

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
SECTION OF DISPUTE RESOLUTION
SECTION OF BUSINESS LAW
SECTION OF STATE AND LOCAL GOVERNMENT LAW
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION
SENIOR LAWYERS DIVISION
COMMISSION ON THE LEGAL PROBLEMS OF THE ELDERLY
NATIONAL CONFERENCE OF ADMINISTRATIVE LAW JUDGES
STANDING COMMITTEE ON ENVIRONMENTAL LAW

RECOMMENDATION*

RESOLVED, that the American Bar Association supports the greater use of “ombuds” to receive, review, and resolve complaints involving public and private entities.

FURTHER RESOLVED, that the American Bar Association endorses the Standards for the Establishment and Operation of Ombuds Offices dated August 2001.

*The “Recommendation” and the “Standards,” but not the attached “Report,” constitute official ABA policy.

STANDARDS¹ FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES

PREAMBLE

Ombuds² receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations.

Federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities have established ombuds offices, but with enormous variation in their duties and structures. Ombuds offices so established may be placed in several categories: A Classical Ombuds operates in the public sector addressing issues raised by the general public or internally, usually concerning the actions or policies of government entities or individuals. An Organizational Ombuds may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies. Both types may conduct inquiries or investigations and suggest modifications in policies or procedures. An Advocate Ombuds may be located in either the public or private sector and like the others evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombuds office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. These standards were developed to provide advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

The essential characteristics of an ombuds are:

- independence

¹ These standards expand on a 1969 ABA resolution to address independence, impartiality, and confidentiality as essential characteristics of ombuds who serve internal constituents, ombuds in the private sector, and ombuds who also serve as advocates for designated populations.

² The term ombuds in this report is intended to encompass all other forms of the word, such as ombudsperson, ombuds officer, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage others from using other terms.

- impartiality in conducting inquiries and investigations, and
- confidentiality.

ESTABLISHMENT AND OPERATIONS

- A. An entity undertaking to establish an ombuds should do so pursuant to a legislative enactment or a publicly available written policy (the “charter”) which clearly sets forth the role and jurisdiction of the ombuds and which authorizes the ombuds to:
- (1) receive complaints and questions about alleged acts, omissions, improprieties, and systemic problems within the ombuds’s jurisdiction as defined in the charter establishing the office
 - (2) exercise discretion to accept or decline to act on a complaint or question
 - (3) act on the ombuds’s own initiative to address issues within the ombuds’s prescribed jurisdiction
 - (4) operate by fair and timely procedures to aid in the just resolution of a complaint or problem
 - (5) gather relevant information
 - (6) resolve issues at the most appropriate level of the entity
 - (7) function by such means as:
 - (a) conducting an inquiry
 - (b) investigating and reporting findings
 - (c) developing, evaluating, and discussing options available to affected individuals
 - (d) facilitating, negotiating, and mediating
 - (e) making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have the authority to act upon them
 - (f) identifying complaint patterns and trends
 - (g) educating
 - (h) issuing periodic reports, and

- (i) advocating on behalf of affected individuals or groups when specifically authorized by the charter
- (8) initiate litigation to enforce or protect the authority of the office as defined by the charter, as otherwise provided by these standards, or as required by law.

QUALIFICATIONS

- B. An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombuds with relevant education and the periodic updating of the ombuds's qualifications.

INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY

- C. To ensure the effective operation of an ombuds, an entity should authorize the ombuds to operate consistently with the following essential characteristics. Entities that have established ombuds offices that lack appropriate safeguards to maintain these characteristics should take prompt steps to remedy any such deficiency.

- (1) Independence. The ombuds is and appears to be free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry.

In assessing whether an ombuds is independent in structure, function, and appearance, the following factors are important: whether anyone subject to the ombuds's jurisdiction or anyone directly responsible for a person under the ombuds's jurisdiction (a) can control or limit the ombuds's performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the budget or resources of the office.

- (2) Impartiality in Conducting Inquiries and Investigations. The ombuds conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the ombuds from developing an interest in securing changes that are deemed necessary as a result of the process, nor from otherwise being an advocate on behalf of a designated constituency. The ombuds may become an advocate within the entity for change where the process demonstrates a need for it.
- (3) Confidentiality. An ombuds does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm. Records pertaining to a complaint, inquiry, or investigation are confidential and not subject to disclosure outside the ombuds's office. An ombuds does not reveal the identity of a complainant without that person's express consent. An ombuds may, however, at the ombuds's discretion disclose non-confidential information and may disclose confidential

information so long as doing so does not reveal its source. An ombuds should discuss any exceptions to the ombuds's maintaining confidentiality with the source of the information.³

LIMITATIONS ON THE OMBUDS' AUTHORITY

- D. An ombuds should not, nor should an entity expect or authorize an ombuds to:
- (1) make, change or set aside a law, policy, or administrative decision
 - (2) make binding decisions or determine rights
 - (3) directly compel an entity or any person to implement the ombuds's recommendations
 - (4) conduct an investigation that substitutes for administrative or judicial proceedings
 - (5) accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent
 - (6) address any issue arising under a collective bargaining agreement or which falls within the purview of any existing federal, state, or local labor or employment law, rule, or regulation, unless the ombuds is authorized to do so by the collective bargaining agreement or unless the collective bargaining representative and the employing entity jointly agree to allow the ombuds to do so, or if there is no collective bargaining representative, the employer specifically authorizes the ombuds to do so, or
 - (7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.

REMOVAL FROM OFFICE

- E. The charter that establishes the office of the ombuds should also provide for the discipline or removal of the ombuds from office for good cause by means of a fair procedure.

³ A classical ombuds should not be required to discuss confidentiality with government officials and employees when applying this paragraph to the extent that an applicable statute makes clear that such an individual may not withhold information from the ombuds and that such a person has no reasonable expectation of confidentiality with respect to anything that person provides to the ombuds.

NOTICE

- F. These standards do not address the issue whether a communication to the ombuds will be deemed notice to anyone else including any entity in or for which the ombuds acts. Important legal rights and liabilities may be affected by the notice issue.

CLASSICAL OMBUDS

- G. A classical ombuds is a public sector ombuds who receives complaints from the general public or internally and addresses actions and failures to act of a government agency, official, or public employee. In addition to and in clarification of the standards contained in Paragraphs A-F, a classical ombuds:
- (1) should be authorized to conduct independent and impartial investigations into matters within the prescribed jurisdiction of the office
 - (2) should have the power to issue subpoenas for testimony and evidence with respect to investigating allegations within the jurisdiction of the office
 - (3) should be authorized to issue public reports
 - (4) should be authorized to advocate for change both within the entity and publicly
 - (5) should, if the ombuds has general jurisdiction over two or more agencies, be established by legislation⁴ and be viewed as a part of and report to the legislative branch of government.

ORGANIZATIONAL OMBUDS

- H. An organizational ombuds facilitates fair and equitable resolutions of concerns that arise within the entity. In addition to and in clarification of the standards contained in Paragraphs A-F, an organizational ombuds should:
- (1) be authorized to undertake inquiries and function by informal processes as specified by the charter
 - (2) be authorized to conduct independent and impartial inquiries into matters within the prescribed jurisdiction of the office
 - (3) be authorized to issue reports

⁴ The 1969 ABA Resolution, which remains ABA policy, provided that a classical ombuds should be “appoint[ed] by the legislative body or . . . by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority, such as two thirds.”

- (4) be authorized to advocate for change within the entity.

ADVOCATE OMBUDS

- I. An advocate ombuds serves as an advocate on behalf of a population that is designated in the charter. In addition to and in clarification of the standards described in Paragraphs A-F, an advocate ombuds should:
 - (1) have a basic understanding of the nature and role of advocacy
 - (2) provide information, advice, and assistance to members of the constituency
 - (3) evaluate the complainant's claim objectively and advocate for change relief when the facts support the claim
 - (4) be authorized to represent the interests of the designated population with respect to policies implemented or adopted by the establishing entity, government agencies, or other organizations as defined by the charter, and
 - (5) be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant.

REPORT

The American Bar Association (ABA) adopted a resolution in 1969 recommending that state and local governments consider establishing ombuds who would be authorized to inquire into administrative action and to make public criticism. That policy also recommended that the statute or ordinance creating the ombuds contain twelve essential points. The ABA then adopted a resolution in 1971 recommending that the Federal government experiment with the establishment of ombudsmen for certain geographical areas, specific agencies, or for limited phases of Federal activities.

Over the past three decades, and particularly recently, an extraordinary growth in the number and type of ombuds⁵ has taken place. Congress has established several ombuds in various programs. In addition to specific legislation concerning ombuds, the Administrative Dispute Resolution Act authorizes Federal agencies to use “ombuds.”

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As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombuds’s office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. These standards were developed to provide advice and guidance on the structure and operation of ombuds offices to the end that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process.

The ABA’s Board of Governors establishes legislative and governmental priorities annually. Based on its importance to society, to the practice of law, and in the administration of justice, one of the year 2001 priorities is alternative dispute

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resolution. The ABA supports the greater use of alternative dispute resolution by private parties, government agencies, and the courts “as a necessary and welcome component of America’s civil justice system, so long as all parties’ legal rights and remedies are protected.” As a protector of individual rights against the excesses of public and private bureaucracies, an ombuds receives complaints and questions from individuals concerning the functioning of an entity, works for the resolution of particular issues, and where necessary, makes recommendations for the improvement of the general administration of the entity. As an independent, impartial, and confidential complaint handler, an ombuds serves as an alternative means of dispute resolution – a means by which issues may be raised, considered, and resolved.

Consistent with ABA priorities, the Sections of Administrative Law and Regulatory Practice and of Dispute Resolution have worked together and appointed a steering committee consisting of representatives from the Coalition of Federal Ombudsmen, the National Association of State Ombudsman Programs, the International Ombudsman Institute (IOI subsequently withdrew), The Ombudsman Association, the United States Ombudsman Association, and the University and College Ombuds Association, as well as other experts in the field. The committee consulted with numerous ombuds from Federal, state, and local agencies, academic institutions, companies, and non-profit organizations. Further, it solicited, received, and considered comments from the international community of ombuds. Based on the steering committee’s work and following extensive consultation with the Commission on Legal Problems of the Elderly, the Section of Business Law, and the Section of Labor and Employment Law, the Sections of Administrative Law and Regulatory Practice and Dispute Resolution have developed a resolution encouraging the use of ombuds in the public and private sectors that adhere to the Standards for the Establishment and Operation of the Ombudsman Offices (Standards).

The Resolution and Standards broaden the ABA’s existing policy to address ombuds who are appointed within government, academia, and the private sector, and who respond to complaints from individuals from within and outside the entity. Further, they clarify the means by which various types of ombuds operate.

For Federal, state, and local governments that want to create a Classical ombuds who would be authorized to address, investigate or inquire into administrative action and to criticize agencies, officials, and public employees, the ABA’s 1969

policy continue to serve as a model.⁶ This Resolution and the Standards clarify that independence, impartiality in conducting inquiries and investigations, and confidentiality are essential characteristics of all ombuds. Ombuds must operate consistently with these essential characteristics to discharge the duties of the office effectively. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

THE RESOLUTION

The resolution recognizes the value of the ombuds in the public and private sectors. For example, the Organizational Ombuds in one prominent company resolves several hundred workplace matters every year; that experience is echoed by other companies and increasingly by government agencies and academic institutions. Classical Ombuds have investigated and issued reports on important issues that need to be addressed by the body politic; a recent prominent example concerned prison conditions. Advocate Ombuds have been successful in protecting vulnerable populations, such as children and residents of nursing homes. As a result, the Resolution recognizes the contribution these offices make in providing a means by which complaints are received, the underlying facts developed through an informal inquiry or a more formal investigation, and those complaints found to have merit are suitably addressed in a means that fits the situation. The Resolution, therefore, supports the greater use of ombuds.

The Resolution also recognizes that entities that create ombuds offices should adhere to the Standards for the establishment and operations of the ombuds offices. The fundamental underlying premise of this resolution is that all ombuds must operate with certain basic authorities and essential characteristics. The effort here is to provide practical advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that

⁶ The twelve essential characteristics that were identified in the original ABA resolution continue to have vitality and remain ABA policy. They are: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority of the legislative body, such as two thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restrictions of civil service and classifications acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; and, (12) immunity of the ombudsman and his staff from civil liability on account of official action.

individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process.

STANDARDS

Section A. Establishment and Operations

An ombuds is a person who is authorized to receive complaints or questions confidentially about alleged acts, omissions, improprieties, and broader, systemic problems within the ombuds's defined jurisdiction and to address, investigate, or otherwise examine these issues independently and impartially.

Importantly, the ombuds's jurisdiction – who complains and who or what are complained about – needs to be defined in advance, setting out the scope of the duties and authority. The ombuds's jurisdiction must be defined in an official act that establishes the office, which is appropriately called the “charter” in the standards. The charter may be a legislative enactment⁷ or a publicly available written policy. The jurisdiction may be limited to a defined constituency or population. For example, a state ombuds may receive complaints or questions from any person, while a university student ombuds may receive complaints or questions only from students at that university, and a long-term care ombuds has jurisdiction only to resolve complaints initiated by or on behalf of residents receiving long-term care.

The ombuds determines whether to accept or to act on a particular complaint or question. The ombuds also has the discretion to initiate action without receiving a complaint or question. An ombuds may determine that the complaint is without merit. Or, an ombuds may receive a complaint or question on a specific topic and conduct an inquiry on a broader or different scope.

Appropriate subjects for an ombuds to review include allegations of unfairness, maladministration, abuse of power, abuse of discretion, discourteous behavior or incivility, inappropriate application of law or policy, inefficiency, decision unsupported by fact, and illegal or inappropriate behavior. It is essential that the ombuds operate by fair procedures to aid in the just resolution of the matter. Ombuds need access to all information relevant to a complaint or a question so that the review is fair and credible, and the charter should authorize access to all relevant information. The entity must be responsible for protecting those seeking assistance from or providing information to the ombuds from personal, professional, or economic retaliation, loss of privacy, or loss of relationships.

An ombuds may make a formal or informal report of results and recommendations stemming from a review or investigation. If such a report is issued, the ombuds

⁷ The “legislative enactment” might be in a constitution, statute, local government charter, or local ordinance depending on the establishing jurisdiction.

should generally consult with an individual or group prior to issuing a report critical of that individual or group, and include their comments with the report. Moreover, the ombuds should communicate the outcome, conclusion or resolution of a complaint or an inquiry to the complainant and may also communicate with other concerned entities or individuals.

In addition, to ensure the office's accountability, an ombuds should issue and publish periodic reports summarizing the ombuds's findings and activities. This may include statistical information about the number of contacts with the ombuds, subjects that the ombuds addressed, evaluation by complainants, etc. These reports may be done annually, biannually, or more frequently.

In receiving complaints or questions and examining problems, the ombuds may use a variety of dispute resolution and other techniques. These processes include: conducting an inquiry; investigating and reporting findings; developing, evaluating, and discussing the options which may be available for remedies or redress; facilitating, negotiating, and mediating; making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have authority to act on them; identifying complaint patterns and trends; and educating.

As necessary, the ombuds may advocate on behalf of affected individuals or groups when authorized by the charter and the situation warrants that action. An ombuds may initiate litigation to enforce or protect the authority of the office. For example, if an ombuds issues a subpoena and the subpoena is ignored, the ombuds should be able to initiate litigation to compel a response. In addition, an ombuds may initiate litigation as otherwise provided by these standards or as required by law. For example, an advocate ombuds should be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant.

An ombuds uses the powers of reason and persuasion to help resolve matters. The goal of the ombuds's efforts is to provide a path to fairness and justice. Therefore, the ombuds's quest is to seek the fair and just resolution of the matter.

Section B. Qualifications

An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombuds with relevant education and the periodic updating of the ombuds's qualifications.

Section C. The Essential Characteristics

The original 1969 resolution contained twelve essentials for the ombuds described in it. These have been distilled and expanded in the Standards. The core qualities are independence, impartiality in conducting inquiries and investigations, and confidentiality. Without them, an ombuds cannot discharge the duties of the office effectively. The Standards therefore provide that an entity should authorize an

ombuds it establishes to operate consistently with these essential characteristics to ensure the effective operation of the duties of the office. The Standards also recognize, however, that some entities may have already established offices that lack appropriate safeguards to comply fully with the characteristics. The Standards then provide that such entities should take prompt steps to remedy any such deficiency.

1. Independence in structure, function, and appearance

To be credible and effective, the office of the ombuds is independent in its structure, function, and appearance. Independence means that the ombuds is free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry. In assessing whether an ombuds is independent, the following factors are important: whether anyone subject to the ombuds's jurisdiction or anyone directly responsible for a person under the ombuds's jurisdiction (a) can control or limit the ombuds's performance of duties, or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the office's budget or resources.

Historically, ombuds were created in parliamentary systems and were established in the constitution or by statute, appointed by the legislative body, and had a guarantee of independence from the control of any other officer, except for responsibility to the legislative body. This structure remains a model for ensuring independence, and a number of states have followed it. In more recent times, however, ombuds have been created by public officials without legislation, by regulation or decree, and by private entities. Ensuring the independence of the ombuds is equally important in these instances, but will require other measures.⁸

⁸ In the United States since the late 1960s, a number of other ways have been developed to ensure independence. Examples of approaches that contribute to an ombuds's independence include: establishment of the office through a formal act of a legislature or official governing body of an organization; establishment outside the entity over which the ombuds has jurisdiction; a direct reporting relationship to a legislative body, the official governing body of an organization or the chief executive; designation as a neutral who is unaligned and objective; a broadly defined jurisdiction not limited to one part of the entity or one subject matter; appointment or removal of the ombuds free of influence from potential subjects of a complaint or inquiry; a set term of office; no reporting relationship to someone with assigned duties that conflict with the ombuds's role; no assignment of duties other than that of the ombuds function; specifically allocated budget and sufficient resources to perform the function; freedom to appoint, direct, and remove staff; sufficient stature in the organization to be taken seriously by senior officials; placement in an organization at the highest possible level and at least above the heads of units likely to generate the most complaints; discretion to initiate and pursue complaints and inquiries; access to and resources for independent legal advice and counsel; prohibition of disciplinary actions against the ombuds for performing the duties of the office; removal only for cause; provision of an employment contract that the ombuds will receive a significant severance provision if terminated without good cause.

Great care has to be exercised in establishing the ombuds structure to ensure that the independence described in the resolution is, in fact, achieved. Choosing which of these approaches are appropriate will depend on the environment. The instrument used to establish independence should be the strongest available and should guarantee the independence of the ombuds from control by any other person.

The twelve essential characteristics of the 1969 ABA Resolution continue to serve as the model for an ombuds reporting to the legislative branch of government who is authorized to investigate administrative action, help provide legislative oversight, and offer criticism of agencies from an external perspective. While there are a number of potential avenues of achieving independence, experience on the state and local level has demonstrated rather consistently that unless there is a structural independence for these ombuds akin to the 1969 ABA Resolution that independence will not be accomplished and the office will not be able to function as envisioned in this resolution and the accompanying standards.

Structuring independence for ombuds who serve inside organizations and classical ombuds who address issues within a single program or agency require similar care. These elements should be in the charter. The ombuds position should be explicitly defined and established as a matter of organizational policy, authorized at the highest levels of the organization; the ombuds should have access to the chief executive officer, senior officers and the oversight body or board of directors of the organization; the ombuds should also have access to all information within the organization, except as restricted by law; and the ombuds should have access to resources for independent legal advice and counsel.

The Standards recognize that at this time there are ombuds who have not achieved this goal. The Standards urge and anticipate that these variations will be eliminated over time.

2. Impartiality in conducting inquiries and investigations

The ombuds's structural independence is the foundation upon which the ombuds's impartiality is built. If the ombuds is independent from line management and does not have administrative or other obligations or functions, the ombuds can act in an impartial manner.

Acting in an impartial manner, as a threshold matter, means that the ombuds is free from initial bias and conflicts of interest in conducting inquiries and investigations. Acting in an impartial manner also requires that the ombuds be authorized to gather facts from relevant sources and apply relevant policies, guidelines, and laws, considering the rights and interests of all affected parties within the jurisdiction, to identify appropriate actions to address or resolve the issue.

The ombuds conducts inquiries and investigations in an impartial manner. An ombuds may determine that a complaint is without merit and close the inquiry or investigation without further action. If the ombuds finds that the complaint has

merit, the ombuds makes recommendations to the entity and/or seeks resolution for a fair outcome. Impartiality does not, however, preclude the ombuds from developing an interest in securing the changes that are deemed necessary where the process demonstrates a need for change nor from otherwise being an advocate on behalf of a designated constituency. The ombuds therefore has the authority to become an advocate for change where the results of the inquiry or investigation demonstrate the need for such change. For example, when an ombuds identifies a systemic problem, it would be appropriate for the ombuds to advocate for changes to correct the problem. An advocate ombuds may initiate action and therefore serve as an advocate on behalf of a designated population with respect to a broad range of issues and on specific matters when the individual or group is found to be aggrieved. But, when determining the facts, the ombuds must act impartially.

3. Confidentiality

Confidentiality is an essential characteristic of ombuds that permits the process to work effectively. Confidentiality promotes disclosure from reluctant complainants, elicits candid discussions by all parties, and provides an increased level of protection against retaliation to or by any party. Confidentiality is a further factor that distinguishes ombuds from others who receive and consider complaints such as elected officials, human resource personnel, government officials, and ethics officers.

Confidentiality extends to all communications with the ombuds⁹ and to all notes and records maintained by the ombuds in the performance of assigned duties. It begins when a communication is initiated with the ombuds to schedule an appointment or make a complaint or inquiry. Confidentiality may apply to the source of the communications and to the content of the communications. Individuals may not want the ombuds to disclose their identity but may want the ombuds to act on the information presented. Therefore, an ombuds does not reveal the identity of a complainant without that person's consent. The ombuds may, however, disclose confidential information so long as doing so does not compromise the identity of the person who supplied it. It should be emphasized that the decision whether or not to disclose this information belongs to the ombuds, and it would not be appropriate for anyone to demand that the ombuds disclose such information, except as required by statute. To the extent that an ombuds may not maintain confidentiality, the ombuds should discuss those exceptions with individuals who communicate with the office.

The authorizing entity should allow the ombuds to provide confidentiality of the identity of persons who communicate with the ombuds and of information provided

⁹ For example, the Model Ombudsman Statute for State Governments that was developed by the Ombudsman Committee of the Section of Administrative Law and Regulatory Practice in 1974 directs the ombudsman to "maintain secrecy in respect to all matters and the identities of the complainants or witnesses coming before him." See, Bernard Frank, *State Ombudsman Legislation in the United States*, 29 U. Miami L.R. 379 (1975).

in confidence. The authorizing entity should not seek information relating to the identity of complainants nor seek access to the ombuds's notes and records.

Providing for confidentiality and protection from subpoena in a statute is particularly important because, where statutes have not provided confidentiality, state courts have not consistently recognized an ombuds privilege nor granted protective orders to preserve the confidentiality of communication made to ombuds. One Federal district court, *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987), recognized a limited privilege under Federal law for an ombuds with a state statutory privilege. The only Federal circuit court to have addressed the issue, *Carman v. McDonnell Douglas Corp.*, 114 F. 3d 790 (8th Cir. 1997), failed to recognize an ombuds privilege.

Short of explicit statutory authority, ombuds offices should adopt written policies that provide the fullest confidentiality within the law. These policies should be publicly available, broadly disseminated, and widely publicized. Several existing model ombuds acts and policies of ombuds organizations address confidentiality.

An ombuds will rarely, if ever, be privy to something that no one else knows. Therefore, providing confidentiality protection to the ombuds allows the ombuds to perform assigned duties while at the same time, society continues to have access to the underlying facts. As evidenced by the statutes and policies that have been developed, there may be instances in which other, competing societal interests dictate that the ombuds must disclose some information. If an individual speaks about intending harm to himself or herself or others, an entity may require an ombuds to disclose this information. Moreover, an ombuds may be compelled by protective service laws or professional reporting requirements to report suspected abuse.

Section D. Limitations on the ombuds' authority

An ombuds works outside of line management structures and has no direct power to compel any decision. The office is established by the charter with the stature to engender trust and to help resolve complaints at the most appropriate level of the entity. To ensure the ombuds' independence, impartiality, and confidentiality, it is necessary to establish certain limitations on the ombuds' authority.

An ombuds should not, nor should an entity expect or authorize an ombuds to make, change, or set aside a law, policy or administrative/managerial decision, nor to directly compel an entity or any person to make those changes. While an ombuds may expedite and facilitate the resolution of a complaint and recommend individual and systemic changes, an ombuds cannot compel an entity to implement the recommendations.

It is essential that an ombuds operate by fair procedures which means that the actions taken will likely vary with the nature of the concern, and that care must be taken to protect the rights of those who may be affected by the actions of an

ombuds. Furthermore, since due process rights could well be implicated, it would not be appropriate for the ombuds's review to serve as the final determination for any disciplinary activity or civil action, nor as a determination of a violation of law or policy. An ombuds's inquiry or investigation does not substitute for an administrative or judicial proceeding. In an administrative or judicial proceeding, the deciding official should not consider the ombuds's review or recommendations to be controlling. Rather, the deciding official must conduct a de novo examination of the matter.

Moreover, it would not be appropriate for the ombuds to act as an appellate forum when a complainant is dissatisfied with the results in a formal adjudicatory or administrative proceeding. Thus, an ombuds should not take up a specific issue that is pending in a legal forum without the concurrence of the parties and the presiding officer. It may, however, be fully appropriate for an ombuds to inquire into matters that are related to a controversy that is in litigation so long as they are not the subject of the suit.

Further, an ombuds should not address, nor should an entity expect or authorize an ombuds to address, any issue that is the subject of a collective bargaining agreement. There are two potential exceptions to this general prohibition: An ombuds may address issues concerning employees who have a lawfully designated collective bargaining agreement if: (1) the ombuds is authorized to do so by the collective bargaining agreement covering the employees or (2) the collective bargaining representative and the employing entity jointly agree to allow the ombuds to do so.

Even where there is no collective bargaining agreement, the involvement of an ombuds in matters that fall within the purview of labor or employment laws raises sensitive issues that may implicate the rights and liabilities of the parties under those laws, such as the issue of notice mentioned in Section F of the Standards. Accordingly, the Standards contemplate that an employer, in establishing an ombuds office, should consider its overall policies for maintaining compliance with those laws, and determine in that light whether to authorize the ombuds to address those matters. That recommendation is in no way intended to suggest, however, that a policy of authorizing an ombuds to address labor- or employment-related matters should be a suspect or disfavored practice. On the contrary, involvement in such matters is a role typically performed by Organizational Ombuds, and the growing reliance on ombuds at institutions across the country is largely attributable to the broad satisfaction with ombuds' fulfillment of that role on the part of both management and the affected employees. Thus, the language in the Standards indicating that an employer should specifically authorize an ombuds to address labor- or employment-related matters does not require any detailed or ponderous recitals. Rather, it should be read as simply a particularized application of the generalized expectation in Section A of the Standards that the jurisdiction of an ombuds office should be identified in its charter.

Finally, an ombuds should not act in a manner inconsistent with the grant and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.

Section E. Removal from office

Entities which establish ombuds offices need to ensure their accountability. Therefore, the charter that establishes the office of ombuds should also provide for the discipline or removal of the ombuds for good cause by means of a fair procedure.

Section F. Notice

When meeting with an ombuds, people discuss allegations of unfairness, maladministration, abuse of power, and other sensitive subjects. They may fear personal, professional, or economic retaliation, loss of privacy, and loss of relationships. Faced with sexual or racial harassment, for example, many people will quit, get sick, or suffer in silence. People often need help in developing ways to report or act so that these matters will be considered and resolved.

Communications must be protected if people are to be willing to visit and speak candidly with the ombuds. As noted above, some ombuds have confidentiality protected by law. Under these Standards, entities that establish an ombuds should authorize the ombuds to operate with confidentiality and independence. If an ombuds functions in accordance with these Standards by operating with confidentiality and independence, it can be strongly argued that management lacks the control over day to day operations that is essential for someone to be deemed an agent. Likewise, there would be a strong argument that any communication to the ombuds should not be imputed to any other person, including the entity. Rather, the ombuds would be deemed independent of the entity itself for these purposes. Thus, it would not be appropriate for the ombuds to accept notice on the entity's behalf with respect to any alleged grievance.

However, some ombuds offices that have been instituted outside the framework of these Standards do not operate with confidentiality or independence. In some cases, management's control over the ombuds may be so extensive as to weaken substantially the argument that the office cannot be deemed to be an agent of management. This circumstance would, in turn, give force to the argument that a communication to the ombuds should be imputed to management.

Because the law in this area is continuing to evolve, it is unclear what a court might decide with regard to notice in the wide range of circumstances that may arise. These Standards, therefore, do not address the issue of whether a communication to the ombuds will be deemed notice to anyone, including any entity in or for which the ombuds acts. Important legal rights and liabilities may, however, be affected by the resolution of that issue. Accordingly, an ombuds should, in appropriate

circumstances, advise an individual that, unless the individual authorizes the ombuds to inform the management of an entity about a matter, the entity may not be deemed to have notice of the matter and such failure to give notice to the entity about the matter might impair the individual's legal rights.

Section G. Classical Ombuds

A Classical Ombuds operates in the public sector addressing issues raised by the general public or internally, usually concerning the actions or policies of government entities or individuals. A Classical Ombuds may conduct inquiries or investigations and suggest modifications in policies or procedures. To ensure access to all pertinent facts, a Classical Ombuds should be granted subpoena power for testimony and evidence relevant to an investigation. In addition, a Classical Ombuds should be authorized to issue public reports and to advocate for change both within the entity and publicly. To ensure the essential independence, the standards provide that whenever a classical ombuds has general jurisdiction over two or more agencies, that position should be established by legislative action and the ombuds should be regarded as part of the legislative branch of government. Thus, for example, it would be appropriate for an agency to establish an ombuds who has jurisdiction over a single program, but the agency should provide the essential independence in the charter establishing the program. To the extent that an agency has established ombuds offices with jurisdiction over a single agency or program but that do not comply with the essential characteristics as described in Paragraph C of the Standards, it should take prompt steps to remedy any deficiency and to provide the requisite independence. If, however, the ombuds has jurisdiction over multiple agencies, experience has shown that it is extraordinarily difficult to provide independence if the ombuds reports to someone in the executive branch.

Section H. Organizational Ombuds

An Organizational Ombuds ordinarily addresses problems presented by members, employees or contractors of an entity concerning its actions or policies. An Organizational Ombuds may undertake inquiries and advocate for modifications in policies or procedures.

Section I. Advocate Ombuds

The Advocate Ombuds may be located in either the public or private sectors, and like the Classical and Organizational Ombuds, also evaluates claims objectively. However, unlike other ombuds, the Advocate Ombuds is authorized or required to advocate on behalf of individuals or groups found to be aggrieved. Because of the unique role, the Advocate Ombuds must have a basic understanding of the nature and role of advocacy. In addition, the Advocate Ombuds should provide information, advice, and assistance to members of the population identified in the law or publicly available written policy. Further, the Advocate Ombuds represents

the interests of a designated population with respect to policies implemented or adopted by the establishing entity and government agencies.

CONCLUSION

Government, academia, and the private sector are answering demands for fairness and responsiveness by establishing ombuds. Ombuds receive complaints and questions concerning the administration of the establishing entity. However, the basic authorities of these persons called ombuds and the independence, impartiality, and confidentiality with which they operate vary markedly. An ombuds works for the resolution of a particular issue, and where necessary, makes recommendations for the improvement of the general administration of the entity. To be credible and effective, the office of the ombuds must be independent in structure, form, and appearance. The ombuds's structural independence is the foundation upon which the ombuds's impartiality is built. The ombuds must conduct investigations and inquiries in an impartial manner, free from initial bias and conflicts of interest. Confidentiality is a widely accepted characteristic of ombuds, which helps ombuds perform the functions of the office. Without these Standards, individuals may be reluctant to seek the ombuds's assistance because of fear of personal, professional, or economic retaliation, loss of privacy, and loss of relationships. This Resolution and the Standards for the Establishment and Operation of Ombuds Offices are appropriate now to ensure that ombuds can protect individual rights against the excesses of public and private bureaucracies.

Respectfully submitted,

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