

Memorandum 87-39

Subject: Confidentiality of Communications Sent to Commission

BACKGROUND

In connection with our work on probate referees, we received a number of frank and open letters from lawyers that were critical of the probate referee system. We have now received a letter from one of those lawyers stating:

Needless to say, I anticipated that my comments would be held in confidence by the Commission and its staff. However, in a recent conversation with [the local probate referee], I was extremely chagrined to learn that [the referee] had been made aware of the particulars of my letter to the Commission. Needless to say, [the referee] was hostile to my position. I am now in the process of working with [the referee] in connection with the appraisal of one piece of property in []. The breach of confidence on behalf of the Commission or its staff could, therefore, prejudice the interests of my clients in that matter.

The damage has been done and this protest will, in all probability, serve no purpose. However, I wish to assure you that I will never again furnish comments to the California Law Revision Commission given the extremely unprofessional manner in which this matter was handled.

We do not know how this lawyer's letter got back to the local probate referee in this case. We suspect either that the local referee receives Commission meeting material or that one of the referees who receives Commission meeting material or attends Commission meetings provided it to the local referee.

THE PROBLEM

Any letter sent to the Commission in the conduct of its business is a public record under the California Public Records Act, Government Code Section 6250 et seq., and available for public inspection. In addition, any letter distributed to the Commission for discussion or consideration at a public meeting is a public record and must be made available for public inspection under the Open Meeting Act, Government Code Section 11120 et seq.

How can the need for open and public conduct of the public's business be reconciled with the need to protect confidentiality in sensitive cases? This is a real problem. The lawyer in this case gave us very thoughtful and detailed comments that presented a perspective the Commission needed to hear; failure to receive this sort of input can be a real loss to the Commission. The Commission needs to be able to hear full and free debate on controversial matters in order to best fulfill its statutory mandate.

This is not a new concern; it has come up on occasion in the past, but the Commission has not been inclined to address it since it has arisen only in isolated instances. However, it seems to be a greater problem in the probate referee area than it has been in others. The staff has spoken with a number of lawyers who have strongly-held views negative to the probate referee system, but who would not put those views in writing for the Commission because they were concerned about having to work with probate referees in the future.

POSSIBLE SOLUTIONS

The simplest approach to this problem (and also probably the only practical one) is to warn persons to whom tentative recommendations are sent that any comments they submit will be available to the public. The cover of the tentative recommendations currently contain a note that "Any comments sent to the Commission will be considered when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature." To this we could add that the comments are a public record, or that the comments will be considered at a public meeting, or both.

This approach is not wholly satisfactory since it will do nothing to encourage free and open debate. But it may at least help to avoid the kind of situation that has occurred in the present case.

Suppose a comment is submitted that includes a request for confidentiality. One possible position is that no comment submitted under that condition will be considered. Another is that the confidentiality request will be honored, either by summarizing or quoting from the communication, or by reproducing the communication with identifying markings masked. The Commission must weigh the

potential value of the information in the communication against the concern that anonymous information could be unreliable or fabricated. The Commission should adopt a policy on this.

If the Commission's policy is to honor a request for confidentiality, should the Commission also give the same treatment to correspondence that does not request confidentiality but that may be of a character that the correspondent would have requested confidentiality if the correspondent had realized that the correspondence would be a public record? This is the situation of our lawyer who commented on the probate referees. The issue could easily arise even if the Commission puts a warning on tentative recommendations, since we receive much correspondence other than as a response to a tentative recommendation. The staff would not want to be in a position of trying to ascertain whether the particular correspondence is of a type that should be given confidential treatment, whether that involves returning it to the author, inquiring whether the author has a concern with disclosing his or her name, or the like.

Ultimately, we cannot ensure the confidentiality of any communication retained and considered by the Commission. We can protect the identity of the correspondent in material circulated for review and discussion by the Commission, but we cannot alter the fact that any letter sent to the Commission and maintained in the Commission files is a public record open to public inspection, and any person may request a copy of the letter. As a practical matter it is unlikely persons will be so intensely interested in the identity of a Commission correspondent they will want to inspect the Commission's files or request copies of letters, but the fact is that this potential remains.

Respectfully submitted,

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