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State Supreme Court Resets Ethics Rewrite

MORAL COMPASS

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The California Supreme Court delivered news on Sept. 19 that shocked many in the ethics world, yet drew surprisingly little publicity: Matter No. S206125 was closed with "no action taken." The matter that the court closed was the revisions to the California Rules of Professional Conduct—revisions that began over a decade ago. Those revisions are now off the table.

Despite the court's apparent inaction, this opens the door to a renewed rules revision process. Still, there is little indication why the court chose its path.

The court's docket sheet for No. S206125 provides little information. The court's per curiam order notes it had received 17 petitions for amending the rules, and granted the State Bar's request to return the rules to the Bar without ruling or further inquiry.

So what's really going on here? Most of the history of the commission is publicly available, and some of the less public information can be pieced together based on the recent exchange of correspondence, the commission's public meetings and discussions, both on and off the record over the years, with many of the principals involved. So here's the history, as I understand it.

The Backstory

California was the only one of 51 jurisdictions (50 states and D.C.) to decline adopting some form of the ABA's Model Rules of Professional Conduct, which date from 1983. Beginning work in 1986, a California rules commission came up with its own set of rules and an entirely different organization and numbering system, which our Supreme Court approved effective May 1989. Then in 2001, under pressure from the court to "harmonize" our rules with the ABA's formulation, the State Bar appointed a commission to engage in wholesale rules revision, keeping in mind the ABA rules and whether differences between other states and California were necessary.

The work of this Rules Commission was doomed from the start. First, instead of appointing a new commission, the Bar re-appointed the old commission, first formed 15 years before, that created the 1989 rules. This had two important effects: first, the commission was older, and less diverse, than it should have been. After all, the commissioners had aged 15 years. This meant very little new blood with new ideas.

Second and perhaps more significantly, the re-appointed commissioners were given the task of changing their own work product—the rules they had themselves created. As it turned out, the commission and its chair, Harry Sondheim, strongly resisted its charter to harmonize the rules with the rest of the country, and set out on its own path to revise the rules as they saw fit. For the first few years of its existence, the commission even refused to use the ABA rules' numbering system, universal except for California.

After some attrition, a certain amount of "new blood" was brought on. Unfortunately, with some exceptions—most notably Mark Tuft of Cooper, White & Cooper, who was appointed as one of the vice-chairs—most new commissioners tended to be "lawyers' lawyers," whose primary occupation was arguing in favor of lawyer protection. As a result, the commission's draft rules not only did not try to harmonize California with other states, but also were seriously—one ABA staffer who closely observed the process thought "shockingly"—lawyer-protective.

The refusal to make even an attempt to conform most rules to the ABA model did not sit well with the court. Nor, I suspect, did a pervasive lawyer-protective attitude that was also inconsistent with the spirit of the ABA rules. It also did not sit well with a series of State Bar presidents, at least two of whom considered de-commissioning the group and starting with a fresh commission, free of baggage and focused on public protection.

But de-commissioning after six or seven years of work ultimately seemed too extreme. In 2008, Holly Fujie, now an L.A. County Superior Court judge, became State Bar president. She made it known she was considerably skeptical about the commission's work. It was widely understood, informally, that she considered de-commissioning the group and that during her tenure the commission heard directly from a Supreme Court representative who attempted to bring the commission back into line in following its charter.

After that, the commission began moving in that direction, although in a glacially slow manner. Although the ABA numbering system was finally adopted, at first that was only tentative. Some

lip service was paid to ABA reasoning, and the commission prepared a chart of how the rules meshed with—or varied from—the ABA's, though the chart sometimes sounded like more of a PR pitch than a substantive analysis. The commission's chairman, Sondheim, who initially allowed endless debate without much concrete work product, became increasingly autocratic, cutting off debate on a series of serious issues, particularly those affecting public interest.

Commission divisions

By this time, the commission had three distinct groups: a few "old-timers" who simply had the honestly-held belief that moving towards the ABA model was wrong and eventually voted against the entire work output; the "lawyer apologists" who continued to insist on rules—and, more nefariously, little "land mines" in the extensive comments sections—that would protect lawyers' interests; and the reformers, led by Tuft and Court of Appeals Justice Ignacio Ruvolo, who saw client and public protection as the rules' primary goals. A few commissioners were not so easily pigeon-holed, and these "independents" became occasional swing voters.

But the reformers won few battles, most significantly changing the conflicts of interest rule to an ABA model. Overall, the eventual work-product that went to the State Bar Board of Trustees in 2010 reflected the composition of the committee. To those concerned about public protection, the 67 proposed rules failed in many respects. But the Bar board, overwhelmed by the huge volume of information provided by the commission and despite the significant misgivings of the then-Bar president, rubber-stamped the rules and sent them to the court.

After preparing the rules with explanations for the court, in early 2011 the Bar submitted all 67 rules at once. The court—then undergoing a change from Chief Justice George, who was quite familiar with the process, to Chief Justice Cantil-Sakauye, who understandably was not—was overwhelmed. It rejected the Bar's submission and asked for the rules to be submitted one at a time, with sufficient explanations of the rules themselves and how and why they varied from the ABA Model Rules.

So the submissions began, and in the last two years 17 rules, with thorough explanations, were submitted to the court. It was these 17 rules that on Aug. 11, the State Bar, in a letter to the court, asked to be sent back for "a comprehensive reconsideration." Whether the Bar acted alone or after conversations with the court is not known.

In any event, the Supreme Court's response went far beyond sending back the rules. It terminated its review completely, and instructed the State Bar to form a second commission. The court insisted on being consulted by the Bar regarding the size and composition of the commission, as well as to "discuss some of the issues that have arisen in the review process." Clearly, the court's discomfort, first exhibited almost a decade ago, had finally prevailed over efforts to fix what turned out to be unfixable.

Reforms come late, but are welcome

Despite the general reaction on ethics forums around the country ("Why did this take so long?" or "What is the court doing?") the action by the court should not be seen as a lack of progress. The first commission's process simply did not work. Several Bar presidents and, I believe, the court itself, came close to abandoning the dysfunctional commission and starting over many times in the past six to eight years. But no one wants to take such extreme action lightly, and so everyone struggled on. The only problem with the Supreme Court's Sept. 19 action is that in hindsight it should have happened five or seven years earlier.

I was the principal drafter and co-author, with professors Geoffrey Hazard of Hastings and Deborah Rhode of Stanford, of a letter submitted to the court in March. This letter, signed by 55 California law professors who teach legal ethics, singles out over 20 areas where the proposed rules were not sufficiently protective of individual clients and the public. That's a huge set of problems. Implicit in that letter was that the current rules should not be approved as they exist.

Frankly, a new commission designed to follow dictates that our Supreme Court formulates will ultimately result in a much better outcome for all Californians—at least all who don't want to protect the unnecessary advantages attorneys now enjoy.

This de- and re-commissioning should have happened years ago. But the Supreme Court has definitely made the right decision by doing it now.

The Recorder *welcomes submissions to Viewpoint. Contact James Cronin at jcronin@alm.com.*

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