

THE **RECORDER**

Viewpoint: State Bar Intrigue Shows Little Concern for Transparency



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The Recorder, December 5, 2014



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Jason Doiy / The Recorder

It's been a pretty wild ride the last few months over at the State Bar of California.

First, the state Supreme Court pulled the plug on the rules commission that had worked for over a decade on a wholesale revision of the Rules of Professional Conduct. Not a single rule of the 67 submitted by the commission to the bar board in 2010 has been approved by the Court.

Then the Bar's board of trustees terminated Joe Dunn, its now-former executive director. Within a day of that news becoming public, Dunn—represented by high-profile, self-described "criminal defense lawyer" Mark Geragos—filed a lawsuit against the Bar claiming he was a whistleblower.

Next came a strongly worded official statement from the Bar, claiming that an independent law firm had been investigating Dunn for months. The allegedly confidential independent report was leaked to at least one media outlet, and shortly thereafter, Geragos accused the Bar of "defaming" both Dunn and immediate past president Luis Rodriguez in its published statement.

Sounds like "Peyton Place" meets "Suits."

More Questions Than Answers

As we move into December, almost everything is up in the air. Meanwhile opacity—long a key State Bar characteristic—rules the day. For instance, the Supreme Court ordered the Bar to appoint a new rules commission by Nov. 26. But there was not a peep from the Bar about the commission appointments as Thanksgiving came and went. By the morning of Dec. 1, the only reference to the commission on the Bar's website was an announcement, marked "NEW!" under the "Ethics" link, that applications for commission volunteers were being accepted until Nov. 21, ten days past.

Let's back up and take stock.

The Supreme Court terminated the rules commission after then-director Dunn had written to the court on Aug. 11, asking that all rules submitted by the Bar to the court be returned so that the Bar could "undertake a comprehensive reconsideration" of the work-product. Dunn's one-page letter said it was written "with approval" from then-president Rodriguez, whose term had almost expired. But the letter makes no mention of having been approved by the board of trustees, which would ordinarily be necessary.

The Dunn letter is interesting for other reasons. It references both the court's "staff" and its "representatives," and implies discussions between court and bar staff, while—opacity being what it is—keeping the specifics extremely vague. And while Dunn twice references the "burden" on the court and its staff, he oddly claims the Bar's own staff suffered from a "lack of information ... that would allow it to fully advise the court of the reasons underlying the State Bar board's approval of the rules."

But the State Bar's key staffers, Director of Professional Competence Randall Difuntorum and the commission's independent consultant, Professor Kevin Mohr, had voluminous information about the commission's and bar board's reasoning. This was not "lack of information," but an overabundance—an excess of documentation based on a 10-year process that was often fractious and confusing.

In any event, the court's reaction to the Dunn letter was to send back all the rules as requested and summarily [terminate the commission](#). The court also laid down specific requirements—input into the "size and composition" of the new commission, and, more importantly, "the issues that have arisen in the review process." And it demanded that the new commission be appointed "no later than November 26, 2014."

Shortly after receiving the court's letter, the Bar board of directors delegated the appointment power for the new commission to new Bar President Craig Holden. At some point, a reference to an application process for those interested in serving on the commission appeared online on an interior Bar "ethics" page, but you'd have had to look hard to find it. I could find no mention of an application process on the Bar's home page; no mention on any of the online pages devoted to committees and commissions; no reference to the process attached to the Bar's announcement of

the court's letter; and no emails to the group of "interested persons" who routinely receive information about State Bar ethical issues, such as commission updates, proposed ethics opinions to critique and notices of various ethics-related events.

The Dunn Affair Intrigue

Meanwhile, Dunn was fired by the new Bar board on Nov. 7, although the news of Dunn's termination wasn't made public until Nov. 13, when a two-sentence announcement was given to State Bar staffers. By the end of that same day, Dunn had filed his lawsuit, claiming he was a whistleblower regarding the malfeasance of his hand-picked chief trial counsel, Jayne Kim, and new State Bar president Holden.

By the following week, the State Bar had posted its response: a strong defense of Kim and Holden, disclosure of the independent investigation of Dunn and a general excoriation of Dunn. Calling Dunn's lawsuit "baseless," "falsely suggest[ive]" and "bewildering," the Bar also trashed the notion that Dunn could ever be a whistleblower, and noted that his lawyers had never made that claim during the Bar's investigation. In fact, said the Bar statement, there was a whistleblower, "a high-level employee raising serious, wide-ranging allegations" accusing Dunn and other employees including the new general counsel, who was fired on Nov. 24.

As for the rules commission, at some point late in the afternoon of Dec. 1, the Bar added a "deadline" link on its home page, saying Jan. 5 was now the "last day to apply to the 2nd Rules Revision Commission." Clicking on that link brought the reader to an ethics page "update" announcing the Supreme Court had granted Holden's request for a Jan. 5 deadline to appoint the commission. But the application deadline stated there remained Nov. 21. As of press time, the home-page link had been removed entirely.

All of which leaves a good many questions unanswered. Who authorized Joe Dunn to write to the Supreme Court in August? Was it the board? Or Rodriguez alone? Or did the impetus come from Dunn himself? Did Dunn consult his in-house ethics director and outside consultant about what information they actually had at their disposal? Were the court's "staff" or "representatives" involved in the process? If so, with whom were they consulting? And what role, if any, did the court play in encouraging the letter to be written, as some have speculated?

Who is the whistleblower, Dunn or senior State Bar staff? Are rumors reported in the legal press—that both acting Director Robert Hawley and chief trial counsel Kim were among Dunn's accusers—true? Was the investigation flawed because of Holden's fingerprints on it, as Dunn claims, or did Holden have nothing to do with the process, as the State Bar asserts?

And what about the second commission? Why was the application process essentially buried? Was this second commission designed to be "by invitation only?" Will the application deadline now be extended? If so, will it be publicized this time around? And will the court have direct input into the composition of the new commission, as it has said it wanted?

There's much to speculate about, but a few things seem clear. First, the senior executives who run the Bar and help appoint volunteers to commissions must take care to ensure that those

volunteers have no skin in the game. For the new rules commission, that means no lawyer apologists, and no old commission members wedded to previous work product. Second, those executives and the volunteers themselves should learn to trust the expertise of people like Difuntorum and Mohr, who not only have extraordinary institutional knowledge but are the least likely people to be motivated by self-interest.

Finally, whatever happens with l'affaire Dunn, the State Bar has to learn to be more responsive to lawyers who inquire about straightforward information and, especially, the public and the public's right to know. Lack of transparency may be convenient to Bar execs and board members, but opacity serves neither the interests of the legal system or the public.

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