

Resources Attached:

1. The State Bar Of California Standing Committee On Professional Responsibility And Conduct Practical Guidance For The Use Of Generative Artificial Intelligence In The Practice Of Law
2. ChatGPT Narrative re Ethics.
3. ADR Services, Inc. Clarification of The Role of Third Party Neutral Form
4. ADR Services, Inc. Mediation Confidentiality Agreement
5. State Bar publication "Rule 8.3 Reporting Scenarios," State Bar of California Office of Professional Competence

You said:

Are there ethical problems with using chatgpt in the practice of law in California

ChatGPT said:

ChatGPT

Yes, there are several ethical considerations and potential problems with using ChatGPT in the practice of law in California, or any jurisdiction. Some of these concerns relate to professional responsibility, the reliability of AI-generated advice, and client confidentiality. Below are key issues to consider:

1. Confidentiality and Privacy (ABA Model Rule 1.9)

- **Risk of Disclosure:** Lawyers are bound by strict confidentiality rules under the California Rules of Professional Conduct (CRPC 1.6), which align with ABA Model Rule 1.6. Any communication with ChatGPT or similar AI models could risk violating these confidentiality obligations. There is a possibility that the AI could inadvertently store or use data, posing a risk to sensitive client information.
- **Data Security:** While OpenAI (the organization behind ChatGPT) implements measures to protect user data, the practice of law requires a higher standard of security. Lawyers must ensure that any use of AI complies with California's data protection laws and the confidentiality provisions required under the law.

2. Competence and Supervision (CRPC 1.1)

- **Inadequate Legal Analysis:** AI like ChatGPT is a tool, but it is not a substitute for professional legal judgment. ChatGPT can provide general information, but it cannot replace a thorough understanding of specific legal issues, nuances, or jurisdictional differences. Relying solely on AI-generated responses may result in incomplete or inaccurate legal analysis, potentially undermining a lawyer's duty to provide competent representation to clients.
- **Inadequate Supervision:** If lawyers rely on ChatGPT to generate drafts, legal research, or advice without reviewing it thoroughly, they could be violating their professional responsibility to supervise the work (CRPC 5.3). AI tools should be used as aids, not as replacements for the lawyer's independent professional judgment.

3. Unauthorized Practice of Law (CRPC 1.0.1 and 5.5)

- **AI as a "Legal Adviser":** If ChatGPT is used by a non-lawyer, or if it is relied upon to provide legal advice, it may be considered an instance of the unauthorized practice of law (UPL). Only licensed attorneys are permitted to provide specific legal advice and guidance. Using ChatGPT to generate advice that is presented to clients without adequate human oversight could lead to UPL concerns.

- **Potential Misinformation:** While ChatGPT is designed to provide helpful information, it can still produce responses that are inaccurate, incomplete, or outdated. Lawyers must ensure that AI-generated content is carefully reviewed to avoid misleading clients.

4. Bias and Discrimination

- **Unintentional Bias:** AI models, including ChatGPT, can inadvertently reflect biases based on the data they were trained on. This could result in legal advice that is discriminatory or otherwise problematic. Lawyers using AI tools must be mindful of the potential for biases in AI outputs and take steps to mitigate these risks when making decisions that affect clients.
- **Ethical Dilemmas:** If a lawyer uses AI that perpetuates biased outcomes, they could face ethical challenges related to fairness and justice under the California Rules of Professional Conduct.

5. Accountability

- **Responsibility for Legal Errors:** If a lawyer uses AI in their practice, they must remain accountable for the outcomes. If the AI provides incorrect advice or misleads a client, the lawyer could be held responsible for any resulting harm. It's crucial for lawyers to understand that AI does not carry legal liability—only the licensed attorney does.
- **Reliance on AI Outputs:** Lawyers should not abdicate their professional responsibility by relying too heavily on AI outputs. If AI tools are used, they should be viewed as assistants, not decision-makers. The lawyer must ensure that their legal advice complies with the law and aligns with the client's best interests.

6. Transparency to Clients

- **Disclosure of AI Use:** Lawyers must be transparent with their clients about the use of AI tools in their legal work. Clients should understand the extent to which AI has been involved in their legal representation, especially if it could impact the quality or nature of the legal advice provided.
- **Client Consent:** If a law firm uses ChatGPT for research, drafting, or other tasks, they may need to inform clients and seek their consent, depending on the scope of work and the nature of the tasks performed by the AI.

7. Ethics of Advertising and Representation

- **Misleading Advertising:** If a law firm uses AI-generated content in their advertising or marketing materials, they must ensure that such content complies with the rules on truthful advertising (CRPC 7.1 and 7.2). It must not mislead clients about the services or expertise of the firm, including any involvement of AI tools in the practice.

Conclusion

In California, as in other jurisdictions, lawyers are required to adhere to strict ethical guidelines when practicing law. While ChatGPT can be a useful tool for legal research, drafting, or idea generation, its use in legal practice must be carefully managed to avoid violating rules related to confidentiality, competence, supervision, and unauthorized practice of law. Lawyers should also ensure that they do not rely solely on AI for legal decision-making and always maintain accountability for the outcomes of their representation.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT**

**PRACTICAL GUIDANCE FOR THE USE OF
GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW**

EXECUTIVE SUMMARY

Generative AI is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, regardless of firm size, and all practice areas. Like any technology, generative AI must be used in a manner that conforms to a lawyer’s professional responsibility obligations, including those set forth in the Rules of Professional Conduct and the State Bar Act. A lawyer should understand the risks and benefits of the technology used in connection with providing legal services. How these obligations apply will depend on a host of factors, including the client, the matter, the practice area, the firm size, and the tools themselves, ranging from free and readily available to custom-built, proprietary formats.

Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

The following Practical Guidance is based on current professional responsibility obligations for lawyers and demonstrates how to behave consistently with such obligations. While this guidance is intended to address issues and concerns with the use of generative AI and products that use generative AI as a component of a larger product, it may apply to other technologies, including more established applications of AI. This Practical Guidance should be read as guiding principles rather than as “best practices.”

PRACTICAL GUIDANCE

Applicable Authorities	Practical Guidance
<p>Duty of Confidentiality</p> <p>Bus. & Prof. Code, § 6068, subd. (e)</p> <p>Rule 1.6</p> <p>Rule 1.8.2</p>	<p>Generative AI products are able to utilize the information that is input, including prompts and uploaded documents or resources, to train the AI, and might also share the query with third parties or use it for other purposes. Even if the product does not utilize or share inputted information, it may lack reasonable or adequate security.</p> <p>A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections. A lawyer must anonymize client information and avoid entering details that can be used to identify the client.</p> <p>A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.</p> <p>A lawyer should review the Terms of Use or other information to determine how the product utilizes inputs. A lawyer who intends to use confidential information in a generative AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product.</p>
<p>Duties of Competence and Diligence</p> <p>Rule 1.1</p> <p>Rule 1.3</p>	<p>It is possible that generative AI outputs could include information that is false, inaccurate, or biased.</p> <p>A lawyer must ensure competent use of the technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law.</p> <p>Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product.</p> <p>Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer.</p> <p>AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for</p>

Applicable Authorities	Practical Guidance
	<p>accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false AI-generated results.</p> <p>A lawyer’s professional judgment cannot be delegated to generative AI and remains the lawyer’s responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and supplement any AI-generated argument with critical, human-performed analysis and review of authorities.</p>
<p>Duty to Comply with the Law</p> <p>Bus. & Prof. Code, § 6068(a)</p> <p>Rule 8.4</p> <p>Rule 1.2.1</p>	<p>A lawyer must comply with the law and cannot counsel a client to engage, or assist a client in conduct that the lawyer knows is a violation of any law, rule, or ruling of a tribunal when using generative AI tools.</p> <p>There are many relevant and applicable legal issues surrounding generative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns. A lawyer should analyze the relevant laws and regulations applicable to the attorney or the client.</p>
<p>Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers</p> <p>Rule 5.1</p> <p>Rule 5.2</p> <p>Rule 5.3</p>	<p>Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and make reasonable efforts to ensure that the firm adopts measures that give reasonable assurance that the firm’s lawyers and non lawyers’ conduct complies with their professional obligations when using generative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of any generative AI use.</p> <p>A subordinate lawyer must not use generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer’s professional responsibility and obligations.</p>

Applicable Authorities	Practical Guidance
<p>Communication Regarding Generative AI Use</p> <p>Rule 1.4</p> <p>Rule 1.2</p>	<p>A lawyer should evaluate their communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with generative AI use, scope of the representation, and sophistication of the client.</p> <p>The lawyer should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use.</p> <p>A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of generative AI.</p>
<p>Charging for Work Produced by Generative AI and Generative AI Costs</p> <p>Rule 1.5</p> <p>Bus. & Prof. Code, §§ 6147–6148</p>	<p>A lawyer may use generative AI to more efficiently create work product and may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs). A lawyer must not charge hourly fees for the time saved by using generative AI.</p> <p>Costs associated with generative AI may be charged to the clients in compliance with applicable law.</p> <p>A fee agreement should explain the basis for all fees and costs, including those associated with the use of generative AI.</p>
<p>Candor to the Tribunal; and Meritorious Claims and Contentions</p> <p>Rule 3.1</p> <p>Rule 3.3</p>	<p>A lawyer must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court.</p> <p>A lawyer should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI.</p>
<p>Prohibition on Discrimination, Harassment, and Retaliation</p> <p>Rule 8.4.1</p>	<p>Some generative AI is trained on biased information, and a lawyer should be aware of possible biases and the risks they may create when using generative AI (e.g., to screen potential clients or employees).</p> <p>Lawyers should engage in continuous learning about AI biases and their implications in legal practice, and firms should establish policies and mechanisms to identify, report, and address potential AI biases.</p>

Applicable Authorities	Practical Guidance
Professional Responsibilities Owed to Other Jurisdictions Rule 8.5	A lawyer should analyze the relevant laws and regulations of each jurisdiction in which a lawyer is licensed to ensure compliance with such rules.



Case Name: [Click here to enter case name](#)

Neutral: [Click here to enter name](#), [Click here to select Mediator or Arbitrator](#)

Clarification of The Role of Third-Party Neutral

A third-party neutral (“Neutral”) is an impartial intermediary who assists two or more persons to resolve a dispute or other matter that has arisen between them. Two of the most common types of third-party neutrals are mediators and arbitrators.

A **mediator** is an independent and impartial third party selected by the parties to help them reach a mutually satisfactory resolution of their dispute through negotiation and compromise. The mediator does not decide who will prevail in the dispute and does not award damages, render a verdict, issue a judgment, or otherwise determine fault.

An **arbitrator** is an independent and impartial third party selected by the parties to decide the outcome of their dispute. An arbitrator reviews testimony and evidence presented by the parties at a hearing and resolves the dispute by issuing a binding decision called an award.

While the Neutral selected for your matter is a licensed attorney in the State of California, s/he is acting solely as an impartial, neutral third party in this matter. The Neutral is not representing or advocating for any party and will not provide any legal, tax or other professional advice to any of the parties in the case. No professional, client, or fiduciary relationship is or has been created between any party and the Neutral or ADR Services, Inc. and the attorney-client evidentiary privilege does not apply.

By signing this form, you understand and agree that: (1) neither the Neutral nor ADR Services, Inc. has or will be acting as your attorney in this case; (2) nothing has been communicated to you by the Neutral or ADR Services, Inc. that is considered legal advice; and (3) you have not and will not rely on any information provided by the Neutral and/or ADR Services, Inc. as legal advice.

BY MY SIGNATURE, I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THE ABOVE INFORMATION.

Date: _____

Signature: _____

Print Name: _____

PLEASE SIGN AND RETURN THIS FORM TO ADR SERVICES, INC. TO:

Case Manager: [Click here to add name/email address](#)



MEDIATION CONFIDENTIALITY AGREEMENT

(In-person or Virtual)

Case Name: _____.

ADRS Case Number: _____.

Date(s) of Mediation: _____.

This is an agreement between _____ and _____ (“the parties”), and their respective counsel, who desire to enter into mediation with the intention of resolving all issues arising from an existing controversy. The parties and the mediator agree as follows:

1. **Settlement Negotiation.** The mediation shall be considered to be a settlement negotiation as contemplated by the California Evidence Code. In the event that this matter is not resolved in mediation, any offer of settlement shall be inadmissible pursuant to the provisions of Evidence Code sections 1152 and 1119.

2. **Confidentiality.** All communications in connection with or in the course of the mediation are confidential and the provisions of Evidence Code sections 703.5 and 1115 et. seq., are incorporated herein by this reference. Confidentiality applies to anything communicated, exchanged, said, done or occurring in the convening and course of the mediation, whether oral or written, including discussions between the mediator and any party or counsel until termination of the mediation.

3. **NO RECORDING POLICY:** If the mediation is being conducted via Zoom, counsel, all parties and all participants to this mediation acknowledge and agree that any and all Audio, Video and Photographic Recording during Pre-Mediation, Mediation and/or Post-Mediation communications of any kind are expressly prohibited. (Personal typed or handwritten notes are permitted.)

4. **Documents Submitted.** To the extent that information or documents are privileged, such privilege is not altered or affected by disclosure to the mediator or the parties during mediation.

5. **Continuing process.** The mediation process may continue until settlement of the matter in writing, until a party notifies the other that the mediation is terminated, or the mediator provides written notice of termination. In that event, subsequent oral or written communication between or among the parties and the mediator, as part of the mediator’s continuing effort to resolve the dispute, shall be subject to this agreement. Accordingly, the parties waive the automatic termination provisions of Evidence Code section 1125(a)(5).

6. **Settlement Enforcement.** In the event that it may become necessary to introduce in a court proceeding or arbitration a written settlement agreement prepared and signed during or after the mediation for the purpose of enforcing the provisions of such agreement under CCP sections 664.6 or 664.7 or otherwise, the parties agree to waive the mediation confidentiality provisions of the Evidence Code for that purpose only.

7. **Recourse for Breach.** The parties understand, acknowledge and agree that neither ADR Services, Inc., nor the mediator have the authority, power, obligation, jurisdiction or other ability to enforce the provisions of this agreement or the provisions of the Evidence Code that apply to this mediation proceeding or to provide or fashion a remedy for any claimed breach of this agreement. The parties understand and agree that their sole forum to seek redress for any claimed breach of this agreement by any other party shall be the court or arbitration proceeding where the action is pending. The parties understand and agree that neither ADR Services, Inc. nor the mediator shall have any responsibility to testify in such proceedings, or to present evidence, or provide information or otherwise be involved in such proceedings and the parties shall not require or request ADR Services, Inc. or the mediator to initiate, support or become involved in such proceedings. The participants in this mediation shall not subpoena the mediator nor any employee or officer of ADR Services, Inc. or request any documents from them that were created or prepared in connection with this mediation. (Evidence Code §703.5.)

8. **Legal Advice.** The mediator is serving as a neutral person who is assisting the parties in an effort to resolve their dispute. The mediator does not act as an advocate for any party. The mediator's statements do not constitute legal advice to any party. The parties shall seek and rely solely on the legal advice that they obtain from their counsel. If the mediator assists the parties in preparing a settlement agreement, the parties agree that the mediator is acting as a mere scrivener and the parties shall have such settlement agreement reviewed and approved by their legal counsel before executing the agreement and the mediator shall have no liability for any error or omission with respect to such settlement agreement.

9. **Limited Liability, Release and Indemnification.** The participants hereby agree that the Mediator has no liability for any act or omission in connection with or arising out of the mediation. (*Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 855, n.6 and 860.) Further, the Mediator makes no representation that the participants will reach an agreement on any of the issues, disputes or controversies discussed in the mediation. Any participant who brings any claim, action or proceeding of any nature against the Mediator or who seeks to have the Mediator testify in any proceeding shall be responsible to indemnify the Mediator for any expenses, loss or damage incurred, including, without limitation, attorney's fees and expenses incurred in connection with such claim, action or proceeding brought by such participant.

10. Nothing contained in this agreement shall preclude a report to the ADR Administrator or prevent ADR Services, Inc. from responding to an inquiry from the ADR Administrator pursuant to California Rule of Court sections 3.850-3.868; 3.890-3.898.

Dated: _____ and signed in counterparts for by each of the participants whose signatures appear below.

Mediator Name: _____.

CONFIDENTIALITY AGREEMENT – SIGNATURE PAGE

CLIENT / ATTORNEY CARD HERE OR	Client Name:
	Plaintiff / Defendant / X-Comp / X-Def
Name:	
Address:	Date:
City:	Signature:
Phone:	Email Address:

CLIENT / ATTORNEY CARD HERE OR	Client Name:
	Plaintiff / Defendant / X-Comp / X-Def
Name:	
Address:	Date:
City:	Signature:
Phone:	Email Address:

CLIENT / ATTORNEY CARD HERE OR	Client Name:
	Plaintiff / Defendant / X-Comp / X-Def
Name:	
Address:	Date:
City:	Signature:
Phone:	Email Address:

CONFIDENTIALITY AGREEMENT – SIGNATURE PAGE

CLIENT / ATTORNEY CARD HERE OR	Client Name:
	Plaintiff / Defendant / X-Comp / X-Def
Name:	
Address:	Date:
City:	Signature:
Phone:	Email Address:

CLIENT / ATTORNEY CARD HERE OR	Client Name:
	Plaintiff / Defendant / X-Comp / X-Def
Name:	
Address:	Date:
City:	Signature:
Phone:	Email Address:

CLIENT / ATTORNEY CARD HERE OR	Client Name:
	Plaintiff / Defendant / X-Comp / X-Def
Name:	
Address:	Date:
City:	Signature:
Phone:	Email Address:



RULE 8.3 REPORTING SCENARIOS

The following scenarios provide examples of a lawyer's obligations under [Rule of Professional Conduct 8.3](#), effective August 1, 2023. The discussion regarding these scenarios is provided for educational purposes only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

SCENARIO 1: MANDATORY REPORTING

FACT PATTERN:

Larry, who represented a defendant in a civil matter, receives a call from his client telling him that the plaintiff keeps calling him and accusing him of failing to make the payment that is due on their settlement agreement. However, Larry's client had already sent the check to the plaintiff's attorney two months earlier. Larry then calls Tom, the plaintiff's attorney, to inquire. During the call, Tom admits that he received the defendant's check two months earlier and assures Tom that there is nothing to worry about because he will distribute the settlement funds to his own client within the next few days. Larry further presses Tom about why Tom's client believes that the defendant still has not yet paid the settlement. Tom explains that he has been busy and just didn't get around to telling his client that he received the settlement funds. Larry continues questioning Tom and asks whether there was any other reason for the delay in distributing funds to the plaintiff. During that discussion, Tom reveals that, for convenience, he deposited the settlement check into his firm's operating account in order to cover the firm's rent for two months, which was equal to Tom's contingency fee in the case, and that he planned to distribute the plaintiff's share of the settlement funds to the plaintiff, just after the second rental payment was withdrawn from the operating account. Is Larry required to report Tom?

DISCUSSION:

Under rule 8.3, Larry is required to report Tom's conduct to the State Bar.

Larry knows of credible evidence that Tom committed various ethical violations because of admissions Tom made about his own conduct during the phone call. In particular, depositing client funds into the firm's operating account in order to pay the firm's expenses is a misappropriation of the client's settlement funds. Also, Tom's concealment of his mishandling of the funds from his client is an act of deceit.

Tom's misappropriation of client funds raises a substantial question as to Tom's honesty, trustworthiness, or fitness as a lawyer. Even if Tom intended to pay, and ultimately pays the

client the full amount due the client from the settlement funds, Tom's honesty and trustworthiness come into question because he allowed his client to believe that the defendant still had not made any payment on the settlement.

Larry must report these violations without delay since the reporting will not cause material prejudice or damage to the interests of Larry's client.

SCENARIO 2: PERMISSIVE REPORTING

FACT PATTERN:

Karen represents Pam in a dispute with her employer. Pam is also going through a divorce, but she is represented by a different attorney, Angela, in the divorce proceedings. Pam complains to Karen that Angela has failed to return Pam's calls or emails for two weeks, and Pam is growing anxious to learn whether there are any new developments in the divorce case. Should Karen report Angela?

DISCUSSION:

Under Rule of Professional Conduct 1.4(a)(3) and Business and Professions Code section 6068, subdivision (m), Angela is required to respond promptly to reasonable status inquiries from her client, Pam, and must keep Pam reasonably informed of significant developments in Pam's divorce proceedings.

Although there may not have been any new developments in the divorce case over the past two weeks, Karen may believe that Pam's requests for information were reasonable, and that a two-week delay in responding to those requests was unreasonable.

Therefore, Karen **may** report Angela to the State Bar. However, Karen is **not required** to report Angela's conduct because rule 1.4(a)(3) and Business and Professions Code section 6068, subdivision (m) are not among the enumerated violations subject to mandatory reporting under Rule 8.3.

SCENARIO 3: EXCEPTIONS TO REPORTING

FACT PATTERN:

Sam has witnessed Fred, an attorney at his firm, tell a client that he missed a deadline and requested an extension from the court due to a recent family death. Sam knows, however, that Fred was on vacation. He is uncertain about his reporting obligations under rule 8.3. Therefore, he hires Jane, an attorney at a different firm, to consult Jane and receive advice about whether Fred's dishonesty to his client and to the court must be reported.

While consulting with Sam, Jane determines that Fred's dishonesty raises a substantial question as to Fred's honesty and trustworthiness. Is Jane required to report Sam or Fred?

DISCUSSION:

Conduct involving dishonesty that raises a substantial question as to a lawyer's honesty is subject to mandatory reporting under rule 8.3.

However, Jane is not required to report Fred's conduct because she learned of Fred's conduct while consulting Sam about Sam's duties under rule 8.3.

Under rule 8.3, Jane is not authorized or required to disclose information learned from her client, Sam, regarding Fred's conduct, or what Sam knows about Fred's conduct because that information is protected by the lawyer-client privilege, Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.8.2.

SCENARIO 4: FALSE REPORTING

FACT PATTERN:

Jacob represents Alicia in divorce proceedings against Todd, who is also an attorney. Jacob is concerned that Alicia cannot pay for living expenses for her and her children on the very low amount that the court awarded Alicia in a temporary child support order. He also believes that Todd mistreated Alicia during the marriage, and therefore believes that Todd should suffer some consequence for his mistreatment of Alicia. Jacob has no reason to believe that Todd's income is any higher than what he reported in the divorce proceedings. Although Jacob's client told him that Todd previously earned a higher salary, years earlier, she also said that she has no evidence that Todd's current income is higher than what he reported. Jacob's discovery efforts also failed to reveal any evidence that Todd misrepresented his current income in the divorce proceedings. However, Jacob thinks that the State Bar's investigators might be able to find something Jacob was unable to find. Jacob is also motivated by the feeling that, even if the State Bar does not find any misconduct by Todd, at least Todd will suffer some inconvenience, which Jacob believes he deserves, after the way he mistreated Alicia during the marriage.

For these reasons, Jacob files a State Bar complaint alleging that Todd violated Business and Professions Code, section 6068, subdivision (d) and Rules 3.3(a) and 8.4(c) by intentionally misrepresenting his income to the court during the divorce proceedings. Jacob asserts that he is complying with his reporting obligations under Rule 8.3. Did Jacob have a basis to report Todd?

DISCUSSION:

Jacob was not aware of any evidence that Todd made misrepresentations to the court. To the contrary, Jacob was aware of evidence that Todd has not made any misrepresentation to the Court. Jacob filed a complaint without an evidentiary basis to see if he could find some evidence that Todd made misrepresentations to the court and to punish Todd.

Rule 8.3 does not require or authorize a lawyer to file a complaint in hopes that an opponent will be found to have violated their ethical obligations. A lawyer may be subject to criminal penalties for false and malicious reports or complaints filed with the State Bar. (Bus. & Prof. Code §6043.5, subd. (a).) A lawyer may also be subject to State Bar discipline under Rule 8.4(c)

for engaging in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation; and discipline under Business and Professions Code, section 6068, subdivision (d) and Rule 3.3(a) for offering false statements or false evidence to a tribunal.

SCENARIO 5: WHERE TO REPORT

FACT PATTERN:

Dimitri represents a plaintiff in litigation against Bob's client. Neither Bob nor his client, the defendant, appeared for the defendant's properly noticed deposition, which was scheduled for 10:00 a.m. at Dimitri's office on the west side of Los Angeles, CA. Due to the nonappearance, Dimitri filed a motion seeking discovery sanctions. In opposition to the motion, Bob filed a response, in which he stated that his mother who lives out of state was rushed to the hospital in a medical emergency, so he took a last-minute flight out of state, early in the morning prior to the scheduled deposition, and was unable to notify opposing counsel that he and his client could not attend the deposition. However, an associate attorney, who works for Dimitri, saw Bob walking into a mediator's office in downtown Los Angeles at 10:00 a.m., the same day of the deposition. When she returned to the office that afternoon, she asked Dimitri whether a different attorney represented the defendant at deposition because she saw Bob somewhere else in Los Angeles at the time of the scheduled deposition. Where should Dimitri report if he determines that reporting is appropriate?

DISCUSSION:

Through the eyewitness information from his associate, Dimitri knows of credible evidence that Bob made an intentional misrepresentation to the court about Bob's whereabouts on the day and time of his client's deposition.

Bob's intentional misrepresentation raises a substantial question as to his honesty and is among the list of conduct enumerated for mandatory reporting under rule 8.3.

Dimitri may satisfy his reporting obligation by reporting Bob's conduct to the court before which the litigation is pending. The court before which the litigation is pending has jurisdiction to investigate Bob's conduct and may properly consider Dimitri's complaint during the discovery sanctions hearing on Dimitri's motion. Dimitri may also satisfy his reporting obligation by reporting Bob's conduct to the State Bar.

SCENARIO 6: CREDIBLE EVIDENCE

FACT PATTERN:

Barbara and Dan are opposing counsel. Barbara represents the plaintiff in a civil litigation matter. Dan represents the defendant. Dan believes his client is telling the truth when his client says that the contract that was signed in 2020 was rescinded by later agreement between the parties. Nonetheless, the plaintiff's complaint seeks to enforce the 2020 contract. At a hearing on a demurrer to the complaint, Barbara argues that the 2020 contract, which is attached as an

exhibit to the complaint, is in full force and effect between the plaintiff and defendant. Should Dan report Barbara?

DISCUSSION:

Intentional misrepresentations as well as reckless misrepresentations are within the list of conduct enumerated for mandatory reporting obligations under rule 8.3.

However, an attorney's duty to report another attorney's misconduct arises only when the attorney **knows of credible evidence** that the offending attorney committed misconduct.

Each attorney in litigation is allowed to rely, in good faith, on their respective client's position regarding the facts in a case. Here, the clients have different positions regarding the status of the 2020 contract.

Barbara is not required to believe Dan's client over her own client. Therefore, Dan does not have evidence that Barbara has made either a reckless or an intentional misrepresentation by stating that the disputed 2020 contract was in full force and effect. Dan is not obligated to report Barbara's conduct, solely on his belief that her statement was inaccurate or incorrect.

SCENARIO 7: CREDIBLE EVIDENCE

FACT PATTERN:

Jill and Darrell are at a party. Jill asks Darrell if he has heard anything about their old law school friend, Jack. Darrell tells Jill that he heard through the grapevine that Jack had been running a Ponzi scheme for years and is now hiding from investors who are angry at the loss of their money. He thinks Jack must have hidden investor money in an offshore account and believes Jack is living outside the country somewhere. Is Jill required to report Jack?

DISCUSSION:

Rule 8.3 imposes a mandatory reporting obligation if an attorney knows of credible evidence that another attorney has committed a crime, when the criminal conduct raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

Rule 8.3 also imposes a mandatory reporting obligation if an attorney knows of credible evidence that another attorney has misappropriated funds or property.

Intentionally defrauding investors through a Ponzi scheme and hiding their money offshore raises a substantial question as to an attorney's honesty, trustworthiness, or fitness as a lawyer in other respects.

However, Jill only heard the information about Jack through rumors told at a party. Rumors do not constitute credible evidence. Therefore, Jill does not have an obligation to report Jack's alleged conduct to the State Bar.

SCENARIO 8: TIMING OF REPORTING

FACT PATTERN:

Manuel is the lead trial lawyer in very contentious litigation. Manuel knows of credible evidence that opposing counsel, Liza, made false statements in a declaration filed with the court. However, Manuel and Liza are in settlement negotiations, and Manuel is concerned that reporting Liza now under his Rule 8.3 obligations would disrupt those negotiations, which will be favorable to Manuel's client's demands. Is Manuel required to report Liza's dishonesty right now, despite the adverse effect it may have on his client's case?

DISCUSSION:

Rule 8.3 contains a temporal requirement for mandatory reporting. It begins: "A lawyer shall, without undue delay, inform the State Bar or a tribunal . . ." (emphasis added). Comment [3] of the rule provides guidance for understanding the phrase "without undue delay." Specifically, the comment provides:

The duty to report without undue delay under paragraph (a) requires the lawyer to report as soon as the lawyer reasonably believes the reporting 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 this scenario, Manuel reasonably believes that reporting will cause material prejudice or damage to the interests of the client because his reporting could disrupt reaching a favorable resolution for his client. Therefore, he is not required to immediately report Liza's dishonesty. Instead, he can wait until after the settlement agreement is finalized, fully executed and capable of enforcement to report Liza's conduct.

UPDATES

5/16/2024: Scenario 8 added.