

5-22-2013

Early disclosure would gut judicial complaint system

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Recommended Citation

Rutberg, Susan and Keane, Peter, "Early disclosure would gut judicial complaint system" (2013). *Publications*. Paper 579.
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Wednesday, May 22, 2013

Early disclosure would gut judicial complaint system

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The State Commission on Judicial Performance performs an invaluable public service: It protects the public by investigating complaints against judges and imposing discipline when those complaints turn out to be justified. During its recent biennial rule review, the commission declined to adopt a rule proposed by the California Judges' Association (CJA), which would have forced the commission to provide full discovery to a judge under investigation before the investigation is completed. The early disclosure sought by CJA would have included the identity of the complainant and

witnesses. After receiving public comment from a number of sources, including members of groups whose livelihood depends on the court, the commission rejected CJA's proposal. Instead, the commission amended its rules consistent with the practice of the State Bar and other professional disciplinary agencies. The amended rules provide that a complained-against judge be given a detailed summary of the allegations, but not the names of complainants or witnesses, before he or she is asked to respond. Full discovery including the identity of complainants and witnesses *will* be provided to the judge, but only if and when formal charges are filed. CJA has publicly threatened to seek legislation requiring the full disclosure it seeks.

What's wrong with CJA's proposal? We strongly feel that to disclose names of complainants and witnesses before a complaint has been investigated would jeopardize the integrity of the complaint process. To divulge the names of the "whistle-blowers" and witnesses against a judge before the filing of formal charges would destroy the effectiveness of judicial oversight in our state. Whether California judges would actually engage in retaliatory behavior toward those who initiated complaints against them or not is not the point. The fear of retaliation is sufficient to gut the effectiveness of the complaint system. CJA's position is not in the best interest of the citizens of California, including court staff and others who regularly interact with the court. Although CJA represents some of California's judges, we do not believe their views represent the views of the majority of California's bench officers. The commission's practice of sending a letter to a judge with specifics of the allegation, without disclosing information which would compromise the confidentiality of complainants and witnesses, strikes the right balance between protecting judges' rights to due process of law and the public's right to protection against judicial wrongdoing and the fair administration of justice. In fact, the state Supreme Court upheld the commission's current discovery practice in the face of a due process challenge. *Oberholzer v. Commission on Judicial Performance*, 45 Cal.3d 518, 526-29 (1988).

CJA faults the commission for failing to collaborate with CJA on this issue. We do not believe that a regulatory body like the commission should "collaborate" with those they are mandated to regulate. CJA is not the only entity or individual with an interest in the commission's discovery process, or the disciplinary system itself, for that matter. Others who are affected by the commission's rules and procedures - attorneys, litigants, court staff, and members of the public - do not have the opportunity to "collaborate" with the commission on the adoption of rules. CJA, like all members of the public, had the opportunity to voice its opinion by submitting comments during the commission's public invitation to comment period.

Comments in favor of the commission's practice and strongly opposed to CJA's discovery proposal were submitted by the California Federation of Interpreters, AFSMCE, District Council 57 (representing employees in a number of California courts), and the authors of this column. These comments reflect a common concern that forcing early disclosure of complainants and witnesses would have an enormously chilling effect on the filing of good faith complaints by employees who staff the courts and/or lawyers who regularly appear before the same judges. The example of the judicial disciplinary commission in Alabama provides ample support for our fears. When the Alabama Inquiry Commission changed its rules to require disclosure of the

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complainant's identity and release of all investigative records during the investigation, the number of complaints dropped sharply, as did witness cooperation with the investigative process. An American Bar Association report on the Alabama system states that Alabama's discovery requirements, "particularly the revelation of the complainant's identity, has a chilling effect on those who may want to file a complaint against a judge." Report of the Alabama Judicial Discipline System, sponsored by the American Association Standing Committee on Professional Discipline (March 2009), p. 19.

The commission's mandate is not only to ensure a fair process for the judiciary, but to protect the public by effectively investigating complaints of judicial misconduct. Eighteen years ago California voters overwhelmingly passed a proposition that expressed the clear intent to make the commission's processes responsive to the interests of public, as well as the judiciary, Proposition 190 changed the composition of the commission from a majority of judge members to a majority of public members and increased transparency to the public. Now is not the time to go backward. The commission should not be faulted for rule-making that is supported by the majority of those who are affected by its process - the public - and not just some members of the judiciary.

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