

Calif. 'Snitch Rule' Drives Atty Ethics Reports ... And Confusion

By Jack Karp

Law360 (June 13, 2024, 4:14 PM EDT) -- The California state bar has reported a "significant" increase in attorney-initiated complaints resulting from a new rule requiring lawyers in the state to report their peers' misconduct, but ethics attorneys say the spike is largely the result of anxious lawyers erring on the side of caution as they grapple with an unclear regulation.

What these ethics experts say they are really seeing in their own practices is an increase in lawyers' confusion about the rule.

The State Bar of California reported an 82% rise in attorney-initiated complaints due to Rule 8.3, which was enacted in August and mandates that attorneys report other lawyers' criminal or dishonest conduct.

But Golden State ethics attorneys tell Law360 Pulse they aren't fielding more disciplinary cases in their own practices. What they are fielding is a lot of calls from lawyers who are unclear about what the rule requires and fear getting in trouble if they make the wrong call.

"There is still a reasonable amount of uncertainty and confusion among some California lawyers" about Rule 8.3, said San Diego professional responsibility attorney Ed McIntyre, who added that he's not surprised that the bar saw a rise in attorney-initiated complaints.

"I think people are airing on the side of, 'Well, geez, I better make a report because I don't want to be disciplined for not making a report,'" McIntyre said.

"Vague" and "Misunderstood"

The California Supreme Court approved Rule 8.3 in June 2023, and it went into effect that August.

The rule, a version of which was already in place in every other state, was implemented after high-profile attorney Thomas Girardi was found to have stolen millions of dollars from client settlements, thefts some of Girardi's colleagues are alleged to have known about but not reported.

Referred to by some attorneys as the "snitch rule," Rule 8.3 requires lawyers who have "credible evidence" that another lawyer has engaged in misconduct to report that misconduct to the California state bar.

That requirement has led, at least in part, to an 82% increase in attorney-initiated complaints between

August 2023 and March 2024 over that same period the previous year, according to the bar's 2023 Digital Annual Report, published on May 31. Sixty-three percent of the 604 attorney-initiated complaints received by the state bar during that period were filed under the new rule.

That's a "significant increase" in attorney complaints, said George S. Cardona, the California bar's chief trial counsel.

"We don't really have a way of definitively saying whether it's due to Rule 8.3 or other factors, but obviously we have the timing," Cardona told Law360 Pulse, adding that "the best guess" is that at least some of that increase is due to Rule 8.3.

Ethics attorneys in the state say while they're not surprised by that increase, they're also not seeing it in their own practices.

"It certainly hasn't been reflected in my caseload," said San Francisco ethics attorney Jonathan I. Arons.

"It's not like the sky is falling and everybody's complaining about everybody else. I have not seen that," echoed Edward O. Lear of Century Law Group LLP, a former bar prosecutor who has defended lawyers before the bar for almost 30 years.

What ethics attorneys are seeing, though, is a lot of unhappy lawyers who find the rule confusing and are unsure what it requires, they told Law360 Pulse.

Golden State attorneys don't know what constitutes "credible evidence" of misconduct, how recent the alleged misconduct must be and how long they have to report it, among other questions, according to ethics experts, who variously called the rule "ambiguous," "unclear," "vague" and "misunderstood."

"Nobody likes the rule," said David C. Carr, whose practice focuses on California legal ethics and state bar discipline defense. "Nobody likes the rule because it is confusing and it imposes an obligation that lawyers are uncertain about what they have to do to meet it."

The rule's text even acknowledges that "a measure of judgment" is required to comply with its provisions. But attorneys say that acknowledgment only adds to the confusion.

"What does that mean, 'a measure of judgment'? It seems to open the door to a lot of lawyers concluding they don't have to comply with the rule because they're not certain they have enough actual knowledge of credible evidence," Carr said.

"I think people are a bit panicked about the exercise of judgment part," McIntyre said.

As a result, these ethics experts have been fielding a lot of anxious phone calls from lawyers asking for advice about their reporting obligations under Rule 8.3.

Most of the queries come from lawyers concerned about finding themselves in trouble if they don't report information they should have reported, ethics attorneys said.

Many of the questions are also from younger, less experienced attorneys. Carr, for instance, said he has counseled law firm associates about situations in which a partner or principal may be engaging in misconduct.

"That's a difficult place to be for a young associate," Carr said. "Do I have a duty to report my boss, essentially, for engaging in this kind of conduct?"

But what most of the lawyers seeking advice about the rule are really asking for is a justification for not reporting their colleagues, Lear said.

"Most of the time when they're calling they really don't want to report, and they're looking for me to come up with any clever way to protect them so that they don't have to report," Lear said.

"They don't like it, but they're afraid of it, and want to figure out a way to circumvent it," Lear added. "Those are the calls that I get."

Looking to Other States

Another reason California attorneys are unclear about their obligations under the new rule is precisely that it's new, according to ethics experts, who point out that there's no guidance or case law yet about how it will be enforced.

"People are unfamiliar with it. There is no background in the state on it, so there's not a lot of precedent you can look to," McIntyre said.

But every other state had some version of Rule 8.3 on the books before California, so there is case law from other jurisdictions interpreting attorneys' obligations under the rule, according to Cardona.

Ethics attorneys in the state say they are turning to those other states' guidance.

Lear, for instance, said he looked to an advisory opinion from the New York City bar's professional ethics committee when counseling an attorney about whether a lawyer is required to report alleged misconduct if that report would violate attorney-client privilege.

The advisory opinion said that, no, if a lawyer discovers that a colleague has engaged in fraudulent billing, the lawyer can't report the misconduct to disciplinary authorities if doing so would violate the duty of confidentiality.

"So now we're digging around and we're looking at what other state bars have done and what are the different scenarios about which there have been opinions," Lear said.

But other states' experience with Rule 8.3 may be of limited help, since California's Rule 8.3 is different from the others, McIntyre said.

"You can go look at the rule in other states, but frankly I've done that and I haven't found that particularly helpful because our version is unique to California," McIntyre said.

It's also likely that a lawyer looking for guidance on Rule 8.3 from other states will find that those states' disciplinary bodies haven't addressed the issue either, ethics lawyers add.

Even in states that have had a version of Rule 8.3 in place for decades, there's been very little disciplinary activity, either triggered by complaints pursuant to the rule or for violation of the rule's

reporting requirements, these experts say.

"When I talk to my colleagues around the country, they can't think of a single prosecution of an attorney for failure to report," Arons said. "There may have been a few prosecutions, but they're few and far between."

Waiting To See

McIntyre said the attorneys who are anxious about complying with Rule 8.3's reporting obligations are overreacting.

There is some vagueness to the rule, but it's not all that confusing. The real problem is that lawyers haven't really looked at it closely yet, he said.

"People just haven't really focused on what does the rule actually say, and what does the rule actually require," he added. "You've got to sit down and study it a little bit to figure out what it means."

There was confusion about the rule at first, Cardona acknowledged, but he and the state bar held training sessions walking lawyers through what Rule 8.3 requires. The state bar's website also includes information about the rule that lawyers can look to, he added.

"So there was some confusion, but I think some of that has cleared up," Cardona said.

A lot of questions people have about the rule may be further cleared up once the bar starts issuing decisions and guidance about it, McIntyre said.

He pointed to Section 6106 of California's Business and Professions Code, which says that "any act involving moral turpitude, dishonesty or corruption" is grounds for disbarment or suspension.

Terms like "moral turpitude" and "corruption" are just as vague as the terms used in Rule 8.3, but Section 6106 has been around long enough and there have been enough decisions concerning it that lawyers can figure out what conduct it encompasses. The same thing is likely to happen with Rule 8.3, McIntyre said.

But Carr said it could be years before there are published decisions concerning Rule 8.3 to provide that guidance.

The bar enacted several new rules in 2018, including Rule 3.8 on the responsibilities of prosecutors and Rule 8.4 concerning professional misconduct, and many of those rules have yet to be tested in published precedential cases, he said.

"There's a lot of ambiguity in the interpretation of all the new rules of professional conduct, and 8.3 is only perhaps the most dramatic example of the kind of murky landscape," Carr said.

Given that the vast majority of state bar complaints get closed, few of the ethics filings that make up that 82% spike the California bar reported are actually going to lead to any disciplinary action — and any precedents, Carr said.

The California state bar hasn't yet fielded an allegation that a lawyer failed to report in violation of Rule

8.3, according to Cardona. And while the bar gets an average of 15,000 to 17,000 complaints a year, only a few hundred come from attorneys; most come from clients and other litigants.

So it will likely still be a while before the bar and attorneys know if Rule 8.3 is having an impact on how Golden State lawyers police each other's conduct, ethics experts say.

"Is Rule 8.3 really protecting the public or is it just resulting in a lot of extra work for the state bar?" Carr said. "We don't know that yet."

--Editing by Marygrace Anderson.

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