RESOLVED, that the American Bar Association supports the greater use of “ombudsmen” 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 Ombudsman Offices dated August 2001.
STANDARDS\textsuperscript{1} FOR THE ESTABLISHMENT AND OPERATION OF
OMBUDSMAN OFFICES

PREAMBLE

Ombudsmen\textsuperscript{2} 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. Ombudsmen 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 ombudsmen offices, but with enormous variation in their duties and structures. Ombudsman offices so established may be placed in several categories: A Classical Ombudsman 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 Ombudsman 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 Ombudsman 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 ombudsman 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 ombudsmen offices so that ombudsmen 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 ombudsman are:

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

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

\textsuperscript{2} Ombudsman is a Swedish word meaning agent or representative. It is recognized internationally as a generic term. Its use here is not intended to discourage others from using more gender-neutral terms. The term ombudsman or ombudsmen in this report is intended to encompass all other forms of the word, such as ombudsperson, ombuds, and ombuds officer.
A. An entity undertaking to establish an ombudsman 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 ombudsman and which authorizes the ombudsman to:

1. receive complaints and questions about alleged acts, omissions, improprieties, and systemic problems within the ombudsman’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 ombudsman’s own initiative to address issues within the ombudsman’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 ombudsman should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombudsman with relevant education and the periodic updating of the ombudsman’s qualifications.

INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY

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

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

(2) Impartiality in Conducting Inquiries and Investigations. The ombudsman conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the ombudsman 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 ombudsman may become an advocate within the entity for change where the process demonstrates a need for it.

(3) Confidentiality. An ombudsman 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 ombudsman’s office. An ombudsman does not reveal the identity of a complainant without that person’s express consent. An ombudsman may, however, at the ombudsman’s discretion disclose non-confidential information and may disclose confidential information so long as doing so does not reveal its source. An ombudsman should discuss any exceptions to the ombudsman’s maintaining confidentiality with the source of the information.3

3 A classical ombudsman 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 ombudsman and that such a person has no reasonable expectation of confidentiality with respect to anything that person provides to the ombudsman.
LIMITATIONS ON THE OMBUDSMAN’S AUTHORITY

D. An ombudsman should not, nor should an entity expect or authorize an ombudsman 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 ombudsman’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 unless the ombudsman is authorized to do so by the agreement or unless the collective bargaining representative and the employing entity jointly agree to allow the ombudsman 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 ombudsman.

REMOVAL FROM OFFICE

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

NOTICE

F. An ombudsman who functions in accordance with these standards shall not be deemed to be an agent of anyone other than the office of the ombudsman, nor shall any communication to the ombudsman be imputed as notice to anyone else, including the entity in which the ombudsman acts.

CLASSICAL OMBUDSMEN

G. A classical ombudsman is a public sector ombudsman 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 ombudsman:

(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 ombudsman has general jurisdiction over two or more agencies, be established by legislation and be viewed as a part of and report to the legislative branch of government.

ORGANIZATIONAL OMBUDSMEN

H. An organizational ombudsman 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 ombudsman 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) be authorized to advocate for change within the entity.

ADVOCATE OMBUDSMEN

I. An advocate ombudsman 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 ombudsman 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

\[4\] The 1969 ABA Resolution, which remains ABA policy, provided that a classical ombudsman should be “appointed 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.”
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

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 ombudsmen 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 ombudsmen 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 ombudsmen has taken place. Congress has established several ombudsmen in various programs. In addition to specific legislation concerning ombudsmen, the Administrative Dispute Resolution Act authorizes Federal agencies to use “ombuds.” In the judicial arena, the Guidelines for Sentencing Organizations creates incentives for companies to take crime controlling actions and encourages organizations to provide confidential resources for employees and other agents to report criminal conduct by others within the organization without fear of retribution.

Federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities have established ombudsman offices, but with enormous variation in their duties and structures. Ombudsman offices so established may be placed in several categories. A Classical Ombudsman 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 Ombudsman 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 Ombudsman 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 ombudsman’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 ombudsmen offices to the end that ombudsmen 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 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 ombudsman 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 ombudsman 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 ombudsmen 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 ombudsmen. 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 ombudsmen 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 ombudsmen 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 ombudsmen operate.

For Federal, state, and local governments that want to create a Classical ombudsman who would be authorized to address, investigate or inquire into administrative action and to criticize agencies, of-
ficials, and public employees, the ABA’s 1969 policy continue to serve as a model. This Resolution and the Standards clarify that independence, impartiality in conducting inquiries and investigations, and confidentiality are essential characteristics of all ombudsmen. Ombudsmen 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 ombudsman in the public and private sectors. For example, the Organizational Ombudsman 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 Ombudsmen 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 Ombudsmen 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 Ombudsmen.

The Resolution also recognizes that entities that create ombudsman offices should adhere to the Standards for the establishment and operations of the ombudsman offices. The fundamental underlying premise of this resolution is that all ombudsmen 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 ombudsmen offices so that ombudsmen 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 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.
STANDARDS
Section A. Establishment and Operations

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

Importantly, the ombudsman’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 ombudsman’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 enactment6 or a publicly available written policy. The jurisdiction may be limited to a defined constituency or population. For example, a state ombudsman may receive complaints or questions from any person, while a university student ombudsman may receive complaints or questions only from students at that university, and a long-term care ombudsman has jurisdiction only to resolve complaints initiated by or on behalf of residents receiving long-term care.

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

Appropriate subjects for an ombudsman 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 ombudsman operate by fair procedures to aid in the just resolution of the matter. Ombudsmen 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 ombudsman from personal, professional, or economic retaliation, loss of privacy, or loss of relationships.

An ombudsman may make a formal or informal report of results and recommendations stemming from a review or investigation. If such a report is issued, the ombudsman 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 ombudsman 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 ombudsman should issue and publish periodic reports summarizing the ombudsman’s findings and activities. This may include statistical information about the number of contacts with the ombudsman, subjects that the ombudsman addressed, evaluation by complainants, etc. These reports may be done annually, biannually, or more frequently.

---

6 The “legislative enactment” might be in a constitution, statute, local government charter, or local ordinance depending on the establishing jurisdiction.
In receiving complaints or questions and examining problems, the ombudsman 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 ombudsman may advocate on behalf of affected individuals or groups when authorized by the charter and the situation warrants that action. An ombudsman may initiate litigation to enforce or protect the authority of the office. For example, if an ombudsman issues a subpoena and the subpoena is ignored, the ombudsman should be able to initiate litigation to compel a response. In addition, an ombudsman may initiate litigation as otherwise provided by these standards or as required by law. For example, an advocate ombudsman should be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant.

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

Section B. Qualifications
An ombudsman should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombudsman with relevant education and the periodic updating of the ombudsman’s qualifications.

Section C. The Essential Characteristics
The original 1969 resolution contained twelve essentials for the ombudsmen 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 ombudsman cannot discharge the duties of the office effectively. The Standards therefore provide that an entity should authorize an ombudsman 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 ombudsman is independent in its structure, function, and appearance. Independence means that the ombudsman 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 ombudsman is independent, the following factors are important: whether anyone subject to the ombudsman’s jurisdiction or anyone directly responsible for a person under the ombudsman’s jurisdiction (a) can control or limit the ombudsman’s performance of duties, or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombudsman, or (3) reduce the office’s budget or resources.

Historically, ombudsmen 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, ombudsmen have been created by public officials without legislation, by regulation or decree, and by private entities. Ensuring the independence of the ombudsman is equally important in these instances, but will require other measures.  

Great care has to be exercised in establishing the ombudsman 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 ombudsman from control by any other person.

The twelve essential characteristics of the 1969 ABA Resolution continue to serve as the model for an ombudsman 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 ombudsmen 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 ombudsmen who serve inside organizations and classical ombudsmen who address issues within a single program or agency require similar care. These elements should be in the charter. The ombudsman position should be explicitly defined and established as a matter of organizational policy, authorized at the highest levels of the organization; the ombudsman should have access to the chief executive officer, senior officers and the oversight body or board of directors of the organization; the ombudsman should also have access to all information within the organization, except as restricted by law; and the ombudsman should have access to resources for independent legal advice and counsel.

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

---

7 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 ombudsman’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 ombudsman 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 ombudsman 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 ombudsman’s role; no assignment of duties other than that of the ombudsman 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 ombudsman for performing the duties of the office; removal only for cause; provision of an employment contract that the ombudsman will receive a significant severance provision if terminated without good cause.
2. Impartiality in conducting inquiries and investigations
The ombudsman’s structural independence is the foundation upon which the ombudsman’s impartiality is built. If the ombudsman is independent from line management and does not have administrative or other obligations or functions, the ombudsman can act in an impartial manner.

Acting in an impartial manner, as a threshold matter, means that the ombudsman is free from initial bias and conflicts of interest in conducting inquiries and investigations. Acting in an impartial manner also requires that the ombudsman 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 ombudsman conducts inquiries and investigations in an impartial manner. An ombudsman may determine that a complaint is without merit and close the inquiry or investigation without further action. If the ombudsman finds that the complaint has merit, the ombudsman makes recommendations to the entity and/or seeks resolution for a fair outcome. Impartiality does not, however, preclude the ombudsman 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 ombudsman 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 ombudsman identifies a systemic problem, it would be appropriate for the ombudsman to advocate for changes to correct the problem. An advocate ombudsman 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 ombudsman must act impartially.

3. Confidentiality
Confidentiality is an essential characteristic of ombudsmen 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 ombudsmen 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 ombudsman and to all notes and records maintained by the ombudsman in the performance of assigned duties. It begins when a communication is initiated with the ombudsman 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 ombudsman to disclose their identity but may want the ombudsman to act on the information presented. Therefore, an ombudsman does not reveal the identity of a complainant without that person’s consent. The ombudsman 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 ombudsman, and it would not be appropriate for anyone to demand that the ombudsman disclose such information, except as required by statute. To the extent that an ombudsman

---

8 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).
may not maintain confidentiality, the ombudsman should discuss those exceptions with individuals who communicate with the office.

The authorizing entity should allow the ombudsman to provide confidentiality of the identity of persons who communicate with the ombudsman and of information provided in confidence. The authorizing entity should not seek information relating to the identity of complainants nor seek access to the ombudsman’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 ombudsman privilege nor granted protective orders to preserve the confidentiality of communication made to ombudsmen. One Federal district court, *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987), recognized a limited privilege under Federal law for an ombudsman 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 ombudsman privilege.

Short of explicit statutory authority, ombudsman 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 ombudsman acts and policies of ombudsman organizations address confidentiality.

An ombudsman will rarely, if ever, be privy to something that no one else knows. Therefore, providing confidentiality protection to the ombudsman allows the ombudsman 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 ombudsman must disclose some information. If an individual speaks about intending harm to himself or herself or others, an entity may require an ombudsman to disclose this information. Moreover, an ombudsman may be compelled by protective service laws or professional reporting requirements to report suspected abuse.

Section D. Limitations on the ombudsman’s authority
An ombudsman 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 ombudsman’s independence, impartiality, and confidentiality, it is necessary to establish certain limitations on the ombudsman’s authority.

An ombudsman should not, nor should an entity expect or authorize an ombudsman 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 ombudsman may expedite and facilitate the resolution of a complaint and recommend individual and systemic changes, an ombudsman cannot compel an entity to implement the recommendations.

It is essential that an ombudsman 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 ombudsman. Furthermore, since due process rights could well be implicated, it would not be appropriate for the ombudsman’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 ombudsman’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 ombudsman’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 ombudsman to act as an appellate forum when a complainant is dissatisfied with the results in a formal adjudicatory or administrative proceeding. Thus, an ombudsman 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 ombudsman 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 ombudsman should not, nor should an entity expect or authorize an ombudsman to address any issue that is the subject of collective bargaining agreement. There are two potential exceptions to this general prohibition: An ombudsman may address issues concerning employees who have a lawfully designated collective bargaining agreement if: (1) the ombudsman 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 ombudsman to do so.

Finally, an ombudsman 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 ombudsman.

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

Section F. Notice
When meeting with an ombudsman, 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 ombudsman. As noted above, some ombudsman have confidentiality protected by law and others do not. Under these Standards, entities that establish an ombudsman should authorize the ombudsman to operate with confidentiality and independence. It follows that if an ombusman functions in accordance with these standards that the ombudsman is not the agent of the entity nor for anyone else other than the ombudsman’s own office. Thus, it would not be appropriate for the ombudsman to accept notice on the entity’s behalf with respect to any alleged grievance. Nor would it be appropriate to impute any communication to the ombudsman to any other person, including the entity. Rather, the ombudsman is independent of the entity itself for these purposes.

Section G. Classical Ombudsmen
A Classical Ombudsman 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 Ombudsman may conduct inquiries or investigations and suggest modifications in policies or procedures. To ensure access to all pertinent facts, a Classical Ombudsman should be granted subpoena power for testimony and evidence relevant to an investigation. In addition, a Classical Ombudsman should be authorized to issues 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 ombudsman has general jurisdiction over two or more agencies, that position should be established by legislative action and the ombudsman should be regarded as part of the legislative branch of government. Thus, for example, it would be appropriate for an ombudsman who has jurisdiction over a single program to be established by the agency administering that program so long as, and only so long as, the essential independence is provided in the charter establishing the position. If, however, the ombudsman has jurisdiction over multiple agencies, experience has shown that it is extraordinarily difficult to provide independence if the ombudsman reports to someone in the executive branch.

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

Section I. Advocate Ombudsmen
The Advocate Ombudsman may be located in either the public or private sectors, and like the Classical and Organizational Ombudsmen, also evaluates claims objectively. However, unlike other ombudsmen, the Advocate Ombudsman is authorized or required to advocate on behalf of individuals or groups found to be aggrieved. Because of the unique role, the Advocate Ombudsman must have a basic understanding of the nature and role of advocacy. In addition, the Advocate Ombudsman should provide information, advice, and assistance to members of the population identified in the law or publicly available written policy. Further, the Advocate Ombudsman 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 ombudsmen. Ombudsmen receive complaints and questions concerning the administration of the establishing entity. However, the basic authorities of these persons called ombudsmen and the independence, impartiality, and confidentiality with which they operate vary markedly. An ombudsman 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 ombudsman must be independent in structure, form, and appearance. The ombudsman’s structural independence is the foundation upon which the ombudsman’s impartiality is built. The ombudsman must conduct investigations and inquiries in an impartial manner, free from initial bias and conflicts of interest. Confidentiality is a widely accepted characteristic of ombudsmen, which helps ombudsmen perform the functions of the office. Without these Standards, individuals may be reluctant to seek the ombudsman’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 Ombudsman Offices are appropriate now to ensure that ombudsmen can protect individual rights against the excesses of public and private bureaucracies.

Respectfully submitted,

Ronald M. Levin,
Chair, Section of Administrative Law and Regulatory Practice
Benjamin F. Overton,
Chair, Section of Dispute Resolution

August 2001
GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice
Section of Dispute Resolution

Submitted By: Ronald M. Levin, Chair
Benjamin F. Overton, Chair

1. **Summary of Recommendation.**
   This resolution supports the greater use of “ombudsmen” to receive, review and resolve complaints involving public or private entities and endorses Standards for the Establishment and Operation of Ombudsman Offices dated July 2000.

2. **Approval by Submitting Entity.**

3. **Has this or a similar recommendation been submitted to the House or Board previously?**
   No

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**
   There are three relevant policies: a 1969 resolution recommending that state and local governments should consider establishing an ombudsman who would be authorized to inquire into administrative action and to make public criticism; a 1971 resolution recommending that the Federal government experiment with the establishment of ombudsmen for certain geographical areas, specific agencies, or for limited phases of Federal activities; and the ABA’s ADR Legislative Priority for 2000. This resolution and the Standards do not replace the existing policy on ombudsmen. Rather, they draw on it and expands it to address independence, impartiality when conducting inquiries and investigations, and confidentiality as essential characteristics of ombudsmen. The resolution and Standards also broaden the existing policy to address ombudsmen who are appointed within government, academia, or the private sector and who respond to complaints from individuals from within and outside the entity. In addition, they are consistent with the legislative priority.

5. **What urgency exists which required action at this meeting of the House?**
   Action is desirable at this meeting to allow consideration of the recommendation by Federal, state and local governments, academic institutions, companies and non-profit organizations, or sub-units of these entities, as they establish ombudsman offices. The Sections have worked with numerous ombudsmen from Federal, state and local governments, academic institutions, companies and non-profit organizations, or sub-units of these entities, to develop these Standards.

6. **Status of Legislation. (If applicable)**
   Legislation on ombudsman is currently pending in Congress and in state legislatures.

7. **Cost to the Association. (Both direct and indirect costs)**
   None
8. **Disclosure of Interest.** (If applicable)
   None

9. **Referrals.**
   A copy of the Resolution, Standards, and Report is being sent to all ABA Sections, Divisions, and Commissions.

   **Contact Person.** (Prior to the meeting)

   Sharan Lee Levine
   Levine & Levine
   427 South Burdick Street
   Kalamazoo, MI 49007
   Phone: (616) 382-0444
   Fax: (616) 382-0464
   E-mail: sillevine@net-link.net

   Ellen J. Waxman
   Stanford University
   P. O. Box 9567
   Stanford, CA 94309-9567
   Phone: (650) 723-3683
   Fax: (650) 725-8986
   E-mail: ewaxman@stanford.edu

11. **Contact Person.** (Who will present the report to the House)

    Ernest Gellhorn
    George Mason University School of Law
    2907 Normandale Lane
    Washington, DC 20008
    Phone: (202) 319-7104
    Fax: (202) 319-7106
    E-mail: gellhorn@pipeline.com

    Pamela Chapman Enslen
    Miller Canfield Paddock & Stone
    444 W. Michigan Avenue
    Kalamazoo, MI 49007-3752
    Phone: (616) 383-5824
    Fax: (616) 382-0244

    Jose C. Feliciano
    Baker & Hostetler, LLP
    3200 National City Center
    Cleveland, OH 44114-3485
    Phone: (216) 621-0200
    Fax: (216) 696-0740
12. Contact Person Regarding Amendments to This Recommendation. (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

   Sharan Lee Levine  
   Levine & Levine  
   427 South Burdick Street  
   Kalamazoo, MI 49007  
   Phone: (616) 382-0444  
   Fax: (616) 382-0464  
   E-mail:  slevine@net-link.net

   Ellen J. Waxman  
   Stanford University  
   P. O. Box 9567  
   Stanford, CA 94309-9567  
   Phone: (650) 723-3683  
   Fax: (650) 725-8986  

   E-mail:  ewaxman@stanford.edu
EXECUTIVE SUMMARY

1. **Summary of the recommendation.**
This resolution supports the greater use of “ombudsmen” to receive, review and resolve complaints involving public or private entities and endorses Standards for the Establishment and Operation of Ombudsman Offices dated July 2001.

2. **Summary of the issue which the recommendation addresses.**
Without adherence to these Standards, persons seeking an ombudsman's assistance could be subject to retaliation, loss of privacy, and loss of relationships. The resolution and Standards are necessary to protect individual rights.

3. **Please explain how the proposed policy position will address the issue.**
The fundamental underlying premise of this resolution is that all ombudsmen must operate with certain basic authorities and essential characteristics. To be credible and effective, the office of the ombudsman must be independent in structure form, and appearance. The ombudsman's structural independence is the foundation upon which the ombudsman's impartiality is built. The ombudsman must conduct inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Confidentiality is a widely accepted characteristic of ombudsmen which helps the ombudsman to perform assigned duties, independently and impartially. Without these essential characteristics and limitations on the ombudsman's authority to protect them, individuals would be reluctant to seek the ombudsman's assistance because of fear of retaliation, loss of privacy, and loss of relationships.

4. **Summary of any minority views or opposition which have been identified.**
Section of Labor and Employment Law.