\_\_\_\_\_  
*Associate Justice*

LIU, J.

\_\_\_\_\_  
*Associate Justice*

KRUGER, J.

\_\_\_\_\_  
*Associate Justice*

GROBAN, J.

\_\_\_\_\_  
*Associate Justice*

JENKINS, J.

\_\_\_\_\_  
*Associate Justice*

EVANS, J.

\_\_\_\_\_  
*Associate Justice*

## ATTACHMENT

### **Rule 8.3 Reporting Professional Misconduct**

- (a) A lawyer shall, without undue delay, inform the State Bar, or a tribunal\* with jurisdiction to investigate or act upon such misconduct, when the lawyer knows\* of credible evidence that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial\* question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.
- (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 would not be 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 would involve disclosure of information that is gained by a lawyer while

participating as a member of a state or local bar association ethics hotline or similar service.

[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\* question" 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] The rule permits reporting to either the State Bar or to "a tribunal\* with jurisdiction to investigate or act upon such misconduct." A determination whether to report to a tribunal,\* instead of the State Bar, will depend on whether the misconduct arises during pending litigation and whether the particular tribunal\* has the power to "investigate or act upon" the alleged misconduct. Where the litigation is pending before a non-judicial tribunal,\* such as a private arbitrator, reporting to the tribunal\* may not be sufficient. If the tribunal\* is a proper reporting venue, evidence of lawyer misconduct adduced during those proceedings may be admissible evidence in subsequent disciplinary proceedings. (*Caldwell v. State Bar* (1975) 13 Cal.3d 488, 497.) Furthermore, a report to the proper tribunal\* may also trigger obligations for the tribunal\* to report the misconduct to the State Bar or to take other "appropriate corrective action." (See Bus. & Prof. Code, §§ 6049.1, 6086.7, 6068.8; and Cal. Code of Jud. Ethics, canon 3D(2).)

[7] A report under this rule to a tribunal\* concerning another lawyer's criminal act or fraud\* may constitute a "reasonable\* remedial measure" within the meaning of rule 3.3.(b).

[8] 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.

[9] 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 Bus. & Prof. Code, § 6090.5.)

[10] Communications to the State Bar relating to lawyer misconduct are "privileged, and no lawsuit predicated thereon may be instituted against any person." (Bus. & Prof. Code, § 6094.) However, lawyers may be subject to criminal penalties for false and malicious reports or complaints filed with the State Bar or be subject to discipline or other penalties by offering false statements or false evidence to a tribunal.\* (See rule 3.3(a); Bus. & Prof. Code, §§ 6043.5, subd. (a), 6068, subd. (d).)



## NOTICE TO ATTORNEYS: RULE OF PROFESSIONAL CONDUCT 8.3 WENT INTO EFFECT AUGUST 1, 2023

Effective August 1, 2023, lawyers must comply with California Rule of Professional Conduct 8.3, which requires a lawyer who knows of credible evidence that another lawyer has engaged in certain conduct to report the lawyer without undue delay.

The rule and comments to the rule can be found here:

<https://www.calbar.ca.gov/Portals/0/documents/rules/Rule-8.3.pdf>

LACBA encourages all attorneys to become familiar with this new reporting requirement. The California State Bar is developing resources to assist lawyers with their obligations under Rule 8.3, and will be hosting a free, one-hour virtual webinar to provide guidance with reporting obligations. One hour of MCLE participatory credit in ethics will be provided.

To read more about Rule 8.3, visit the State Bar of California's website "[Rule 8.3 Required Reporting](#)". FAQ, reporting procedures, and scenarios are provided, as well as sign-up information for upcoming August 23, 2023 and September 1, 2023 free MCLE courses.

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 04-433

August 25, 2004

## Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law

*A lawyer having knowledge of the professional misconduct of another licensed lawyer, including a non-practicing lawyer, is obligated under Model Rule 8.3 to report such misconduct if it raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer. The professional misconduct must be reported even if it involves activity completely removed from the practice of law. If the report would require revealing the confidential information of a client, the lawyer must obtain the client's informed consent before making the report.*

This opinion explores a lawyer's duty under the Model Rules of Professional Conduct<sup>1</sup> to report the misconduct of a licensed but non-practicing lawyer.<sup>2</sup> This situation can arise in a variety of contexts. For example, a lawyer practicing in a corporation may learn of misconduct by a fellow employee who is a licensed lawyer but employed by the corporation in a non-legal capacity. A lawyer in private practice may discover misconduct by an employee of her firm (such as the firm's in-house accountant) who the lawyer knows is admitted to law practice. In addition, there are circumstances in which the lawyer observing the misconduct may herself not be engaged in active law practice, as in the situation in which she serves on the faculty of a

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1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional responsibility, and opinions promulgated in the individual jurisdictions control.

2. For purposes of this opinion, a "non-practicing lawyer" is a lawyer who, at the time of the misconduct, was not actively engaged in the practice of law, i.e., did not accept engagements by clients to provide legal services and did not hold himself out as a lawyer prepared to accept such engagements. This opinion does not address the uncommon situation in which the lawyer learns of misconduct by a non-practicing lawyer by virtue of her serving in an approved lawyers assistance program. Although it is unlikely that a non-practicing lawyer would turn to such a program for assistance, where he does so, the information revealed is protected from disclosure under Rule 8.3(c), and reporting it generally would be forbidden.

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AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 321 N. Clark Street, Chicago, Illinois 60610-4714 Telephone (312)988-5300 CHAIR: Marvin L. Karp, Cleveland, OH □ Michael E. Bragg, Bloomington, IL □ William B. Dunn, Detroit, MI □ Thomas M. Fitzpatrick, Seattle, WA □ Marcia B. Marsh Goffney, Canton, MI □ Charles McCallum, Grand Rapids, MI □ E. Fitzgerald Parnell, III, Charlotte, NC □ Hon. Henry Ramsey, Jr., Berkeley, CA □ John P. Ratnaswamy, Chicago, IL □ Manuel San Juan, San Juan, PR □ CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel

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law school and learns of misconduct by another law professor who is a licensed lawyer exclusively engaged in teaching.

### **Conduct Encompassed by Model Rule 8.4**

Most, but by no means all, ethical duties under the Model Rules spring from a lawyer's representation of clients. A lawyer also may violate the Model Rules when he or she engages in misconduct unrelated to the practice of law. Model Rule 8.4(a) provides that it is professional misconduct for a lawyer "to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Model Rule 8.4(c) provides that it is professional misconduct for a lawyer "to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

The most obvious, and perhaps the most serious type of misconduct in which a non-practicing lawyer might engage, is criminal activity. Criminal conduct by a lawyer is addressed in Rule 8.4(b), which indicates that lawyers are subject to professional discipline for criminal conduct if the conduct "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."<sup>3</sup> Lawyers committing the crimes of stalking,<sup>4</sup> harassing,<sup>5</sup> and willfully failing to file a tax form<sup>6</sup> have been found to have violated Rule 8.4(b). Similarly, crimes involving the use of alcohol or drugs, sex-related crimes, and crimes of violence, including domestic violence, can result in a violation of the Model Rules whether or not the lawyer is convicted or even charged with a crime.<sup>7</sup> "Even criminal conduct that is arguably minor or personal may be found to fall within the Rule if a court finds that such conduct tends to exhibit a disregard of legal obligations."<sup>8</sup> Whether the conduct

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3. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 604 (5<sup>th</sup> ed. 2002) ("Criminal Conduct Committed in Capacity Other Than That of a Lawyer"). In Formal Opinion 336, this Committee concluded that "a lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional Responsibility whether or not he is acting in his professional capacity." ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 336 (June 3, 1974), in FORMAL AND INFORMAL ETHICS OPINIONS 93 (ABA 1985). We believe this statement is equally valid under today's Model Rules of Professional Conduct.

4. See *Attorney Grievance Comm'n of Maryland v. Thompson*, 786 A.2d 763, 768-69 (Md. 2001) (conviction for stalking thirteen-year-old boy reflects adversely on trustworthiness and fitness as lawyer notwithstanding lawyer's arguments that his practice was limited to areas not involving minors and that stalking was not in course of representing clients).

5. See *In re Muller*, 659 N.Y.S.2d 255, 255-56 (App. Div. 1997) (lawyer made harassing phone calls to former girlfriend and posed as clerk to federal court judge to harass her at law school and gain information about her).

6. See *Arizona State Bar Op. 87-26* (Dec. 30, 1987), available at <http://www.myazbar.org/Ethics/pdf/87-26.pdf>.

7. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 605-07.

8. See *id.* at 605 ("Offenses Covered").

exhibits such a disregard will depend upon the nature of the act and the circumstances of its commission.<sup>9</sup>

Isolated minor infractions do not necessarily trigger disciplinary action. On the other hand, the repetition of even minor violations “can indicate indifference to legal obligation.”<sup>10</sup>

Rule 8.4(c) addresses conduct that may or may not be criminal in nature, and prohibits a very broad range of dishonest, fraudulent,<sup>11</sup> or deceitful conduct, or misrepresentation. This expansive provision reaches any activity or aspect of the lawyer’s personal or professional life. For example, willful and material misrepresentations on the lawyer’s personal applications for employment, credit, or insurance would violate Rule 8.4(c),<sup>12</sup> as would personal insurance claims fraudulently submitted by the lawyer.<sup>13</sup>

### **A Lawyer’s Duty to Report Misconduct of Licensed but Non-practicing Lawyers**

We now examine the duty of a lawyer to report to the appropriate disciplinary authorities the misconduct of licensed but non-practicing lawyers.<sup>14</sup>

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9. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. g (2000) (hereinafter “RESTATEMENT”).

10. Annotated Model Rules of Professional Conduct at 604 (citing Rule 8.4 cmt. 2).

11. The Model Rules define “fraud” and “fraudulent” expansively. Rule 1.0(d) indicates that either term “denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” Comment [5] to Rule 1.0 elaborates that fraud “does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.”

12. *See, e.g.*, In re Courtney, 538 S.E.2d 652, 653 (S.C. 2000) (lawyer, inter alia, filed false credit application and prepared false title opinion letter in order to obtain real estate mortgage loan); In re Capone, 689 A.2d 128, 129 (N.J. 1997) (lawyer knowingly made false statement on loan application).

13. *See, e.g.*, In re Bennett, 975 P.2d 262, 263 (Kan. 1999) (lawyer submitted itemized claim to his homeowner’s insurance company for purportedly burglarized items still in his possession).

14. There are few reported decisions where a lawyer has been disciplined solely for failing to report the misconduct of another lawyer. These decisions are not particularly instructive in the context of this opinion. The most widely known decision is In re Himmel, 533 N.E.2d 790 (Ill. 1988). Himmel, however, was not decided under the Model Rules, but rather under the Illinois version of the Model Code of Professional Responsibility. The Illinois Supreme Court limited the confidentiality afforded by the Illinois Code to information protected by the attorney-client privilege. This is much narrower than the scope of protection afforded to confidential information by the Model Rules. A second decision, In re Condit, No. SB-94-0021-D (Ariz. Mar. 14, 1995) is an unpublished decision of the Arizona Supreme Court in which the court publicly censured a lawyer for violating the Arizona analog of Model Rule 8.3. Due to the procedural nature of the case, the court acknowledged, but did not address, the tension between Rules 1.6 and 8.3.

Because the legal profession enjoys the privilege of regulating itself, it is critically important that its members fulfill their responsibility to stand guard over the profession's integrity and high standards. Rule 8.3(a) implements this responsibility. It states: "[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, shall inform the appropriate professional authority."

The Committee is mindful of the awkwardness and potential discomfort of reporting the misconduct of a colleague. The difficulty confronting the lawyer in that situation may be even more acute if the lawyer to be reported is a superior of the lawyer making the report. Whether employed in a law firm, a corporate law department, on a law school faculty, or elsewhere, the lawyer may be facing the same dilemma: jeopardize her career by making the report, or jeopardize it by remaining silent in violation of the rules of ethics.<sup>15</sup> In this regard, however, the Committee notes the instruction of the Preamble to the Model Rules, Comment [12]: "Every lawyer is responsible for observance of the Model Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."

### **Thresholds for Reporting**

When Rule 8.3 is read in conjunction with Rule 8.4, then it is apparent that lawyers must report a wide variety of misconduct. Two thresholds must be reached, however, before the lawyer's obligation arises: the lawyer must "know" of the violation; and the misconduct must raise a "substantial question" as to the lawyer's honesty, trustworthiness or fitness as a lawyer. Therefore, we now turn to a discussion of those two requirements.

Rule 1.0(f) in the Terminology section of the Model Rules states that the term "knows" denotes "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

Most cases and ethics opinions conclude that "knowledge" is determined by an objective standard. The following analysis by the Mississippi Supreme Court typifies this approach: "The standard must be an objective one ... not tied to the subjective beliefs of the lawyer in question. The supporting evidence must be such that a reasonable lawyer under the circumstances would

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15. See Lindsay M. Oldham & Christine M. Whitlege, *Current Developments 2001-2002: The Catch-22 of Model Rule 8.3*, 15 GEO. J. LEGAL ETHICS 881 (2002) (discussing ethics rule requiring lawyers to report other lawyers' unethical conduct and how violations of that rule are prosecuted, as well as associate's causes of action for termination after reporting co-worker's unethical behavior); Douglas R. Richmond, *Associates as Snitches and Rats*, 43 WAYNE L. REV 1819, 1838-47 (1997) (discussing problems facing law firm associates who learn of professional misconduct by other lawyers in their firms).

have formed a firm opinion that the conduct in question had more likely than not occurred.”<sup>16</sup>

If a lawyer “knows” that another licensed lawyer violated the Rules, she must report such misconduct only if the violation raises a “substantial<sup>17</sup> question” as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. As Comment [3] to Rule 8.3 points out, “[t]he term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.”

Criminal conduct that violates Rule 8.4(b) often will raise a “substantial question” as to the lawyer’s fitness. Whether particular non-criminal conduct raises such a question, however, will almost invariably require “a measure of judgment.”<sup>18</sup>

If the lawyer, after assessing all of the circumstances,<sup>19</sup> remains uncertain whether she has a duty to report, she nevertheless may opt to do so. Voluntary reporting made in good faith always is permissible, subject to the guidance of Rule 8.3(c) regarding information protected by Rule 1.6 or gained by a lawyer or judge while participating in an approved lawyers assistance program.<sup>20</sup>

### **Rule 1.6 and the Duty of Confidentiality**

Rule 1.6(a) provides in relevant part that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.... “ Read together with Rule 8.3, this means that, if a report of misconduct would reveal information relating to the representation of a

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16. *Attorney U. v. Mississippi Bar*, 678 So.2d 963, 972 (Miss. 1996). The Restatement also supports an objective standard: “[K]nowledge is to be assessed on an objective standard.... Knowledge exists in an instance in which a reasonable lawyer in the circumstances would have a firm opinion that the conduct in question more likely than not occurred.”) RESTATEMENT § 5 cmt. i. *But see* Rhode Island Eth. Adv. Panel Op. 95-41 (Sept. 14, 1995) (“[T]he determination as to whether another attorney has violated an ethical rule ... is one which involves [a] credibility determination that is largely subjective and is therefore one to be made by the attorney witnessing such conduct....”).

17. “‘Substantial’ when used in reference to degree or extent denotes a material matter of clear and weighty importance.” Rule 1.0(l).

18. *See* Rule 8.3 cmt. 3.

19. *See* District of Columbia Bar Op. 246 (adopted Apr. 19, 1994; revised Oct. 18, 1994) (“In the end, however, it is for the inquiring lawyer to determine, in light of all the facts of the situation as she knows them, whether in her judgment a particular disciplinary violation raises a ‘substantial question’ about another lawyer’s fitness, so as to trigger her own ethical obligation to report it. It is and should be a solemn and unenviable task.”).

20. *See* New York State Bar Ass’n Committee on Prof. Eth. Op. 635 (Sept. 23, 1992) (“As a general proposition, a lawyer is always free to report evidence of what may constitute improper conduct by another attorney, subject to the obligations to preserve client confidences and secrets. The lawyer need not have actual proof of misconduct; a good faith belief or suspicion that misconduct has been committed is a sufficient basis for making a report.”).

client, a lawyer must obtain the client's informed consent before making such a report. According to the Annotation to Rule 8.3, "[t]he duty to report misconduct is subordinate to the duty of confidentiality set forth in Rule 1.6."<sup>21</sup> Stated more bluntly, Rule 1.6 trumps Rule 8.3.<sup>22</sup>

Although paragraph (b) of Rule 1.6 sets forth a number of exceptions to the prohibition contained in paragraph (a), those exceptions seldom will come into play in the context of reporting the misconduct of another lawyer. For example, Rule 1.6(b)(1) allows a lawyer to reveal information relating to the representation of a client, but only "to prevent reasonably certain death or substantial bodily harm," a circumstance that will most likely be rare. The exception in paragraph (b)(4), which permits revelations "to comply with other law or court order," also is of limited application in the present context. "Other law" refers to law extraneous to the Model Rules, such as the substantive or procedural law of the jurisdiction.<sup>23</sup>

We also note that Rule 1.6 is not limited to communications protected by the attorney-client privilege or work-product doctrine. Rather, it applies to all information, whatever its source, relating to the representation.<sup>24</sup> Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.<sup>25</sup>

Within a corporate environment, the reach of Rule 1.6 is particularly wide. Its protection includes any information relating to the representation of any client or any communication with the organization's lawyer by a constituent of the organization in the constituent's organizational capacity.<sup>26</sup>

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21. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 599 ("No Duty to Disclose Confidential Information").

22. *But see* GEOFFREY C. HAZARD, JR. & WILLIAM HODES, *THE LAW OF LAWYERING* § 64.2 at 64-6 (3rd ed. 2002 & Supp. 2003) ("Whether confidentiality trumps the duty to report globally, or only in qualified terms, will have a large impact on the scope of the reporting rule itself....").

23. *See* Rule 1.6 cmt. 12 ("Other law may require that a lawyer disclose information about a client. Whether such a law supercedes Rule 1.6 is a question of law beyond the scope of these Rules."). *See also* Maryland Rule of Professional Conduct 1.6(b)(4) (2002) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to comply with these Rules, a court order or other law.").

24. *See* HAZARD & HODES, § 17.6, at 17-18 ("essentially all information about the client and its legal affairs is covered by the professional duty to preserve a client's confidences....").

25. *See* District of Columbia Bar Op. 246 ("Thus, even if the client has authorized the lawyer to file a lawsuit charging another lawyer with malpractice, this does not mean that the client cannot expect the lawyer to keep the matter confidential for other purposes.").

26. *See* Rule 1.13 cmt. 2 ("When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6.").

As a practical matter, clients have the ultimate authority when it comes to protecting confidential information.<sup>27</sup> Hence, however salutary and indeed important the reporting of misconduct of lawyers may be, under the Model Rules the hands of lawyers are often effectively tied in these situations by the wishes or even whims of their clients.<sup>28</sup>

### **Seeking Informed Consent to Disclose the Confidences of Clients**

If the lawyer determines that the information necessary to report the misconduct is protected by Rule 1.6, what should the lawyer do? Comment [2] to Rule 8.3 entreats a lawyer to “encourage a client to consent<sup>29</sup> to disclosure where prosecution would not substantially prejudice the client’s interests.” Any discussion of consent to disclosure, therefore, must include the potential adverse impact that disclosure may have on the client, including the effect on the client’s ultimate recovery in a malpractice action, for example.<sup>30</sup>

Clients may have a variety of reasons for not wanting to consent to disclosure of information. For example, they may be embarrassed by the matter, hesitant to become entangled in the controversy, or simply want the matter to come to an end. As a practical matter, there may be little benefit for the client in consenting to report the misconduct to the disciplinary authorities.

Nevertheless, we believe it would be contrary to the spirit of the Model Rules for the lawyer not to discuss with the client the lawyer’s ethical obligation to report violations of the Rules. In essence, this would allow the lawyer to circumvent them.<sup>31</sup>

### **Conclusion**

We interpret Rule 8.3 as requiring a lawyer to report professional miscon-

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27. See HAZARD & HODES § 64.8 at 64-17 (“In practical terms, this usually means that the client will be able to exercise a veto, since typically the information available to the would-be reporting lawyer will be confidential client information.”).

28. See *In re Ethics Advisory Panel Op. 92-1*, 627 A.2d 317, 321 (R.I. 1993) (“Rhode Island’s version of Rule 1.6 does not authorize an attorney to second guess a client’s decision to refuse disclosure of otherwise confidential information.”).

29. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 93 (“Informed Consent to Disclosure”) (“Informed consent means that a client’s decision to disclose information is based upon an understanding of the risks and benefits that may result from the disclosure and nondisclosure. In the context of Rule 1.6, relevant issues include whether disclosure could result in the attorney-client privilege being waived, or the information being disclosed to others or used to the client’s disadvantage.”).

30. See, e.g., Rhode Island Eth. Adv. Panel Op. 94-54 (Aug. 25, 1994).

31. See HAZARD & HODES § 64.8 at 64-18 (“Good faith decisions by a client to withhold information from the disciplinary process must be respected, but it should be regarded as a violation of Rule 8.3 for a lawyer to manipulate a client into making that choice. If the violation that should be reported is serious enough, the lawyer has at least a moral duty – even putting aside the ethical duty – to urge the client to come forward (or to permit the lawyer to come forward) in the public interest.”).



duct committed at any time by a licensed but non-practicing lawyer. Even misconduct arising from purely personal activity must be reported if it reflects adversely on the lawyer's fitness to practice law. A lawyer violates the Model Rules and is subject to professional discipline when she fails to report such professional misconduct, in circumstances in which Rule 8.3 requires such reports.

# Rule 8.3: Reporting Professional Misconduct

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## *Maintaining The Integrity of The Profession*

(a) 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, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

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