

# THE **RECORDER**

## Viewpoint: State Bar Initiates Ethics Rewrite 2.0



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Optimistic is a word I don't often use when it comes to the machinations of the State Bar of California. But the recent appointment of the second rules revision commission has me feeling positively optimistic. Well, cautiously optimistic.

As I wrote in this space [last October](#), after years of fits and starts, and with far more fits than starts, the State Bar Commission for the Revision of the Rules of Professional Conduct, the first commission whose task was a soup-to-nuts revision of California's ethics rules, was disbanded by order of the Supreme Court with essentially none of its work product being adopted despite over a decade of work. The court ordered a new rules commission be created by the bar with input from the court, and on Jan. 30 the members of that rules commission were announced.

I'm hopeful about the makeup of that group. For those unfamiliar with this column, let me make my bias clear: the desire to see that protection of clients and the public come before the self-protection of lawyers.

## **MEET THE PLAYERS**

By naming an appellate justice, Lee Edmon, as chair, State Bar President Craig Holden, who was given the power of appointment by the bar board, helped ensure a measure of objectivity and, one would hope, a concern for the public interest. By naming Jeffrey Bleich as co-vice chair, Holden chose someone who, when State Bar president in 2007, was keenly aware of the importance of the ethics rule revisions, and the first commission's problems. In addition, Bleich,

most recently the U.S. ambassador to Australia, has a long history of advocating for the public good.

By electing to rename the first commission's co-vice chair, Mark Tuft, Holden again chose wisely. Tuft was the first commission's strongest advocate for protecting clients and the public. Other appointments are also wise choices. Toby Rothschild, a lifelong legal services lawyer who recently retired, attended most of the first commission's meetings and is already familiar with the issues at hand, including those that pit lawyers against clients.

One of Holden's most intriguing choices is Aja Brown, a 32-year-old African American woman who worked as a city planner, most recently for the city of Compton, before a surprise landslide election installed her as mayor of Compton in 2013. I don't know Mayor Brown, but I'd hope that with her background, she will be a public member who is interested in public protection.

More good news: the bar retained Professor Kevin Mohr as its "consultant," or chief counsel. Between them, Mohr and internal ethics counsel Randall Difuntorum have unique institutional knowledge about what worked and didn't work the first time around. With a much shorter deadline to work with, it's my hope that Mohr will be more outspoken in leading the commission to some key public policy positions and necessary truths. He certainly has the requisite knowledge, skill and perspective.

Other choices made by Holden, who received input from the court along the way, reflect the practice diversity the court wanted: the Los Angeles chief public defender, a federal prosecutor from L.A., a Santa Clara deputy county counsel and two more judges, one from superior court, and California Public Utilities Commission Chief Judge Karen Clopton. One would hope these public citizens would bring a perspective favoring the public good.

Not all the news is so positive. Along with Tuft, the two other holdover commissioners, Bob Kehr and Raul Martinez, are both lawyers' lawyers, though Kehr, to his credit, has proven to be someone who listens to and accepts rational discourse. But they are joined by Jim Ham, whose practice is almost entirely representing lawyers before the State Bar Court. And two of the three "advisors" to the commission (whatever that means), while able and honorable counsel, also defend lawyers for a living (the third advisor is another appellate judge).

It's not clear whether Holden, acting Executive Director Bob Hawley or someone else named these advisors. But it is clear that five professional lawyer protectionists—three commissioners and two advisors—will be in the commission meeting room. Too many, in my view, particularly when not sufficiently balanced with a client-centric perspective. There are no commission members who routinely sue lawyers or otherwise attack them. There are, so far as I can tell, no "clients," or in-house counsel, a glaring omission. And it's tough for just one public member, Mayor Brown, to represent the entire public.

## **CHALLENGES AND EXPECTATIONS**

Of course, only time will tell whether this commission will have any better success than its predecessor, but it sure has a lot less baggage. Still, it will confront the somewhat puzzling and self-contradictory charges the Supreme Court has given the new commission. The court reiterated its charge to the first commission to "eliminate ambiguities ... in the rules," to "assure

adequate protection to the public" and "avoid unnecessary difference between California and other states, fostering the evolution of a national standard." This implied California should move towards the model rules created by the American Bar Association, and in fact in the past the court had urged the first commission to adopt the ABA's numbering system and to justify any differences between its draft and the ABA rules.

But that perspective differs from the statements to the second commission in the court's Sept. 19 letter to the State Bar, in which the court suggested to begin with the existing California rules, not the ABA's, and made it clear the commission should "avoid incorporating the purely aspirational" portions of the ABA rules. In fact, the court wrote, "Comments to the proposed rules should be used sparingly and only to elucidate and not to expand upon the rules themselves," and that the rules' "historical purpose is to regulate the professional conduct of members of the bar, and that as such, the proposed rules should remain a set of minimum disciplinary standards."

These last two statements may have been the result of the first commission's overwhelmingly dense series of comments, particularly on conflicts of interest and trust accounts, some of which seemed legislative rather than explanatory. Still, eliminating comments and doing "bare-bones" disciplinary rules concerns many, including the signatories of the ethics professors' letter, who encouraged the court to develop rules providing guidance to the overwhelming majority of lawyers who will never face disciplinary charges. Significantly, Mark Tuft, the most important holdover from the first commission, has long been an advocate of providing guidance to the average practitioner. He is right.

Still, the Supreme Court's two "charges" to the new commission are sufficiently ambiguous when read together, so the new commission may still have a considerable amount of leeway to do what the court wants while ensuring the work product is something that protects the public and guides lawyers at the same time.

It's hard to know at this early date whether this second commission can meet the challenge, but given its makeup, it has a chance, something the last commission never really had.

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