

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

SB 42 (Umberg)  
Version: December 5, 2022  
Hearing Date: May 2, 2023  
Fiscal: No  
Urgency: No  
AM

**SUBJECT**

Attorneys: reporting professional misconduct

**DIGEST**

This bill requires a licensee of the State Bar of California who knows that another licensee has engaged in professional misconduct that raises a substantial question as to that licensee's honesty, trustworthiness, or fitness as an attorney in other respects, to inform the State Bar, except as provided.

**EXECUTIVE SUMMARY**

The State Bar of California (State Bar) is a public corporation that functions as the administrative arm of the California Supreme Court for the purpose of assisting in attorney admissions (licensing) and discipline. The State Bar's highest priority is the protection of the public, which includes quickly finding and disciplining dishonest or incompetent attorneys. Attorneys are subject to the Rules of Professional Conduct and can be disciplined by the State Bar for violating them. The American Bar Association (ABA), a national professional association, has promulgated Model Rules of Professional Conduct for the legal profession. California is the only state that has not enacted some version of ABA Model Rule 8.3, which requires attorneys to report the conduct of another attorney who they know violated the rules of professional conduct. This bill seeks to remedy this by enacting a version of that ABA model rule on mandatory reporting. By requiring attorneys to report the misconduct of other attorneys of which they have knowledge, this bill will bring California in line with the other 49 states and hopefully help preserve and potentially increase the integrity of the legal profession.

The bill is author sponsored. The bill is supported by the Consumer Attorneys of California and the Peace Officers' Research Association of California. The bill is opposed by the California Dispute Resolution Council and Los Angeles Dependency Lawyers, Inc.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Requires all attorneys who practice law in California to be licensed by the State Bar and establishes the State Bar, within the judicial branch of state government, for the purpose of regulating the legal profession. (Cal. const. sec. 9, art. VI.; Bus. & Prof. Code § 6000 et seq.)
- 2) Provides that protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (Bus. & Prof. Code § 6001.1.)
- 3) Provides that the Chief Trial Counsel (CTC), with or without the filing or presentation of any complaint, may initiate and conduct investigations of all matters affecting or relating to: the discipline of the licensees of the State Bar; the acts or practices of a person whom the CTC has reason to believe has violated or is about to violate any provision of Articles 7 (commencing with Section 6125) and 9 (commencing with Section 6150) of the State Bar Act; and any other matter within the jurisdiction of the State Bar. (Bus. & Prof. Code § 6044.)
- 4) Authorizes the Board of Trustees, with the approval of the Supreme Court, to formulate and enforce rules of professional conduct for all licensees of the State Bar. (Bus. & Prof. Code § 6076.)
  - a) The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all licensees of the State Bar. (Bus. & Prof. Code § 6076.)
  - b) the State Bar Court has power to discipline licensees by reproof, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years for a willful breach of any of the rules of professional conduct. (*Ibid.*)
- 5) Establishes the Attorney Diversion and Assistance Program to identify and rehabilitate attorneys with an impairment due to substance use or a mental health disorder affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety, as provided. (Bus. & Prof. Code § 6230 et seq.)
- 6) Establishes an attorney-client privilege under the Evidence Code that provides the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer, as provided.

This bill:

- 1) Requires a licensee of the State Bar who knows that another licensee has engaged in professional misconduct that raises a substantial question as to that licensee's honesty, trustworthiness, or fitness as an attorney in other respects, to inform the State Bar.
- 2) Provides that this provision does not require disclosure of information otherwise protected by the attorney-client privilege or information gained by a licensee while participating in the Attorney Diversion and Assistance Program.

### COMMENTS

#### 1. Stated need for the bill

The author writes:

SB 42 requires attorneys to inform the State Bar if they know of another attorney that has engaged in professional misconduct that raises a substantial question as to that attorney's honesty, trustworthiness, or fitness. Each state has its own rules that govern ethical standards for attorneys. For example, the California Rules of Professional Conduct regulate the professional conduct of attorneys licensed by the State Bar through discipline. However, these rules have no requirement that attorneys report the misconduct of their colleagues. Many state rules have either been copied or influenced by the standards created by the American Bar Association (ABA). In fact, 49 states have some sort of requirement that attorneys report their colleague's misconduct. California only requires attorneys to report their own professional misconduct and not the misconduct of others.

SB 42 aims to prevent some of the most egregious examples of attorney misconduct. Specifically, the type of corruption and unethical behavior seen in the Girardi scandal. Girardi was a nationally renowned trial attorney who misappropriated millions of dollars' worth of settlement money for clients and cheated fellow attorneys out of fees. Hundreds of former clients sued Girardi when money damages were never transferred to them. These monies included the misappropriation of at least two million dollars due to crash victims' widows and orphans for those killed in a Boeing 737 MAX, crash and dozens of cancer survivors who were awarded \$17 million from a pharmaceutical company.

Many attorneys noticed Girardi's egregious ethical violations, including those in his own law firm. However, these attorneys had no duty to report his misconduct. The lack of a mandatory reporting statute resulted in a substantial delay in justice to the victims. Thankfully, in 2022, a court ordered Girardi to pay \$2,300,000 in restitution and he was finally was disbarred.

In order to prevent future abuses to vulnerable clients, SB 42 would require attorneys to report the professional misconduct of other attorneys to the State Bar. Changing these reporting requirements will ensure that California's attorneys are held to an equivalent standard as other attorneys from the other 49 states.

2. California is the only state in the nation that has not enacted some version of the ABA Model Rule for Professional Conduct regarding mandatory reporting of attorney misconduct

The comment to the ABA Model Rule 8.3 states that "self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense."<sup>1</sup> In recognition that a rule that would require any violation of the rules of professional conduct to be reported would be unworkable, the ABA model rule limits the conduct the type of which a "self-regulating profession must vigorously endeavor to prevent." For this reason the conduct that must be reported is conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

This bill follows the guidance provided in the Comment to ABA Model Rule 8.3, and only requires a licensed attorney who knows that another licensee has engaged in professional misconduct that raises a substantial question as to that licensee's honesty, trustworthiness, or fitness as an attorney, in other respects, to inform the State Bar of such conduct. The bill provides exceptions for disclosing knowledge gained by a licensee via the participation in the Attorney Diversion and Assistance Program or information that is protected by the attorney-client privilege.

Girardi, a prominent trial attorney, was accused of stealing millions of dollars from his injured clients over many years. Serious and repeated allegations of misconduct against him were reported to the State Bar over several decades, but the State Bar did not take action against him until 2021, when he was disbarred. This year, he was indicted by federal grand juries in two states. As noted by the author, it is almost certain that other attorneys knew about his unethical violations, but under current law there is no duty on attorneys to report such unethical conduct to the State Bar. By enacting this bill, attorneys would have a duty to report misconduct of other attorneys, which they have knowledge about, that raises a substantial question as to that licensee's honesty, trustworthiness, or fitness as an attorney. Maintaining the integrity of the legal

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<sup>1</sup> *Comment to Rule 8.3 Reporting Professional Misconduct*, ABA available at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_3\\_reporting\\_professional\\_misconduct/comment\\_on\\_rule\\_8\\_3/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct/comment_on_rule_8_3/).

profession is not a weight that should fall solely on the public. This bill remedies this and brings California in line with every other state regarding mandatory reporting for attorney misconduct.

3. The State Bar is, once again, contemplating adopting a mandatory reporting rule to the Rules of Professional Conduct

At the November 17, 2022 Board of Trustees Meeting of the State Bar, the Chair of the Board of Trustees asked the State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) to prepare a proposal for a new rule of professional conduct on a lawyer's duty to report the misconduct of another lawyer, pointing to the fact that California was the only state in the nation without such a rule. This will be the third time the State Bar has considered some form of a mandatory reporting rule for attorneys. It did so in 2010 and 2016 as part of the work of the Rules Revision Commission. In 2010, the then Board of the State Bar rejected the proposal to adopt a mandatory reporting rule that would have required a lawyer to report another lawyer who committed a felonious criminal act that raised a substantial question as to that lawyer's honesty, trustworthiness, or fitness. In 2016 the Rules Revision Commission voted 10 to 4 against recommending the adoption of a version of rule 8.3 and a proposed rule was never brought to the Board for a vote.

COPRAC submitted its proposal to the Board at their March 16, 2023 meeting.<sup>2</sup> The proposal included two options and recommended the Board put forth both options for a 45-day public comment period that is to end on May 4, 2023. The first provided that a lawyer must, without undue delay, inform the State Bar when the lawyer knows of credible evidence that another lawyer has committed a criminal act, engaged in fraud, or misappropriated funds or property in violation of rule 1.15 of the Rules of Professional Conduct when that conduct raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Rule 1.15 of the Rules of Professional Conduct specifically governs how an attorney is to safeguard client funds and property in the possession of the attorney.

The second proposed rule provided that a lawyer must, without undue delay, inform the State Bar when the lawyer has: (1) committed a criminal act that reflects adversely on that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; or (2) engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property. Both proposed rules provide more expansive exceptions than the bill does, such as mediation confidentiality and other applicable privileges. And both proposed rules also specifically authorize, but do not require, a lawyer to report violations of the rules of professional conduct or other rules of the State Bar.

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<sup>2</sup> Agenda Item 60-1, Mar. 16, 2023 Open Session, State Bar Board of Trustees Meeting, available at <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000030459.pdf>.

4. Statements in support

The Peace Officers Research Association Committee writes in support stating:

SB 42 would require a licensee of the State Bar who knows that another licensee has engaged in professional misconduct that raises a substantial question as to that licensee's honesty, trustworthiness, or fitness as an attorney in other respects, to inform the State Bar.

PORAC supports the passage of SB 42 because it will keep attorneys accountable for their actions. This will help ensure that all licensees of the State Bar are trustworthy and fit to be attorneys.

5. Statements in opposition

The California Dispute Resolution Council writes that they are opposed unless amended, stating:

SB 42 currently contains two exceptions, to wit, information otherwise protected by the attorney client privilege and information gained by a licensee while participating in the Attorney Diversion and Assistance Program. By specifically including two exceptions, it would appear that no other exception was considered by the Legislature. Hence, the bill would supersede the doctrine of confidentiality set forth in Evidence Code Sections 1115 et. seq.

CDRC believes that mediation confidentiality should be an exception to the reporting requirement set forth in SB 42. The ability of parties in a mediation to speak to each other and to the mediator candidly is the key to a successful mediation. If a mediator-attorney files a report to the State Bar about the conduct of another attorney who is participating in the mediation, the mediator will likely be breaching mediation confidentiality and that breach not only will affect the attorney who is acting inappropriately, but all the other mediation participants, who may have had nothing to do with the attorney's misconduct. This prospect may deter individuals from participating in a mediation and will substantially reduce the number of California mediations, causing many of the lawsuits which otherwise would have been resolved in a mediation to be added to the court docket.

Please bear in mind that the doctrine of confidentiality does not apply to any information that was known before the mediation commenced. A party thus cannot convert non-confidential information to confidential information through the device of discussing it during the mediation.

**SUPPORT**

Consumer Attorneys of California  
Peace Officers' Research Association of California  
1 individual

**OPPOSITION**

California Dispute Resolution Council  
Los Angeles Dependency Lawyers, Inc.

**RELATED LEGISLATION**

Pending Legislation: *See* Comment 3, above.

Prior Legislation: None known.

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