



Journal of the

International Ombudsman Association



INTERNATIONAL
OMBUDSMAN
ASSOCIATION

VOLUME 2, NUMBER 1, 2009

Good Intentions Gone Astray: How the ABA Standards Affect Ombudsmen

SARA THACKER

ABSTRACT

This year celebrates the 200th Anniversary of the first ombudsman. Over the centuries, the role of the ombudsman has evolved. This article provides a rich history of the evolution of the various types of ombuds and a critical analysis of the American Bar Association Standards for the Establishment and Operation of Ombuds Offices.

KEY WORDS

American Bar Association standards, organizational ombuds, classical ombuds, legislative ombuds, executive ombuds, advocate ombuds

INTRODUCTION

“Ombudsman” — the word leaves many scratching their heads. Despite the extraordinary growth in the profession, many individuals either do not know the term or are confused by the various types of ombuds.¹

The dictionary defines an ombudsman as “someone who works for a government or large organization and deals with the complaints made against it.”² But this description does not begin to encompass the multiple types of ombuds and the broad and diverse tasks they undertake. As federal, state and local governments, corporations, businesses, universities, and non-profit organizations began to use ombuds with regularity in the 1960’s, variations in how they dealt with complaints emerged. For example, some ombuds investigate and issue formal reports or findings; others offer informal, interest-based dispute resolution options; and still others advocate for particular groups. These differences cause public confusion and spark heated debate in the profession over who is a “real” ombudsman.³

In response to the lack of uniformity and diverging roles of ombudsmen, in 2001 the American Bar

Association (ABA), a voluntary private professional association of lawyers, adopted Standards for the Establishment and Operation of Ombuds Offices (the “Standards”). The ABA developed these Standards with good intentions — to advise and guide ombuds on the structure and operation of their offices and to improve public confidence in the integrity of the ombuds process.⁴

While many ombuds are not attorneys, historically, the ABA has been at the forefront of the ombuds movement. Ombuds are highly effective in dispute resolution, a key component of the American legal system. Ombuds often resolve conflicts in their early stages, which could otherwise develop into litigation or more substantial disputes. Therefore, ombuds — whether or not they are attorneys — serve a vital role by establishing a process to handle complaints, exploring underlying facts through informal inquiry or investigation, and addressing those complaints in a manner that best fits the situation.⁵ As a result, since 1969, the ABA has urged the establishment of ombuds offices in the governmental sector to investigate and critique administrative actions.⁶ More recently, the ABA has undertaken a greater role in the ombuds profession. By 2001, the ABA had broadened its policies to support greater use of ombuds in all areas, including academia and the private sector, and created the Standards for the Establishment and Operation of Ombuds Offices.⁷

The 2001 Standards categorized the different types of ombudsmen and set forth the basic authorities and essential characteristics by which all ombuds should operate. In 2004, the ABA revised the Standards to include new provisions that address important legal issues, such as confidentiality, notice, and the scope of ombuds authority.⁸ While the ABA Standards do not have the force of law, courts often look to the ABA for guidance on legal and ethical issues.⁹ Accordingly, the ABA Standards need to be clear and reflect industry practices for the various types of ombuds.

This article examines how the ABA's good intentions to define and legitimize the profession went astray. Part I of this article examines the evolution of the ombuds profession from its origins to the present categorization by the ABA into four distinct types and explores the need for Standards that emphasize the fundamentally different orientations of ombuds. Part II examines the common essential characteristics of ombuds and explores the need for Standards that describe how different kinds of ombuds approach independence, impartiality, and confidentiality differently. By emphasizing these differences and creating separate standards for each ombuds category, the ABA would add more clarity to a profession plagued by public misunderstanding.

Additionally, the ABA Standards should minimize confusion by ombuds over important provisions affecting legal issues, such as confidentiality, notice, and the scope of ombuds authority. Part III of this article examines how these provisions cause confusion and explores the legal and functional implications for ombuds. It also offers recommendations for revising the Standards so that ombuds can function with the strong protection of confidentiality, provides clear provisions defining what constitutes notice of employee acts that may subject an entity to liability, and describes the scope of ombuds' authority to assist union employees.

While the ombuds profession is relatively new in North America, by examining the Standards, I hope to increase knowledge and clarity about the profession and reduce the number of quizzical and confused looks by individuals who ask — "ombudswhat?" In addition, this article speaks to practicing ombuds who may feel threatened by the Standards and their legal implications, and offers recommendations to maintain the integrity of the profession.

I. EVOLUTION OF THE OMBUDS PROFESSION

A. ORIGINS OF THE CLASSICAL MODEL — AN ADJUDICATORY APPROACH

Today's classical ombudsman is based on a model originating in Sweden.¹⁰ In 1713, Swedish King Charles XII appointed a "Chancellor of Justice" to investigate the conduct of administrators who acted in his name.¹¹ The Chancellor would report his

findings to the King and serve as an overseer of administrative actions.¹² As Sweden moved towards a representative democracy, Parliament also wanted a "watchman" who would monitor, investigate, and report back to Parliament (not the King) on the operation of the new government.¹³

In its 1809 Constitution, Sweden instituted the position of the justitieombudsman (justice ombudsman).¹⁴ Elected by the legislature, the justice ombudsman was to be "a person of known legal ability and outstanding integrity."¹⁵ The purpose of the ombudsman was to "ensure the legality of official actions" and protect the public by "investigating complaints of official wrongdoing." If necessary, the ombudsman would prosecute officials who acted unlawfully or failed to perform their duties properly.¹⁶ As the role of the justice ombudsman evolved, he became more of a "citizen defender," concerned with resolving public complaints against the public bureaucracy, and less as a prosecutor of official wrongdoing.¹⁷ Today, Sweden has four ombudsmen, each specializing in different public fields.¹⁸

The concept of the ombudsman did not spread quickly. It took more than 100 years before another country followed Sweden's example and appointed an ombudsman.¹⁹ Momentum for instituting ombudsmen began in 1955 when Denmark appointed its first ombudsman.²⁰ New Zealand and Norway followed in 1962 and 1963 and the ombuds movement continued to spread around the world to Guyana, Tanzania, Canada, the United Kingdom, Mauritius, Northern Ireland, Israel, Fiji, France, Zambia, Papua New Guinea, Portugal, Australia, Austria, Trinidad and Tobago, Jamaica, The Philippines, Ghana, Ireland, The Netherlands and Spain.²¹ While the United States did not adopt a federal ombudsman, several states joined the ombuds ranks, starting with Hawaii in 1969, followed by Nebraska, Iowa, New Jersey, Alaska, Kansas, and Florida, as well as several urban areas.²² Some scholars refer to this surge from the mid 1950s to the 1980s as "ombudsmania" and attribute it to governmental recognition of "the ability of ombudsmen to advance the cause of human rights, to control the public bureaucracy, to remedy individual grievances against public maladministration, and to draw public attention to administrative maladies in public organizations."²³

In performing these duties, classical ombudsmen took an adjudicatory approach by conducting investiga-

tions, deposing witnesses, subpoenaing evidence, creating an official record, and issuing findings, judgments and formal public reports.²⁴ The mission of the classical ombudsman reflects this approach:

The institution's mission is to generate complaints against government administration, to use its extensive powers of investigation in performing a post-decision administrative audit, to form judgments which criticize or vindicate administrators, and to report publicly its findings and recommendations but not to change administrative decisions.²⁵

Thus, the classical ombudsman provides both procedural and substantive justice — procedural justice by following standard procedures for conducting investigations and substantive justice by judging and reporting on the merits of a complaint.²⁶

B. ORIGINS OF THE ORGANIZATIONAL MODEL — AN ADR APPROACH

Introduction of the organizational ombuds model in the United States in the 1960s occurred during a period of political and social turmoil, as universities faced student protests against the war in Vietnam and citizens demanded protections from the maladministration of corporate bureaucracies.²⁷ "From within corporations and universities, there was a growing concern about employee complaints regarding managerial power abuse, the complexities of managing and increasing diverse workforce, recognition of the limitations of hierarchical management structures, and similar issues."²⁸ As a result, corporations and universities looked to ombuds as a way to manage internal grievances and conflicts. Instead of copying the classical Swedish ombuds model, most corporations and universities who appointed ombudsmen modified the role to meet specific needs within these institutions.²⁹

Corporations and universities were seeking an internal mechanism by which grievances and conflicts could be handled in an impartial manner by an independent person who would be seen as neutral with respect to the various factions, interest groups, and statuses within the organization.³⁰

Unlike the classical model, which was born out of a need for independent investigation and prosecution of public complaints, the corporate or organizational ombudsman originated from a need for an alternative form of dispute resolution for employee and con-

sumer complaints.³¹

The mission of the organizational ombudsman is to provide a confidential, neutral and informal process which facilitates fair and equitable resolutions to concerns that arise in the organization. In performing this mission, the ombudsman serves as an information and communication resource, upward feedback channel, advisor, dispute resolution expert and change agent.³²

Mary Rowe, ombudsman for the Massachusetts Institute of Technology and co-founder of the Corporate Ombudsman Association — now The International Ombudsman Association — further defined the role of the organizational ombudsman, which highlights this ADR approach:³³

An effective [organizational] ombuds program typically would offer all *informal, interest-based, dispute resolution options*: listening, coaching, informal intervention, 'looking into a matter' informally, classic mediation, facilitating generic approaches to a problem, support systems change, training through-out the organization to prevent needless disputes, safe access for people with serious concerns, and confidential transmittal of information for those who need to 'blow the whistle.'³⁴

Like the concept of the multi-door courthouse, the organizational ombudsman refers visitors to the appropriate place inside the organization for addressing a visitor's problem.³⁵ In this sense, "[o]mbudsmen do not deliver due process, they deliver whatever responsible process is appropriate for each individual circumstance."³⁶

C. ABA'S CREATION OF OMBUDS CATEGORIES

1. Classical, Organizational and Advocate Ombuds

According to classical ombudsmen, organizational ombudsmen have distorted the Swedish model and are inappropriately using the title, diluting the purity of the profession.³⁷ While organizational ombudsmen were not the first to lay claim to the title, they are now the most prevalent form of ombudsmen in the United States.³⁸ In fact, some classical ombudsmen have bitterly complained that organizational ombudsmen have "hijacked" the ombuds movement.³⁹

Faced with the tension between classical and organizational ombuds, the ABA sought to define and clarify their different roles. In the Preamble to the Standards, the ABA describes ombuds as those who “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.”⁴⁰ The ABA’s definition of an ombudsman unified the profession such that it could apply to both classical and organizational models.

To further define and distinguish between the various types of ombudsmen who have emerged in the field, the ABA created separate categories of ombudsmen. In its 2001 Standards, the ABA identified three categories: classical ombudsmen, organizational ombudsmen, and advocate ombudsmen.

The ABA defined a classical ombuds as “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.”⁴¹ This definition was based on the Swedish model. In contrast, the ABA defined an organizational ombuds as one who “facilitates fair and equitable resolutions of concerns that arise within the entity.”⁴² This definition alludes to the ADR approach of the organizational ombuds. It may also be construed to limit the organizational ombuds’ jurisdiction by failing to address concerns arising outside the organization. Traditionally, organizational ombuds have also handled concerns arising outside the entity, for example, those brought by customers, consumers, vendors, or other public members who interact or are affected by the organization; however, these complaints brought by those outside the organization are not included in the ABA’s definition of an organizational ombuds.

Both classical and organizational ombudsmen objected to the addition of “advocate ombudsmen” to their ranks.⁴³ Advocate ombudsmen looked radically different from other ombudsmen in that they failed to adhere to one of the fundamental characteristics of ombuds — impartiality. Unlike classical or organizational ombuds, advocate ombuds serve as agents of individuals who may be unable or have difficulty finding a resolution to their disputes and may need a voice to advocate on their behalf.

The first advocate ombuds originated in response to abuse and neglect of nursing home residents in the

late 1960’s and early 1970’s.⁴⁴ In 1971, President Nixon directed the Health, Education and Welfare Department (HEW, now the Department of Health and Human Services) “to assist the States in establishing investigative [ombuds] units which would respond in a responsible and constructive way to complaints made by or on behalf of individual nursing home patients.”⁴⁵ Today these ombudsmen are the largest group of advocate ombudsmen in the United States.⁴⁶ Known as Long-Term Care (LTC) Ombudsmen, they serve to promote the interests of institutionalized elderly to protect their health, safety, welfare and rights.⁴⁷

While LTC Ombudsmen assist nursing home residents by coaching them to develop specific strategies to use to address their problems directly, LTC Ombudsmen also advocate directly on behalf of the individual resident.

There may be times when a resident wants the ombudsman to speak on his or her behalf or needs the support of the ombudsman in pursuing resolution. This usually occurs when resources within the home or community are unknown, when family or legal problems arise, or when there is fear of causing tension in resident-staff relationships. There are also cases where an ombudsman may represent a resident who is unable to communicate his/her wishes and has no one else to uphold his or her rights.⁴⁸

Not only do LTC Ombudsmen assist residents in asserting their rights and expressing their grievances *within* the long-term care facility, they advocate for residents *outside* the facility by seeing administrative, legal or other remedies to protect their health, safety, welfare and rights.⁴⁹ These functions are contrary to both the classical and organizational models, which prevent ombuds from suing on behalf of a complainant or advocating on behalf of an individual.

2. Classical Ombuds Further Differentiated — Executive and Legislative Ombuds

In 2004, the ABA further differentiated among types of ombudsmen. In order to distinguish between ombudsmen who are appointed by the legislature and ombudsmen who are appointed by a governmental executive or public official, the ABA broke up the “classical ombudsman” category into “legislative ombuds” and “executive ombuds.”⁵⁰ For example, a national human rights ombudsman may be estab-

lished by the legislative or executive branch.⁵¹ In Africa, human rights ombudsmen are typically based on the executive ombuds model.⁵² Those who support the executive model argue that these ombudsmen are effective because they have more credibility and command great respect due to their proximity to the head of state, their personal disposition and integrity.⁵³ Conversely, executive ombudsmen may have to investigate, critique or challenge those who appointed them, and therefore may not feel comfortable exercising their duty freely.⁵⁴ Because legislative ombuds are appointed by a legislative body, they have more autonomy and statutory protections to ensure their integrity will not be compromised.

Executive ombuds may also be located within the private sector and may be appointed by a private executive. Whether located within the public or private sector, executive ombuds “work to hold the entity or specific programs accountable or work with officials to improve the performance of a program.”⁵⁵ For example, an executive ombuds office may function as a private non-profit corporation that serves to assist citizens in resolving complaints against agencies of a county government.⁵⁶ A news ombudsman may also be considered an executive ombuds. Appointed by the executive editor, publisher or president, “[a] news ombudsman receives and investigates complaints from newspaper readers or listeners or viewers of radio and television stations about accuracy, fairness, balance and good taste in news coverage.”⁵⁷ He or she recommends appropriate remedies or responses to correct or clarify news reports.⁵⁸ Many newspapers have dedicated a column for their news ombudsmen to publish their recommendations or the results of their informal investigations so the public is informed. In this capacity, a news ombudsman holds the media accountable and improves the quality of journalism.⁵⁹

3. The Different Approaches Identified, But Not Clarified

While the ABA Standards identify separate ombuds categories to distinguish their roles, the Standards add confusion by recommending that the enabling ombuds legislation or written ombuds charter should authorize ombuds to investigate and report findings, facilitate, negotiate, mediate, and make recommendations for the resolution of individual complaints.⁶⁰ Some of these functions are contrary to the classical and organizational models,

yet are described as part of the role of all ombudsmen. The only ombuds function the ABA points out as not applying to all ombudsmen is the ability to “advocat[e] on behalf of affected individuals or groups.”⁶¹ This function is reserved for advocate ombuds and applies only when “specifically authorized by the charter.”⁶²

The ABA Standards should be revised so that all functions, not just that of advocacy, are specifically authorized by the enabling legislation, written charter or internal regulation. In addition, the scope of the organizational ombuds should be expanded to include concerns that come from outside the organization. Finally, the Standards should make clear that not all legislation, charters or regulations should authorize ombuds to perform the same functions, especially functions that are contrary to the orientations of the different ombudsmen. These different orientations of adjudication and ADR permeate all aspects of certain ombuds operations.

II. DIFFERENCES IN THE ESSENTIAL CHARACTERISTICS AND OPERATION OF OMBUDSMEN

In addition to establishing categories of ombudsmen, the ABA identified essential characteristics common to all ombudsmen, including independence, impartiality, and confidentiality. However, by focusing on these commonalities, real differences in the ways ombudsmen function in accordance with the essential characteristics of the ombuds office are overshadowed.

A. INDEPENDENCE

The Standards require that ombudsmen be independent in their structure, function and appearance. For some ombuds this is a more difficult task than for others.

Structurally, legislative ombudsmen have the most independence because their independence is guaranteed by law. While legislative ombuds are appointed by the legislature and are part of the legislative branch, they are guaranteed independence by the enabling constitution or statute.⁶³ This ensures that they are “free from interference in the legitimate performance of duties and independent from control,

limitation, or 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.⁶⁴ In addition, legislative ombuds are typically assured a term of service with a high salary equivalent to that of a high officer and may be removed only for cause, which enhances their structural independence.⁶⁵

Legislative ombuds need independence to have the freedom to investigate and perform their duties without fear of retaliation or control by other entities or individuals. For legislative ombuds, the ABA's 1969 resolution outlining essential characteristics for maintaining independence still serves as a model for federal, state and local governments who want to create such an office. In addition to the previous structural characteristics, the following functional characteristics ensure independence:

- [A]uthority of the ombudsman to criticize all agencies, officials and public employees . . .
- [F]reedom of the ombudsman to employ his own assistants and to delegate them . . .
- [F]reedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee;
- [A]ccess of the ombudsman to all public records . . .
- [A]uthority 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;
- [D]iscretionary power to determine what complaints to investigate and to determine which criticisms to make or to publicize;
- [O]ppportunity 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 statement⁶⁶

Executive ombuds do not have a similarly strong statutory guarantee of independence. Executive ombuds are appointed by and serve at the pleasure of governmental or private executives.⁶⁷ As these executives change, the ombuds office may receive more or less support or may even be phased out.⁶⁸ Despite these limitations, governmental and private executives can provide the ombuds office with

independence and with the same characteristics previously endorsed by the ABA for legislative ombuds. Because executive ombuds follow a classical ombuds model, which focuses on investigation and reporting the results of these investigations, the legitimacy of this work is jeopardized when the ombuds office is not independent from the chief executive.

Though executive and legislative ombuds are independent, paradoxically their very connection to their chief executives and legislative creators may account for their effectiveness.⁶⁹ "When an executive Ombudsman encounters an obstinate or inefficient agency, he may call on his chief for support. When a classical Ombudsman meets a similar situation, he may call upon the Legislature through a special or annual report, or upon the press to impose a similar pressure."⁷⁰ For example, the Executive Ombudsman of the City of Portland described how his connection to the Mayor helped him obtain information and documents from public employees who usually provide them under the assumption that the ombuds office is "an adjunct to the Mayor, rather than an independent body."⁷¹ In contrast, legislative ombuds have independent subpoena power and do not need to rely on the perceived power brought by the executive or wait for the Mayor to grant such subpoena power as provided by City Charter.⁷² While the close association with the executive may be helpful in fulfilling the ombuds investigative role, it also may confuse public employees over the role of the ombudsman as an independent office.⁷³

Independence is necessary to prevent ombuds from being influenced or controlled by executives with political motives. For example, while running for reelection in 1986, Marion Barry created the position of Ethics Ombudsman in response to public concern over alleged corruption in city government.⁷⁴ In addition to hearing complaints from city government employees and the public, the Ethics Ombudsman had "the authority to report findings of wrongdoing to the public or to law enforcement officials, as well as to the mayor, the inspector general and city agency heads."⁷⁵ While exposing corruption was the stated objective of the Ethics Ombudsman, it is questionable whether Barry truly wanted corruption to be revealed in light of his own political agenda. Shortly after the election, the Ethics Ombudsman position faded away and is now defunct.⁷⁶ Without independence, an executive ombuds may feel pressure to provide a

flattering report of governmental activities or modify the results of their investigations to suit the political aspirations of the executive.

Advocate ombuds are often appointed by a governmental executive.⁷⁷ However, the location of the advocate ombuds office may pose conflicts of interest. For example, in some states Long-Term Care Ombudsmen are appointed by the governor; whereas in others, they are appointed by a director of an agency where the ombuds office is located.⁷⁸ Like other ombudsmen, advocate ombuds need to be insulated from political interference, agency pressure, or retaliation.⁷⁹ Independence allows ombuds to “tell it like it is” without the same fear that other internal agency staff may have.⁸⁰ For example, advocate ombuds must have the freedom to gather sufficient information about the problem to advocate on behalf of the individuals they serve. Moreover, in advocating for individuals of a particular population, advocate ombuds may be criticizing or arguing against the very agency in which they are housed. As a result, special care needs to be given to ensure independence so that ombuds have the freedom to serve as a strong voice for the people they represent.

Organizational ombuds also require independence, but for a different purpose. Unlike legislative and executive ombuds, the primary purpose of organizational ombuds offices is not to conduct investigations or issue public reports. In fact, investigations are specifically prohibited.⁸¹ Organizational ombuds need to remain independent from all other line and staff structures so that visitors will utilize the office and seek out the ombuds as an alternative to the other channels within the organization. If an organizational ombuds is viewed as a part of the management structure or an extension of the CEO, employees may not come forward for fear that the ombuds will be biased or will breach confidentiality. Furthermore, organizational ombuds provide a variety of services for visitors, offering a flexible process that varies according to the needs of the visitor. Accordingly, organizational ombuds need to operate without interference from other entities or individuals within the organization and should not be penalized for inquiring about a particular issue or problem.

Like executive ombuds, organizational ombuds do not have independence guaranteed by statute. Instead, the governing policy of the institution provides the organizational ombuds with indepen-

dence. For example, organizational ombuds report only to the highest officer(s) in an organization, such as the CEO. If there are too many people between the ombuds department and the CEO to whom the ombuds reports, employees will recognize that the ombuds could potentially be influenced by or beholden to these individuals.⁸²

In addition to reporting only to the highest level within an organization and remaining outside the line management structure, organizational ombuds can be assured independence by policies that provide for renewable term limits, removal clauses for cause only, high salary, access to information within the organization, an adequate budget that cannot be reduced for retaliatory purposes, and access to independent counsel. In this way, organizational ombuds can maintain independence, serving as the “inside-outsider.”⁸³

Critics of these safeguards argue that without statutory protections, ombuds cannot be assured independence because they are part of the organization they serve.⁸⁴ Because organizational ombuds typically report to the CEO or board of directors, they may potentially seek to please these individuals or act in a way to maintain their positions as ombuds.⁸⁵

The ABA uses the following criteria to determine whether an ombuds is independent:

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.⁸⁶

While organizations may have internal policies prohibiting this type of control or retaliation, ombuds can still suffer reprisal by a President or CEO who can find ways to eliminate, remove, or reduce the ombuds office.⁸⁷ Organizational ombuds can never attain the same structural independence as legislative ombuds, whose independence is guaranteed by law and protected by the legislative branch. Instead, organizational ombuds are only independent to the extent the entity allows.⁸⁸ These differences in independence are important and need to be explained in the ABA Standards so that the public is aware of the limits of independence within these categories.

B. IMPARTIALITY IN CONDUCTING INQUIRIES AND INVESTIGATIONS

The ABA requires that ombuds demonstrate impartiality only when conducting inquiries and investigations.⁸⁹ The ABA limited impartiality in response to the needs of ombuds who advocate on behalf of a particular population and for ombuds who issue public reports, findings or recommendations that advocate change in law, policy or decisions.

These actions are contrary to the practice of organizational ombudsmen, who strive for impartiality in all aspects of their work. As in facilitative mediation, visitors to the ombuds office should not expect to be given advice.⁹⁰

For an ombudsperson, giving advice may be a form of condescending partisanship; condescending because it assumes the inability of the advisee to come to her/his own decision about the best course of action and partisanship because it means we have been seduced — “tell me what to do” is merely the most flattering version of “be on my side.” . . . If an ombudsperson gives advice, then the ombudsperson has a stake in the outcome.⁹¹

Instead, organizational ombuds work with visitors to identify and evaluate a range of options.⁹² The visitors, not the ombuds, decide how to proceed with their complaints and which options are best suited to resolve their disputes.⁹³ If people perceive they have some control over the complaint process, they cope better with tough problems and are more likely to feel the process is fair.⁹⁴ In addition, organizational ombuds recognize that there may be several ways to resolve a dispute and that the optimal solution for the visitor is the one freely chosen.⁹⁵ Recognizing the importance of self-determination in conflict, organizational ombuds do not provide advice and remain impartial.

Unlike other types of ombuds, organizational ombuds do not conduct investigations or issue reports, findings or recommendations stemming from these investigations. Engaging in such activities would jeopardize their reputations as impartial conflict resolution resources. Organizational ombuds do conduct informal inquiries at the request of a visitor to obtain more information about a conflict and explore options for resolution. However, these inquiries (sometimes referred to as informal investigations) are not conducted to generate any reports,

findings or recommendations by the ombuds for how the dispute should be resolved. One organizational ombuds described this practice of informal investigation “not as the last word on an issue, but as a catalyst for the parties to attend to the matter anew, and from a different vantage point.”⁹⁶ Another described the purpose of informal investigations as “uncovering the dynamics of a dispute.”⁹⁷

By meeting with visitors, organizational ombuds acquire a wealth of information about the types of conflicts and problems that arise. Although visits to the ombuds are confidential, organizational ombuds may provide upward feedback to management that identifies general trends and patterns in complaints brought to the ombuds office without revealing confidential information or disclosing the identity of the visitors.⁹⁸ For example, organizational ombuds may record the demographics of those who visit the office (e.g. gender, race/ethnicity), the visitor’s general position held at the organization (e.g. supervisor, administrative staff, or other employee classification specific to the organization), and the type of issues raised by visitors (e.g. policy, benefits, discipline, ethics, discrimination, personnel, management, work environment).⁹⁹ These categories are general enough that an individual visitor would not be able to be identified yet the organization has access to information that identifies problem areas. In addition, the organizational ombuds may learn of a particular problem, such as failure to enforce a policy, on the basis of a single case and may provide feedback to management while maintaining the confidentiality of the visitor.¹⁰⁰ This upward feedback allows management to take proactive measures to find solutions to problems that otherwise may go unidentified and leads to systematic change within the organization.

In addition to identifying trends and patterns in complaints, organizational ombuds may provide general recommendations for systematic change. For example, in its 2000 Annual Report, the NIH Office of the Ombudsman, Center for Cooperative Resolution recommended that the National Institutes for Health:

- Strengthen formal and informal systems for addressing complaints and conflicts and ensure that those with grievances and complaints work within those systems
- Review the current approach to employee performance evaluation
- Evaluate supervisors on their management responsi-

bilities and provide effective, ongoing training for managers

- Reconsider the structure of stage one of the agency grievance process
- Develop new approaches to addressing racial and other identity issues at NIH
- Shift the focus at NIH away from an exclusive concentration on problems and failures¹⁰¹

These recommendations do not advocate specific solutions, but are important starting points to explore options for systematic change within the organization. In performing this function, organizational ombuds have been deemed “change agents.”¹⁰²

In providing recommendations for change, organizational ombuds need to walk a fine line. Often organizational ombuds are asked to serve on and advise committees responsible for drafting new policies and procedures that were formed as a result of the very problems identified by the ombudsman.¹⁰³ While ombuds want to assist in correcting these problems, it is important that they not serve in a decision-making capacity, draft new policies, or advocate a particular result.¹⁰⁴ Ombuds may have to meet with employees in the future who have problems or complaints with these policies. If ombuds are invested in forming or endorsing particular policies, they may feel compelled to defend them, thereby compromising their neutrality.¹⁰⁵ In addition, if the ombuds serves on these committees with others in the organization’s management structure, it may give the appearance that the ombuds is simply an arm of management.

In order to assist the organization in forming new policies while maintaining impartiality, some ombudsmen serve on committees in an “ex officio or advisory capacity” or as a “critical reader.”¹⁰⁶ By maintaining distance from management and by refusing to endorse particular policies, these ombuds adhere to their duty to serve in an impartial manner. In this capacity, ombuds should be aware of the “important difference between helping to identify possible problems in proposed policies and procedures and promoting particular policies or procedures.”¹⁰⁷

For legislative, executive and advocate ombuds, this distinction does not exist. As part of their practice, these ombuds not only promote particular policies and procedures, but they may do so publicly. In addition, they may take a position about the merits of a complaint or the outcome of an investigation. For

these ombuds, impartiality extends to their conduct during their investigation and the evaluation of a complainant’s claim, but does not prohibit them from ultimately opining on who is right or wrong. The fact that impartiality extends only to inquiries or investigations does not mean that it is any less important for legislative, executive or advocate ombuds. If an ombuds is not impartial, complainants may not seek the ombuds’ assistance and any criticism or recommendation made by the ombuds will not be viewed as credible.¹⁰⁸

The ABA Standards should reflect the difference in impartiality between organizational ombuds and others. For organizational ombuds, impartiality extends to all aspects of their work, not simply to informal inquiries or investigations. The ABA should emphasize this difference so that the public has a clear understanding of how various ombuds operate.

B. CONFIDENTIALITY

The ABA recognizes confidentiality as an essential characteristic of all ombuds offices. Under the ABA Standards, “[a]n ombuds does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm.”¹⁰⁹ In addition, all “[r]ecords pertaining to a complaint, inquiry, or investigation are confidential.”¹¹⁰ However, this definition is misleading. Under the ABA Standards, an ombuds “may disclose confidential information so long as doing so does not reveal its source.”¹¹¹ In essence, the ABA Standards guarantee anonymity, not confidentiality. If the ombuds believes that disclosure of confidential information is needed, the ombuds may disclose this information without obtaining consent from the source as long as the source’s identity is not compromised.¹¹² Unless the source requests that his/her identity be revealed, the ombuds will protect it from disclosure.

For organizational ombuds, the protection of confidentiality is much broader. Under the Code of Ethics for organizational ombuds, the ombudsman “holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so.”¹¹³ Therefore, all information divulged by a visitor is confidential and the information cannot be revealed unless the visitor gives express consent. This gives visitors a feeling of control over their conflicts. Yet the

ABA Standards appear to take this control away: When an ombuds communicates with representatives of the entity about allegations by multiple complainants that may reflect inappropriate or wrongful behavior or conduct, the complainants are only advised after the fact if the ombuds communicated confidential information to the entity.¹¹⁴ As long as the identity of the complainant is not revealed, confidential information may be shared.¹¹⁵ Ultimately, the choice to disclose confidential information belongs to the ombuds. A complainant cannot demand that the ombuds disclose such information or direct the ombuds actions.

Confidentiality is the heart of the organizational ombuds practice. Without confidentiality, individuals would not feel safe coming forward to express their conflicts, problems or concerns. The protection of confidentiality is a unique feature that other traditional channels within the organization — such as management, human resources, audit, security, legal, and compliance — do not provide. The ombuds office does not replace these channels; rather, it offers an alternative that enables employees to communicate their grievances by providing them with a confidential forum.¹¹⁶ Indeed, the organizational ombuds would add little value if “the same information could have flowed through traditional channels.”¹¹⁷

Individuals fear using formal grievance channels, which “are often ill-suited to providing prompt, efficient and just solutions to the problems that are brought to them.”¹¹⁸ Approximately 10 percent of the complaints within an organization become formal grievances.¹¹⁹ The other 90 percent come from employees who feel mistreated and will “lump it,” failing to bring a complaint because they believe they will not receive their desired outcome or avoiding a conflict by withdrawing from the relationship.¹²⁰ Fearing that their dispute will be disclosed, individuals fail to take action to resolve the conflict. Fears may arise from many sources, including:

- Loss of privacy and dignity
- Jeopardizing the relationship
- Covert and/or overt reprisal
- Being thought of as disloyal, lacking in humor or a poor sport
- Being seen as troublemakers
- Not having enough evidence¹²¹

Without confidentiality, employees may also fear

losing control over their conflict. They need the ability to speak freely with an ombuds about their conflict without fear that action will be taken without their consent. In addition, employees also worry about the organization’s response to their complaints. Individuals may not report misconduct because they do not believe employers will take action to stop the misconduct or resolve the conflict.¹²² Conversely, other individuals fail to report misconduct because they believe the employer will impose exceedingly harsh measures on the perpetrator.¹²³ Organizational ombuds may help fearful employees think through which options best suit their individual needs and conflict styles.

Unlike public citizens who bring complaints to a legislative or executive ombuds, employees of an organization who bring complaints are particularly vulnerable.¹²⁴ “Participation in an organization, like a company or a university can be terminated in ways that participation in one’s country cannot, even if one’s rights as a citizen can be drastically restricted.”¹²⁵ This threat of retaliation warrants strict confidentiality by the organizational ombuds office.

As a result, an organizational ombuds must be very careful not to discuss a case in a way that may compromise the identity of the complainant and must promote strict measures to ensure confidentiality. Not only should organizational ombuds not use the names of visitors, they should not reveal information that could lead to identification of a visitor without that individual’s express permission.¹²⁶ In addition, the organizational ombuds office does not keep case records for the organization and should have a consistent and standard practice for destroying any notes from a case.¹²⁷ All data prepared for the organization should be carefully scrutinized to protect the identity of the visitor.¹²⁸ In order for employees to use the organizational ombuds office and discuss their problems and complaints openly and honestly, they need assurance that they are communicating in a safe space and that the organizational ombuds will keep their communications confidential unless given express consent to disclose.

For organizational ombuds, confidentiality is central to their practice and is necessary in all communications with visitors. However, for legislative and executive ombuds, confidentiality is a tool that is offered at the ombuds’ discretion in order “to elicit needed information or protect the source of needed

information.”¹²⁹ Confidentiality does not extend to all communications, but is provided on a case-by-case basis when needed. For these classical ombuds, the ABA Standards do not pose a problem because even confidential information may be revealed as long as the source is protected. Disclosing confidential information will not likely lead to disclosure of the source where the ombuds receives numerous complaints from the public.

Due to the critical role that confidentiality plays in the organizational ombuds practice, the ABA should revise its Standards so that this protection does not merely guarantee anonymity. The Standards should go farther by providing that confidential information not be disclosed unless the source provides express consent and the ombuds agrees to disclose this information. Such a provision would correct the inconsistencies in the ABA Standards that send two different messages — one protecting only the source, not the confidential information, from disclosure and the other protecting all confidential information from disclosure unless the source consents to reveal it.¹³⁰

The inconsistencies in the confidentiality provisions of the ABA Standards may be explained by the need of organizational ombuds to provide upward feedback to the organization. As part of their practice, organizational ombuds may provide an organization with trending data. This information may be used by the organization to promote systematic change. As a result, organizational ombuds must be able to reveal information without the visitor’s consent. However, the information that the ombuds reveals is not confidential. This information may include the general demographics of visitors to the ombuds office; the type of issue addressed; the work relationship between complainants and respondents; the processes used by the ombuds office to assist visitors; the time it took to resolve disputes; and the techniques used for resolving cases. The ABA Standards do not adequately address this upward feedback function in its discussion of the limits of confidentiality. While the Standards recommend that the ombuds “discuss any exceptions to the ombuds’s maintaining confidentiality with the source of the information,” the Standards should explicitly refer to the upward feedback function of ombuds. Clarity is needed for visitors who may be confused as to the limits of confidentiality and what information ombuds retain and distribute as part of this function.

If the Standards are not revised to take into account upward feedback, the Standards may be construed to prohibit this function since “any information the person provides in confidence” cannot be disclosed unless the source provides consent. Such an interpretation would obliterate one of the essential roles of an organizational ombuds to promote change within the organization.

III. LEGAL AND FUNCTIONAL IMPLICATIONS OF THE ABA STANDARDS ON OMBUDSMEN

A. CONFIDENTIALITY — A MISSED OPPORTUNITY

The ABA passed on an opportunity to strengthen the confidentiality of the ombuds office. The seminal case finding an ombuds privilege, *Roy v. United Technologies Corporation*, and its progeny provide a legal basis for protecting the confidential communications of organizational ombudsmen.¹³¹ The ABA, however, declined to incorporate this privilege into its Standards.

Roy is the first case to protect communications of an organizational ombuds from disclosure under a federal common law privilege.¹³² Although unpublished, this case has become the most influential and is frequently cited by other courts. In this case, Monoranjan Roy, a United Technologies (UTC) employee, visited the ombuds office. He later filed suit against UTC for discrimination on the basis of age, race, and national origin.¹³³ When he sought to depose the UTC Ombudsman, the ombuds filed a motion for protective order to prevent disclosure of confidential information.¹³⁴

The court granted the protective order. In his ruling, Judge Cabranes looked to Federal Rule of Evidence 501, which provides that “...the privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.”¹³⁵ While this rule provides little specific guidance, it provides judges with flexibility to develop privilege rules on a case-by-case basis.

The court granted the protective order. In his analysis, Judge Cabranes found that the ombudsman relationship must exhibit four factors to support a finding of

common law privilege. Known as the Wigmore test, these factors include:

- (1) [t]he communication must be one made in the belief that it will not be disclosed;
- (2) confidentiality must be essential to the maintenance of the relationship between the parties;
- (3) the relationship should be one that society considers worthy of being fostered;
- (4) the injury to the relationship incurred by the disclosure must be greater than the benefit gained in the correct disposal of the litigation.¹³⁶

The UTC ombudsman satisfied all four factors. First, there was an expectation that communications with the ombuds office would be kept confidential. This was demonstrated by the “extensive precautions – such as having an 800 number to prevent tracing calls – that were taken to ensure confidentiality.”¹³⁷ Second, confidentiality is essential to the relationship and is a defining characteristic of an ombuds office. In fact, UTC established the ombuds office for the purpose of ensuring confidentiality and promoting candor.¹³⁸ Third, the ombuds office benefits society by promoting accountability among contractors, encouraging individuals to report waste and fraud, and enabling many disputes to be resolved informally.¹³⁹ Finally, the ombuds strong interest in confidentiality is outweighed by the plaintiff’s minimal interest in discovery.¹⁴⁰ Because the privilege belonged to the ombuds office and the plaintiff could not waive it, the ombudsman could not be deposed about the confidential communications regarding the case.

Relying on *Roy*, the court in *Kientzy v. McDonnell Douglas Corporation*, also recognized an ombuds privilege and prevented discovery of communications made with the corporation’s ombuds office.¹⁴¹ In *Kientzy*, the plaintiff wished to depose employees about communications with the McDonnell Douglas ombuds office to prove discriminatory intent and to prove that the ombuds participated in the final decision to terminate her as part of the company’s procedure for appealing a dismissal.

Applying the Wigmore test, the court found the ombudsman satisfied all four factors. Communications made to the ombuds were made under the belief that they would not be disclosed. This policy of confidentiality was supported by the structure of the ombuds office as an independent and neutral entity, by the ombuds’ adherence to a code of ethics providing for confidentiality, and by the employer’s strict

pledge and advice to employees that communications were confidential. In addition, the court found that confidentiality was essential to the relationships between employees and the ombuds office.

Without this confidentiality, the office would be just one more non-confidential opportunity for employees to air disputes. The ombudsman’s office provides an opportunity for complete disclosure, without the specter of retaliation, that does not exist in the other available, non-confidential grievance and complaint procedures.¹⁴²

The ombuds office also serves an important role in society by providing employees who work for “very large federal government contractors in the aircraft, space, and other industries . . . [with] an opportunity to make confidential statements and to receive confidential guidance, information, and aid to remedy workplace problems to benefit themselves and possibly the nation.”¹⁴³ Moreover, society benefits from the ombuds office, which promotes informal dispute resolution and settlement based on confidential communications. In the years following *Kientzy*, several jurisdictions continued to uphold a privilege for the ombuds office.¹⁴⁴

In a case surprising on its face, McDonnell Douglas, the very corporation that obtained an ombuds privilege in *Kientzy* was denied this same protection six years later. In *Carman v. McDonnell Douglas Corporation*, the Eighth Circuit failed to provide a privilege for confidential communications made by an employee to the company ombudsman who investigated and mediated workplace disputes.¹⁴⁵ However, a closer look at the procedural and substantive history of the case reveals that McDonnell Douglas forced the court’s hand by failing to submit evidence to the lower court of the value of its ombuds office. Consequently, the appellate court may not have factual basis in the record to extend the privilege.

In *Carman*, McDonnell Douglas fired Frank Carman as part of a RIF (reduction in force). Carman later sued alleging his termination violated the Age Discrimination in Employment Act, the Missouri Human Rights Act, and the Employee Retirement Income Security Act of 1974.¹⁴⁶ During discovery, Carman requested all the ombudsman’s notes and documents concerning the plaintiff and a number of other individuals.¹⁴⁷ The request covered various topics, including meeting notes regarding lay-offs and meeting notes about Carman.¹⁴⁸

In failing to extend the ombuds privilege, the *Carman* court did not utilize the four-part Wigmore test. Instead the court examined whether the party seeking the creation of a new evidentiary privilege overcame “the significant burden of establishing that ‘permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.’”¹⁴⁹ The court recognized the public good that the ombuds office fosters in encouraging “fair and efficient alternative dispute resolution techniques.” However, this was not enough:

McDonnell Douglas has failed to present any evidence, and indeed has not even argued, that the ombudsman method is more successful at resolving workplace disputes than other forms of alternative dispute resolution, nor has it even pointed to any evidence establishing that its own ombudsman is especially successful at resolving workplace disputes prior to the commencement of litigation.¹⁵⁰

In other words, general claims of the benefits of alternative dispute resolution were insufficient to secure a privilege for the ombuds office. Instead, specific proof of the success of the office in promoting alternative dispute resolution needed to be offered. While the *Kientzy* court recognized the ombuds office received 4,800 communications in six years, the *Carman* court found that this statistic did not provide any context to evaluate its significance.¹⁵¹

In addition, the *Carman* court was not persuaded that the benefits provided by the ombuds office would be lost without the privilege. According to the court, “when an aggrieved employee or an employee witness is deciding whether or not to confide in a company ombudsman, his greatest concern is not likely to be that the statement will someday be revealed in civil discovery.”¹⁵² The court found that even without the privilege employees would utilize the ombuds office since the ombuds could still keep confidential communications from management.¹⁵³

On the face of the opinions, it seems surprising that two courts could come to such drastically different conclusions about the importance of the McDonnell Douglas ombuds office. However, Charles L. Howard, the attorney who represented the UTC ombudsman in the seminal *Roy* case, offers some insight into the decision in *Carman*.¹⁵⁴ McDonnell Douglas first

objected to plaintiff’s request for production of documents by simply stating “activities as an ‘ombudsman’ were considered confidential and any information and documents relating to her activities are immune from discovery.”¹⁵⁵ The lower court overruled this objection, but later reconsidered when McDonnell Douglas submitted two unreported orders from the same district court recognizing a privilege for the McDonnell Douglas ombuds office.¹⁵⁶ Ultimately, the district court ruled that McDonnell Douglas did not have to produce ombuds documents, but failed to provide any analysis on the issue.¹⁵⁷ “Since McDonnell Douglas had not presented any factual basis to the trial court to prove its entitlement to the privilege, the appeals court had virtually no choice but to deny the privilege.”¹⁵⁸

While this post-hoc rationalization for the *Carman* court’s decision is appealing, nevertheless, ombudsmen must still face the precedent *Carman* left behind that weakens ombuds’ claim to privilege. Indeed, while most courts considering the ombuds privilege have extended it, *Carman* is the highest court to have ruled on this issue.

Since *Carman*, two other courts denied extending a privilege to ombuds communications.¹⁵⁹ These cases demonstrate the weakness of the protection of confidentiality offered by organizational ombudsmen. In light of the conflicting case law, it is important that the ABA provide guidance and endorse a confidentiality privilege as established in *Roy* and its progeny.

Unfortunately, the ABA Standards do not take this approach. The ABA Standards impose only limited rights of confidentiality and do not mention the legal requirements needed to create a confidentiality privilege. First, the legal requirement that the communication “be made in the belief that it will not be disclosed” is not strongly supported by the ABA Standards. While communications with the ombuds office are confidential under the ABA Standards, an ombuds may disclose confidential information as long as the source is not revealed. If a visitor is aware of this limitation on confidentiality, then communications may not be made under the belief that they will be kept confidential. In order to ensure that communications are made under the belief of confidentiality, the Standards should allow an ombuds to disclose confidential information only with the visitor’s permission. The Standards should also encourage practices that will support a privilege, including a

code of ethics that obligates an ombuds to maintain strict confidentiality, use of 1-800 numbers to prevent the tracing of calls, a policy for the destruction of records, access to independent counsel, a policy against testifying in any proceeding, and a process for compiling aggregate statistics regarding the effectiveness of the ombuds office.¹⁶⁰

Second, the Standards should include a provision that confidentiality is essential to the relationship between organizational ombuds and visitors. A survey by the Ethics Resource Center reveals that 44% of all non-management employees do not report the misconduct they observe.¹⁶¹ A top reason given for failure to report misconduct was fear that the report will not be kept confidential.¹⁶² Only by having a confidential forum will employees feel safe communicating with the ombuds office.

The ABA Standards should also endorse the ombuds relationship as “one that society considers worthy of being fostered.” In this time of corporate scandals, the ombuds office functions as an early warning device of corporate malfeasance. For example, ombuds may provide data on the number of visitors who complained of unethical accounting matters, which may show a trend in these types of complaints. In addition to this upward feedback, ombuds may provide visitors with (1) information about laws or policies requiring employees to report such misconduct, (2) information about the proper procedures to follow when reporting such misconduct, and (3) information about the organization’s anti-retaliation policies to encourage disclosure. If the visitor agrees, the ombuds may also assist by reporting the misconduct on the visitor’s behalf. In this capacity, an ombuds may increase the amount of reporting of corporate malfeasance in spite of the office’s confidential nature.

Congress recognized the importance of confidentiality in the U.S. Sentencing Guidelines, which require that an organization take “reasonable steps . . . to have and publicize a system, which may include mechanisms that allow for anonymity and confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual conduct without fear of retaliation.”¹⁶³ In addition, the Sarbanes-Oxley Act of 2002 requires the audit committees of the boards of directors of publicly held companies establish procedures for “the confidential, anonymous submissions by employees of the [company] of concerns regarding questionable

accounting or auditing matters.”¹⁶⁴ Exposure of corporate corruption would prevent huge losses sustained by the public, shareholders, and employees, and ombuds can serve a vital role facilitating such exposure.

Organizational ombuds also work to resolve disputes informally, thus decreasing the amount of resources spent by the judiciary and organizations on employment litigation. Resolving disputes informally with the assistance of an organizational ombuds, saves on costly attorneys’ fees, reduces turnover, increases retention of valuable employees, increases employee productivity and decreases management time spent on workplace disputes.¹⁶⁵ By endorsing these societal benefits and supporting a common law privilege, the ABA Standards could be used by ombuds to counter courts like *Carman* that question the value of ombuds offices and undermine ombuds confidentiality.

B. BEFUDDLED NOTICE

If an employer has knowledge of wrongful conduct by its employees, it may be subject to liability. For example, notice to the employer of a hostile work environment is critical to determining employer liability.¹⁶⁶ Individuals often disclose complaints of sexual harassment or discrimination to the ombuds. If an employer has knowledge or notice of these complaints, then it may be subject to liability for the perpetrators’ conduct. As a result, the ABA Standards need to provide clear guidance on what constitutes notice to the entity the ombuds serves.

The standard for determining employer liability depends on whether the hostile work environment was created by a co-worker or supervisor. An employer is subject to liability for hostile environment harassment created by a co-worker if the employer *knew or should have known* of the harassment and failed to take immediate and appropriate corrective action.¹⁶⁷ Thus, an employer may have actual knowledge of the harassment or constructive notice of the harassment where the harassment was so severe and pervasive that management should have known of its existence.¹⁶⁸

As for supervisors, “an employer is subject to vicarious liability to a victimized employee for actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.”¹⁶⁹ Should an employee succeed in making such a claim, the employer has the following affirma-

tive defense and must prove by a preponderance of the evidence that: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, *and* (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise avoid harm.¹⁷⁰ Thus, notice to the employer is important in establishing an affirmative defense to prove it took reasonable preventive and corrective action and that the plaintiff may have been unreasonable in not taking advantage of opportunities after being subjected to harassing behavior.

When an individual complains about harassment to the ombuds office, this communication does not put the organization on notice. Simply because the ombuds is employed by the organization does not mean the ombuds is capable of receiving notice. An organization can be put on notice only through one of its agents. Agency is determined by the following factors:

- (1) The manifestations by the principal that the agent shall act for him;
- (2) The agent's acceptance of the undertaking;
- (3) The understanding of the parties that the principal is to be in control of the undertaking.¹⁷¹

Under these factors, ombuds cannot be considered agents of their employer because of the independence of the office. Ombuds do not act on behalf of any person or entity, nor does any person or entity control their actions. Upholding this notion, the ABA Standards expressly prohibit the ombuds from being deemed an agent of any person or entity, other than the office of the ombuds.¹⁷²

While direct communications with the ombuds office does not put the employer on notice, an individual may request that the ombuds discuss her case with management and disclose her identity. Under the ABA Standards, if the ombuds communicates with representatives of the entity and reveals the facts of "a specific allegation and the identity of the complainant" then this communication is considered to provide notice to the entity.¹⁷³ This notice provision is consistent with case law that allows for someone other than the complainant to provide notice to the employer.¹⁷⁴

In addition to actual notice, employers may receive constructive notice of the hostile work environment. Under the ABA Standards, if an ombuds "communi-

cates with representatives of the entity concerning an allegation of a violation, then . . . a communication that reveals the facts of . . . allegations by multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful should be regarded as providing notice to the entity of the alleged violation. . . ."¹⁷⁵ Not only is this language convoluted, it fails to recognize the legal standard used to establish constructive notice. In order to have constructive notice of a hostile work environment, the harassment must be so severe and pervasive that the employer should have known of its existence.¹⁷⁶ In evaluating whether multiple instances are so pervasive that the employer is put on notice, courts consider when the past incidents of harassment occurred.¹⁷⁷ If the harassment occurs intermittently over a long period of time multiple incidents are insufficient to put an employer on notice.¹⁷⁸

In addition to failing to require pervasive harassment, the ABA notice provision raises a number of questions. First, why should an ombuds be required to speak with "representatives of the entity" — i.e. more than one representative — concerning an allegation of a violation before an employer may be put on notice? There is no legal precedent to support such a requirement. In addition, why not use language such as "agents" instead of "representatives" to comport with legal precedent? Second, must the communication reveal the identity of the alleged perpetrator of the harassment? While an ombuds may inform an employer of multiple complaints of related conduct or behavior without disclosing the identities of the complainants, the ABA Standards do not specify whether the identity of the alleged perpetrator must be disclosed to constitute notice. Some courts have found anonymous complaints that fail to disclose the identity of the alleged perpetrator as insufficient to constitute notice.¹⁷⁹ While the Report accompanying the ABA Standards states that the information provided in the complaints should "be sufficiently detailed that the entity could conduct its own investigation with respect to the allegations," it is unclear what details are required.¹⁸⁰ Without clarity on what constitutes notice, employers may restrict the ombuds from communicating anonymous complaints of harassment or trends in the workplace environment to management for fear that they will be put on notice.

Because the ABA Standards are used to guide ombuds offices, more clarity is needed so that organizations

know when they have been put on notice. At the very least, the ABA Standards should require that allegations by multiple complainants identify the alleged perpetrator of related inappropriate or wrongful behavior or conduct. If the alleged perpetrator is not identified by multiple complainants, the ABA Standard should reflect the legal standard requiring that the inappropriate or wrongful behavior or conduct be so pervasive or widespread that the organization should have known of its existence.

Once an employer is on notice of co-worker harassment, it is subject to liability if it fails to take immediate and appropriate corrective action. Likewise, an employer is subject to liability for a hostile work environment created by a supervisor with immediate (or successively higher) authority over the victimized employee unless it can bring an affirmative defense. As part of the affirmative defense the employer must show that it exercised reasonable care to prevent and promptly correct the harassment. In order to correct the harassing behavior, the employer must have notice of its existence. Without notice of the harassing behavior, an employer exercising reasonable care cannot act promptly to correct the harassment.

In addition, an employer must show that the employee failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise avoid harm. Thus, an employer may avoid liability where an employee failed to report or delayed reporting the harassment. While an employee's failure to report is "tantamount to per se 'unreasonable' behavior," courts vary as to how long an employee can delay reporting harassment before such delay is considered unreasonable.¹⁸¹ Employees who first use an ombuds to resolve their complaints informally may be considered to be unreasonable in their decision to delay their reports of harassment to the employer.¹⁸² An employee who reports to the wrong party may also be considered unreasonable in failing to take advantage of the employer's policies and procedures.¹⁸³ Likewise, because an ombuds is expressly not an agent for the receipt of notice, an employee who reports to an ombuds to put an employer on notice may likewise be considered unreasonable.

Because notice impacts the employee's right to recovery, the ABA requires that an ombuds provide warnings to individuals who contact the ombuds office for help or advice. Specifically, the ombuds should inform visitors that:

- (a) the ombuds will not voluntarily disclose to anyone outside the ombuds office, including the entity in which the ombuds acts, any information the person provides in confidence or the person's identity unless necessary to address an imminent risk of serious harm or with the person's express consent
- (b) important rights may be affected by when formal action is initiated and by and when the entity is informed of the allegedly inappropriate or wrongful behavior or conduct
- (c) communications to the ombuds may not constitute notice to the entity unless the ombuds communicates with representatives of the entity as described [in the paragraph about which communications constitute notice]
- (d) working with the ombuds may address the problem or concern effectively, but may not protect the rights of either the person contacting the office or the entity in which the ombuds operates
- (e) the ombuds is not, and is not a substitute for, anyone's lawyer, representative or counselor, and
- (f) the person may wish to consult a lawyer or other appropriate resource with respect to those rights¹⁸⁴

While these warnings may be appropriate for some visitors, they may be completely inapplicable to others. For example, some visitors contact the organization's ombuds to obtain more information about a particular policy or benefit and may simply be referred to another office. If an ombuds begins every conversation with a series of warnings instead of first listening to the concerns of an upset visitor, the ombuds may be seen as unhelpful or callous and may be jeopardizing the relationship with the visitor. Providing these warnings in brochures, ombuds policies and publicity, and providing ombuds the flexibility to determine how and when to give visitors verbal warnings about notice are consistent with the informality of the ombuds process.

Finally, the ABA's notice provisions invite discovery into the communications made with the ombuds office. The very question of whether a communication constitutes notice depends on the communications the ombuds had with the organization. Because the ombuds is simply passing on information from the visitor, any communications made by the visitor may also be subject to scrutiny. To serve as a provider of alternative dispute resolution services, an organizational ombuds needs to be able to communicate with

both visitors and all other employees, including managers, in confidence. Accordingly, the ABA's notice provisions should promote the confidentiality of these communications.

C. LIMITS OF AUTHORITY

Under the ABA Standards, the ombuds' scope of authority is severely curtailed by preventing ombuds from assisting union employees, an area where they could be of vital assistance. When the ABA revised the Standards, it prohibited any ombuds from "address[ing] any issue arising under a collective bargaining agreement or which falls within the purview of any federal, state, or local labor or employment law, rule, or regulation, unless there is no collective bargaining representative and the employer specifically authorizes the ombuds to do so."¹⁸⁵ First, many of the disputes employees bring to the ombuds office implicate labor or employment laws, rules or regulations. Barring ombuds from handling such matters would create a long line of visitors who would be turned away. Second, even when an issue is covered by a collective bargaining agreement, an ombuds may still be helpful in resolving a dispute.¹⁸⁶ While ombuds should defer to the union process for matters covered under the collective bargaining agreement, this does not mean that ombuds should be excluded from assisting with such issues where union representatives, management, and union members agree to use the ombuds office for informal resolution.¹⁸⁷ As long as ombuds assistance does not amount to an unfair labor practice under the National Labor Relations Act or is not barred by the collective bargaining agreement, the ABA should recommend that ombuds assist in this area.¹⁸⁸

Many ombuds comment on their effectiveness in resolving disputes with union employees. In the federal government setting, the ombuds and union may attempt to resolve a matter jointly.¹⁸⁹ As an alternative to formal grievance procedures, an ombuds can resolve disputes early on and may decrease retaliation brought by a formal grievance.¹⁹⁰ In addition, the ombuds may assist in facilitating resolution of a dispute by providing access to records, "carry[ing] the union's message to management in a less challenging manner" and providing information about "how hard management will fight on an issue."¹⁹¹ The ombuds may also serve as a vital link between different offices involved in the dispute resolution process including the union, EEO, EAP and

labor relations.¹⁹² In the university setting, a faculty union employee may even request that an ombuds assist in addressing sexual harassment complaints when faculty members are unwilling to use the formal complaint procedures.¹⁹³ Likewise, corporate ombuds have offered their assistance to both union employees and non-union employees alike.¹⁹⁴ Accordingly, the benefits ombuds provide to employers with collective bargaining units should not be curtailed by the ABA Standards more than existing law may require.

The Standards need to be modified. Where the employer, the collective bargaining unit, and the union employee, all agree to use the ombuds office to address an issue arising under a collective bargaining agreement, the Standards should permit such use. For those issues that are not covered by collective bargaining agreements, the Standards should authorize an ombuds to assist union employees. Union employees should not be prevented from the value of the ombuds office and should obtain the same benefits from this office as their non-union peers.

CONCLUSION

Though the ABA has adopted Standards, the largest ombudsman organizations disagree with many of its provisions.¹⁹⁵ In light of the opposition by the very profession the ABA seeks to regulate, the ABA should revise its Standards so that they are consistent with the best practices and standards that ombudsmen use to regulate their own profession.

While attempting to bring general clarity to the ombuds role, the ABA Standards have glossed over important differences in roles and functions thus suggesting the need for separate standards and an elimination of a "one size fits all" approach. While the ABA Standards recognize four categories of ombudsmen, they do not clearly define the fundamentally different orientations of these groups — some ombuds take an adjudicatory-like approach and others are guided by principles of the alternative dispute resolution (ADR) movement.

Moreover, by emphasizing shared essential characteristics of independence, impartiality, and confidentiality, the ABA did not go far enough to describe how ombuds operate differently in accordance with these characteristics. Organizational, legislative, executive and advocate ombuds may all share common characteristics, such as independence, impartiality, and

confidentiality; however, they each operate differently in accordance with their essential roles. While the goal of all ombuds is to resolve disputes, each type does so in a fundamentally different fashion, some relying on facilitation, others relying on investigations, and others relying on advocacy.

In light of the fundamentally different orientations of each ombuds category, it does not make sense to continue to have uniform standards governing all ombuds practices. While the Standards unite ombuds, placing ombuds in the same pot makes these guidelines difficult to digest. This article presents recommendations for structuring standards that comport with the orientations of each ombuds category. By doing so, the ABA would better serve to guide the profession and bring focus to a field diluted by various adaptations of the ombuds model.

ABOUT THE AUTHOR

Sara Thacker is the Associate Ombudsperson for the Staff Ombuds Office at the University of California, Berkeley and co-chair of the IOA Communications Committee. Ms. Thacker is a certified mediator and provides training to employees on managing conflict, facilitating workplace disputes, dealing with difficult people, and bullies. Prior to joining the Staff Ombuds Office, she served as Adjunct Professor and Hewlett Fellow in Conflict Resolution and Legal Problem Solving at Georgetown University Law Center where she taught courses in negotiation, mediation, and multi-party dispute resolution. Ms. Thacker holds a *Juris Doctor* degree and previously worked as a litigator for two international law firms.

ENDNOTES

¹ The term “ombuds” includes “ombudsman,” “ombudsperson,” “ombuds officer.” These terms are used interchangeably throughout. The author prefers the term “ombuds” as does the American Bar Association; however, this article uses alternative forms of the word in recognition of the variations in terminology.

² CAMBRIDGE DICTIONARY OF AMERICAN ENGLISH 591 (5th ed. 2004).

³ Howard Gadlin, *The Ombudsman: What’s in a Name?*, 16 NEGOTIATION J. 37, 38 (2000) (discussing the evolution of organizational ombuds and the contentious divide between classical and organizational ombuds); Larry B. Hill, *American Ombudsmen and Others; or, American Ombudsmen and ‘Wannabe’ Ombudsmen*, Address Delivered at the 1997 Spring Meeting of the ABA Section of Administrative Law and Regulatory Practice (April 18, 1997), <http://abanet.org/>

adminlaw/ombuds/wannabe.html (describing why classical ombuds conducting impartial investigations of citizens’ complaints are “real” ombudsmen, while organizational ombuds are “simply mediators”).

⁴ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES REPORT 10 (2004).

⁵ Sharan Lee Levine, et al., *Ethical Dilemmas Arising Out of Ombuds Practice*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 214-15 (Phyllis Bernard & Bryant Garth eds., 2002) (describing the ABA’s recognition of the benefits of the ombuds profession).

⁶ *Id.*

⁷ *Id.*

⁸ On August 7, 2001, the American Bar Association first adopted the Standards for the Establishment and Operation of Ombuds Offices. On February 9, 2004, the ABA revised these Standards. Hereinafter all references to the Standards refer to the latter.

⁹ See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (finding “[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g. ABA Standards for Criminal Justice . . . are guides to determining what is reasonable [effective assistance of counsel], but they are only guides”); *U.S. v. Browne*, 318 F.3d 261, 267 (1st Cir. 2003) (finding the ABA Standards for Criminal Justice do not have the force of law); *In re Bucknam*, 160 Vt. 355, 365, 628 A.2d 932, 938 (1993) (finding the ABA Standards For Imposing Lawyer Sanctions are not controlling, but provide guidance for determining the appropriate sanction).

¹⁰ While there is evidence of complaint officers that may bear some resemblance to ombudsmen used by ancient Egyptian kings, Moses, the Roman Republic, and the Control Yuan in the Han Dynasty, modern ombudsmen looked to the Swedish model for guidance. See Gerald E. Caiden, Niall MacDermot & Ake Sandler, *The Institution of Ombudsman*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 9 (Gerald E. Caiden ed., 1983); see also Walter Gellhorn, OMBUDSMEN AND OTHERS: CITIZENS’ PROTECTORS IN NINE COUNTRIES 194-95 (1966).

¹¹ Gellhorn, *supra* note 10.

¹² *Id.*

¹³ *Id.*

¹⁴ H. H. Kirchheiner, *The Ideological Foundation of the Ombudsman Institution*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 3 (Gerald E. Caiden ed., 1983).

¹⁵ Caiden et al., *supra* note 10.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ “Each of the four Ombudsmen is responsible for a supervisory area comprising a number of public authorities,” including courts of law, public prosecutions, the police

force, the armed forces, prisons and probation, taxation, national insurance, social services, health and medical care, education, administrative courts, legal aid discrimination, housing and accommodation, and others. <http://www.jo.se>; see also Donald C. Rowat, *THE OMBUDSMAN PLAN: THE WORLDWIDE SPREAD OF AN IDEA* 4 (2d ed. 1985).

¹⁹ In 1920, Finland appointed its first ombudsman. See Caiden et al., *supra* note 10, at 11.

²⁰ Caiden et al., *supra* note 10, at 11.

²¹ *Id.*

²² *Id.*

²³ *Id.*; Hill, *supra* note 3.

²⁴ Mary Rowe & Dean M. Gottenhrer, *Similarities and Differences Between Public and Private Sector Ombudsmen* (1997), <http://www.abanet.org/adminlaw/ombuds/g&rsimilar.html>.

²⁵ Hill, *supra* note 3.

²⁶ Caiden et al., *supra* note 10, at 5.

²⁷ Carolyn Stieber, *57 Varieties: Has the Ombudsman Concept Become Diluted?*, 16 *NEGOTIATION J.* 49, 50 (2000) (describing how “[v]irtually every campus of any size was traumatized by repeated demonstrations against the war and the military draft then in effect”); Howard Gadlin, *The Ombudsman: What’s in a Name?*, 16 *NEGOTIATION J.* 37, 38 (2000) (describing citizen’s “demand for mechanisms by which people could address maladministration by government, educational, and corporate bureaucracies”).

²⁸ Gadlin, *supra* note 3, at 41.

²⁹ Gadlin, *supra* note 3, at 39-40.

³⁰ *Id.* at 40.

³¹ *Id.* at 40-41.

³² THE OMBUDSMAN ASSOCIATION STANDARDS OF PRACTICE (1985).

³³ In an effort to define the corporate or organizational ombuds role and unify the profession, a group of ombudsmen formed the Corporate Ombudsman Association (COA). Ten years later, in 1992, COA changed its name to The Ombudsman Association (TOA) to better reflect its diverse membership and those individuals served by the organization. Further expanding its membership, in July 2005, TOA merged with the University and College Ombuds Association (UCOA) and became the International Ombudsman Association (IOA).

³⁴ Mary Rowe & Mary Simon, *Effectiveness of Organizational Ombudsmen* (2001), http://web.mit.edu/ombud/documents/effectiveness_final.pdf.

³⁵ Ellen J. Waxman & Howard Gadlin, *An Ombudsman Serves as a Buffer Between and Among Individuals and Large Institutions*, 4 *DISP. RESOL. MAG.* 21, 23 (1998); see also Carrie Menkel-Meadow, *Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution*, 28 *FORDHAM URBAN L. J.* 979 (2001) (advocating use of the term “appropriate dispute

resolution’ rather than ‘alternative dispute resolution,’ precisely to signal that different processes may be appropriate for different kinds of disputes or in different types of settings”).

³⁶ Mary Rowe, *The Ombudsman’s Role in a Dispute Resolution System*, 7 *NEGOTIATION J.*, 353, 354 (1991).

³⁷ Hill, *supra* note 3; see also Suzane Belson, *Where is Darwin Now We Need Him? The Ombudsman in Evolution*, Keynote Speech at The Ombudsman Association Conference, (May 14, 1997), <http://www.abanet.org/adminlaw/ombuds/belson.html>.

³⁸ Waxman & Gadlin, *supra* note 35, at 21; see also Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 *OHIO ST. J. ON DISP. RESOL.* 95, 109-10 (1996) (noting the proliferation of ombudsmen in the United States, but recognizing that few fit the classical ombuds model); James T. Ziegenfuss, Jr., *ORGANIZATIONAL TROUBLESHOOTERS: RESOLVING PROBLEMS WITH CUSTOMERS AND EMPLOYEES* (1988) (estimating as many as 8,000 ombudsman-like practitioners in North America).

³⁹ Hill, *supra* note 3.

⁴⁰ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004).

⁴¹ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § G (2001).

⁴² ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § H (2001); ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § I (2004).

⁴³ The United States Ombudsman Association refused to endorse the ABA Standards in 2001 and did not participate in the subsequent revisions of the Standards in 2004. See letter from the United States Ombudsman Association to President, ABA Board of Governors (July 19, 2001), available at http://www.usombudsman.org/ABA/USOA_Letter.doc (arguing that the term “advocate ombudsman” is an oxymoron); see also letter from Presidents of The Ombudsman Association and the University and College Ombuds Association (July 18, 2001), available at http://www.usombudsman.org/ABA/TOA_COA_Letter.doc (objecting to use of the term “advocate ombudsman”).

⁴⁴ Sara S. Hunt, *Equipping Long-Term Care Ombudsmen for Effective Advocacy: A Basic Curriculum 5-6* (National Long-Term Care Ombudsman Resource Center, 2004).

⁴⁵ *Id.* at 6.

⁴⁶ Today all 50 states, the District of Columbia, and Puerto Rico have LTC Ombudsman as required by the Older Americans Act. *DIV. OF HEALTH CARE SERVS., INST. OF MEDICINE, REAL PEOPLE, REAL PROBLEMS: AN EVALUATION OF THE LONG-TERM CARE OMBUDSMAN PROGRAMS OF THE OLDER AMERICANS ACT 3* (Jo Harris-Wehling et al. eds., 1994).

⁴⁷ *Id.* at 1.

⁴⁸ Hunt, *supra* note 44, at 14.

⁴⁹ Other examples of advocate ombuds include juvenile justice ombudsmen or child welfare ombudsmen, who protect children in foster care, group homes, juvenile facilities or other governmental programs. See Judith Jones & Alvin W. Cohen, *State Ombudsman Programs*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, JUVENILE JUSTICE BULLETIN (Feb. 2005); see also ABA CTR. ON CHILDREN & THE LAW, ESTABLISHING OMBUDSMAN PROGRAMS FOR CHILDREN AND YOUTH: HOW GOVERNMENT'S RESPONSIVENESS TO ITS YOUNG CITIZENS CAN BE IMPROVED (Howard A. Davidson et al. eds., 1993).

⁵⁰ Gadlin, *supra* note 3, at 39.

⁵¹ Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 6 (2000).

⁵² Linda C. Reif, *The Promotion of International Human Rights Law by the Office of the Ombudsman*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY 287 (Linda C. Reif ed., 1999).

⁵³ Mjemmas G.J. Kimweri, *The Effectiveness of an Executive Ombudsman*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY 379 (Linda C. Reif ed., 1999) (examining the executive ombuds office in Tanzania known as the Tanzanian Permanent Commission of Enquiry, which is responsible for safeguarding individual rights).

⁵⁴ Roy Gregory, *Building an Ombudsman Scheme: Statutory Provisions and Operating Practices*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY 134 (Linda C. Reif ed., 1999).

⁵⁵ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § H (2004).

⁵⁶ See, e.g., *State ex re. Strothers v. Wertheim*, 80 Ohio St. 3d 155, 684 N.E.2d 1239 (1997) (holding the executive ombuds office was a public office subject to the disclosure requirements of the Public Records Act since it was a publicly funded agency that acted as an intermediary between citizens and the government of a county, and the requested records were not confidential).

⁵⁷ It may be argued that news ombudsmen are organizational ombuds because they do not conduct formal investigations, but rather rely on informal inquiries; however, they do not fit within the ABA's definition. Organizational ombuds only facilitate "fair and equitable resolutions of concerns that arise within the entity." Complaints brought by the public do not constitute concerns that arise within the entity.

⁵⁸ Organization of News Ombudsmen, *What is a news ombudsman?*, <http://www.newsombudsmen.com/what.htm>.

⁵⁹ Neil Nemeth, NEWS OMBUDSMEN IN NORTH AMERICA: ASSESSING AN EXPERIMENT IN SOCIAL RESPONSIBILITY (2003).

⁶⁰ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § A (2004).

⁶¹ *Id.* at § J.

⁶² *Id.*

⁶³ For example, Argentina's ombudsman "carries out its functions with absolute independence, without receiving instructions from any authority." Jorge Luis Maiorano, *The Defensor Del Pueblo in Argentina: A Constitutional Institution of Control and Protection*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY 362 (Linda C. Reif ed., 1999). While the ombudsman may be removed by congress, legislation guarantees that it is an independent institution with control over its own budget and administrative staff. *Id.*

⁶⁴ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § C(1) (2004).

⁶⁵ In a 1969 resolution, the ABA identified 12 essential characteristics for [legislative] ombudsmen to achieve structural independence, including, "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" and "a high salary equivalent to that of a designated top officer." This 1969 policy is still endorsed by the ABA and serves as a model for legislative ombudsmen. See ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES REPORT at 19 (2004).

⁶⁶ *Id.*

⁶⁷ Alan J. Wyner, *Executive Ombudsmen, and Criticisms of Contemporary American Public Bureaucracy*, in EXECUTIVE OMBUDSMEN IN THE UNITED STATES 10 (Alan J. Wyner ed. 1973).

⁶⁸ *Id.* at 12; see also, Michael Mills, *Municipal Government Ombudsman*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 426 (Gerald E. Caiden ed., 1983) ("The degree to which the individual [executive ombuds] imparts impartiality to the citizens they serve is largely dependent upon the values of the elected official to whom they are accountable. While I happen to enjoy serving in an office where the values of fairness and equity are shared in common, there is no guarantee of that being maintained beyond the term of the current Mayor.")

⁶⁹ Stanley V. Anderson, *Comparing Classical and Executive Ombudsmen*, in EXECUTIVE OMBUDSMEN IN THE UNITED STATES 310 (Alan J. Wyner ed., 1973).

⁷⁰ *Id.*

⁷¹ Mills, *supra* note 68, at 428.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Tom Sherwood, *Ethics Official Named; Barry Pledges Total Freedom, Ex-Judge Says*, WASH. POST, July 2, 1986, at B4.

⁷⁵ *Id.*

⁷⁶ See Marie D. Farrell-Donaldson, *Will the Real Ombudsman Come Forward?*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 417 (Gerald E. Caiden ed., 1983) (describing how the Ethics Ombudsman position faded from DC government); Tom Sherwood, *All's Quiet for Ethics*

Ombudsman, Wash. Post, June 11, 1987, at J1 (describing how the lack of publicity of the Executive Ombudsman position has led to few calls since its inception); see also www.dc.gov (current searches of the DC government's website and directory and calls to DC government failed to provide any results for the Ethics Ombudsman).

⁷⁷ For example, in Oregon, the Long Term Care Ombudsman is appointed by the governor, whereas in North Dakota, the Long Term Care Ombudsman is appointed by the executive director of the department of human services. See ORS §441.103; cf. ND §50-10.1-02.

⁷⁸ *Id.*

⁷⁹ ABA CTR. ON CHILDREN & THE LAW, ESTABLISHING OMBUDSMAN PROGRAMS FOR CHILDREN AND YOUTH: HOW GOVERNMENT'S RESPONSIVENESS TO ITS YOUNG CITIZENS CAN BE IMPROVED 7 (Howard A. Davidson et al. eds., 1993).

⁸⁰ *Id.*

⁸¹ THE INTERNATIONAL OMBUDSMAN ASSOCIATION STANDARDS OF PRACTICE §4.5 (2007); see also Carolyn Stieber, *57 Varieties: Has the Ombudsman Concept Become Diluted?*, 16 NEGOTIATION J. 49, 54 (2000).

⁸² John S. Barkat, *Blueprint for Success: How to Effectively Design an Organizational Ombuds Department 5* (2002), http://www.abanet.org/adminlaw/ombuds/organizational_ombudsmen.html.

⁸³ Howard Gadlin and Elizabeth Walsh Pino, NEUTRALITY: WHAT AN ORGANIZATIONAL OMBUDSPERSON NEEDS TO KNOW 3 (The Ombudsman Association 2001).

⁸⁴ See Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 OHIO ST. J. ON DISP. RESOL. 95, 113 (1996) (“[Organizational ombuds] creation, as well as their continuing viability, is not grounded in law. Thus, their independence is more easily compromised than that of the classical ombudsman.”).

⁸⁵ Gadlin & Pino, *supra* note 83, at 15.

⁸⁶ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § C(1) (2004).

⁸⁷ Typically, an organizational ombuds has jurisdiction over and works with all employees, including top executives such as the President or CEO. Retaliation against the ombuds is difficult to prove since an organization can simply blame budgetary constraints as opposed to disdain for the actions of the ombuds in its decision to eliminate, remove or reduce the office.

⁸⁸ Belson, *supra* note 37.

⁸⁹ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § C(2) (2004).

⁹⁰ Gadlin & Pino, *supra* note 83, at 9.

⁹¹ *Id.*

⁹² *Id.*; see also Mary P. Rowe, *Options and Choice for Conflict Resolution in the Workplace*, in NEGOTIATION: STRATEGIES FOR

MUTUAL GAIN 105-19 (Lavina Hall ed., 1993).

⁹³ Arguably, ombuds may still “advise” without choosing a particular option. By counseling clients, ombuds may be providing a form of advice. In fact, some ombuds “define their role more in terms of helping individuals.” Deborah M. Kolb, *Corporate Ombudsman and Organization Conflict Resolution*, 31 JOURNAL OF CONFLICT RESOLUTION 673, 681 (1987). They “help” by inventing individualized solutions to visitors’ problems and assisting in implementing these remedies. *Id.* at 682.

⁹⁴ Rowe, *supra* note 92, at 110.

⁹⁵ *Id.* at 108.

⁹⁶ Frances Bauer, *The Practice of One Ombudsman*, 16 NEGOTIATION J. 59, 72-73 (2000).

⁹⁷ Gadlin, *supra* note 3, at 44.

⁹⁸ Marsha L. Wagner, *The Organizational Ombudsman as Change Agent*, 16 NEGOTIATION J. 99, 103 (2000).

⁹⁹ See *infra* note 101.

¹⁰⁰ *Id.*

¹⁰¹ NIH Office of the Ombudsman, Center for Cooperative Resolution was established as a pilot program in 1997 and has served the entire NIH community since 1999. The 2000 Annual Report may be found at <http://ombudsman.nih.gov/fy00annualrpt.pdf>. This document is an example of the type of important upward feedback an ombudsman can provide an organization. For a collection of annual reports from various organizations, see <http://ombuds-blog.blogspot.com/search/label/Annual%20Reports>.

¹⁰² Wagner, *supra* note 98.

¹⁰³ Gadlin & Pino, *supra* note 83, at 7.

¹⁰⁴ *Id.* at 7-8.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 8.

¹⁰⁷ *Id.*

¹⁰⁸ UNITED STATES OMBUDSMAN ASSOCIATION GOVERNMENTAL OMBUDSMAN STANDARDS § II.B. (2003).

¹⁰⁹ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § C(3) (2004).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ THE INTERNATIONAL OMBUDSMAN ASSOCIATION CODE OF ETHICS (2007).

¹¹⁴ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § F(2)(a) (2004).

¹¹⁵ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § C(3) (2004).

¹¹⁶ Organizational ombuds in corporations refer over 88% of visitors' issues to traditional formal channels, audit, compliance, human resources, and line management as options for resolution. See Arlene Redmond & Randy Williams, *Enter the Watchmen: The Critical Role of an Ombuds Program in Corporate Governance*, RISK MANAGEMENT 49, 52 (Sept. 2004). In this capacity, organization ombuds serve as an information resource and assist employees to use resources already at their disposal.

¹¹⁷ William L. Kandel & Sheri L. Frumer, *The Corporate Ombudsman and Employment Law: Maintaining the Confidentiality of Communications*, 19 EMPLOYEE RELATIONS LAW JOURNAL 587 (1994).

¹¹⁸ Waxman & Gadlin, *supra* note 35, at 22.

¹¹⁹ *Id.* at 23.

¹²⁰ William L. Ury, Jeanne M. Brett & Stephen B. Goldberg, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 9-10 (1988).

¹²¹ Mary P. Rowe, *An Effective, Integrated Complaint Resolution System*, in SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 203-04 (Bernice R. Sandler & Robert J. Shoop eds., 1997).

¹²² Mary Rowe & Corinne Bendersky, *Workplace Justice, Zero Tolerance, and Zero Barriers*, in NEGOTIATIONS AND CHANGE, FROM THE WORKPLACE TO SOCIETY 123 (Thomas Kochan & Richard Locke eds., 2002).

¹²³ *Id.*

¹²⁴ Belson, *supra* note 37.

¹²⁵ Gadlin, *supra* note 3, at 44.

¹²⁶ THE INTERNATIONAL OMBUDSMAN ASSOCIATION STANDARDS OF PRACTICE § 3.1 (2007).

¹²⁷ *Id.* at § 3.5 - §3.6.

¹²⁸ *Id.* at § 3.4.

¹²⁹ THE UNITED STATES OMBUDSMAN ASSOCIATION GOVERNMENTAL OMBUDSMAN STANDARDS § II.C (2003).

¹³⁰ Confidential information may also be revealed to prevent an imminent risk of serious harm. See ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § C(3) (2004). Societal interests may compel an ombuds to disclose confidential information when an individual threatens physical harm upon himself or others. See ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES REPORT 15 (2004); Charles L. Howard & Maria A. Gulluni, THE OMBUDS CONFIDENTIALITY PRIVILEGE THEORY AND MECHANICS 12 (The Ombudsman Association 1996).

¹³¹ *Roy v. United Technologies Corp.*, Case No. H-89-690 (JAC) (D. Conn. 1990).

¹³² While *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987) is the first reported case to recognize a privilege for communications by a legislative prison ombuds, the federal court simply applied the state statute that expressly provided for

the evidentiary privilege.

¹³³ Charles Howard & Maria A. Gulluni, THE OMBUDS CONFIDENTIALITY PRIVILEGE: THEORY AND MECHANICS 3 (The Ombudsman Association 2001).

¹³⁴ *Id.*

¹³⁵ Transcript of Hearing on Motion for Protective Order at 22-23, *Roy v. United Technologies Corp.*, Case No. H-89-690 (JAC) (D. Conn. May 29, 1990).

¹³⁶ *Id.* at 24-25 (citing *In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983) (citing 8 J. Wigmore, Evidence § 2285 at 527 (McNaughton revised ed. 1961)).

¹³⁷ *Id.* at 25.

¹³⁸ *Id.*

¹³⁹ *Id.* at 25-26.

¹⁴⁰ *Id.* at 26.

¹⁴¹ *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991).

¹⁴² *Id.* at 572.

¹⁴³ *Id.*

¹⁴⁴ See *Smith v. American Express Co.*, Case No. 98-7206-CIV-JORDAN (S.D. Fla. Jan. 3, 2000) (finding the four factors necessary for the establishment of the ombuds privilege under *Kientzy* satisfied and granting defendant's motion for protective order precluding the deposition of its ombudsman); *Van Martin v. United Techs. Corp.*, Case No. 95-8389-CIV-UNGARO-BENAGES (S.D. Fla. July 16, 1996) (finding the four factors necessary for the establishment of a privilege under *Kientzy* met and granting defendant's motion for protective order precluding the deposition of its ombudsman); *Jones v. McDonnell Douglas Corp.*, Case No. 4:94-CV-355 (CEJ) (E.D. Mo. May 22, 1995) (finding the four factors necessary for the establishment of an ombuds privilege under *Kientzy* present and granting the ombuds' motion for protective order precluding the discovery of documents generated by the ombudsman or his deposition); *McMillan v. Upjohn Co.*, Case No. 1:92:CV:826 (W.D. Mich. Mar. 8, 1995) (ordering that neither plaintiff nor defendant may seek testimony from employees of the ombudsman about communications made to the ombudsman by any employee other than the plaintiff); *Acord v. Alyeska Pipeline Serv. Co.*, U.S. Dept. of Labor Case No. 95-TSC-4 (Oct. 4, 1995) (determining that respondent has established the four factors necessary for the establishment of the ombuds privilege under *Kientzy* present and granting respondent's motion for protective order excluding discovery relating to complainant's participation in the ombudsman program). See also *Kozlowski v. Upjohn Co.*, File No. 94-5431-NZ (Mich. Cir. Ct., Macomb Co. Aug. 16, 1995) (finding the four factors necessary for the establishment of the ombuds privilege satisfied and granting the ombudsman's motion for protective order); *Wagner v. Upjohn Co.*, File No. A91-2156CL (Mich. Cir. Ct., Kalamazoo Co. April 22, 1992) (granting the ombudsman's motion for protective order precluding the

deposition of ombuds' office members or the production of their documents because information sought by plaintiff is available from sources other than the defendant's ombudsman and that breaching the confidentiality offered by the ombuds office would be highly prejudicial to its dispute resolution services).

¹⁴⁵ *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997).

¹⁴⁶ *Id.* at 791.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 793.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 794.

¹⁵³ *Id.*

¹⁵⁴ Charles L. Howard & George R. Wratney, *In Aftermath of the Carman Decision, Ombuds 'Privilege' Still Has Validity*, ETHIKOS (May/June 1999).

¹⁵⁵ *Carman*, 114 F.3d at 791.

¹⁵⁶ Howard & Wratney, *supra* note 154.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See *Miller v. Regents of the University of Colorado*, 199 U.S. App. LEXIS 16712 (10th Cir. 1999) (affirming district court's ruling failing to recognize an ombudsman privilege); *Solorzano v. Shell Chemical Co.*, 2000 U.S. Dist. LEXIS 12072 (E.D. La. 2000) (refusing to recognize a federal common law privilege for the company ombudsman).

¹⁶⁰ Mary Elizabeth McGarry, *The Ombudsman Privilege: Keeping Harassment Complaints Confidential*, NEW YORK L. J. (Nov. 30, 1995).

¹⁶¹ The Ethics Resource Center, 2003 NATIONAL BUSINESS ETHICS SURVEY EXECUTIVE SUMMARY, http://www.ethics.org/nbes2003/2003nbes_summary.html; see also The Ethics Resource Center, 2007 NATIONAL BUSINESS ETHICS SURVEY, <http://www.ethics.org/research/NBESOffers.asp> (42% of employees who observe misconduct do not report it to company leadership).

¹⁶² *Id.*

¹⁶³ U.S.S.G. §8B2.1(b)(5)(C).

¹⁶⁴ 116 Stat. 745 § 301.

¹⁶⁵ Rowe & Simon, *supra* note 34.

¹⁶⁶ A claim for hostile work environment harassment is established by evidence that "(1) the employee belonged to a protected group, (2) the employee was the subject of unwelcome [sexual] harassment, (3) the harassment complained of was based on sex [race, color, religion or national origin], (4) the harassment was sufficiently severe

to unreasonably interfere with work performance or create an intimidating, hostile, or offensive work environment." 78 A.L.R. Fed. 272. For a sexual harassment claim, a hostile work environment harassment is characterized by "[u]nwelcoming sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . [when] such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. 1604.11 (a)). Hostile work environment harassment can also originate from harassment based on race, color, national origin, or religion. See e.g. *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981) (race); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002) (national origin).

¹⁶⁷ 29 C.F.R. 1604.11 (d).

¹⁶⁸ *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002).

¹⁶⁹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

¹⁷⁰ *Id.*

¹⁷¹ Restatement (2d) of Agency § 281.

¹⁷² ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § F(3)(a)(2004).

¹⁷³ *Id.* at § F(2)(a)(i).

¹⁷⁴ *Notice in Hostile Environment Discrimination*, 112 HARV. L. REV. 1977, 1981 (1999) (citing *Dees v. Johnson Controls World Servs.*, 168 F.3d 417, 423 (11th Cir. 1999) (vacating and remanding district court's entry of summary judgment in favor of employer where a genuine issue of material fact remained regarding whether employer had received notice of harassment from a human resources employee and a fire department employee); *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209, 1213-14 (8th Cir. 1996) (finding communication of reports of sexual harassment by plaintiff's fiancé to supervisor was sufficient to put organization on notice of the incidents).

¹⁷⁵ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § F(2)(b)(ii) (2004).

¹⁷⁶ *Miller*, 277 F.3d at 1278.

¹⁷⁷ *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777 (10th Cir. 1995) (evidence of employee's earlier sexual harassment of others that is "similar in nature and near in time" to employee's later sexual harassment of plaintiff may be used to prove notice to employer of hostile work environment) *Jeffries v. Kansas*, 147 F.3d 1220, 1229 (10th Cir. 1998) (same).

¹⁷⁸ *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997); *Jones v. United States Gypsum*, 126 F.Supp.2d 1172, 1179 (N.D. Iowa 2000) (isolated [multiple] incidents occurring over a 16 year period of time do not constitute notice).

¹⁷⁹ *Notice in Hostile Environment Discrimination Law*, 112

Harv. L. Rev. 1977, 1982 (1999) (citing *Juarez v. Ameritech Mobile Commc'ns, Inc.*, 957 F.2d 317, 320 (7th Cir. 1992) (supervisor who had heard about other female employees being "bothered" or "asked out" by the company's assistant treasurer insufficient to establish knowledge).

¹⁸⁰ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES Report 18 (2004).

¹⁸¹ David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1290-97 (2001) (study found that the standard for unreasonableness varied from a delay of one year or more to a delay of months or even weeks between the first harassing action and the report).

¹⁸² *Id.* at 1299.

¹⁸³ *Id.* at 1298.

¹⁸⁴ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § F(1) (2004).

¹⁸⁵ *Id.* at § D(6).

¹⁸⁶ See *infra* notes 189-194.

¹⁸⁷ Howard Gadlin, *New Ombuds Standards Create Tension and Opportunity*, *DISPUTE RESOL. MAG.* 15, 17 (Winter 2005) (advising ombuds to defer to union processes for matters covered under the collective bargaining agreement).

¹⁸⁸ See National Labor Relations Act, 29 U.S.C. §151-169.

¹⁸⁹ D. Leah Meltzer, *The Federal Workplace Ombuds*, 13 *OHIO ST. J. ON DISP. RESOL.* 549, 588 (1998).

¹⁹⁰ *Id.* at 573.

¹⁹¹ *Id.*

¹⁹² *Id.* at 581.

¹⁹³ Howard Gadlin, *New Ombuds Standards Create Tension and Opportunity*, *DISPUTE RESOL. MAG.* 15, 17 (Winter 2005).

¹⁹⁴ Lee P. Robbins & William B. Deane, *The Corporate Ombuds: A New Approach to Conflict Management*, 2 *NEGOTIATION JOURNAL* 195, 197 (1986).

¹⁹⁵ The United States Ombudsman Association, representing classical ombudsmen, refused to endorse the ABA Standards in 2001 and did not participate in the subsequent revisions of the Standards in 2004. See ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES REPORT at 10. In addition, the largest organizational ombuds associations that existed at the time disagreed with the 2004 Standards. See Resolution of the Board of Directors of The Ombudsman Association (TOA) and the University and College Ombuds Association (UCOA) (Aug. 2004). After TOA and UCOA merged, the International Ombudsman Association issued GUIDANCE FOR BEST PRACTICES AND COMMENTARY ON THE AMERICAN BAR ASSOCIATION STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES, REVISED FEBRUARY 2004 (May 14, 2006). Also, the Coalition of Federal Ombudsmen modified the ABA Standards for use in the federal sector. See Coalition of Federal Ombudsmen (CFO) and Federal Interagency ADR Working Group Steering Committee, A GUIDE FOR FEDERAL EMPLOYEE OMBUDS: A SUPPLEMENT TO AND ANNOTATION OF THE STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES ISSUED BY THE AMERICAN BAR ASSOCIATION (May 9, 2006) at http://www.usdoj.gov/adr/pdf/final_ombuds.pdf.