7 Shield Law articles 1991-1992

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SHOULD AN OMBUDSMAN TESTIFY?

I believe that the unusual situation of an ombudsman is, with rare exceptions, not compatible with being a witness in a specific case in apparently adversarial proceedings. (The question of whether an ombudsman may ethically appear in such circumstance is not yet a completely settled matter among ombudsmen. But I do not actually know of any ombudsman who has appeared in a court or before a Committee of the Congress of the United States on a specific case. Many ombudsmen have declined to participate in adversarial hearings even within their own establishments. And the position of the Board of the Corporate Ombudsman Association is clear, that it would endanger the mission of our offices to compromise even the appearance of the confidentiality offered to complainants). I will first state what I see as the general case, and then speak to possible exceptions.

If an ombudsman appears as a witness in a specific case, in an apparently adversarial hearing, the image of the confidentiality of these practitioners will be damaged. I believe that this is so, even in those cases where specific complainants to the office have given permission for the ombudsman to speak about them in a public hearing. First of all, the ombudsman is not exactly like other confidential practitioners, for example, like those in Employee Assistance. The clients of an Employee Assistance practitioner are usually just those people who go for help to a given Employee Assistance office. An ombudsman, by contrast, as a designated neutral, must endeavor equally to protect the rights of ***everyone*** involved in a case, (including, for example, the complainants, the accused, witnesses, the employer, and possibly others). It has therefore been argued, that before an ombudsman spoke in an apparently adversarial hearing about a given case, he or she would have to get permission from each person involved in the case.

There is however a wider problem. If an ombudsman appears as a formal witness, the ***image*** of confidentiality is damaged. Observers may or may not hear that permission was given by each party to the case, and may simply see that an ombudsman will, after all, break confidentiality. (One can imagine the public discomfort about seeing a doctor or priest testify in public about a confidential discussion.)

There are also neutrality problems associated with an ombudsman's appearing in an apparently adversarial proceeding. If a workplace ombudsman testifies in a way that appears to favor an employer against a worker or manager, it will appear to many observers that the ombudsman is just a tool of management. If an ombudsman testifies against the employer, it will sharply reduce the interest of employers to maintain, in their midst, this kind of in-house critic and change agent. And faced with this potential dilemma, practitioners themselves may lose their courage to be outspoken in raising problems to management, and in support of those who blow the whistle.

Many employers are attempting to deal with these dilemmas by agreeing with their ombudsmen that they will not call these in-house neutrals in the employer's defense. And that they will seek to discourage the calling of ombudsmen into an adversarial hearing by

anyone else. The Corporate Ombudsman Association has sought to protect the confidentiality and neutrality of its members by insisting on a Code of Ethics that supports these principles. Other major professional associations of mediators and ombudsmen similarly discourage designated neutrals from joining in adversarial proceedings and/or breaking confidentiality. Various legislative bodies have passed protective legislation in a similar vein. As an example, in my own state, there is a shield law protecting certain mediators.

I believe that the experience of recent years affirms the importance to people in the workplace and to students, of having a safe and neutral place to go. My own experience is that complaints of irresponsible, unprofessional and unethical conduct are very likely to be addressed to an ombudsman office. However it is important To note that the first question of nearly everyone who comes to an ombudsman office with problems of this type is, "Is this discussion of the record?" Other researchers and I have therefore written and spoken quite widely about the importance of building an "ombuds" capacity into complaint systems, to aid in surfacing harassment, theft, safety problems, fraud, and similar delicate problems of unethical conduct.

I do not mean to claim that ombudsmen have, or should have, an absolute privilege. If an ombudsman does a formal investigation for management, or has deliberately been a formal observer or witness of some investigatory meeting, that ombudsman should not be shielded from questioning about that investigation. An ombudsman who is direct witness to a felony should report it like anyone else. If an ombudsman hears information that indicates that a life may be at stake, plainly that information must surface, from the original informant if possible, but if necessary from the ombudsman. I also believe that if an in-house ombudsman comes to suspect criminal activity or other serious, dangerous or unlawful conduct, then that practitioner must do every reasonable thing to surface the information to the managers responsible for investigation and judgment. (Usually one can offer several different responsible options to a complainant with this kind of information.)

Finally, there may be situations where a court or management tribunal needs to know if the ombudsman behaved in a proper and ethical fashion, in a given case. Since it is always proper for an ombudsman to describe, in general, the complaint system of the employer and how this ombuds office fits into that complaint system, and how this ombudsman operates, this general testimony may suffice. But suppose, for example, the ombudsman is successfully subpoenaed about his or her actions in a given case and (the) specific client(s) give(s) permission for testimony?

Under these circumstances I believe an ombudsman may still decide on principle not to speak, and risk the consequences. (The consequences incidentally may include an unfair attack on the ombudsman, who will not be able to defend him or herself, and may also leave open the possibility that justice will not be done because the ombudsman's testimony is lacking. This will be very painful for the practitioner.)

An alternative is that the ombudsman may accept the subpoena but limit (or attempt to limit) answers to two subjects: the practitioner's own actions and the information given by (only) those persons who have given permission for the ombudsman to speak.

It is my strong recommendation that ombudsmen and their employers come to an understanding about these topics before the need arises.

H 2415

Chapter 325

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Eighty-five

AN ACT PROVIDING FOR THE CONFIDENTIALITY OF COMMUNICATIONS MADE DURING CERTAIN MEDIATION OF DISPUTES.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 233 of the General Laws is hereby amended by inserting after section 23B the following section:-

Section 23C. All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

For the purposes of this section a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.

House of Representatives, September 19, 1985.

Passed to be enacted, George Lewiecan, Speaker.

In Senate, September 23, 1985.

Passed to be enacted, William M. Bulger, President.

October 1, 1985.

Approved,

Governor.

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