

## Legislating Honesty: The One Bad Apple Conundrum



The Anthony M. Kennedy American Inn of Court  
Team 7

Tuesday, April 16, 2024

## I. California Rule of Professional Conduct 8.3

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

## II. Articles of Interest

Harriet Ryan & Matt Hamilton, *COURT ADOPTS LAWYER ‘SNITCH RULE’; After Girardi scandal, California will punish failure to report colleague misconduct*, Los Angeles Times (Jun. 23, 2023), <https://www.latimes.com/california/story/2023-06-22/california-attorneys-must-now-report-misconduct-by-their-peers>

George Cardona & Erika Doherty, *Addressing misconceptions and practical application under Rule 8.3*, Daily Journal (Oct. 24, 2023), <https://www.dailyjournal.com/articles/375341-addressing-misconceptions-and-practical-application-under-rule-8-3>

Kevin Mohr, *Ethics Spotlight: California Joins Other States in Requiring a Lawyer to Report Misconduct*, California Lawyers Association (Aug. 2, 2023), <https://calawyers.org/california-lawyers-association/attorney-ethics-reporting-misconduct-rule-8-3/>

Francie Skaggs, *Exploring California Rule 8.3: A Game-Changer for Legal Ethics*, LPI, <https://www.legalprofessionalsinc.org/exploring-california-rule-8-3-a-game-changer-for-legal-ethics/>

Neil J Wertlieb, *The “Snitch Rule”*, California Lawyers Association (Oct. 10, 2023), <https://calawyers.org/business-law/the-snitch-rule/>

## III. Additional Resources

- State Bar Informational Video – [California Rules of Professional Conduct, Rule 8.3: Required Reporting](#)
- Rule 8.3 FAQs – <https://www.calbar.ca.gov/Portals/0/documents/ethics/Rule-8-3-FAQ.pdf>
- Rule 8.3 Scenarios – <https://www.calbar.ca.gov/Portals/0/documents/ethics/Rule-8-3-Scenarios.pdf>

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