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PERSPECTIVE

Am I my brother's keeper? Seeking Golden Snitches in the Golden State

By Kevin Kayhanian

Recently the California State Bar has mandated a new rule regarding professional conduct, Rule 8.3, endearingly called 'the *Snitch*' rule. The new rule facially intends to curb several varieties of undesirable conduct from lawyers by mandating the reporting of wrongdoers. Much like Harry Potter, it appears the Golden State is also seeking Golden Snitches. Rule 8.3 states in relevant part:

Rule 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 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."

On its face the rule seems like a good idea. Lawyers are generally to report other lawyers that they know are committing crimes, stealing from their clients, or are acting in a manner which goes against the spirit and nature of being a lawyer. Lawyers – being legal representatives with fiduciary duties – are placed in a paramount position of utmost trust and esteem



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by their clients and should engage in a manner befitting such trust and esteem. Though seemingly well intentioned, a quick look at the practical effect of Rule 8.3 begins to shed some light on the impracticality and difficulty of following the rule as it is written and the real world effects it will have on the legal community.

Firstly, the rule requires an attorney to inform the proper authority without "undue delay." But what does the terms of art *undue delay* mean? The rule gives some guidance as to what "undue delay" means by stating "as soon as the lawyer *reasonably believes* the re-

porting will not cause *material prejudice* or damage to the *interests of a client* of the lawyer or a client of the lawyer's firm." In the definition of the term of art - *undue delay*, we find at least three more terms of art: *reasonably believes*, *material prejudice*, *interests of a client*. Circumstantially, *undue delay* could mean an hour, a day, a week, a month, a year, etc. In the first sentence of the rule that's presumably designed to give guidance on practical timing issues, already we find a subjective standard, or at best, a subjective-objective hybrid, with currently no case law to offer guidance.

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Secondly, what is “credible evidence?” If someone overhears a conversation regarding dishonesty, fraud, or misappropriation of funds at the water cooler in the office is that *credible*? Say, for example, you have a local office gossip. Let’s call her Karen. Karen goes around telling stories of things she has heard through the grapevine. Karen is well-known in the firm for exaggerating the truth or even making stories up entirely. If Karen claims the managing partner at the firm is stealing from the client account is her information considered credible evidence? What if Karen just joined the firm and makes the same claim about the managing partner, is she more or less credible based on her novel status? Again, we have another subjective-objective hybrid term of art with little to no actual guidance.

Thirdly, what does it mean to engage in “conduct involving dishonesty?” Does rule 8.3 only extend to the legal arena whilst engaged in the practice of the law, or, can a Lawyer be liable for all acts of dishonesty, including in their personal life as well? Moreover, what is the limit on dishonesty, is it a hard and fast rule or is it malleable based on circumstance and gravity?

Let’s pose another real-world hypothetical: Alice and Greg are both practicing attorneys and work at the same firm. One night Alice and Greg decide to play a game of cards at Alice’s house. While playing, Greg draws two cards when he is only supposed to draw one. Alice sees Greg draw two

cards and mentions it to Greg, who laughs and readily admits to intentionally cheating. Does Alice now have a responsibility to report Greg based on his conduct under Rule 8.3? Furthermore, does the surrounding circumstance of the action have any effect on the reporting rules, or is it the spirit of dishonesty that falls into the crosshairs of the rule? This remains unclear.

One may say the aforementioned hypothetical is laughable and surely there is no duty to report such conduct. Though a fair point, would there be a different outcome regarding the reporting duty under Rule 8.3 if Greg and Alice were playing for money? What if the card game were not at Alice’s home but a Casino? Does the location of the dishonest behavior have any relevance or bearing on the magnitude of dishonesty? Is Alice going to lose her license to practice law because she failed to report Greg and his degenerate two-card drawing tactics? Expanding further, if Alice’s co-worker – Jenny – discovered that Alice let Greg off the hook, does Jenny now have a duty to report Alice for her shapeless ethics in allowing Greg the degenerate to continue practicing law while knowing he drew two cards instead of one?

As a more practical matter which is likely to rear its ugly head, though we as lawyers care not to view our profession as being so prurient in membership, what is to stop the less morally steadfast of our colleagues from reporting

their competition for the tactical advantage? Imagine Bob is opposing counsel on a matter Louisa is handling. On the eve of an important hearing, deposition, conference, or the like, Louisa decides to report Bob for an alleged act involving dishonesty, a criminal act, or misappropriation of funds, under the guise of “credible evidence.” Now Bob, through no fault of his own, has to spend time defending himself in front of a tribunal because of Louisa’s attempts to gain a tactical advantage. The lack of clarity in the wording of the rule opens up the possibility to create a society of legal professionals fear-bound together by paranoia, avarice and gamesmanship, as opposed to any actual empathy for the individuals being victimized by true bad-faith lawyers.

Another issue with the rule which is wholly unclear and will give rise to confusion, is the broad stroke of mandatory reporting if a lawyer has committed a “criminal act.” Are all criminal acts created equal? Surely not. It is widely accepted that not all criminal acts are the same, be it in gravity, intent, or action. This is the reason why the law has varying requirements regarding culpability for convictions, and why not all sentences are equal. Yet notably, the rule makes no mention of this, it simply mandates reporting criminal acts, seemingly *all* criminal acts.

If a colleague says they took their child fishing over the weekend at the local creek, and an attorney knows for fact that their

colleague has no fishing license, are they required to notify the California State Bar of their colleagues’ nefarious fishing behaviors without undue delay? Moreover, is it not foreseeable, if not likely, that an individual would be highly influenced and directed by their own moral compass when it came to reporting criminal activities. For example, a Vegan animal rights activist may very well equivocate all fishing, licensed or not, with the taking of innocent life. Thereby if the opportunity presented itself to report someone who was fishing without a license they would be salivating at the opportunity to do so for punitive purposes according to their own ethics code.

Rule 8.3 has the right intent, and one must not fault the powers that be for trying to take a meaningful step to curb unethical behavior by lawyers. However, as written Rule 8.3 will inevitably cause immense confusion and be a source of potential abuse by ill-meaning lawyers. Any guidance from the Courts by way of case law is likely years away and in the interim it is up to the individual to reasonably navigate the nuances of the rule. As an aside you may be reading this wondering “how do I comply with the new rule and keep my license?” The pragmatic approach would be to use the logic and judgment that got you to be a Lawyer in the first place: weigh the credibility of the evidence, understand the nature of the harm, and verify the alleged actions from the wrongdoer and report it accordingly.

