

**AMERICAN BAR ASSOCIATION**

**ADOPTED BY THE HOUSE OF DELEGATES**

**AUGUST 14-15, 2017**

**RESOLUTION**

RESOLVED, That the American Bar Association encourages greater use and development of ombuds programs that comply with generally recognized standards of practice, as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.



## REPORT

### I. INTRODUCTION

The number of “ombuds” or “ombudsman” programs continues to grow in both the public sector and in our private organizations. In the public sector, many bills have already been introduced in the 115<sup>th</sup> Congress that would establish or reform ombuds programs in various federal agencies, and several bills were also introduced in the last Congress to establish ombuds programs in various federal agencies<sup>1</sup>. In addition, a comprehensive study of the role of ombuds in federal agencies was completed at the end of 2016 which documents the virtual explosion of ombuds programs of various types in the federal sector since the early 1990s.<sup>2</sup> At the state and local level, ombuds roles have been widely used in many state and local governments and even at the level of local school districts. In non-governmental and other contexts, the ever-increasing need for mechanisms to help resolve individual and systemic conflicts has been recognized in such diverse sectors as the media, universities, leading non-profit agencies, companies, and multinational corporations.

While one of the most valuable aspects of the ombuds concept is the ability to adapt it to a wide variety of contexts, experience has shown that with this growth in usage, many ombuds programs have been proposed or created without incorporating the key principles generally viewed as essential to all types of ombuds programs. Moreover, programs have been created that are not compliant with any of the generally recognized professional standards of practice for the principal types of ombuds programs. Even more troubling is the fact that some programs labeled as “ombuds” incorporate functions that are completely incompatible with what would generally be expected of an ombuds.

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<sup>1</sup> During the 115<sup>th</sup> Congress, for example, bills have been introduced to: establish an Independence of Commission Ombudsman and an Enforcement Ombudsman within the Securities and Exchange Commission (H.R. 10); establish an Office of the Ombudsman for the public health insurance option within the Department of Health and Human Services (H.R. 635 and H.R. 1307); establish an Office of the Municipal Ombudsman within the Environmental Protection Agency (H.R. 1971, H.R. 2355, and S. 692); establish an Ombudsman Office within the Transportation Security Administration (H.R. 1986); require the Department of Health and Human Services to award grants to states enabling them to establish, expand, or provide support for behavioral health ombudsman programs that are independent of other state agencies (H.R. 2047); ensure that the Women Veteran Program Manager program in the Department of Veterans Affairs is supported at each medical center of the Department with a Women Veteran Program Ombudsman (H.R. 2452 and S. 681); establish an Immigration and Customs Enforcement Ombudsman within the Department of Homeland Security (S. 748); establish a Private Landowner Ombudsman within U.S. Customs and Border Protection (S. 757); require the Secretary of Health and Human Services to appoint a Medicare Reviews and Appeals Ombudsman within the Centers for Medicare & Medicaid Services (S. 794); and enhance the ability of the Small Business Administration Regulatory Enforcement Ombudsman to assist small businesses in meeting regulatory requirements (S. 1146). Additional ombuds bills are likely to be introduced later in the 115<sup>th</sup> Congress.

<sup>2</sup> Carole Houk et al., *A Reappraisal--The Nature and Value of Ombudsmen in Federal Agencies*, available at [www.acus.gov/research-projects/ombudsman-federal-agencies-0](http://www.acus.gov/research-projects/ombudsman-federal-agencies-0).

The proliferation of ombuds programs, both domestically and internationally, since 2004, the date of the last resolution on ombuds programs adopted by the American Bar Association (ABA), has prompted the Ombuds Committee of the ABA Dispute Resolution Section to develop the proposed resolution and this report. The proposed resolution--in keeping with previous ABA resolutions--encourages the expanded use of ombuds programs as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes. However, it also urges that ombuds programs comply with generally accepted principles and standards of practices.

Ombuds, also known as ombudspersons or ombudsmen, provide significant value to organizations and constituencies at all levels.<sup>3</sup> The word “Ombudsman” is Scandinavian and means “representative” or “proxy.” As the term is generally used, an ombuds is a person who may make an inquiry into a complaint and who tries to help the inquirer have the problem addressed fairly by the organization. The term is used to describe roles in many different contexts, and the role varies widely from program to program. Ombuds can be found in a wide variety of organizations *worldwide*, including universities and colleges, governments at all levels, health-care institutions, corporations, financial institutions, for-profit and not-for-profit organizations, prison systems, the media, and even the United Nations system itself.

In previous resolutions, the ABA recognized that there are different types of ombuds and identified their essential characteristics. Two resolutions adopted by the ABA in 2001 and 2004 recommended standards for creating and operating ombuds programs,<sup>4</sup> and described three main categories of ombuds: Classical (Executive and Legislative), Organizational, and Advocate.<sup>5</sup> As the use of ombuds has increased in multiple sectors since the time of those resolutions, the categories articulated in those

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<sup>3</sup> In keeping with usage in earlier ABA reports, the term ombuds in this report is intended to encompass all other forms of the word such as ombudsperson, ombuds officers, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage the use of other terms.

<sup>4</sup> In August 2001, the House of Delegates of the ABA adopted a Report and Recommendation to the House of Delegates that supported “...the greater use of ‘ombuds’ to receive, review, and resolve complaints involving public and private entities and endorsed the accompanying Standards for the Establishment and Operation of Ombuds Offices. See Resolution 01A 107D (2001 Resolution). The 2001 Resolution used the categorization of “Classical,” “Organizational,” and “Advocate” to describe the principal types of ombuds programs. On February 9, 2004, the House of Delegates adopted a policy revising the Standards for the Establishment and Operation of Ombuds Offices. See Resolution 04M 115 (2004 Resolution) which replaced the category of “Classical” ombuds with “Legislative” and “Executive,” but both of these types are generally understood to be variations of the classical ombuds model. See e.g., Charles L. Howard, *The Organizational Ombudsman: Origins, Roles, and Operations - A Legal Guide*, 1 (2010), Appendices 6 and 7, for the full text of 2001 and 2004 Resolutions and Reports.

<sup>5</sup> Howard, Charles and Julie Smith, “Understanding the Types of Ombuds: A Starter Guide,” *Just Resolution* February 2015, available at: [http://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/Newsletter%20articles/Howard\\_Smith\\_Types\\_of\\_Ombuds.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/dispute_resolution/Newsletter%20articles/Howard_Smith_Types_of_Ombuds.authcheckdam.pdf) (last accessed April 4, 2016) (providing thorough coverage of the different types of ombuds categories according to the ABA resolutions).

resolutions have become unduly limiting and do not accurately reflect the current reality of ombuds practice, although they were an important step in working to articulate the principles of independence, impartiality, and confidentiality that are fundamental to successful ombuds programs.

Ombuds functions today vary widely with respect to the nature of their creation, their mandate and function, who they serve, and the standards that are followed. For example, there are many ombuds offices that practice what has typically been defined as the classical model of practice where an office is charged with impartially investigating complaints, formally or informally. These offices are in both the private sectors and in the government sector at the federal, state, and local levels of government. Such government offices are established by legislative enactment or a charter which sets forth the jurisdiction of the office and the span of its authority.<sup>6</sup> Therefore, there is no single functional definition for an executive or federal ombudsman, just as there is no single definition for the role in other contexts.

While specific, limited definitions may no longer be beneficial, it is clear that generally recognized standards have emerged for various modalities of ombuds, including: The “ABA Standards,” as articulated in previous ABA resolutions; The United States Ombudsman Association (USOA) Governmental Ombudsman Standards (“USOA Standards”), available at: <http://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf> ; the International Ombudsman Association (IOA) Standards of Practice (“IOA Standards”), available at: [http://www.ombudsassociation.org/IOA\\_Main/media/SiteFiles/IOA\\_Standards\\_of\\_Practice\\_Oct09.pdf](http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf) ; and a supplement to the ABA Standards created by the Coalition of Federal Ombudsmen (COFO) (“COFO Guide”), available at: [http://federalombuds.ed.gov/federalombuds/pdfs/Final\\_Ombuds\\_Standards.pdf](http://federalombuds.ed.gov/federalombuds/pdfs/Final_Ombuds_Standards.pdf) . While these standards are not the only canons that have achieved wide acceptance, they reflect adherence to the key principles of independence, confidentiality, and impartiality and thus underscore one of the primary purposes of the proposed resolution: that urging the creation of ombuds programs which are compliant with generally recognized standards will best serve both the programs themselves and the institutions and constituencies they serve. For this reason, the proposed resolution does not recommend one set of standards over another. Rather, it reiterates the ABA’s support of ombuds functions in multiple arenas and further encourages their use in a manner consistent with recognized ombuds standards that have been developed over many years for the different types of ombuds programs.

The goal of the proposed resolution is, therefore, to address the limitations created in the previous resolutions and to encourage the use of ombuds programs, thereby reinforcing administrative and organizational integrity, accountability, fairness, and equity, and upholding the greater societal interest of empowering people to surface good

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<sup>6</sup> This practice is consistent with the 2004 ABA Resolution.

faith concerns to the government or an organization without fear of retaliation or other adverse consequences. Further, this proposed resolution recognizes the growing variation in models, policies and procedures governing the differing roles played by ombuds in different sectors and, especially in view of this growth, urges adherence to best practices and recognized standards followed by the most effective ombuds and ombuds offices.

## II. BACKGROUND

The ombuds concept was first introduced into the United States in the early 1960s as a means of improving public administration and serving as a check and balance on administrative processes. During the 1960s, ombuds programs were established in numerous governmental organizations, including states and municipalities.

The American Bar Association adopted a resolution in 1969, which was revised in another resolution adopted in 1971, recommending that “state and local governments should give consideration to the establishment of an Ombudsman authorized to inquire into administrative action and to make public criticism.”<sup>7</sup> The 1969 Resolution also identified the twelve essential characteristics of a statute creating an ombuds program.

During the 1970s and 1980s, ombuds programs continued to develop beyond state and local governments to include programs at colleges and universities, corporations, the federal government and other organizations.

During this same time, ombuds practices also evolved based on the contexts in which they operated, including programs that were independent but advocated on behalf of a constituency (for example, prison ombuds and nursing home ombuds), those that followed the traditional public model of ombuds with an investigative function, and those within private organizations that often operated according to an organizational charter and standards of practice, rather than a legislative or government mandate.

## III. OMBUDS AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

The ombuds function has also emerged as a valuable form of alternative dispute resolution (ADR) given that ombuds act as third parties and address disputes outside of formal channels, such as litigation, grievances, equal employment opportunity (EEO) complaints and so forth.

In the United States, most ombuds are in fact third-party neutrals, with the exception of Advocate Ombudsmen who are often authorized to advocate on behalf of vulnerable populations. Generally, ombuds utilize ADR skills and processes, as well as other creative avenues, as a means to address disputes and concerns. Ombuds essentially stand for procedural justice, fundamental fairness, accountability and equity, thereby allowing inquirers, visitors, complainants, or customers to voice concerns that might not

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<sup>7</sup> See e.g., Charles L. Howard, *The Organizational Ombudsman: Origins, Roles, and Operations - A Legal Guide*, 1 (2010), Appendix 1 (full text of 1969 ABA Resolution and Report) and Appendix 2 (full text of 1971 ABA Resolution and Report).

otherwise be heard by an organization or entity. The USOA has referred to this as providing a means for “credible review.” The ability of ombuds to help people informally – on a wide range of issues that might not otherwise be addressed due to the limitations of litigation or fear of retaliation – makes them an important component of a comprehensive conflict management system.

#### **IV. THE PROPOSED RESOLUTION AND EXISTING ABA POLICIES**

The proposed resolution is consistent with and builds upon existing ABA policies. It seeks to highlight the growth and evolution of ombuds functions and encourages greater use of ombuds programs. In the early stages of the evolution of the ombuds concept, ombuds were limited to governmental and administrative functions, but the use of the ombuds continues to grow.<sup>8</sup> This proposed resolution is intended to keep the ABA abreast of these changes to facilitate good decision-making as new ombuds programs are created.

The ABA has adopted four prior resolutions related to the ombuds function.

##### Resolution Adopted by the ABA in January 1969

As noted above, the ABA adopted a resolution in 1969 encouraging state and local governments to “give consideration to the establishment of an ombudsman authorized to inquire into all administrative actions and to make public criticism.”<sup>9</sup> The resolution further sets out 12 suggested characteristics or parameters for a statute or ordinance establishing such an ombudsman, including independence, freedom “to investigate any act or failure to act by any agency, official, or public employee,” authority, discretion, and immunity from civil liability.<sup>10</sup>

##### Resolution Adopted by the ABA in July 1971

In 1971, the ABA adopted a resolution which amended the 1969 resolution and recommended the creation of a pilot ombudsman program “for limited geographical area or areas, for a specific agency or agencies or for a limited phase or limited phases of Federal activity.”<sup>11</sup> It was suggested that such experimentation take place before the establishment of a government-wide program.<sup>12</sup>

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<sup>8</sup> References to ombuds can be found in the Administrative Dispute Resolution Act of 1999 and the Uniform Mediation Act of 2003, which further demonstrate a broad acceptance of the ombuds function.

<sup>9</sup> See Howard, *supra* n. 4.

<sup>10</sup> *Id.* at Appendix 1 (full text of 1969 ABA Resolution and Report).

<sup>11</sup> *Id.* at Appendix 2 (full text of 1971 ABA Resolution and Report).

<sup>12</sup> *Id.*

## Resolution Adopted by the ABA in August 2001

In 2001, the ABA adopted a resolution supporting the greater use of ombuds to “receive, review, and resolve complaints involving public and private entities.”<sup>13</sup> The ABA also endorsed the Standards for the Establishment and Operation of Ombuds Offices dated August 2001. The report accompanying the 2001 Resolution set out the ABA’s support of Classical, Organizational, and Advocate Ombuds models.<sup>14</sup>

## Resolution Adopted by the ABA in February 2004

The ABA adopted its fourth ombuds resolution in 2004, revising the Standards from 2001.<sup>15</sup> The 2004 ABA Standards mention the ombuds categories of Legislative, Executive, Organizational, or Advocate.<sup>16</sup>

## Related ABA Policy: Resolution 100 (2016)

In a similar context involving disputes in the healthcare arena, the ABA just recently adopted a resolution encouraging the greater use of ADR mechanisms to help resolve healthcare disputes. The report accompanying the Resolution specifically references ombuds as such a mechanism.

## **V. DEVELOPMENTS SINCE 2004**

Since the adoption of the 2001 and 2004 Resolutions, the ombuds role and function has continued to develop in a variety of ways.

### **Classical Ombuds**

The ABA used the term “Classical Ombuds” in its 2001 report but re-classified this function as “Legislative Ombuds” and “Executive Ombuds” in its 2004 report.<sup>17</sup> While the resolution itself does not specifically define roles, this report recognizes the definition of “classical” put forth by the USOA, the oldest ombuds association in the United States. As referenced in this report, the term “classical” is used to describe a form of practice in which the office has authority to independently and impartially investigate complaints against an entity or any complaints within the entity’s jurisdiction (i.e., engage in fact-finding). The responsibility to impartially investigate complaints in a

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<sup>13</sup> See Resolution 01A 107D, *available at*: <http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf> (last accessed March 18, 2016). See also Howard, *supra* n. 2, Appendix 6.

<sup>14</sup> *Id.*

<sup>15</sup> See Resolution 04M 115, *available at*: <http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf> (last accessed March 18, 2016); see also Howard, *supra* note 2, Appendix 7.

<sup>16</sup> *Id.*; see also, n.2 *supra*.

<sup>17</sup> By definition, a Legislative Ombuds according to the ABA Standards would be a Classical Ombuds, but not all Classical Ombuds are Legislative Ombuds. Therefore, for purposes of this report, Legislative Ombuds are encompassed by Classical Ombuds.

formal way is a hallmark of the classical model. However, while the classical model may be characterized by the conducting of formal investigations, classical ombudsmen are not limited to conducting only “formal” investigations. A significant amount of their work is done informally, through inquiries, providing assistance and coaching, etc. In addition, unless specifically restricted, classical ombudsmen can also investigate or informally address complaints from employees of an agency, the same types of complaints that organizational ombuds handle. It is important when describing the classical model to be clear that the model does not limit the ombudsman to conducting only formal investigations of complaints against an agency from parties outside the agency.<sup>18</sup>

- *Growth and Development in the Classical Model*

Over the past decade, there has been growth in the number of classical ombuds at the local and state levels. At the local government level, this growth is most apparent in school districts. Portland and Seattle are examples of school districts creating a classical ombuds office to address education-related concerns.

Most municipal ombuds offices follow the classical model and deal with external complaints by users or those impacted by programs or agencies.<sup>19</sup> King County, Washington, Dayton-Montgomery County, Ohio, and Detroit, Michigan are examples of general jurisdiction municipal offices.

At the state level, only five states have general jurisdiction ombuds offices created in pure classical form as offices housed in the legislative branch with oversight over executive branch functions: Alaska, Arizona, Hawaii, Iowa, and Nebraska.<sup>20</sup>

The recent addition of classical ombudsman offices at the state level has primarily been within offices created to serve specific programs, such as children and family services, mental health services, or corrections. In 1995, Michigan created the Office of Children’s Ombudsman to independently investigate complaints about protective services, foster care, adoptions services and juvenile justice. According to the National

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<sup>18</sup> Other terms have also evolved to help describe governmental programs that previously were considered to be “classical” because they were established by government agencies. For example, some of these programs are described as “externally facing” or “internally facing,” depending on whether the principal constituency served is the public or the agency’s employees. Some of these programs in other respects also more resemble “organizational” ombuds programs than what has been traditionally understood to be “classical” ombuds programs.

<sup>19</sup> A general jurisdiction office might address any kind of issue across a number of agencies, whereas a specific jurisdiction ombuds might focus, for example on children’s issues. See Stier, John, “Classical Ombuds: Current Rhythms,” *Just Resolutions*, February 2016, available at: [http://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/newsletter/feb2016/Classical\\_Ombuds.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/feb2016/Classical_Ombuds.authcheckdam.pdf) (discussing a decade of increased specialization in classical ombuds functions) (last accessed March 18, 2016).

<sup>20</sup> South Carolina also has an ombuds office which arguably is not based on a “pure classical model.”

Conference of State Legislatures, twenty-two states now have Children’s Ombudsman Offices.<sup>21</sup>

For those offices created at the state level to address specific programs, the models may differ. The office may be attached to the agency whose actions the ombudsman is authorized to investigate; others are attached to the governor or another agency within the executive branch. For those ombuds offices that lack structural independence from a sponsoring agency, particular steps must be taken to ensure functional independence. Such independence is intended to give complainants the confidence that any investigation is impartial and also lessens any fear of retaliation.

- *Standards of Practice*

The ABA adopted *Standards for the Establishment and Operations of Ombuds Offices* in 2001 and revised these Standards in 2004.<sup>22</sup> Among other things, the final standards create a particular set of guidelines for those practicing under the various models, including both Legislative Ombuds and Executive Ombuds. These Standards can be and have been used to establish ombuds offices.<sup>23</sup>

The USOA, a national organization for public sector ombuds professionals, did not fully endorse the 2001 standards or participate in the drafting of the revised 2004 standards. Instead, the USOA adopted Governmental Ombudsman Standards in 2003, identifying basic principles, guidelines, and best practices for ombudsman offices which follow the classical model of practice.<sup>24</sup> USOA Standards include independence, impartiality, and confidentiality, with the addition of credible review process.<sup>25</sup> USOA has also developed a model statute for state legislatures to use in creating new ombuds offices.<sup>26</sup>

## Executive Ombuds

According to the 2004 ABA Standards, Executive Ombuds “may be located in either the public or private sector and receive[] complaints from the general public or internally”...to “hold the entity or specific programs accountable or work with officials to improve the performance of a program.” Executive Ombuds may conduct investigations and issue reports.

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<sup>21</sup> National Conference of State Legislatures, <http://www.ncsl.org/research/human-services/childrens-ombudsman-offices.aspx> (last accessed March 18, 2016).

<sup>22</sup> See 2004 Resolution, *supra* n. 2 and 12.

<sup>23</sup> However, not all offices function in practice in accordance with the Standards. Urging adherence to recognized standards is an important objective of the present proposed resolution. .

<sup>24</sup> USOA Governmental Ombuds Standards, *available at*: <http://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf> (last accessed May 26, 2016)

<sup>25</sup> *Id.*

<sup>26</sup> *Available at*: <http://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-MODEL-ACT.pdf> (last accessed April 3, 2016)

Externally-facing federal sector ombuds offices are often created by statute and assist in resolving process issues arising from the public's interactions with a federal agency. While such ombuds usually do not have formal investigative authority, many of them review and study broader systemic issues and provide feedback and recommendations to the agency and, where required by law, to Congress. They typically practice according to the standards of independence, impartiality, and confidentiality in keeping with guidance set forth by USOA, the Coalition of Federal Ombudsmen, and others.<sup>27</sup> This has been a growth sector for many years.

One example of the executive ombuds model is the US Government's Freedom of Information Act (FOIA) ombudsman. Congress updated the FOIA in 2007 to establish a federal office—the Office of Government Information Services (OGIS)—to provide mediation services as an alternative to litigation between FOIA requesters and federal agencies.<sup>28</sup> From the office's inception, Congress referred to the office as the “FOIA Ombudsman” and though it is not a term used in the statute, the FOIA community has embraced both the name and the mission.<sup>29</sup> Requests for assistance from the FOIA Ombudsman come from both requesters and agencies.

In addition to resolving disputes, the statute directs OGIS to review agency FOIA policies, procedures and compliance, with the goal of improving the FOIA process.<sup>30</sup> The office's handling of cases, as it mediates and facilitates disputes, allows for a first-hand observation of agency practices that also is helpful in its review role. As with its mediation services, the OGIS examines an agency's FOIA process in the role of an advocate for the FOIA process in general, with a particular focus on impartiality and fairness. OGIS has made a number of recommendations to the President and to Congress to improve the administration of FOIA and to promote government openness, as directed by the statute.<sup>31</sup> The 114<sup>th</sup> Congress appears to have heeded concerns about the need to give the FOIA ombudsman more authority and independence.<sup>32</sup> Both the House of Representatives and the Senate passed a FOIA reform bill to do just that, which the President signed into law as the FOIA Improvement Act of 2016.<sup>33</sup>

## Organizational Ombuds

Initially, Organizational Ombuds programs in the US were created in response to particular societal needs. In the college and university context, the rise of organizational ombuds programs coincided with student riots and campus unrest in the 1970's. In the

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<sup>27</sup> See e.g., *A Guide for Federal Employee Ombuds*, *supra* note 23, available at: [http://federalombuds.ed.gov/federalombuds/pdfs/Final\\_Ombuds\\_Standards.pdf](http://federalombuds.ed.gov/federalombuds/pdfs/Final_Ombuds_Standards.pdf) (last accessed March 16, 2016).

<sup>28</sup> 5 U.S.C. § 552(h) (2007).

<sup>29</sup> FOIA Ombudsman blog, <https://foia.blogs.archives.gov>

<sup>30</sup> 5 U.S.C. § 552(h)(2)(A)-(B)) (2007)

<sup>31</sup> 5 U.S.C. § 552(h)(2)(C) (2007)

<sup>32</sup> H. Rept. 114-391, FOIA Oversight and Implementation Act of 2015, at 13 (“An effective OGIS is an independent OGIS”). <https://www.congress.gov/congressional-report/114th-congress/house-report/391/1>

<sup>33</sup> 5 U.S.C. § 552, as amended by Pub. L. No. 114-185.

corporate setting, many programs were created as a result of concerns over improving corporate responsibility and governance and to encourage employees and others to report misconduct without fear of retaliation.<sup>34</sup> An Organizational Ombuds office works within an organization to serve as an informal line of communication, a resource for interpersonal and systemic challenges, and a champion of organizational best practices for corporate governance.

- *The International Ombudsman Association Standards of Practice*

The formation of the IOA in 2005 was a major milestone for organizational ombuds. The IOA was created from the merger of the University and College Ombuds Association (UCOA) and The Ombudsman Association (TOA), which primarily served corporate and other organizational ombuds programs. IOA, the largest international association of professional organizational ombuds practitioners in the world, currently represents almost 900 members from the United States and across the globe. The IOA has established Standards of Practice for organizational ombuds, which include independence, impartiality, informality, and confidentiality.<sup>35</sup>

- *Organizational Ombudsman Certification*

In 2009, IOA established the Certified Organizational Ombudsman Practitioner (Co-Op) certification; this program requires certified organizational ombuds to meet training and experience prerequisites, successfully complete an examination and to adhere to the IOA Code of Ethics and Standards of Practice. In addition to passing required certification exams, Co-Op members must have at least one year of experience as a practicing organizational ombudsman and demonstrate that they operate as independent, impartial, neutral and confidential practitioners in accordance with the IOA Standards. Co-Op re-certification is required every four years and has continuing education requirements. A “Co-Op Professional Practices Committee” is charged with investigating and adjudicating any formal complaints filed against a Co-Op member.

- *Federal Sector Ombuds*

The Coalition of Federal Ombudsman was formed in the mid-1990s and has grown in the federal space over the years. COFO is comprised of federal-sector ombuds that are internally-facing and therefore organizational ombuds (assisting on internal, workforce issues) externally-facing executive ombuds (assisting with process issues arising from the public’s interactions with the agency), or ombuds that are both internally- and externally-facing. The Coalition of Federal Ombudsmen supports the

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<sup>34</sup> See e.g., Charles L. Howard, *The Organizational Ombudsman: Origins, Roles, and Operations - A Legal Guide*, (2010), at 79.

<sup>35</sup> IOA Standards of Practice, available at: [https://www.ombudsassociation.org/IOA\\_Main/media/SiteFiles/IOA\\_Standards\\_of\\_Practice\\_Oct\\_09.pdf](https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct_09.pdf) (last accessed March 18, 2016). It bears noting that the Hawaii legislature has contemplated the creation of a university organizational ombuds office that would adhere to USOA standards of practice, though it is unclear how this will take shape in practice.

principles of independence, impartiality (neutrality), and confidentiality. The Coalition of Federal Ombudsmen and the Federal Interagency ADR Working Group Steering Committee created the *Guide for Federal Employee Ombuds*<sup>36</sup> in 2006. The Guide is intended to operate as a supplement to the ABA's *Standards for the Establishment and Operations of Ombuds Offices* referenced above.

## Advocate Ombuds

Advocate Ombuds serve as advocates for identified constituencies, often those identified as vulnerable populations, such as residents of nursing homes and prisoners. A key difference between an advocate ombuds and a legislative or executive ombuds is that many advocate ombuds do not practice impartiality/neutrality but do use impartiality in determining whether, and to what extent, advocacy is appropriate in any particular instance. Some examples of advocate ombuds are:

- *Long-Term Care Ombuds*

Long-Term Care Ombudsmen (LTCOs) are “advocates for residents of nursing homes, board and care homes and assisted living facilities.”<sup>37</sup> Under the Older Americans Act, every state is required to have a LTCO program to address complaints and advocate for improvements in the long-term care system. There are currently 53 LTCO programs – representing all 50 states, Guam, Puerto Rico, and Washington D.C. The LTCO program is federally-administered by the Agency on Aging, though each state program has autonomy in its day-to-day operations. LTCO programs may emphasize different practices due to the demographics and local needs they address, and they consistently strive to handle complaints, create awareness, and advocate on behalf of quality care. Their work is to remain confidential unless a resident gives permission. According to the Administration of Community Living, the LTCO program continues to flourish; in 2014 there were over 127,000 cases opened nationwide.<sup>38</sup>

- *Corrections Ombuds*

Several states have statutes establishing Corrections Ombuds offices, which advocate for fairness on behalf of those incarcerated. Corrections Ombuds also provide information about the prison system to inquirers, clarify policies, facilitate resolution of complaints and issues, and make recommendations. Ombuds operating in correctional facilities may also operate under what may be seen as classical ombuds standards; the exact nature of the work is dependent on the language of the charter or statute creating the office.

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<sup>36</sup> Guide for Federal Employee Ombuds, *available at*: [http://federalombuds.ed.gov/federalombuds/pdfs/Final\\_Ombuds\\_Standards.pdf](http://federalombuds.ed.gov/federalombuds/pdfs/Final_Ombuds_Standards.pdf) (last accessed March 16, 2016).

<sup>37</sup> The National Long-Term Care Ombudsman Resource Center, *available at*: <http://ltcombudsman.org/about/about-ombudsman> (last accessed March 16, 2016).

<sup>38</sup> See Administration on Community Living, Data at a Glance, *available at*: <http://www.agid.acl.gov/DataGlance/NORS/> (last accessed March 18, 2016).

- *News Ombuds*<sup>39</sup>

News ombuds have been in practice in the United States since 1967<sup>40</sup> and the Organization of News Ombudsmen (ONO) was formed in 1980. Modern day news ombudsmen, also known as public editors or reader representatives, are typically tasked with dealing with listeners, readers, or viewers regarding ‘accuracy, fairness, balance, and good taste in news coverage.’<sup>41</sup> The ombudsman will investigate the issue, attempt to find a solution, and at the very least provide an explanation of what caused the issue. Some news ombuds offer opinions or recommendations regarding the best way to resolve the particular issue, often openly criticizing the news outlet, an approach which is consistent with advocate ombuds standards. News ombudsmen offer a number of beneficial advantages to news organizations, including reducing libel lawsuits, strengthening the relationship with the public, and enhancing credibility.<sup>42</sup> According to Jeffrey Dvorkin, former Executive Director of the Organization of News Ombudsmen, “Ombudsmen see the world differently. They are there to sort out the differences among the various critics, to engage with the public and to foster a culture inside the news organization to acknowledge that the public must be part of the journalistic process.”<sup>43</sup>

## VI. 2016 ADMINISTRATIVE CONFERENCE RECOMMENDATION 2016-5, “THE USE OF OMBUDS IN FEDERAL AGENCIES”

### Background

More than twenty-five years ago, the Administrative Conference of the United States (ACUS), a small federal administrative agency which undertakes non-partisan research projects and then makes recommendations for the improvement of federal agency practices and processes, conducted a study of ombudsman programs in federal agencies, selecting for review six offices that were set up to help the public resolve problems arising in dealing with the government. That study served as the basis for the Administrative Conference’s Recommendation 90-2 (adopted in 1990) which urged “the President and Congress to support federal agency initiatives to create and fund an effective ombudsman in those agencies with significant interaction with the public” and provided guidance for the establishment and operation of federal ombudsman offices.<sup>44</sup>

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<sup>39</sup> Characterizing News Ombuds as Advocates is somewhat artificial. News ombuds advocate on behalf of journalistic integrity and honesty/transparency in news.

<sup>40</sup> Organization of News Ombudsmen, <http://newsombudsmen.org/about-ono> (last accessed March 3, 2016).

<sup>41</sup> *Id.*

<sup>42</sup> See Meyers, C. (2000). Creating an Effective Newspaper Ombudsman Position. *Journal of Mass Media Ethics*, 15(4), 248-256.

<sup>43</sup> Dvorkin, Jeffrey, *The Modern News Ombudsman: A User’s Guide*, [http://www.newsombudsmen.org/wp-content/themes/sink\\_ono/documents/onohandbook.pdf](http://www.newsombudsmen.org/wp-content/themes/sink_ono/documents/onohandbook.pdf) (last accessed March 3, 2016).

<sup>44</sup> ACUS Recommendation 90-2, *available at*: <https://www.acus.gov/recommendation/ombudsman-federal-agencies>

Since that time, the number, prominence, and diversity of federal ombuds offices has grown dramatically. With urging from the Dispute Resolution Section Ombuds Committee, ACUS sponsored a new study in 2015 on the current status of ombuds in federal agencies. The study identified which federal agencies make use of ombuds offices, described the scope of their activities, identified best practices for the establishment and operation of ombuds offices, and recommended situations in which expanded use of ombuds may benefit agencies. The contractor selected to undertake the study (with a team of researchers that included prominent ombuds, lawyers, and academics) submitted its extensive (over 600 pages in length) Final Report, “A Reappraisal--The Nature and Value of Ombudsmen in Federal Agencies” to ACUS on November 14, 2016.<sup>45</sup>

Following public hearings on the Report and proposed recommendations contained in the Final Report, ACUS adopted Administrative Conference Recommendation 2016-5, “The Use of Ombuds in Federal Agencies” on December 14, 2016. A copy of this Recommendation is available at: <https://www.acus.gov/recommendation/recommendation-2016-5-use-ombuds-federal-agencies> .

### **Administrative Conference Recommendation 2016-5**

Recommendation 2016-5 adds further support to both goals of the proposed resolution: it recognizes the value of ombuds programs and urges support for them by the President and Congress, and it encourages greater compliance with generally recognized standards for ombuds programs.

In particular, Recommendation 2016-5 states:

Federal ombuds now include multiple variations of both primarily externally-focused and primarily internally-focused ombuds (i.e., those who receive inquiries and complaints from persons within the agency). The individuals and offices can and do make a distinct and beneficial contribution to government effectiveness. While all forms of alternative dispute resolution embraced by the ADRA [Administrative Dispute Resolution Act] have the capacity to reduce litigation costs and foster better relationships, the ombuds alone affords the constituent and the agency the opportunity to learn about and address the issues before, in effect, they have been joined. Constituents and the agency are served by the ombuds’ skilled, impartial assistance in resolution, and the agency is served by the opportunity for critical early warning of specific and systemic issues.<sup>46</sup>

<sup>45</sup> A copy of the Executive Summary of the Final Report is available at: [https://www.acus.gov/sites/default/files/documents/PART%201\\_Executive%20Summary%20%28ACUS%29%2011.16.16\\_0.pdf](https://www.acus.gov/sites/default/files/documents/PART%201_Executive%20Summary%20%28ACUS%29%2011.16.16_0.pdf) . Both the Executive Summary and the other sections of the Final Report provide in-depth support for the recommendations that were then adopted by the Administrative Conference.

<sup>46</sup> Administrative Conference Recommendation 2016-5 at 1-2.

Recommendation 2016-5 noted the challenging environment in which federal agencies now work, and observed that ombuds are “uniquely situated to provide both pertinent information and assistance in resolving issues to constituents and the agency alike,”<sup>47</sup> all of which leads to greater trust, which it described as “a commodity without which government in a democratic society cannot function effectively.”<sup>48</sup> The same observations could also be made about ombuds in virtually all of the other contexts in which ombuds programs have been created.

Recommendation 2016-5 addressed head-on the issue underlying the second aspect of the proposed resolution--the need for compliance with generally recognized standards-- and its conclusion is unequivocally consistent with the language of the proposed resolution. The Recommendation discussion of this point (which also applies to the other contexts in which ombuds programs have been created), could very well serve as a summary of this report and deserves quoting at some length:

Although the functionality of the federal ombuds landscape is quite diverse, most federal ombuds share three *core standards of practice*-- independence, confidentiality, and impartiality--and share common characteristics. The core standards are set forth in the standards adopted by the American Bar Association (ABA), the International Ombudsman Association (IOA), and the United States Ombudsman Association (USOA) though with some variations, particularly with respect to confidentiality. These organizations’ standards are generally followed, as applicable, and considered essential by the ombuds profession, both with and outside government. . . .

Most federal ombuds also share the following common characteristics: (1) Ombuds do not make decisions binding on the agency or provide formal rights-based processes for redress; (2) they have a commitment to fairness; and (3) they provide credible processes for receiving, reviewing, and assisting in the resolution of issues. The three core standards and these common characteristics, taken together, are central to the ombuds profession. (Emphasis in the original) (Citations and footnotes omitted.)<sup>49</sup>

Indeed, Recommendation 2016-5 goes even further: it recommends that, in addition to the creation of new ombuds programs that comply with these standards, existing ombuds programs in federal agencies which do not comply should “align their office standards and practices with those included in this recommendation” or “consider modifying their title, where permitted, to avoid any confusion.”<sup>50</sup> It is precisely this point that the proposed resolution seeks to address: the American Bar Association should encourage the greater use and development of ombuds programs that comply with generally accepted standards.

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<sup>47</sup> *Id.* at 3

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 3-4

<sup>50</sup> *Id.* at 3 and 6.

## VII. CONCLUSION

An effective ombuds office serves as an alternative channel to assist people in resolving conflicts and in surfacing their concerns without fear of retaliation. Despite the many benefits offered by an effective ombuds office, many governments and organizations have not yet created ombudsman programs. This resolution is intended to call attention to and encourage the use of a broad range of ombuds functions, which likewise employ a range of ADR processes to effectively address systemic and individual issues. The ever-increasing need for mechanisms to resolve individual and systemic conflicts is recognized by multiple entities, including the media, universities, government, leading non-profit agencies and Fortune 500 companies. Such offices serve increasingly important societal interests, and as such, the value of the ombuds function in all sectors cannot be overstated. However, to maximize the effectiveness of these programs they should be created in such a manner that they will be able to operate consistently with the generally recognized standards that experience has shown are critical to effective ombuds programs.

Respectfully submitted,

Nancy Welsh, Chair  
Section of Dispute Resolution  
August, 2017

## GENERAL INFORMATION FORM

Submitting Entity: Section of Dispute Resolution

Submitted By: Nancy Welsh, Chair

1. Summary of Resolution.

This resolution encourages the greater use and development of ombuds programs, consistent with recognized standards of practice, as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.

2. Approval by Submitting Entity.

Yes. The proposed resolution was approved by the Dispute Resolution Section Council on February 4, 2017.

3. Has this or a similar resolution been submitted to the House or Board previously?

Yes. The ABA previously adopted four resolutions from 1969 to 2004 supporting the greater use of ombuds in a variety of sectors and functions. However, this resolution is the first proposal since 2004 and addresses definitional issues in the previous resolutions while also encouraging the use of generally recognized standards.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The proposed resolution builds upon four existing ABA resolutions adopted by the House of Delegates from 1969 to 2004 supporting the increased use of ombuds in a variety of sectors and functions. These include (1) a resolution adopted in February 1969 recommending that state and local governments consider establishing an ombudsman authorized to inquire into administrative action and to make public criticism, consistent with twelve essential characteristics; (2) a related resolution adopted in August 1971 recommending several amendments to the 1969 resolution; (3) ABA Resolution 107D, adopted in August 2001, supporting the greater use of ombuds to receive, review and resolve complaints involving public or private entities and endorsing the Standards for the Establishment and Operation of Ombuds Offices dated August 2001; and (4) ABA Resolution 115, adopted in February 2004, endorsing revised Standards for the Establishment and Operation of Ombuds Offices.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. (If applicable)

During the 115<sup>th</sup> Congress, at least fourteen separate bills have been introduced that would establish or reform ombudsman positions in different federal agencies. However, the proposed resolution supports the greater use of ombuds in general and does not expressly address any of those bills or any other bills that may be proposed later in the 115<sup>th</sup> Congress. The proposed resolution, however, is entirely consistent with Recommendation 2016-5 adopted by the Administrative Conference of the United States on December 14, 2016 which encourages greater use of ombuds programs and that both new and existing programs should adhere to generally accepted standards.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

On an ongoing basis, the Section of Dispute Resolution and the ABA Governmental Affairs Office will examine the various ombuds-related bills pending in Congress and determine whether ABA advocacy letters should be submitted in connection with any of those bills.

8. Cost to the Association. (Both direct and indirect costs) None.

9. Disclosure of Interest. (If applicable) None.

10. Referrals.

Referred to all Section, Division and Forum staff representatives including State and Local Government Law, Litigation, TTIPS, Government and Public Sector Lawyers, GP Solo, Young Lawyers Division, Law Student Division and Administrative Law Section.

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution encourages the greater use and development of ombuds programs, consistent with recognized standards of practice, as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.

### 2. Summary of the Issue that the Resolution Addresses

The ever-increasing need for mechanisms to resolve individual and systemic conflicts is recognized by multiple entities, including the media, universities, government, leading non-profit agencies and Fortune 500 companies, and this proposal once again encourages the expanded use of ombudsman programs. During the most recent legislative cycle, a number of bills were introduced to establish or reform ombudsman positions in different federal agencies. The proliferation of Ombudsman programs since the 2004 resolution, both domestically and internationally, in conditions that did not always recognize or adhere to generally accepted ombuds standards, led the Ombuds Committee of the ABA Dispute Resolution Section to draft this resolution. The proposed resolution is consistent with Recommendation 2016-5 adopted by the Administrative Conference of the United States on December 14, 2016 which encourages greater use of ombuds programs and that both new and existing programs should adhere to generally accepted standards.

### 3. Please Explain How the Proposed Policy Position will address the issue

The proposed resolution language encourages greater use of ombuds programs in keeping with recognized standards of practice. The proposed resolution is not intended to favor any particular ombuds category or set of standards. Instead, it is intended to encourage members of the ABA, lawmakers, policy makers, and others to deepen their understanding of the different roles ombuds play, and how these ombuds functions relate to conflict management systems, government operations, and societal interests at large and to then implement a program that will best serve the identified needs.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA

The Dispute Resolution Section is not aware of opposition from any other section or division or from other sources.