



Three Reasons Why California Lawyers Still Won't Snitch on Opposing Counsel

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On June 22, 2023, the California Supreme Court approved one of two alternative versions of the proposed Rule of Professional Conduct 8.3, which has been derisively referred to as the “Snitch Rule.” In summary, the new Rule 8.3(a) requires a lawyer to report colleagues to the State Bar or other authorities in certain situations, as follows:

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.

Rule 8.3's Limitations

Many lawyers fear Rule 8.3 will result in a flood of complaints to the State Bar by lawyers seeking to punish their opposing counsel or gain an advantage in litigation. However, the majority of other jurisdictions in the United States maintain some version of the mandatory reporting requirements of Rule 8.3 and have not seen such a tidal wave. Rather, Rule 8.3 contains several qualifications that will likely limit the situations wherein reporting opposing counsel is appropriate.

First, Rule 8.3(a) limits the reporting requirement to instances wherein a lawyer “knows of credible evidence” of a crime or “conduct involving fraud, deceit, [etc.],” that “raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer.” As such, there is no reporting requirement where the reporting lawyer lacks evidence that can accompany the report. Additionally, the intent and “substantial question” requirements of Rule 8.3 raise the level of act that falls within the rule’s scope, such that the evidence must show that the offending lawyer’s subjective belief was that the actions were criminal, wrong, or dishonest, rather than falling within an acceptable interpretation of the applicable law or rules by the offending attorney.



Second, Rule 8.3(d) creates a broad exception, excluding from the reporting requirement “information gained by a lawyer while participating in a substance use or mental health program, or requir[ing] 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.” In other words, there are many plausible and foreseeable scenarios where a lawyer will be aware of evidence that should be reported pursuant to Rule 8.3(a), but the lawyer will be precluded from reporting the same information due to the broad nature of the duty of confidentiality (or the other areas of exclusion referenced above). Indeed, California’s high standards on the duty of confidentiality will likely greatly limit the situations wherein reporting opposing counsel under Rule 8.3 is even allowed.

Third, nothing in Rule 8.3 abrogates Rule 3.10(a)’s bar of threats “to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.” To wit, comment 8 to Rule 8.3 reminds lawyers of the same. As many lawyers know, the threat of action is often more effective than the action itself. A complaint to the State Bar can often have the unintended consequence of prolonging a dispute, because a lawyer defending against the complaint will be forced to prove the merits of his position rather than agreeing to a favorable settlement to avoid being proven wrong.

The Takeaway

Rather than causing a deluge of snitching against opposing counsel, Rule 8.3 will hopefully prod otherwise reticent attorneys to report their colleagues if they engage in wrongdoing (e.g., reporting trust account theft). Whether or not Rule 8.3 achieves that goal remains to be seen. In the interim, lawyers should think carefully about the potential consequences before deciding to snitch on their opposing counsel.



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