Proposed Rule 8.3 Reporting Professional Misconduct

(a) A lawyer shall 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).

(b) For purposes of this rule, "personal knowledge" is distinct from the definition of "[k]nowingly," "known," or "knows" under rule 1.0.1(f) and is limited to information based on firsthand observation gained through the lawyer's own senses.

(c) 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; the lawyer-client privilege; 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's professional misconduct.

[3] If a lawyer reasonably believes* that it would be contrary to the interests of a client of the lawyer or a client of the lawyer's firm promptly to report under paragraph (a), the lawyer should report as soon as the lawyer reasonably believes* the reporting will no longer cause material prejudice or damage to the client. The lawyer should also consider the applicability of other rules such as rules 1.4 (the duty to communicate) and 1.7(b) (material limitation conflict).

[4] 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.

[5] In addition to reporting professional misconduct 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.

[6] 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; see also rule 5.6(b) and Business and Professions Code section 6090.5 with respect to the prohibition on agreements that preclude the reporting of a violation of the rules.

[7] Communications to the State Bar relating to lawyer misconduct are "privileged and no lawsuit predicated thereon may be instituted against any person." See Business and Professions Code section 6094; but see Business and Professions Code section 6043.5 with respect to criminal penalties for false and malicious reports or complaints.