ESTABLISHING EFFECTIVE EARLY INTERVENTION
PROGRAMS TO MANAGE DAY-TO-DAY DISPUTES, SYSTEM
STANDARDS COMPLIANCE AND SYSTEM CHANGES

Dean T. Fournaris
Wiggin and Dana LLP
Philadelphia, PA

Sherin Sakr
Kahala Corporation
Scottsdale, AZ

Sue Vandittelli
CFA and IFA Ombudsman
Toronto, Canada

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I. INTRODUCTION

Franchise lawyers are widely aware that "alternative dispute resolution" techniques exist that allow franchisors and franchisees to resolve claims and controversies other than in a judicial forum. What is less widely appreciated is the extent to which sophisticated franchisors have adopted procedures designed to prevent disputes from arising in the first place and, when disputes do arise, from turning into conflict. For these franchise systems, carefully designed early dispute prevention techniques are an important component of a comprehensive overall dispute resolution process. Faced with escalating costs of resolving day-to-day disputes with franchisees through traditional litigation or formal arbitration procedures, franchisors from around the country are creating early intervention programs that identify and address franchisor-franchisee issues before they fester into legal disputes. At the same time, many sophisticated franchisors have come to realize that conflicts and disputes are a normal part of franchising and, to some degree, a necessary part of growth. For these franchisors, the critical element is not that conflicts and disputes exist, but rather how skillfully they are resolved to ensure the best possible result and a stronger franchise relationship. As Carolyn Stock, Sr. Director, Franchise Relations & Ombudsman at Kahala Corporation explains:

"We have learned that good things can actually come from conflict. Conflict can help us discover new paths, can be a catalyst for progress and can actually strengthen relationships. In a healthy organization, there are no problems, no issues and no concerns that cannot be addressed."

This paper will explore the topic of dispute prevention through alternative dispute resolution procedures that emphasize early identification and intervention and will discuss some of the leading in-house early conflict resolution programs that franchise companies are implementing, including mandatory communication procedures, ombudsman programs, franchise advisory councils, and franchise peer review panels.

II. EARLY INTERVENTION PROGRAMS AS A MEANS OF CONFLICT/DISPUTE MANAGEMENT

A. The Value of Strong Working Franchise Relationships to Franchise Systems

A strong working relationship between a franchisor and its franchisees are essential to the strength and vitality of a franchise system. At the same time, strong working relationships are not born out of contracts. Indeed, while written franchise agreements help to shape and define roles and responsibilities, they do not guarantee good relationships between a franchisee and a franchisor.

Franchisors and franchisees with strong working relationships operate on a level above the four corners of their written contracts. They have relationships built on respect, mutual interest, culture and trust. These relationships do not develop overnight. Instead, they require years to build and require a tremendous investment of time and effort on the part of everyone involved. Given their value, strong working relationships are assets, which should not be squandered.
B. **The Opportunities and Nature of Franchise Conflict**

Like other interdependent relationships, franchise relationships present opportunities for conflict. Franchise disputes usually center on one of three things—interests, rights and power. Interests are the underlying reasons for an action or response. They include: (1) substantive interests, which center around money, time and/or materials; (2) procedural interests, which involve how the parties discuss the problem and the way a resolution is implemented; and (3) psychological interests, which center on the emotional needs of the parties.¹

When the underlying interests of parties are unsatisfied or ignored, conflicts can escalate into disputes about: (1) contractual or statutory rights; and (2) economic or political power. Therefore, when conflicts occur, they must be resolved. If left unresolved, they can grow and spread, destroying relationships beyond repair and contaminating other relationships. Left unresolved, conflicts also harm operations and cost money. In short, conflicts are not good for anyone’s business or bottom line.²

While franchise relationships present opportunities for dispute, they also offer incentives to resolve those disputes. A franchisor and its franchisees have a great deal of time, money and effort invested in the franchise system and their respective individual franchise relationships. Those investments are well worth preserving.

C. **The Role of Alternative Dispute Resolution**

While inevitable, franchise conflicts revolving around legitimate interests can be managed and, in most instances, resolved. Unfortunately, conflicts about rights and power do not lend themselves necessarily to easy compromise. Rather, conflicts about rights and power often require the involvement of an arbitrator or a judge to make a win-lose decision. Therefore, the most efficient method of preventing and resolving conflicts is through an interest-based approach delivered before a conflict evolves into a dispute about rights and power. Early alternative dispute resolution (ADR) programs that involve negotiation and mediation, such as mandatory communication procedures, ombudsman programs, franchise advisory councils, and franchise peer review panels, address conflicts in this manner and work toward win-win resolutions.

Whether realized or not, virtually all franchisors are already using some type of ADR process to resolve conflicts within their franchise systems. While routine fact-finding and negotiation are the most widely used, many franchisors use some form of mediation and arbitration as well.³ Alternative dispute resolution programs allow parties to resolve disputes peacefully and early so they can focus on their respective businesses, engage in self-regulation and problem solving, and avoid costly and distracting litigation.

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³ One recent study comparing data from major franchisors over a period of eight years (from 1999-2007) found that 43-45% of franchise agreements contained an arbitration clause. *See* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 71 Hofstra L. R. 71, 75 (2008).
Finally, it is significant to note that while many franchisors have experimented with one form of ADR or another over the years, very few of those same franchisors have decided subsequently to abandon their ADR efforts completely and to use litigation exclusively as their franchise dispute resolution process. Indeed, while franchisors and franchisees may complain from time to time about the deficiencies of any particular ADR technique, no one seems to be abandoning ADR altogether and relying solely on litigation as the tool to resolve conflicts.

III. EARLY CONFLICT RESOLUTION PROGRAMS

ADR programs come in many forms, ranging from informal “open door” policies that encourage franchisees to communicate their concerns to their franchisor’s representatives to formal arbitration indistinguishable from litigation except for the decision maker, who is a private arbitrator chosen by the parties instead of a judge from state or federal court. In between, there are various dispute resolution techniques that allow franchisees to make their concerns known to their franchisors and, where appropriate, to take a dispute through the franchisor’s organizational chain of command.

These early dispute resolution techniques include: (1) mandatory communication procedures, in which methods and lines of communication are purposefully established in order to avoid and resolve potential conflicts as soon as possible; (2) ombudsman programs, in which individuals independent of franchisor management provide confidential help to resolve franchise disputes; (3) franchise advisory boards and councils, in which a body of franchisees, either selected or elected, periodically meet with the franchisor’s management to discuss system-wide issues; and (4) peer review systems, in which a panel of franchisee “peers” participate with franchisor representatives to resolve franchise disputes. A description follows of the various early ADR approaches that may be developed and incorporated within a franchise system or obtained from private, third-party sources. Each technique offers opportunity for keeping issues and potential conflicts within a franchise system and to address and resolve issues and conflicts before they escalate into more formal, adversarial conflict.

A. Mandatory Communication Procedures

1. What are Mandatory Communication Procedures?

The most successful franchisors recognize that good communication leads to good franchisee relations, which leads to more motivated and content franchisees. Of course, motivated and content franchisees tend to have better operational and financial performance, which leads to less conflict and litigation. The most successful franchisors recognize that good communication systems do not happen by chance. Rather, they are the product of careful planning, extensive training and mandated procedures regarding use and content.

Communication and negotiation between two parties is probably the single most common form of dispute resolution in any relationship. Listening to expressions of concern, acknowledging the validity of the concern, and positioning parties to address problems nips potential conflicts and strengthens working relationships.

Franchise relationships are no different. Successful and durable franchise relationships require robust, bilateral communication, which elicits feedback and makes it easy for franchisees to express their concerns. If franchisees believe their franchisor is not listening or acting upon their expressions of concern, they may become disgruntled with the franchisor or disillusioned with the system. Additionally, one-way communication only by the franchisor can
cause a false sense of security for the franchisor. Absent bilateral communication, franchisors may make serious errors of strategy or implementation, or proceed wholly unaware of franchisee concerns that could grow into serious conflict.

Accordingly, a well-planned and effective communication system is widely recognized as essential to a successful franchise system. Indeed, whether by cause or effect, many of the most successful franchise systems also happen to have some of the best franchisee communication systems.

To enhance their communications, the most successful franchisors study their system’s overall communications procedures, including all of their methods and actual forms of recurring and spontaneous communication, and then systematize and mandate their most effective forms and procedures. Some proven effective ways to communicate include: (1) call centers and web based help centers that provide advice and assistance to franchisees with guaranteed response times if the appropriate person is not available; (2) an advisory board that meets several times a year to gather and provide input on the system and new programs; (3) regional business consultants who make periodic visits each year to each franchisee to assist in education and business planning; (4) regional meetings on a periodic basis during each year involving top franchisor management; (5) monthly newsletters for franchisees; (6) an annual franchisee convention; (7) an awards program that benchmarks and provides incentives for desired performance; (8) a robust initial and ongoing training/educational program; (9) internal and external press releases tied to system initiatives and developments; (10) a web based or paper franchise information center for franchisees; and (11) mandatory form written communications that enhance clarity and consistency of approach and message. One of the tools used by McDonald’s USA is a survey of franchisees twice a year with questions about the business and support by the franchisor. These answers are taken very seriously and McDonald’s spends considerable time and expense first taking the survey and then responding to those items that do not receive acceptable survey responses.

2. **Mandatory Communication Procedures Pros and Cons**

When structured and implemented correctly, mandatory communication procedures can be a very successful approach to identifying and resolving disputes, particularly if implemented at an early stage. Successful mandatory communication procedures result in a well-defined system of communication practiced at every level of a franchise organization. The rewards of such a program include: (1) stronger and more durable working relationships with franchisees; (2) more motivated and content franchisees; (3) less tension and conflict, which leads to less relationship damage and litigation; and (4) a more successful and profitable franchise system.

There are no disadvantages to having well-designed and implemented mandatory communication procedures. In contrast, there are many disadvantages to having poorly-designed or implemented communication procedures or no communication procedures at all. The most obvious disadvantage being a higher likelihood of having matters elevated to litigation or arbitration, which can be costly to both the franchisor and the franchisee, but can also impact the overall morale of the franchise system and the other franchisees.

3. **The Attributes of an Effective Communication Program**

An effective mandatory communication program enjoys the total commitment of the franchisor's management and all employees who are responsible for implementing and maintaining the program. The franchisor recognizes that a highly effective communication
program is a necessary part of successful franchise service, which is integral to overall franchise system success. The commitment to a successful communication program is incorporated and executed at all levels of the franchisor, from top management down to the support staff.

In general, a successful mandatory communication program has a developed and comprehensive communication philosophy. The communication philosophy is based on the proven methods of successful franchisors, which include treating franchisees with consistency, respect and as customers of the franchisor. This philosophy is the underlying latticework that forms the foundation of each communication between the franchisor and its representatives, on the one hand, and its franchisees and their representatives, on the other. It also communicates to the franchise community that the franchisor is open to feedback and responsive to it.

4. The Attributes of a Weak Communication Program

A weak communication program is one where the franchisor and its franchisees do not have a good understanding of what each party can expect from the other. In some instances, the franchisor’s communications and requirements are excessively complex and difficult for franchisees to understand. In other instances, the franchisor’s communications and requirements are simplistic and underdeveloped, leaving franchisees anxious and with unanswered questions.

Often times, these programs exhibit unclear and inconsistent communications between the franchisor and its franchisees. Misunderstandings and misinformation due to a lack of reliable or accurate information are common. Improper communications, or a lack of sufficient information, routinely lead to a lack of trust and conflict within the franchise system. A weak program also indicates to franchisees that the franchisor does not ask for or listen to community feedback.

B. Ombudsman Programs

1. What is an Ombudsman?

An ombudsman is a neutral, independent, confidential and informal resource who facilitates and provides recommendations for conflict resolution. An ombudsman or ombuds does not advocate for either the franchisee or the franchisor. Rather, an ombudsman serves as a designated neutral.

Once engaged, the ombudsman may act as an intermediary, providing information and counsel to both franchisees and the franchisor’s senior management as to how they might approach and resolve particular problems. Armed with a mandate from the franchisor’s senior management to identify and become involved in disputes, an ombudsman acts separate and apart from a franchisor’s formal organizational structure and decision-making.4 Although each ombudsman program is slightly different, an ombudsman typically engages in skilled active listening, explores options, resources and strategies, helps to find mutually beneficial solutions using non-legal methods, provides experienced coaching for individuals to resolve the issue in the most constructive and effective manner, gathers facts, attempts to facilitate effective equitable resolutions, and can provide an informal confidential report as appropriate on issues with recommendations. An ombudsman typically has no authority to force settlements or

4 A sample Charter for a Franchise Ombudsman Office is attached as Appendix A.
results, but rather attempts to achieve equitable resolutions by informally facilitating and making recommendations to the disputing parties.

Usually the franchisee makes initial contact to the ombudsman program, but franchisor management may also call upon the services of the ombudsman. While an ombudsman is often a designated employee of the franchisor, an ombudsman is also frequently an external, third-party professional resource.

2. **How Do Ombudsman Programs Work?**

After an ombudsman program is adopted, franchisees are invited by their franchisors to bring forward any complaints or concerns they have with their relationship with their franchisor or its representatives from both a personal and/or system-wide perspective, if not already resolved through other company channels. The majority of contacts to an ombudsman program are from existing franchisees and employees of the franchisor. Depending on the scope of the program, other contacts may come from former franchisees, prospective franchisees, former employees of the franchisor, and current and former employees of franchisees, customers and vendors.

Franchisee complaints are held in confidence unless and until the franchisee's permission is obtained to share the complaint with the franchisor. Franchisors may also approach the ombudsman, although this happens less frequently. The confidentiality issue is a recurring and important one when the decision is made to use an ombudsman program. Generally, an ombudsman should be obligated to keep information the ombudsman receives confidential and should not be called as a witness in a later suit. However, if a serious problem is disclosed during the process, an ombudsman who is an employee may have a conflict and a duty to disclose the information. In order to navigate the confidentiality issues, as well as liability and others that can present, many ombudsmen require the parties' entry into a formal ombudsman agreement as part of the ombudsman's intake procedure. Another strategy is to add confidentiality provisions into the franchise agreement relating to a franchisor's ombudsman program.  

In some instances, the ombudsman process may only involve a discussion with the complaining party and a series of informal coaching sessions. Depending upon the severity of the complaint and the desires of the complaining party, the ombudsman process can also be a more formal engagement, complete with intake procedures and written ombudsman agreements, which address among other things confidentiality, ombudsman liability and other safeguards should litigation or arbitration ultimately ensue. If and when appropriate, the ombudsman could also raise issues proactively on a more system-wide basis, without identifying affected individuals, which can potentially eliminate future conflicts.

The ombudsman process typically includes an objective assessment (versus investigation) of the relevant facts. The ombudsman may interview the affected parties to ascertain the nature and severity of the complaint. Through the interview and assessment process, the ombudsman will evaluate and discuss the dispute, analyze the issues and problems, and explore potential solutions and options to resolve the dispute. With the permission of the complaining party, the ombudsman will contact the other party to discuss the complaining party’s concerns and assist with the resolution of the dispute or conflict from an impartial perspective. When a recommendation issues at the conclusion of the process, the

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5 A sample Ombudsman Confidentiality Agreement is attached as Appendix F.
ombudsman may choose to share the result first with the franchisor in order to obtain the franchisor’s buy-in and allow the franchisor the opportunity to present the proposed resolution to the franchisee.

However, the ombudsman’s role is clearly delineated and limited. For example, an ombudsman will not take sides or act as an advocate for any one party, participate in the franchisor’s management decisions, replace the normal or formal channels of communication within a franchise system, provide legal advice, conduct formal investigations or breach party confidences unless compelled to do so.

A franchise ombudsman typically will prepare a periodic, system-wide analysis of the complaints received during an agreed upon reporting period, the resolutions achieved, and the matters remaining open. The reports, which are delivered periodically in confidence to the franchisor’s management and franchisee advisory council when appropriate, identify the cases received and resolved, as well as trends that have been observed. The reports also may draw conclusions or form recommendations to address any specific or systemic problems. These reports are provided normally on a quarterly and annual basis and individual party confidentiality is maintained.

3. **Ombudsman Program Pros and Cons**

A well-designed and implemented ombudsman program allows a franchisor to protect and enhance its franchise relationships, reduce legal costs and engage in a more predictable form of self-regulation. In particular, a good franchise ombudsman program will: (1) increase the level of integrity and ethics in the dispute resolution system; (2) increase the customer service level of the dispute resolution system; (3) preserve the quality and integrity of franchise relationships; (4) decrease the cost of resolving disputes; (5) provide a strategic advantage to the franchisor (including, more efficient conflict resolutions and an early warning system of conflict themes and issues); (6) connect the franchisee to certain grass root franchisee constituencies; and (7) help the franchisor to bridge multi-cultural differences. In short, a successful ombudsman program preserves relationships and allows franchisors and their franchisees to save money and focus on other things, such as profitability in growing the business.

Franchise relationship issues of virtually every shape and size are suitable for attempted resolution by a skilled franchise ombudsman. Some of the typical issues handled by franchise ombudsman include: (1) interpersonal communication and relationship breakdowns; (2) controversies related to unit-level openings including delayed openings, training issues, and additional or unanticipated costs; (3) controversies related to system changes, including new or changed products and equipment, advertising, and other system changes; (4) opportunities for growth and impact; (5) opportunities and conditions for renewal, including remodel requirements; and (6) transfer and system exit issues, including terms of sale, non-competition and termination. Other issues may include: (i) insurance and contractual indemnification related issues; (ii) accounting and reporting related issues; and (iii) issues relating to the interpretation of agreements.

At the same time, ombudsman programs are not cure-alls and have limitations. An ombudsman program is only as good as the ombudsman who are in it. Ombudsmen who do not enjoy credibility, are not effective listeners and communicators, or lack outstanding analytical skills, will impair individual resolutions and the program’s ultimate success. At the same time, some conflicts are not susceptible to win-win resolutions and ombudsmen cannot
force or require resolutions. As a result, stalemates can and do result, especially where the ombudsman is not highly skilled or does not enjoy credibility with both parties.

4. The Attributes of an Effective Ombudsman Program

Effective ombudsman programs efficiently and effectively identify and resolve individual disputes and trends with non-legal methods, engage in collaborative dispute resolution, provide neutral and independent advice and guidance to all participants, and provide confidentiality. Effective ombudsman programs are consistent in their results and approach. Their processes and results are well documented and understood. Successful ombudsman programs have analytical tools and data at their disposal that allow the ombudsmen to analyze and calibrate the types of cases they are addressing, the results they are achieving across issues and systems, and to report upon results and trends in a timely and effective manner.

A successful ombudsman program is supported by a well-developed structure and adequate resources. It follows the ombudsman standards of practice of confidentiality and informality and has institutional authority pursuant to a franchisor mandate. A sample of the ombudsman standards of practice and an example of standard terms of reference appear in the Appendix.

The franchisor’s senior management must be committed and supportive of the ombudsman program and the process. The ombudsman program is recognized as a cost and relationship saver, not a cost center.

An effective ombudsman program naturally includes one or more skilled ombudsmen, who are active listeners and adept at gathering facts, counseling and negotiation. An effective ombudsman must also be willing to engage in shuttle diplomacy, offer creative solutions and serve as an agent for change. An effective ombudsman enjoys credibility because he or she is able to build relationships and deliver consistent satisfactory results.

One example of a successful ombudsman program is McDonald’s Corporation’s program. The McDonald’s Ombudsman Program was created in 1976. In formulating their thoughts for this paper, the authors had an opportunity to interview Ron Hawkins, a vice president and national ombudsman for McDonald’s USA. A career McDonald’s employee, Ron Hawkins works to resolve issues with franchisees and corporate employees. During our interview, Mr. Hawkins described the position of ombudsman as being an independent, internal third party. Mr. Hawkins believes an ombudsman’s ability to resolve conflicts is based on trust and went on to explain:

“You build credibility by building trust, and you build trust by doing the right thing. It is not who is right, it is what is right. And it is not what is done, but how it is done.”

According to Mr. Hawkins, none of the cases that have been handled by the McDonald’s Ombudsman Program during the last five years have resulted in litigation.

The actual role of the ombudsman must be defined by the franchisor. At least initially, few franchisors will want to employ a true ombudsman in the traditional sense, as that role gives the ombudsman a great deal of influence (versus power) to help resolve (versus decide) issues that are in dispute between the parties. However, one benefit to such a broader role is to give the franchisees confidence that the franchisor is interested in treating the franchisees fairly and
in hearing all of the relevant facts. An ombudsman with a broad mandate (versus power) also has the ability to go to any level in the franchise company to resolve quickly pending issues. After a number of years of experience with an ombudsman, a franchisor may become more comfortable with the ombudsman playing this role.

5. **The Attributes of a Weak Ombudsman Program**

The attributes of a weak ombudsman program include a lack of structure, resources and authority. These shortcomings often emanate directly from a lack of management commitment. Weak ombudsman programs are also inconsistent in their results and approach. Their processes and results are not well documented or understood.

Weak ombudsman programs do not value preserving relationships as much as achieving perceived results. They lack the tools and data necessary to analyze and calibrate properly the types of cases they are addressing and the results they are achieving across issues and systems. Finally, weak ombudsman programs lack credibility due to their inability to build relationships and deliver consistent satisfactory results.

6. **Various Ombudsman Program Models**

Ombudsman programs come in a variety of shapes and sizes, including the International Franchise Association (IFA) and the Canadian Franchise Association (CFA) Ombudsman Program, private legal Ombudsman Programs and in-house Ombudsman Programs. Most franchise ombudsman programs focus their efforts on the franchisor-franchisee relationship. However, ombudsmen may be called upon to handle disputes involving people outside of the direct franchisor-franchisee relationship, including franchisees' employees and customers. Some internal ombudsman also may receive calls from customers of franchisees with specific complaints about events at the franchisee's store. In most instances, the ombudsman explains the independent contractor relationship and encourages the customer to contact the franchisee for resolution. In some instances, the ombudsman may contact local or regional franchisor management to make them aware of the problem so they can coordinate a resolution or response with the franchisee.

Aside from the scope of the ombudsman's jurisdiction, another central differentiating factor among various ombudsman program models is whether the ombudsman is an internal or external resource to the franchise system.

a. **Internal Programs**

Depending on the size of the franchisor and the anticipated frequency of use, a franchisor may decide to develop and implement an internally staffed ombudsman program. For small and mid-sized franchisors, a single individual may fulfill the ombudsman function across the entire system. For larger franchisors, the ombudsman program may include a dedicated office of several, highly skilled and trained ombudsmen. Where the franchisor employs more than one ombudsman, the ombudsmen typically have different areas of geographic or, less frequently, issue specific responsibility. Large franchisors with robust ombudsman programs also may employ a national or director level ombudsman to supervise the regional level ombudsmen and to serve as an additional layer of review and appeal short of litigation or arbitration. In some systems, similarly situated franchisees are identified by the ombudsman and are assigned the task of shadowing and facilitating the process.
There are several potential benefits of an internal ombudsman program. Perhaps the most significant potential benefit is the internal ombudsman’s ability to develop and enjoy an extraordinary level of credibility, trust and knowledge across all system constituencies and issues. The greater the credibility, trust and knowledge that an ombudsman enjoys across constituencies, the better the likely program and individual case results. For mid-sized and large franchisors, an internal ombudsman program is also likely to present decreased operational costs in the long term. Obviously, the operational costs of the program per case will increase as the case volume decreases. Utilizing an internal ombudsman may also eliminate actual and perceived conflicts of interest associated with engaging an external professional hire, including any perception that an external ombudsman might favor the repeat or paying customer. Finally, an internal ombudsman fully understands the franchisor’s system and culture and can respond accordingly.

b. **External Programs**

There are several potential benefits of an external ombudsman program. As an arms length neutral, an external ombudsman enjoys increased independence and perceived credibility. As a result, the external ombudsman may be able to have greater reach and better contact with the affected and disengaged segment of a franchise community. Another significant potential benefit is an external ombudsman may have more experience and technical skill than an underutilized or inexperienced internal ombudsman. The greater the ombudsman’s skill set and experience base, the better the program and individual case results.

Engaging an external ombudsman may also eliminate actual and perceived conflicts of interest associated with a “company” or internal ombudsman. Finally, engaging an external ombudsman may also reduce or eliminate certain perceived litigation risks, including the risk that an internal ombudsman could be forced to testify should litigation ensue.

One of the best ways a franchisor can access an external franchise ombudsman is through the IFA’s or CFA’s Ombudsman Program. The IFA Ombudsman Program is a key component to the IFA self-regulation program, which was established in 2001. The CFA Ombudsman Program followed in 2002. These ombudsman programs are an organization/facilitative model, which is available to both franchisees and franchisors. The ombudsman programs provide free telephonic access to an experienced ombudsman. While these services are free, there is an expectation that large franchise systems looking to adopt a broad ombudsman program will fund their own private label ombudsman program for the majority of their cases. The IFA and CFA Ombudsman Program provide expertise in ombudsmanship, dispute resolution and communication/business strategies in a franchise context, but do not provide legal advice.⁶

C. **Franchisee Advisory Boards and Councils**

1. **What is an Advisory Board?**

A franchisee advisory board or council is another common franchise system communication and dispute prevention method. A franchisee advisory board or council is a body of franchisees, either selected or elected, who periodically meet with the franchisor’s management to discuss system-wide issues, such as policy, operations and finance. They typically do not discuss individual franchisee issues. The franchisee members of the board

⁶A list of these ombudsman resources and others is set forth in Appendix G.
present their ideas and concerns to the franchisor's representatives, and the franchisor's representatives present their plans for future initiatives and programs to the franchisees. Both sides discuss the issues presented with the single goal of improving the overall system and its respective businesses.

The rules and organizational structures for franchisee advisory boards and councils are varied. Franchisee advisory boards and councils range from very formal groups that may have actual advertising or other decision making authority, to very informal groups invited to get together periodically.

Notwithstanding this diversity of structure, a few general observations are available. The franchisor typically exerts some degree of control over the activities of the advisory board. The advisory board typically is created at the suggestion of the franchisor. The franchisor often prepares its governing documents, determines the method for selection of the members and any conditions for membership. After the franchise advisory board is established, the franchisor typically sets the meeting schedule, prepares the agendas and sends out meeting notices and minutes. The franchisor usually participates in all meetings of the franchise advisory board and provides some reimbursement to the committee and its members for related room charges, meals and travel expenses.

Irrespective of structure, a franchisee advisory board is in its essence a communication vehicle that can identify, prevent and resolve disputes. Among other things, the board can provide valuable input and information to the franchisor, while serving as an early warning system and emotional outlet for the system.

One effective way to use an advisory board as an early dispute resolution process is to form subcommittees of the advisory board itself, composed and led by both the franchisor's personnel and franchisees. There should be two team leaders per subcommittee, one franchisee and one person from the franchisor's management team. The subcommittee teams should deal with niche topics that are agreed upon, based on input from both the franchisor and the franchisees. The subcommittee teams then develop recommended solutions for each problem, which are presented to the full council, further refined and then recommended to the franchisor.

2. **How Do Franchise Advisory Boards Work?**

Franchise advisory boards exist to insure that at least some consideration is given to the franchisee constituency. Franchise advisory boards also serve as a means of communicating ideas from franchisees to their franchisor, as well as from the franchisor to its franchisees, on system-wide issues. A franchise advisory board works best when it seeks out and encourages active participation and feedback from all franchisees, opens lines of two-way communication, and helps everyone become successful.

With these goals in mind, there are several factors that should be considered before a franchise advisory board is established or a major change in the board is initiated. These factors include: the criteria for membership and selection or election of participants; whether to prepare minutes or summaries, as well as who should prepare and receive the minutes or summaries; the board's operating rules, including how the issues of interest are identified, communicated and acted upon; the goals or purposes of the board; whether the board has any authority, and if so, the limits of such authority; and who attends meetings as a representative of the franchisor.

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Franchise advisory boards should have formal written by-laws to govern the board’s structure, responsibilities and basic policies. Absent written by-laws, the board is likely to be disorganized, arbitrary, and paralyzed with conflict. A sample set of by-laws appears at the end of this paper in the Appendix.

Franchise advisory boards and their by-laws tend to evolve over time as a franchise system grows and matures. At first, the franchisor may invite a small group of the most successful franchisees to participate. As time passes, franchisees typically begin to elect their own councils either by secret, mail-in ballot or by nomination and election at an annual convention, although many franchisors reserve a considerable degree of input of one variety or another. As the franchise system matures, regional boards or regional representation may be adopted. As the system grows and operations become more complex, standing committees or subcommittees may form to work with the franchisor’s counterparts on issues such as finance, operations, marketing, and service.

Most franchise advisory boards have fixed terms of service, which are usually two to three years. Many do not allow franchisees to serve more than one or two consecutive terms. Most franchise advisory boards tend to stagger the members’ terms so one third to one-half of the members are elected each year. The by-laws usually provide that the board have officer positions to lead the board. The officers typically fill one or two year terms, but may be re-elected after they step down for a corresponding period. Typically, the board members elect the officers in a secret ballot, but sometimes the franchisor has substantial input including direct appointment.

Franchise advisory boards generally meet two to four times per year. The franchisor’s annual franchise convention is usually the site for one meeting, which allows all franchisees to meet with the franchise advisory board to raise and discuss concerns. Where and how other meetings are held varies widely. Some franchisors hold the meetings at resorts while other franchisors prefer the franchisor’s regional or corporate headquarters. The meetings tend to last for all or a portion of two days.

Although some franchisors set-up and then lead their advisory boards for a short time, the franchisor’s representatives at most meetings serve as listeners and occasional presenters. The franchisor will give presentations on new programs and present follow-up reports on previously discussed problems. Of course, the franchisor’s representatives will answer questions and provide informal advice when called upon to do so.

3. **Advisory Board Pros and Cons**

As a franchise system grows, a franchisor should consider establishing an advisory board. At their best, advisory boards can be an effective method to build trust between the various stakeholders in a franchise system. Advisory boards provide access to the franchisor for their constituent franchisees and access to the franchisee community for the franchisor, harness and focus energy, share responsibility, generate input, test and ratify ideas, build relationships, lower barriers and build trust.

Franchisors with advisory boards proclaim to have franchisees who feel more connected to the franchisor, bring less lawsuits, are more engaged in the system’s improvement and refinement, and are more successful and profitable. In short, a good advisory board not only
prevents potential disputes, but encourages the best franchisees to contribute their ideas and energy to help the entire system succeed.

The prevailing view of advisory boards is not uniform. Indeed, advisory board detractors point out that access to a board is typically proportional to the power and privilege of the participants. Critics also point out that advisory boards can foster negative energy, especially when they are allowed to regress into venues for venting frustration, fostering rumors, and assigning blame and fault for system failures and shortcomings.

4. **The Attributes of an Effective Advisory Board**

An effective advisory board builds trust between the participants and the rest of the system's various constituencies. It has a clearly defined purpose and role. An effective advisory board gives honest and realistic input, provides genuine support for the system and its initiatives, builds strong relationships between the various constituencies and members, and produces clear outcomes. It takes ownership of its initiatives and decisions and is not parochial or local in its view of system-wide issues.

An effective advisory board allows the franchisee representatives to do all of the heavy lifting. Franchisor representatives listen carefully, but they do not try to control or dominate the meetings. Franchisor presentations are periodic, brief and focused on particular issues and initiatives.

Legitimate issues tend to bubble up through the advisory board to the franchisor's management team. Parochial concerns and ill-advised ideas tend to be resolved or dismissed by the advisory board without the involvement of the franchisor's management team.

5. **The Attributes of a Weak Advisory Board**

A weak advisory board lacks a clearly defined purpose and role. It can act as a rumor mill and fuels doubt and discontent about the system, the system's direction, and leadership. Rather than providing genuine support and feedback for the system and its initiatives, a weak advisory board erodes trust and goodwill. The board members believe the franchisor does not listen to them. They feel disgruntled and frustrated. A weak advisory board also fails to produce clear outcomes. It does not take ownership of its initiatives and decisions and is parochial in its view of system-wide issues.

D. **Peer Review Panels or Boards**

1. **What is a Peer Review Panel?**

Some franchisors have established voluntary, internal peer review panels or boards in which a panel composed of a number of franchisees and a slightly smaller number of franchisor representatives convenes and reviews franchise system disputes. Properly designed and implemented, peer review panels and boards can be an effective and popular early ADR technique.

2. **How Does a Peer Review Panel Work?**

Typically, there are three to five total representatives on a peer review panel or board. The disputing franchisee and franchisor management representatives make a presentation to
the panel. The panel may have the power to call in witnesses, accept and consider submissions or examine system documents. Upon completion of the initial investigation, the panel will typically conduct a vote upon the dispute, with a simple majority vote carrying the decision. The decision by the peer review panel or board may be binding on both parties or may simply be an advisory recommendation to the franchisor’s management team.

3. **Peer Review Panel Pros and Cons**

   One of the advantages of a peer review panel is it is an appeal process that is believed to be fair to both parties. Franchisees also tend to accept decisions made by their peers more readily than decisions imposed by management. Peer review panels also are credited by many for “keeping the lawyers out of the picture.” Another advantage is the members of the decision-making panel are already familiar with, and have a vested interest in, the franchise system. Proponents of peer review panels also tout the relative low cost as an advantage. Indeed, everyone on a peer review panel is already on an existing payroll, and the time lost is usually comparable to or less than that which would be required for any other form of dispute resolution.

   Naturally, there are also disadvantages to peer review panels. Panels can cause dissension within the ranks of a franchise system. Moreover, the risk of inconsistent results and favoritism is considerable. Peer review panels must be able to realize that just because a franchisee makes a complaint does not mean that a decision of the franchisor is incorrect.

4. **The Attributes of an Effective Peer Review Panel**

   An effective peer review program promotes franchisee participation and fosters good morale across a franchise system. Franchisees do not feel hesitant to use such a program when necessary and, when they do, their experience is quick and cost effective. An effective peer review program allows franchisees to “let off steam” with little downside. The results issued are fair and reasonable. The franchisor’s and franchisee’s representatives on the panel share responsibility for and ownership of each outcome.

5. **The Attributes of a Weak Peer Review Panel**

   A weak peer review program gives its panel too much jurisdiction and authority. A weak program features divided panels that are split along clear franchisor/franchisee lines. The panel’s proceedings are not kept confidential, but rather routinely leak. The panel as a whole fails to take responsibility for and ownership of each outcome. As morale and outcomes suffer, management begins to perceive that the “inmates are running the asylum.”

IV. **DESIGNING AN EARLY CONFLICT RESOLUTION PROGRAM**

   Regardless of its size and industry, developing systems that resolve franchise disputes early should be an important consideration for every franchisor. Compared to litigation or arbitration, early conflict resolution programs are relatively inexpensive and can be successfully utilized at various points during an escalating conflict. Accordingly, every franchisor should at least consider deploying one or more early conflict resolution programs as a means to prevent disputes and preserve relationships and resources.

   In evaluating the array of available early conflict resolution programs, franchisors and their counsel need to consider which of the available methods may be most effective for their
particular system. The type of industry, culture of the system and nature of the disputes most frequently experienced by the franchisor will affect the analysis.

Analyzing the nature of the disputes occurring most frequently in the franchise system is the first step. After this analysis is complete, the franchisor must identify those disputes that lend themselves to early conflict resolution. Next, the franchisor should create an overall alternative dispute resolution framework by pairing each type of identified recurring dispute with at least one possible dispute resolution technique. If the franchisor discovers for example that most franchisee lawsuits could have been avoided with better levels of communication and a better understanding of each party’s expectations, the franchisor should adopt early conflict resolution programs designed to improve the franchisor’s performance in those areas.

Finally, it is important to point out that adopting an early conflict resolution program is not a zero-sum exercise. Indeed, many of the most successful franchise companies in the world have incorporated multiple alternative dispute resolution programs into their systems.

V. IMPLEMENTING AN EARLY CONFLICT RESOLUTION PROGRAM

There are certain principles that are essential in any successful program implementation. No matter the dispute resolution process - whether it is a one-on-one negotiation, group meeting or ombudsman program or in an advisory council or peer review setting - one key to successful implementation is to make sure the participants are prepared. Preparation, including gathering and analyzing all relevant documents, opinions and information, is critical to any successful program.

Another key to successful program implementation is to make sure that the best people are involved in the process. If the goals of an early ADR program are to prevent and resolve conflicts before they turn into disputes about rights and power, then the representatives of each party who will engage in the process must have the necessary mindset and level of authority to match the goals of the process. Personalities, unnecessary emotion, an unwavering win-lose mindset, and a lack of knowledge will jeopardize the outcome of any negotiation. Getting the best people involved may also mean securing the services of an experienced ombudsman, mediator, arbitrator or other neutral.7

Another key to successful program implementation is to make sure that the program and the process are interest, and not rights or power, driven. For any early dispute resolution process to succeed, the parties must know what their respective interests are and must seek a solution based on those interests. To the extent that either party stands on its rights or ability to exert power, the early dispute resolution process will be more likely to fail. Rather, the program and individual process must remain focused on arriving at a win/win resolution in which the problem is resolved with a minimum of harm to the parties’ on-going working relationship.8

Like other systems, early ADR programs benefit from constant improvement, customization and experience. As such, franchisors should engage in a periodic, system-wide analysis of the complaints received and issues raised during an agreed upon reporting period, the resolutions achieved, the methods used to achieve those resolutions, and the matters which

7 Carole Trocchio, Managing Conflicts and Settling Disputes, Chapter 22, IFA Franchise Relations Handbook (1992), pg. 98.
8 Carole Trocchio, Managing Conflicts and Settling Disputes, Chapter 22, IFA Franchise Relations Handbook (1992), pg. 98.
remain open or could not be resolved. Such an analysis will allow the franchisor to improve and further customize its early ADR programs based on its prior experience and results.

VI. WHEN BEST EFFORTS FAIL AND REASONABLE MINDS CONTINUE TO DIFFER

As discussed above, conflicts about rights and power do not necessarily lend themselves to compromise. Rather, conflicts about rights and power may require the involvement of an arbitrator or a judge to make a win-lose decision. When the franchisor’s agreement or system is at risk or trademarks are in jeopardy, litigation or arbitration may be necessary and are the most appropriate avenues for a win-lose type of conflict. Finally, in some situations, the best approach to resolving the conflict may be to terminate the franchise relationship. Even where termination is required, however, it is best to explore the possibility of reaching a mutual understanding about the need and process for the termination with a minimum of conflict.

VII. CONCLUSION

In light of the potentially catastrophic financial and relationship costs of litigation and arbitration, early ADR is definitely worth investigating and, for most franchisors, worth some investment of time and effort to create an ADR system that meets the needs of the particular franchisor and its franchisees. In their efforts to resolve disputes early through ADR and short of litigation or arbitration, franchisors should be aggressive, but fair. The franchisor’s message to its franchisees should be simple and direct—the franchisor wants to solve problems fairly and expeditiously, and short of formal litigation or arbitration. The worst thing that can happen is a return to a court or hearing room, which is exactly where a franchise company is right now if it does not have an early ADR system in place. The other business reality is that franchising is not stagnant. Rather, it is constantly growing and evolving. As such, effectively working through different opinions and disputes as and when they arise is integral to the success of franchise systems. Given the potential financial cost and relationship damage that can occur in litigated disputes, it would appear well worth a franchisor’s time and money to investigate the alternatives.
APPENDIX A

SAMPLE TERMS OF REFERENCE FOR FRANCHISE OMBUDSMAN ROLE

- All Franchisees are invited to bring forward any concerns they have with their working relationship with their Franchisor and/or work environment from both a personal and/or system-wide perspective. All complainants' identities will be held in confidence. If contact is made with the other party, or a step is taken that requires the identification of the complainant, the complainant's permission will be requested in advance of the ombudsman making contact. All complaint material will be held in a confidential and secure location until it is destroyed. Any notes taken are destroyed within 60 days of the complaint being received. Franchisors may also approach the ombudsman.

- Interview Franchisees to ascertain the nature and depth of their complaints. Through the interview process, the ombudsman will: discuss concerns; analyze problems; assist with the prioritization of issues; explore appropriate problem solving channels; assist with generating options to resolve the conflict; and facilitate or mediate conflicts if requested to do so.

- When appropriate to do so and with the permission of the Franchisee, contact Franchisor to discuss Franchisee's concerns and assist with the resolution of the dispute or conflict from an impartial perspective.

- Prepare an analysis of the complaints which are received; identify any trends that emerge; draw conclusions and form recommendations to address any individual and systemic problems which are identified. The ombudsman's annual reports for each organization will be submitted to the xxx executive, respectively, by xxx each year. Interim reports will also be provided, upon request.

Deliverables:

- An experienced, neutral ombudsman who handles all complaints sensitively and effectively, in a timely manner
- Independent, impartial Ombudsman's Office which is not aligned with Franchisors or Franchisees
- Annual report detailing the types of complaints received; the trends observed (if any); and the resulting conclusions and recommendations (if any)

Qualifications:

- Extensive experience in ombudsman role, e.g. all aspects of complaint handling, in-person and telephone interviewing, analyzing material, exploration of options for alternative dispute resolution
- Ability to create trust and confidence; capacity to facilitate, mediate and assist with the resolution of conflicts
- Should follow the Standards and Practices of an Ombudsman Association and should be a member in good standing with an Ombudsman Association, such as the International Ombudsman Association (IOA).
APPENDIX B

SAMPLE CHARTER FOR A
FRANCHISE OMBUDSMAN OFFICE

Note: Each Charter should be customized for the particular organization and, as such, this sample would need to be further developed prior to adoption and implementation.

Establishment of Office: *(Specific to organization, Ombuds details are as follows)*

The Company has created an office, to be known as the Ombuds Office ("Ombuds Office") as an independent, neutral, informal and confidential channel of communication for franchisees, employees of the franchisor and the Company.

The Ombuds Office is designed as an off-the-record and alternate mechanism that supplements, rather than replaces, existing formal channels of communication, mediation, or dispute resolution. It helps those who seek guidance on how to resolve disputes or on how to report misconduct. It helps identify policies, practices, and emerging trends and issues where systemic change is appropriate. To the extent possible while maintaining the confidentiality of communications with inquirers, the Ombuds Office attempts to identify and discuss with appropriate representatives systemic changes that may prevent malfeasance or that may prevent business issues from becoming significant or reoccurring. As such, it helps the Company, Company employees and its franchisees comply with the Company's Code of Conduct and their franchise agreements and helps protect the valuable reputation and good will of the Company and its franchisees and their financial and human resources.

The Ombuds Office also supports the Company's efforts to comply with the highest standards of corporate governance and ethical behavior and to comply with applicable laws and regulations, including the Sarbanes-Oxley Act of 2002 and the United States Organizational Sentencing Guidelines, which require companies to have confidential and anonymous means to report or discuss workplace concerns without fear of retaliation.

Additional details may include references to future expansion such as including licensees, and third party vendors etc. Key to include - The ombudsman program may be terminated only with the consent of the CEO, the franchise advisory council, and the Audit Committee of the Board of Directors.

Standards

The Ombuds Office and its staff shall adhere to the International Ombudsman Association ("IOA") Code of Ethics and Standards of Practice, a copy of which is attached hereto and incorporated by reference in this Charter. These require the Ombuds Office to function independent of management and to be a neutral, confidential, and informal resource. The Ombuds Office shall have the following characteristics:

1. Neutrality and Independence. The Ombuds Office is required to remain neutral and impartial. It is not part of management and shall be free from interference in the legitimate performance of its duties. The Ombuds Office does not make management decisions or policy, does not advocate for either the Company or franchisees, does not adjudicate or arbitrate claims, and does not conduct formal investigations. The Ombuds Office has no authority to
serve as an agent of the Company or any franchisee for receiving notice of any claim. Although the Ombuds Office has been given access to all necessary Company business information necessary to perform its duties, it operates as an independent office and has no other formal role in the Company. To further promote the independence of the Ombuds Office, the Company has entered into a contract with a third party service provider to obtain experienced ombuds to staff the Ombuds Office, rather than have Company employees serve in this capacity.

2. **Confidentiality.** Maintaining the confidentiality of communications with inquirers is critical to the work of the Ombuds Office. Inquirers may also, if they prefer, contact the Ombuds Office anonymously. Confidentiality is protected through statutes that protect the confidentiality of communications made in connection with mediation and alternative dispute resolution processes, by a privilege claimed by the Ombuds Office, and by the terms under which the Company has made the Ombuds Office available to its franchisees and employees of the Company.

   a) Much of the work of the Ombuds Office involves mediation and the alternate dispute resolution techniques. Accordingly, communications with the Ombuds Office are confidential and protected from disclosure by applicable statutes, such as the Uniform Mediation Act, and other similar provisions in applicable jurisdictions.

   b) Consistent with the IOA Code of Ethics and Standards of Practice, the Ombuds Office claims a privilege concerning any confidential communications. Any such privilege is held by the Ombuds Office and cannot be waived by the Company or by any other person.

   c) The Company has created the Ombuds Office as a purely voluntary resource for the Company, employees of the Company and its franchisees with the understanding that communications with the Ombuds Office will remain confidential. The Company agrees that it will not request or seek to compel the Ombuds Office to testify in any legal proceeding concerning confidential communications. The Company further agrees that it will publicize the existence of the Ombuds Office to eligible franchisees and Company employees together with the essential provisions of the confidentiality requirements of the office, including revising the Uniform Franchise Offering Circular as appropriate, internal policies and amending the provisions under which disputes are required to be arbitrated, to inform franchisees and Company employees who use the Ombuds Office that, in so doing, they agree to be bound by these confidentiality provisions and that they may not request or seek to compel the Ombuds Office to testify in any legal proceeding.

   d) The Ombuds Office shall refuse to provide others access to confidential information, including by seeking a protective order or other relief in legal proceedings, unless the protective order or other relief is denied and disclosure is compelled by law.

   e) The only exceptions to confidentiality are when the Ombuds Office determines that is an imminent threat of serious harm or when, in the course of an inquirer’s communications with the Ombuds Office, the Ombuds asks for and is given permission to make a disclosure.

3. **Informality.** The Ombuds Office does not keep notes or permanent records of confidential communications. Any notes taken by the Ombuds Office are routinely destroyed at the conclusion of an inquiry. Permanent records kept by the Ombuds Office include only non-confidential and statistical information. While maintaining confidentiality, the Ombuds Office may provide statistical analyses, reports, or updates to the Company’s business leaders and to the franchise advisory council to identify trends and prevention opportunities.
Reporting Structure *(Specific to organization. Ombuds recommendations as follows)*

The Ombuds Office reports to the Chairman and Chief Executive Officer and has a dotted line reporting relationship to the Audit Committee of the Company's Board of Directors and the franchise advisory council.

Operations *(Specific to organization. Ombuds details are as follows)*

The Ombuds Office is authorized to receive inquiries from either Company representatives, eligible franchisees or Company employees concerning any matter involving their working relationships or the business of the Company, including concerns with the business environment from either an individual or system-wide perspective.

The Ombuds Office will be staffed to permit it to be able to respond to inquiries.

The Company will provide space on its intranet site for materials describing the Ombuds Office and how it may be contacted. In addition, the Company shall prepare other materials such as brochures and bulletins, which inform the franchise system of the existence and role of the Ombuds Office. When appropriate to do so, representatives of the Ombuds Office will attend business meetings and presentations of the Company to discuss the Ombuds Office and to build awareness and understanding of it.

The Company will provide such other assistance as reasonably requested by the Ombuds Office to do its work and to maintain the confidentiality of its communications.
APPENDIX C

The ombudsman subscribes to the following IOA Code of Ethics:

INTERNATIONAL OMBUDSMAN ASSOCIATION

CODE OF ETHICS

PREAMBLE

The IOA is dedicated to excellence in the practice of ombudsman work. The IOA Code of Ethics provides a common set of professional ethical principles to which members adhere in their organizational ombudsman practice.

Based on the traditions and values of ombudsman practice, the Code of Ethics reflects a commitment to promote ethical conduct in the performance of the ombudsman role and to maintain the integrity of the ombudsman profession.

The ombudsman shall be truthful and act with integrity, shall foster respect for all members of the organization he or she serves, and shall promote procedural fairness in the content and administration of those organizations’ practices, processes, and policies.

ETHICAL PRINCIPLES

INDEPENDENCE

The ombudsman is independent in structure, function, and appearance to the highest degree possible within the organization.

NEUTRALITY AND IMPARTIALITY

The ombudsman, as a designated neutral, remains unaligned and impartial. The ombudsman does not engage in any situation which could create a conflict of interest.

CONFIDENTIALITY

The ombudsman holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm.

INFORMALITY

The ombudsman, as an informal resource, does not participate in any formal adjudicative or administrative procedure related to concerns brought to his/her attention.

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Rev. 1/07
APPENDIX D

The ombudsman subscribes to the following IOA Standards of Practice:

INTERNATIONAL OMBUDSMAN ASSOCIATION

STANDARDS OF PRACTICE

PREAMBLE

The IOA Standards of Practice are based upon and derived from the ethical principles stated in the IOA Code of Ethics.

Each ombudsman office should have an organizational Charter or Terms of Reference, approved by senior management, articulating the principles of the ombudsman function in that organization and their consistency with the IOA Standards of Practice.

STANDARDS OF PRACTICE

INDEPENDENCE

1.1 The ombudsman office and the ombudsman are independent from other organizational entities.

1.2 The ombudsman holds no other position within the organization which might compromise independence.

1.3 The ombudsman exercises sole discretion over whether or how to act regarding an individual's concern, a trend or concerns of multiple individuals over time. The ombudsman may also initiate action on a concern identified through the ombudsman' direct observation.

1.4 The ombudsman has access to all information and all individuals in the organization, as permitted by law.

1.5 The ombudsman has authority to select ombudsman office staff and manage ombudsman office budget and operations.

NEUTRALITY AND IMPARTIALITY

2.1 The ombudsman is neutral, impartial, and unaligned.

2.2 The ombudsman strives for impartiality, fairness and objectivity in the treatment of people and the consideration of issues. The ombudsman advocates for fair and equitably administered processes and does not advocate on behalf of any individual within the organization.

2.3 The ombudsman is a designated neutral reporting to the highest possible level of the organization and operating independent of ordinary line and staff structures. The ombudsman should not report to nor be structurally affiliated with any compliance function of the organization.

2.4 The ombudsman serves in no additional role within the organization which would compromise the ombudsman' neutrality. The ombudsman should not be aligned with any formal or
informal associations within the organization in a way that might create actual or perceived conflicts of interest for the ombudsman. The ombudsman should have no personal interest or stake in, and incur no gain or loss from, the outcome of an issue.

2.5 The ombudsman has a responsibility to consider the legitimate concerns and interests of all individuals affected by the matter under consideration.

2.6 The ombudsman helps develop a range of responsible options to resolve problems and facilitate discussion to identify the best options.

CONFIDENTIALITY

3.1 The ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following:

The ombudsman does not disclose confidential communications unless given permission to do so in the course of informal discussions with the ombudsman, and even then at the sole discretion of the ombudsman; the ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the ombudsman office, nor does the ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the ombudsman office, without that individual’s express permission; the ombudsman takes specific action related to an individual’s issue only with the individual’s express permission and only to the extent permitted, unless such action can be taken in a way that safeguards the identity of the individual contacting the ombudsman office. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the ombudsman.

3.2 Communications between the ombudsman and others (made while the ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the ombudsman and the ombudsman office, rather than to any party to an issue. Others cannot waive this privilege.

3.3 The ombudsman does not testify in any formal process inside the organization and resists testifying in any formal process outside of the organization, even if given permission or requested to do so.

3.4 If the ombudsman pursues an issue systemically (e.g., provides feedback on trends, issues, policies and practices) the ombudsman does so in a way that safeguards the identity of individuals.

3.5 The ombudsman keeps no records containing identifying information on behalf of the organization.

3.6 The ombudsman maintains information (e.g., notes, phone messages, appointment calendars) in a secure location and manner, protected from inspection by others (including management), and has a consistent and standard practice for the destruction of such information.

3.7 The ombudsman prepares any data and/or reports in a manner that protects confidentiality.

3.8 Communications made to the ombudsman are not notice to the organization. The ombudsman neither acts as agent for, nor accepts notice on behalf of, the organization and shall not
serve in a position or role that is designated by the organization as a place to receive notice on behalf of the organization. However, the ombudsman may refer individuals to the appropriate place where formal notice can be made.

**INFORMALITY AND OTHER STANDARDS**

4.1 The ombudsman functions on an informal basis by such means as: listening, providing and receiving information, identifying and reframing issues, developing a range of responsible options, and – with permission and at ombudsman discretion – engaging in informal third-party intervention. When possible, the ombudsman helps people develop new ways to solve problems themselves.

4.2 The as an informal and off-the-record resource pursues resolution of concerns and looks into procedural irregularities and/or broader systemic problems when appropriate.

4.3 The ombudsman does not make binding decisions, mandate policies, or formally adjudicate issues for the organization.

4.4 The ombudsman supplements, but does not replace, any formal channels. Use of the ombudsman office is voluntary, and is not a required step in any grievance process or organizational policy.

4.5 The ombudsman does not participate in any formal investigative or adjudicative procedures. Formal investigations should be conducted by others. When a formal investigation is requested, the ombudsman refers individuals to the appropriate offices or individual.

4.6 The ombudsman identifies trends, issues and concerns about policies and procedures, including potential future issues and concerns, without breaching confidentiality or anonymity, and provides recommendations for responsibly addressing them.

4.7 The ombudsman acts in accordance with the IOA Code of Ethics and Standards of Practice, keeps professionally current by pursuing continuing education, and provides opportunities for staff to pursue professional training.

4.8 The ombudsman endeavors to be worthy of the trust placed in the ombudsman office.

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APPENDIX E

INTERNATIONAL OMBUDSMAN ASSOCIATION

BEST PRACTICES

A SUPPLEMENT TO IOA'S STANDARDS OF PRACTICE¹

Version 2, March 31, 2008

The Best Practices guide is intended to provide guidance to Organizational Ombudsmen² in practicing according to IOA Standards of Practice to the highest level of professionalism possible. Any questions or suggested revisions are welcome and should be sent to the Chair of the Professional Ethics, Standards, and Best Practices Committee.

PREAMBLE

The IOA Standards of Practice are based upon and derived from the ethical principles stated in the IOA Code of Ethics.

Each ombudsman office should have an organizational Charter or Terms of Reference, approved by senior management, articulating the principles of the ombudsman function in that organization and their consistency with the IOA Standards of Practice.

Before implementing an Ombudsman Program, an organization should educate all affected constituencies about the nature and scope of the program, including the role of the ombudsman within the organization and the Standards of Practice that will govern the activities of the office. Each entity that establishes an organizational ombudsman office should make certain that the office has a Charter that ensures that the ombudsman will function according to the Standards of Practices and the core values of independence, impartiality/neutrality, confidentiality, and informality. These Standards of Practice will govern the way in which the ombudsman receives complaints, works to resolve issues, and makes recommendations for the general improvement of the organization. The Charter should also specify the ombudsman’s scope of practice, limitations on ombudsman authority, and qualifications to be an ombudsman. IOA asserts that communications with an ombudsman are confidential and strives to protect confidentiality for all protected communications. One basis for protecting confidentiality is a claim of privilege. The law on this issue is still evolving and the determination of whether such a privilege is applicable is made by courts on a case-by-case basis since there is no statute creating such a privilege. In addition, ombudsman offices have been able to protect the confidentiality of communications where program materials adequately state that people who use the office agree to abide by expressed confidentiality principles or where statutes dealing with alternative dispute resolution or mediation are applicable to ombudsman communications.

¹ IOA Standards of Practice are indicated by text boxes; recommended Best Practices follow each text box. IOA Code of Ethics, Standards of Practice, and Best Practices are designed to guide "Organizational Ombudsmen" as distinguished from "Classical", "Advocate", "Executive" or other types of Ombudsmen.

² The term Ombudsman is used to communicate to the widest possible community and is not intended to discourage others from using alternatives. IOA respectfully acknowledges that many practitioners use alternative forms of this word.
STANDARDS OF PRACTICE

INDEPENDENCE

1.1 The ombudsman office and the ombudsman are independent from other organizational entities.

The director of the ombudsman office should report directly to the highest level of the organization (such as board of directors, CEO, agency head, etc.) in a manner independent of ordinary line and staff functions.

The director of the ombudsman office should have terms of employment that indicate that his or her stature in the organization is not subordinate to senior officials. The ombudsman should be able to function independently from control, limitation, or interference imposed by any official in the entity. The ombudsman should be protected from retaliation (such as of elimination of the office or the ombudsman, or reduction of the ombudsman budget or other resources) by any person who may be the subject of a complaint or inquiry. The ombudsman should have a set and renewable term, or should be removable only for neglect of duty, misconduct, or medical incapacity, and only by means of a fair process and procedure. The ombudsman should obtain assurance from the organization at the outset, and apart from any particular dispute, of access to outside legal counsel at his or her own discretion. The expense of outside counsel should be covered by the organization and included in the overall budget for the ombudsman office. The ombudsman should have an understanding with the organization that the ombudsman is not required to inform the organization when it communicates with or accesses outside counsel. The purpose of outside legal counsel should be to enhance the ombudsman’s ability to practice according to the Standards of Practice. The ombudsman should consider how outside counsel may assist in a variety of situations, including when the entity and the ombudsman need to strategize how best to handle a discovery request made of the ombudsman, or when the ombudsman and the entity could benefit from consultation with outside counsel regarding how best to establish and operate the office so as to ensure the integrity of function, and to protect the ombudsman.

1.2 The ombudsman holds no other position within the organization which might compromise independence. See Sections 2.3 and 2.4.

1.3 The ombudsman exercises sole discretion over whether or how to act regarding an individual’s concern, a trend or concerns of multiple individuals over time. The ombudsman may also initiate action on a concern identified through the ombudsman’s direct observation. The ombudsman should bring to the attention of the appropriate office those policies, programs, procedures or practices which may be problematic for the organization or which negatively affect people’s health, safety or rights. The ombudsman should issue periodic reports summarizing activities, problem areas identified, and recommendations for systemic change. Ombudsman office materials (websites, brochures, etc.) should state that all such reporting is conducted in a manner that protects the identity of individuals and does not place the organization on notice.

1.4 The ombudsman has access to all information and all individuals in the organization, as permitted by law.
1.5 The ombudsman has authority to select ombudsman office staff and manage ombudsman office budget and operations. The ombudsman office must be provided with sufficient resources to operate an independent and effective program. These resources include adequate space, equipment, staffing, staff development, and the production and distribution of informational materials. The independence of the ombudsman office may be supported by having the selection and evaluation of the ombudsman, as well as the establishment of an appropriate level of funding, be determined by or in consultation with committees representative of various institutional constituencies.

NEUTRALITY AND IMPARTIALITY

2.1 The ombudsman is neutral, impartial, and unaligned. See Section 1.2.

2.2 The ombudsman strives for impartiality, fairness and objectivity in the treatment of people and the consideration of issues. The ombudsman advocates for fair and equitably administered processes and does not advocate on behalf of any individual within the organization. All members of the specified community served by the ombudsman may voluntarily seek services from the ombudsman office and will be treated with respect and dignity. The ombudsman should assure access impartially, including to people with disabilities, people who need language interpreters, or people whose work hours require flexibility in scheduling appointment times. The organization should assure that all specified members of the organization have the right to consult with the ombudsman, and retaliation for exercising that right will not be tolerated.

2.3 The ombudsman is a designated neutral reporting to the highest possible level of the organization and operating independently of ordinary line and staff structures. The ombudsman should not report to nor be structurally affiliated with any compliance function of the organization. The ombudsman should have direct access to the board of directors (or other oversight body as appropriate). See Sections 1.1 and 1.2. While the ombudsman should be an internal position, it should not report to, nor have the appearance of reporting to, any compliance office or function or the organization. The Charter or Terms of Reference for the ombudsman office should state specifically that the ombudsman does not serve as an agent of notice for the organization.

2.4 The ombudsman serves in no additional role within the organization which would compromise the ombudsman’s neutrality. The ombudsman should not be aligned with any formal or informal associations within the organization in a way that might create actual or perceived conflicts of interest for the ombudsman. The ombudsman should have no personal interest or stake in, and incur no gain or loss from, the outcome of an issue. See Sections 1.2, 4.4, and 4.5. Except in the administrative capacity as manager of the ombudsman office, the ombudsman should not participate in formal management functions or serve in any other role that poses an actual conflict of interest or creates the perception of one. For example, an ombudsman ought not conduct formal investigations; serve in a position or role that is designated by the organization as a place to receive notice on behalf of the organization; serve as a voting member on a search committee (other than for ombudsman staff); handle formal appeals of management actions; keep case records on behalf of the organization; or be charged in any way to make, change, enforce or set aside a law, rule or management decision. If possible, the ombudsman should hold only one position in the organization. If the ombudsman does hold another role within the organization, the different roles should be structured so that they are as separate and distinct as possible.
The ombudsman should not provide ombudsman services to people whom the ombudsman -- in the other role -- serves, manages, reports to, teaches, advises, or evaluates, in order to avoid partiality or perceptions of conflict of interest. The ombudsman should provide ombudsman services in a location that is different from the location in which the ombudsman, in the other role, works, teaches, counsels, etc., to clarify the distinctions between roles, and to assure confidentiality and off-the-record informality of the ombudsman communications. The ombudsman’s support staff (people who take messages or receive visitors, for example) for the ombudsman role should be separate and distinct from the support staff in any other role. The ombudsman should continually call attention to the role in which he or she is acting at any given time, and repeatedly educate members of the organization about the principles in the ombudsman office’s Charter. The ombudsman should attempt to provide alternatives for people and situations in which the ombudsman cannot serve as ombudsman due to actual or perceived conflicts of interest.

2.5 The ombudsman has a responsibility to consider the legitimate concerns and interests of all individuals affected by the matter under consideration.

2.6 The ombudsman helps develop a range of responsible options to resolve problems and facilitate discussion to identify the best options.

An ombudsman should help the visitor explore and assess an appropriate range of options, from the very informal to the most formal. Formal options may include ways to put management on notice of an issue, referrals to rights-based elements of the organization’s conflict resolution system, or the provision of information about the possibility of seeking external resources or assistance. The ombudsman should never provide legal advice. When the ombudsman works with the visitor to address issues that may involve formal alternatives (under laws, policies, rules, or regulations), the ombudsman should make clear to the visitor that an informal approach does not automatically exclude the visitor’s later participation in more formal options, but that the visitor should keep in mind possible time limits and their potential impact on the visitor’s formal options. See Section 4.4. The impartiality of the ombudsman office may be supported by consultation with various organizational constituencies regarding the ombudsman office’s effectiveness.

CONFIDENTIALITY

3.1 The ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following: The ombudsman does not disclose confidential communications unless given permission to do so in the course of informal discussions with the ombudsman, and even then at the sole discretion of the ombudsman; the ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the ombudsman office, nor does the ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the ombudsman office, without that individual’s express permission; the ombudsman takes specific action related to an individual’s issue only with the individual’s express permission and only to the extent permitted, unless such action can be taken in a way that safeguards the identity of the individual contacting the ombudsman office. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the ombudsman. The ombudsman publicizes the confidential nature of ombudsman work. The ombudsman office should be situated in an appropriate location to protect the privacy of visitors.
to the office. When an individual gives the ombudsman permission to reveal his or her identity, disclose information, or act on his or her concerns, such permission must be given at the time that the ombudsman is engaged in the informal conflict resolution process, not as part of a formal process. The ombudsman office Charter for each organization should specify what types of events rise to the level of “imminent risk of serious harm.” The ombudsman may negotiate with the organization to be exempt, based on ombudsman confidentiality, from some mandates that require reporting by other employees. Best practice is to interpret “imminent risk of serious harm” as narrowly as possible – for example, imminent risk to human life.

3.2 Communications between the ombudsman and others (made while the ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the ombudsman and the ombudsman office, rather than to any party to an issue. Others cannot waive this privilege. The confidentiality privilege is critical to making the ombudsman office a place where people can raise any issue, including an alleged violation of statute, regulation, rule, policy, or ethical standard. IOA asserts that communications made to the ombudsman do not constitute “notice” to the organization. No one, including the employing entity, should consider the ombudsman office to be agent of notice (that is, an office that receives formal notice on behalf of the organization) and no one, including the entity, should seek information about communications to the ombudsman office. The nature and role of confidentiality should be explained to the visitor, who should understand that the ombudsman claims the privilege for the office and that it is not the visitor’s privilege to waive. Whenever possible, this information should be communicated prior to discussing the concerns brought by the visitor. Visitors should understand that as a condition for accepting and benefiting from the ombudsman office services, they have the obligation to support the ombudsman claim of privilege and not to attempt to breach this claim.

The ombudsman should emphasize in office materials and with the management of the organization:

- that the ability to have confidential communications that do not constitute “notice” to the organization is essential to the effective functioning of an ombudsman office and distinguishes the ombudsman from formal reporting channels;
- that it is the “off-the-record” aspects of the office that lead people who use the ombudsman to do so before taking any official or formal action;
- that the ombudsman office enables people to come forward with an issue when they might otherwise be afraid to do so or when they fear retaliation from managers or peers;
- that only by offering the security of confidentiality can the ombudsman facilitate organizational responsibility and accountability, which are at the heart of provisions contained in the U.S. Sentencing Guidelines and the Sarbanes-Oxley Act that call for mechanisms of confidential reporting and/or guidance;
- that where issues cannot be confidentially raised, they may not be raised at all, thereby depriving the organization of an opportunity to address issues and rectify misconduct that has not yet surfaced through other channels.

3.3 The ombudsman does not testify in any formal process inside the organization and resists testifying in any formal process outside of the organization, even if given permission or requested to do so. The IOA Board has asked the IOA Standing Committee on Professional Ethics, Standards, and Best Practices to review the language and interpretation of 3.3. Please look for updates in the near future. See Section 4 on informality.
3.4 If the ombudsman pursues an issue systemically (e.g., provides feedback on trends, issues, policies and practices) the ombudsman does so in a way that safeguards the identity of individuals. Ombudsman materials should state that any ombudsman reporting of trends, or communication of recommendations for systemic change, is done in a manner that protects the identity of individuals.

3.5 The ombudsman keeps no records containing identifying information on behalf of the organization.

3.6 The ombudsman maintains information (e.g., notes, phone messages, appointment calendars) in a secure location and manner, protected from inspection by others (including management), and has a consistent and standard practice for the destruction of such information. The ombudsman record-keeping systems and/or database should be independent of the organization’s technology system, with access allowed only to ombudsman office personnel. The ombudsman office should also be secure to protect private information and records. The office should develop and implement processes and procedures to regularly purge information that could identify individual visitors to the office. Records such as phone bills, which may indicate with whom the office has communicated, should be made available only to the ombudsman office staff. The ombudsman should take all reasonable steps to protect the confidentiality of any temporary notes or documents, such as locking file drawers and offices, and exercising extreme vigilance if any notes are carried from one place to another.

3.7 The ombudsman prepares any data and/or reports in a manner that protects confidentiality.

3.8 Communications made to the ombudsman are not notice to the organization. The ombudsman neither acts as agent for, nor accepts notice on behalf of, the organization and shall not serve in a position or role that is designated by the organization as a place to receive notice on behalf of the organization. However, the ombudsman may refer individuals to the appropriate place where formal notice can be made. Except in the administrative capacity as manager of the ombudsman office, the ombudsman is never an agent of notice (that is, an officer who receives notice for the organization), and communications to the ombudsman office never constitute notice to the organization. If a visitor wishes to make a record, or put the organization “on notice,” the ombudsman can provide information about how to do so. Best practice is for the organization to receive allegations of wrongdoing directly from a complainant or witness, and not indirectly through the ombudsman. If the visitor is reluctant to make a formal report to the organization, the ombudsman can work with the visitor to address the reasons the visitor resists reporting, or to work with the organization to make formal reporting channels more accessible. If the visitor gives the ombudsman permission to discuss a concern with a manager, and if the concern may involve some allegation of wrongdoing, the ombudsman should pass on information only in general terms (without specifying names, dates, or events). If the ombudsman does pass on allegations of wrongdoing, the ombudsman should emphasize the he or she has not confirmed the accuracy of the allegations. It is not appropriate for the organization to take any adverse action on the basis of information reported informally through the ombudsman. The ombudsman may coach the manager on how to make reporting channels more accessible or how to gather information himself or herself. An ombudsman may place the organization on “notice” when the ombudsman evaluates the circumstances and specifically elects to place the organization on notice by identifying an appropriate point of contact within the organization and communicating to that point of contact specific information which the ombudsman expressly intends to share for the purpose of placing the organization on notice of a specific concern or specific situation. If an ombudsman makes such an intentional notice
communication, confidentiality is waived only with regard to the specific communication made with the point of contact for purposes of the notice communication. It is the conversation between the ombudsman and the appropriate point of contact within the organization that constitutes notice and not the conversation between the ombudsman and the visitor. Thus, under no circumstances, is the original communication to the ombudsman part of the notice communication. All ombudsman offices should have a well-defined and generally available procedure detailing the limited circumstances and the processes under which the ombudsman may provide notice. If the ombudsman elects to place the organization on notice under the conditions above, the ombudsman should follow the protocol of the particular ombudsman office regarding this unusual action. The protocols should include specific steps so that is clear that the ombudsman made an intentional decision to make a notice disclosure.

INFORMALITY AND OTHER STANDARDS

4.1 The ombudsman functions on an informal basis by such means as: listening, providing and receiving information, identifying and reframing issues, developing a range of responsible options, and – with permission and at ombudsman discretion – engaging in informal third-party intervention. When possible, the ombudsman helps people develop new ways to solve problems themselves.

The ombudsman should work with the organization to encourage it to provide its constituents with a variety of effective formal (rights-based) and informal (confidential and interest-based) options for surfacing and resolving concerns. All options should be well established and clearly and regularly communicated to the entire organization. As the visitor may wish to consult with additional resources and services, such as the employee assistance program, human resources, or the benefits office, the ombudsman should describe resources that might be appropriate to the visitor’s presenting circumstances. See Section 2.6

The ombudsman may consider issues, perceptions, interpretations, information, and concerns about inappropriate acts, omissions, or improprieties presented by individuals or groups. Ombudsman functions include informal third-party intervention, such as shuttle diplomacy, facilitating communication, and informal mediation, which is voluntary and may or may not produce a written agreement. Any documents or written agreements resulting from informal processes should not be maintained by or within the ombudsman office. The ombudsman uses a flexible approach with regard to concerns brought to the ombudsman office; options are tailored to individual circumstances.

4.2 The ombudsman as an informal and off-the-record resource pursues resolution of concerns and looks into procedural irregularities and/or broader systemic problems when appropriate.

4.3 The ombudsman does not make binding decisions, mandate policies, or formally adjudicate issues for the organization. The ombudsman should not participate in formal management functions. See Section 2.4.

4.4 The ombudsman supplements, but does not replace, any formal channels. Use of the ombudsman office is voluntary, and is not a required step in any grievance process or organizational policy. For most entities, it is the combination of informal services and formal grievance procedures, embodied in a conflict management system, that provides the appropriate range of options to allow for early identification and resolution of potential legal
issues or concerns. The ombudsman should give visitors information about the entity's formal procedures and remedies whenever appropriate. While a visitor may choose to explore informal options for a wide variety of reasons, the ombudsman should remind the visitor to keep in mind possible time limits and their potential impact on the visitor's formal options. See Section 2.6. The Ombudsman Charter or Terms of Reference should define the role, if any, of the ombudsman in relation to employees and issues covered by collective bargaining agreements (CBAs). This role definition should also, where possible, be incorporated in CBAs, and should include a statement that although the CBA permits the ombudsman to function in these defined ways, the ombudsman nevertheless retains the authority to decline to be involved. (See Section 1.3.) The union and management may also enter into an ad hoc agreement permitting an ombudsman to handle an issue.

4.5 The ombudsman does not participate in any formal investigative or adjudicative procedures. Formal investigations should be conducted by others. When a formal investigation is requested, the ombudsman refers individuals to the appropriate offices or individual. The visitor may have important legal rights related to the visitor's issue, and important time limits and other factors may be involved. The Ombudsman Program is not a substitute for a lawyer or other professional who might represent the visitor's rights. The ombudsman should never provide legal advice, but should make the visitor aware of the possible option of seeking legal advice. When the ombudsman works with the visitor to address issues that may involve formal alternatives (under laws, rules, policies, or regulations), it should be made clear to the visitor that an informal approach does not automatically exclude the visitor's later participation in more formal options. The ombudsman should remind the visitor to keep in mind possible time limits and their potential impact on the visitor's formal options. See Section 2.6. If an individual who has initiated a formal process wishes to return to informal resolution, it should be clarified that the formal process is suspended, or that the issues to be resolved informally are distinct and separate from those that are being addressed through the formal process.

4.6 The ombudsman identifies trends, issues and concerns about policies and procedures, including potential future issues and concerns, without breaching confidentiality or anonymity, and provides recommendations for responsibly addressing them. The ombudsman should be particularly careful to maintain neutrality when making recommendations for system change.

4.7 The ombudsman acts in accordance with the IOA Code of Ethics and Standards of Practice, keeps professionally current by pursuing continuing education, and provides opportunities for staff to pursue professional training.

4.8 The ombudsman endeavors to be worthy of the trust placed in the ombudsman office.

www.ombudsassociation.org
February 19, 2008
APPENDIX F

SAMPLE OMBUDSMAN CONFIDENTIALITY AGREEMENT

You requested the Franchise Ombudsman's assistance in resolving your concerns. The Franchise Ombudsman process is voluntary. It provides a means to discuss unresolved concerns and is an opportunity for open communication within a confidential process.

All communication (letters, documents, conversations etc.) within the ombudsman process must be kept confidential and cannot be disclosed outside of the ombudsman process or in any legal proceedings. All communication in the ombudsman process will be conducted with a view to resolving the issues raised, without prejudice to any rights or remedies, which you may have now or may acquire in the future should resolution not be possible. The parties agree that any information obtained during the ombudsman process, including but not limited to statements made during negotiations and/or offers to settle are confidential and, will not be introduced in any court or dispute resolution proceedings. You will not ask the Franchise Ombudsman to testify in legal proceedings, if any.

In the event that the parties wish to formalize in writing any agreement reached, whether during the ombudsman process or otherwise, the parties understand that such a written agreement is made outside the ombudsman process and without the ombudsman office's assistance. The ombudsman process is an ADR process and as such is covered by ADR statutes under appropriate provincial and/or federal legislation.

For purposes of accountability, statistics are kept which will include your case. No identifying information will be included in the statistical report.

You are asked to acknowledge your understanding of and agreement to the foregoing by signing and returning a copy of this document so that we may proceed. Please seek independent advice, as you deem appropriate before signing the letter.

Agreed: ________________________________ ________________________________
(Signature) (Print Name)

Date: ________________________________
APPENDIX G

OMBUDSMAN RESOURCES

1. IFA (International Franchise Association) Ombudsman Program:
   Web Site: www.ifaresolve.com
   Telephone Contact Info: 1-888-452-0303

2. CFA (Canadian Franchise Association) Ombudsman Program:
   Web Site: www.cfa.ca
   Telephone Contact Info: 1-866-443-8255

3. IOA (International Ombudsman Association):
   Web Site: www.ombudsassociation.org
   Telephone Contact Info: 1-908-359-0246

4. FCO (Forum for Canadian Ombudsman Association):
   Web Site: www.ombudsmanforum.ca
   Email Contact Info: questions@ombudsmanforum.ca
APPENDIX H

MODEL FRANCHISEE ADVISORY BOARD

ORGANIZATIONAL STRUCTURE

Number of Members:  Varies from five to 24, usually five to 11. Often reflects regional structure.

Membership:  Successful, committed franchisees, master franchisees or distributors.

Selection:  Nomination and election by other franchisees.

Term:  Staggered three-year or five-year terms.

Meetings:  Two or three meetings per year, two to three days each.

Officers:  Chairman, vice-chairman, secretary.

Typical Subcommittees:
  Marketing/advertising
  Operations
  Technical Support
  Finance
APPENDIX I

MODEL FRANCHISOR

EXECUTIVE ADVERTISING/ADVISORY COUNCIL BY-LAWS

I. Purpose

A. The Franchise Executive Advertising/Advisory Council is designed to provide Franchisor with a regular forum to hear advice and counsel from the field, offer guidance on advertising development, general publicity and to provide franchisees with recognized leaders to whom they can turn for advice.

B. The Council will review the Ad Fund and propose new advertising materials.

C. The format of this Council is to advise and offer direction to the Franchisor. The Council is not a policy making board, but can recommend as to policy decisions.

II. Qualifications

A. Candidates for the Executive Advertising/Advisory Council of the Franchisor must be franchise owners who have been in business for at least 18 months and are in good standing with the Franchisor. Members must remain in good standing with the Franchisor during their term on the Council.

III. Applications

A. Persons interested in service of the Executive Advertising/Advisory Council should request consideration for membership in writing. The letter of application should include a brief resume of the applicant’s reasons for wanting to serve and a statement of what they believe they can contribute. All letters will be received by the Franchisor staff coordinator of the Executive Advertising/Advisory Council.

B. The Franchisor can appoint and/or select members without written application.

IV. Selection

A. Selection will be made from among the applicants by a committee consisting of two members of the Franchisor and the Chairman of the Council. Selections will be made once per year prior to the Franchisor’s Annual Meeting.

V. Term

A. Members of the Council will normally serve a term of three years with one-third of the members rotating off each year. Upon completion of term, a member must remain off the Council for one year before being selected to serve a subsequent term.
VI. Number

A. The number of members of the Council will be nine.

VII. Meetings

A. The members of the Executive Advertising/Advisory Council plus the Vice President of the Franchisor will constitute the Franchise Executive Advertising/Advisory Council. The Council will meet twice per year. One meeting of the Council will be held in conjunction with the Franchisor Annual Meeting. One other meeting per year will be called by the Franchisor and the Chairman of the Council.

VIII. Duties

A. Members of the Executive Advertising/Advisory Council must agree to participate in the meetings of the Council. Members may preside at regional seminars, should they be held within his or her region, and participate in the Annual Meeting. Members should be able to answer questions, offer advice and generally serve as an ear for franchisees in the field.

B. Members will be asked to welcome new franchisees.

C. Only members in attendance at the meetings may vote.

IX. Expenses

A. The Franchisor will reimburse members for reasonable expenses incurred in the course of the performance of any duties requested beyond attendance at the regularly scheduled meetings. A per diem allowance or other allowance may be provided to help defray the costs of attending these meetings.

X. Officers

A. The members of the council will select from among its members, a Chairman. The Chairman will be selected by a majority of the members attending in a secret ballot. The selection of the Chairman will take place at the Winter Meeting.

XI. Duties of the Officers

A. The Chairman of the Council will preside at the meetings and consult with the Franchisor regarding the agenda for meetings and progress of projects. At the time of the Annual Meeting, the Chairman will present a report of the activities and deliberations of the Council. The Chairman will serve a one year term and may be re-elected after a year’s absence as Chairman.

B. The Vice Chairman will fill in for the Chairman in the event that the Chairman is unable to perform his/her duties.
DEAN T. FOURSARIS

Dean T. Fournaris is a franchise and distribution lawyer who has represented public and private franchisors, licensors, manufacturers, pharmaceutical companies, distributors and developers in matters across the country. A member of Wiggin and Dana LLP’s Franchise and Distribution Practice Group, Mr. Fournaris focuses his practice on developing, structuring and maintaining franchise and distribution networks, transactions and contracts involving franchise and distribution systems, and other related regulatory and transactional matters. In his practice, Mr. Fournaris regularly advises franchise and distribution system clients in connection with all aspects of their franchisee-distributor, customer, supplier and competitor relationships. Mr. Fournaris has also prosecuted and defended cases, including injunction actions, before state and federal courts and arbitration panels on behalf of franchisors, manufacturers and distributors. Mr. Fournaris is recognized by "Best Lawyers in America" for Franchise Law, by Franchise Times on its list of the top 100 U.S. franchise lawyers, and by Philadelphia Magazine as a franchise "Super Lawyer." Mr. Fournaris is a graduate of Franklin and Marshall College (B.A., 1988) and Cornell Law School (J.D., 1991).
SHERIN SAKR

Sherin Sakr was born in Cairo, Egypt, and lived in Germany and Puerto Rico before settling in the United States. She is fluent in Arabic, German, Spanish and English. She received her B.S. from the University of Cincinnati in 1996. She obtained her JD and LLM in Taxation from the University of Denver in 1999 and 2001, respectively. Before leaving Denver, she worked for the regional law firm of Snell & Wilmer LLP, during which time she assisted in the drafting of disclosure documents and franchise agreements for Cold Stone Creamery's development into Taiwan, China and South Korea. Immediately prior to joining Kahala Corp, she was a Senior in the International Tax Services group of Ernst & Young LLP in Irvine, CA. As Associate Counsel of International for Kahala Corp, Ms. Sakr drafts and negotiates international franchise agreements, manages the international trademark portfolio for all 13 brands franchised by Kahala Corp, and prosecutes trademark infringers around the globe.
SUE VANDITTELLI

Sue Vanditelli, International (IFA) and Canadian (CFA) Franchise Ombudsman for franchisees and franchisors throughout Canada and the United States has over 25 years of business and dispute resolution experience. The IFA Ombudsman program has successfully been in place since 2001 and the CFA program since 2002.

Ms. Vanditelli has been the current Ombudsman since 2004 and has been responsible for 5 Ombuds programs in the past 15 years. Sue also regularly consults for other Ombuds programs and other ADR programs such as mediation, executive coaching, conflict assessment etc. She has consulted with organizations such as 7-Eleven Inc., Air Canada, Bell Canada etc.

Sue has successfully worked through thousands of Ombuds requests and is recognized for diffusing difficult and complex situations by providing a calming influence and maintaining a fully objective approach. Known for her business acumen and, strategic ability to work with clients to develop creative solutions resulting in practical solutions and repaired or enhanced franchise relationships.

Ms. Vanditelli is an active member of the: The Ombudsman Association (IOA); The Forum for Canadian Ombudsman (FCO); The Ontario Bar Association (ADR Section); The Arbitration and the Mediation Institute of Ontario Inc. (ADR Ontario) and; The Toronto Board of Trade.

Sue has a degree in Business from York University (Toronto) and has successfully completed Ombuds Training, several intensive levels of Mediation Training, a Civil Justice Course from the University of Windsor Law School & Stitt Feld Handy ADR Ltd, and a Certificate for Mediating when a Party has a Psychiatric Disability from the City University of New York.