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Fighting International Corruption: The U.S. Government's Perspective

By Stephen D. Potts

In late February of this year, Vice President Albert Gore hosted the Global Forum on Fighting Corruption: Safeguarding Integrity Among Justice and Security Officials. The impetus for the conference came out of President Clinton's "International Crime Control Strategy" of May 1998, which called for an international conference to shed light on how corruption has affected a key element of society, namely justice and security officials. The Vice President agreed to host the conference with the intention of both highlighting the incredible progress that has been made to date in fighting corruption while at the same time helping to define a path for the future of the international anti-corruption movement.

The conference proved to be an impressive success on both counts. More than 500 delegates from 89 countries, including dozens of multinational organizations and nongovernmental organizations, convened at the Department of State, eclipsing nearly all early projections of conference attendance.

The progress the international community has made in understanding corruption, and in summoning the political will to combat it, 'has been nothing short of extraordinary.'

Reflections on an earlier conference

As I sat during the opening plenary session listening to the Vice President's address and surveyed the varied crowd of delegates before me, I could only think back to 1994 when members of my own staff at the Office of Government Ethics (OGE) in cooperation with the U.S. Information Agency (USIA) hosted an International Conference on Ethics in Government. Like the Forum organizers, we were unsure of the likely success of our conference. Were foreign governments ready to frankly discuss the problems of corruption their own governments faced? Had the international community's understanding of the costs of corruption developed far enough to consider taking strong counteractive measures? As it developed, our concerns were not warranted, and the conference attracted almost 200 delegates from fifty countries who engaged each other with pointed and lively discussions over the issues at hand.

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The OECD has developed an Ethics Checklist that describes the basic elements of an effective ethics infrastructure for member countries.

Nonetheless, the progress that has been made in the intervening years between the two conferences has been nothing short of astounding. While the 1994 conference organized by OGE and USIA focused specifically on ethics as a means of combating corruption, and included government officials from ethics or related offices, the Vice President's Forum was held on a ministerial level, with heads of state, vice presidents, secretaries general and senior ministerial figures. The ability to hold an anti-corruption conversation on this level of visibility indicates the very recent and full recognition of the importance of the battle against corruption, from those employees who have day-to-day administrative responsibility, to the political leaders who make national and international policy.

Effective and coherent policy planning and coordination at the national level of the U.S. Government has been one of the most significant outgrowths of this recognition. In conjunction with the Forum, the U.S. Government published an International Strategy Against Corruption, a compilation of the activities of Federal agencies in the international fight against corruption. These activities can be broken down into four major anti-corruption areas: support for multinational agreements; support for international organizations; regional initiatives; and bilateral cooperation.

Multinational Agreements: OAS

The most notable responses of the international community to the challenge of corruption has been through the work of multinational organizations. Responding to commitments made at the 1993 Summit of the Americas, the Organization of American States (OAS) member states signed the Inter-American Convention Against Corruption in 1996, a document that would have seemed impossible to produce only a decade ago.

The OAS Convention mandates that signatories develop laws to criminalize bribes to foreign public officials by its domestic companies and other private interests. Moreover, it stands as an authoritative statement on international norms of what are considered illicit activities related to bribery, articulates preventive measures against such activities, and obligates signatories to cooperate in extradition efforts for prosecuting corruption.

The U.S. Government was directly involved in the drafting of the OAS Convention and was instrumental in ensuring the incorporation of the preventive measures in the document, including provisions for transparency systems, codes of conduct and education and counseling systems. U.S. leadership in organizing support for the OAS Convention has been critical to its early success, an interesting irony given that the U.S. Senate has yet to ratify the agreement. As of March 1999, however, over a dozen countries have ratified the OAS Convention, many of whom have been very proactive in implementing its provisions rather than waiting for all of the members to sign the

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One good example is the case of Argentina which has created the National Office of Public Ethics (ONEP). ONEP has already developed and implemented a code of ethics in tandem with a financial disclosure system for all senior level public servants, including the president and vice-president. OGE has been actively involved in facilitating the creation of ONEP through a number of joint work projects with Argentine ethics officials, and we continue to monitor the development of that office on behalf of the U.S. Government.

OECD

In 1977 the United States passed the Foreign Corrupt Practices Act (FCPA), a pioneering landmark in the struggle against foreign bribery. The FCPA prohibits American corporations from paying bribes to foreign public officials. Since its passage, the FCPA has placed the United States in the forefront of the effort to remove corrupt practices from international business dealings. For decades America stood alone on this issue as other advanced western democracies continued to allow their companies to engage in this practice and even to permit corrupt payments to qualify for tax deductions.

Last year the Council of the Organization for Economic Cooperation and Development (OECD) adopted the Convention on Combating Bribery in International Business Transactions (see *ethikos*, March/April 1999). This agreement seeks the criminalization of bribery of foreign public officials, the discontinuance of tax deductions for bribes to foreign officials, and the implementation of accounting, external auditing and internal company controls to prevent and detect bribery of foreign officials. It represents the effective internationalization of the FCPA and thus a major victory for U.S. foreign policy. All 29 members of the OECD who have signed onto the Convention have since been joined by non-OECD member states, including Argentina, Brazil, Bulgaria, Chile and the Slovak Republic.

There is much work yet to be done. Each signatory government must now pass implementing legislation that will put the provisions of the OECD Convention into effect. The U.S. Congress has passed certain key amendments to the FCPA in order to fully comply with the provisions of the Convention, and the U.S. Government has been vocal in encouraging our OECD partners to do likewise. The United States also remains one of the foremost proponents for new measures outlawing the tax deductibility of bribes which the OECD plans to address in the near future.

OGE and the State Department's Office of the Inspector General have initiated a number of joint work projects with the Chinese Ministry of Supervision, the primary anti-corruption agency in China.

As a more proactive measure, the OECD has developed an Ethics Checklist that describes the basic elements of an effective ethics infrastructure for member countries. These elements include: clear standards of conduct for public officials; open decision-making processes in government; transparency in public procurement; and adequate enforcement mechanisms. The Checklist is a result of the growing consensus of the importance that ethics systems can have in both preventing corruption and promoting integrity. The U.S. Government has long been an active proponent of such systems and anticipates that OECD member states will resort to the Checklist as a tool in implementing their own preventive systems.

International Organizations: World Bank

Building on the recent momentum of the Forum, Vice President Gore has offered his support to the World Bank's efforts to develop national plans against corruption in selected countries receiving Bank assistance. The World Bank-sponsored national plans provide comprehensive strategies for attacking corruption in areas where it is viewed as most threatening to a particular country.

The U.S. Government has applauded this effort as a key step in identifying partners to lend country-specific assistance for in-country anti-corruption initiatives. To this effect, the Vice President has asked the various Federal agencies with anti-corruption expertise or authority to lend their services in helping to implement the national plans. It is envisioned that the World Bank's efforts will serve as a model for anti-corruption strategies that will confront a host of complex issues in a targeted and coordinated way.

International Monetary Fund

The United States has been vocal in urging the International Monetary Fund to consider corruption and governance issues in its lending policies. Most experts agree that

The U.S. Government considers the IMF an essential partner in the anti-corruption struggle.

corruption is a key causal factor leading to decreased economic performance and even to the sorts of economic crises we are now witnessing in Asia.

The IMF is in a unique position to evaluate the economic and financial policies of loan recipients and to exert leverage over these governments to implement anti-corruption reforms. The U.S. Government considers the IMF an essential partner in the anti-corruption struggle and will continue to work with that body to encourage other regional lending banks, such as the Inter-American Development Bank and the African Development Bank, to make anti-corruption criteria an intrinsic part of international lending policies.

Regional Initiatives

The U.S. Government has been involved at the regional level with a number of governance initiatives. As an observer state, the United States helped negotiate the Council of Europe Criminal Law Convention, one of the broadest of the multilateral conventions yet in this field. The Convention was opened for signature in January 1999, and the United States will consider signing onto the agreement over the course of the next year, while overseeing and encouraging the implementation of this initiative among the countries of Europe.

The Global Coalition for Africa (GCA), an intergovernmental policy forum, recently agreed to adopt a set of 25 anti-corruption principles that would facilitate implementation of uniform standards at both the national and regional level within Africa. This agreement represents the results of a number of Africa-directed initiatives by the U.S., including President Clinton's 1998 visit to the continent and a number of joint meetings between the Department of State and the GCA. Among the commitments, ten reflected the preventive measures articulated in the OAS Convention. These principles are expected to form the basis for a more comprehensive framework in the future.

United Nations

The U.S. Government is considering incorporating an anti-corruption protocol to the recently proposed UN Convention on Transnational Crime. This Convention would commit governments to implement credible measures to fight transnational organized crime, particularly in the area of illicit drug production, traffic and abuse. The U.S. Government is especially concerned with the influence that criminal organizations exert over governments in many countries and the role that bribes, kickbacks and money laundering schemes play in establishing extralegal collusive relationships between criminals and public servants. As negotiations proceed, the United States will continue to urge that governments adopt comprehensive frameworks to promote public integrity and incorporate anti-corruption measures into law to address this sort of malicious influence.

Bilateral Assistance

Direct, country-to-country assistance on the part of Federal agencies with their counterpart institutions has always been a backdrop for U.S. anti-corruption activities. A number of agencies administer technical training and assistance programs with foreign governments in line with their area of competence. The Departments of Justice, Treasury, Commerce, and State, along with the FBI, US Agency for International Development (USAID), and USIA are particularly active in this respect. These agencies play an essential role in preparing foreign officials to develop and implement their own, country-specific systems. In one means of doing so, many agencies lead programs that describe U.S. institutions and basic principles that have proven effective in creating transparent government.

One of the focal points of these efforts has been the former Soviet republics and Eastern bloc countries. The U.S. Government has been extremely active in helping these countries to make the transition from socialist, command-driven societies to open and accountable democracies. USIA, for example, implements a vital educative function by organizing rule-of-law seminars and programs both here and overseas that describe basic U.S. principles of government. By contrast, the FBI provides more specific instruction to foreign law enforcement officials on the type of functions it performs through bilateral, in-country training courses covering such topics as internal controls, police ethics, and public corruption investigations.

The Office of Government Ethics has developed an outreach initiative to respond to the strong demand from foreign governments for learning about proactive, preven-

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Lockheed-Martin Moves Beyond The Internet To Intranet Compliance Training

By Andrew Singer

It is critical to know when to use technology—and when not to use it. Technology is not a solution to all of a company's needs—not in ethics and compliance, or any other sector. So asserts Paul Haney, Director, Ethics and Corporate Compliance Programs, Lockheed-Martin Corporation, Westlake Village (CA).

That said, Lockheed-Martin continues to make aggressive use of digital technology in the compliance and ethics areas. Within the foreseeable future the company may be conducting most compliance training via the intranet, i.e., its internal computer network.

Recently, about 80 percent of compliance training has been digitalized in the form of CD-ROM training modules.

The bandwidth hurdle

Until now, 'bandwidth' has posed the major stumbling block that prevents the company from moving its CD-ROM compliance training modules to the intranet. While the modules' text and audio present few conversion problems, the video segments require a wide electronic pipeline. Otherwise the picture tends to freeze up.

"Until recently, we thought we'd never be able to do full-motion video on the intranet," says Haney. That premise was challenged, however, as a result of some tests the company conducted in 1998. Currently, the company has a file server in Denver, Colorado that runs the firm's 'harassment' training module. Haney can run this training program from his desk in California.

"We think the bandwidth constraint will go away in the next three years." The company's intranet uses a T-3 line, with a bandwidth of 256 kilobytes per second (256K), "which is faster than any dial-up modem, but not as fast as cable modem. But with 'streaming video,' I can even dial in with a 56K modem and get acceptable quality." It is not the same quality as is generated with the CD-ROM, but "it's definitely watchable," says Haney.

'We saved a forest'

The company has a history of technological innovation in the compliance/ethics area. In September 1995, Lockheed-Martin became one of the first corporations to place its code of ethics and business conduct on the Internet, something that has since become fairly common among large corporations.

In 1996, the company posted its annual compliance training plans on-line. These plans describe who in a given business unit must take a compliance training course—when they must take it, how often, etc. Because Lockheed-Martin has 46 business units, each of which develops compliance training plans, the total number of training plans is close to

'Doing [ethics awareness training] in a meeting, with a manager and employees, is low-tech, but it is much more effective.'

1,400. Posting these plans had been an enormous 'paper' process, recalls Haney. Placing them on the company's in-house computer network "saved a forest." The compliance plans are also reviewed at the sector level on-line.

"In terms of handling large amounts of information, this was really the first application" of on-line technology in the ethics/compliance area, notes Haney.

CD-ROM training modules

More recently, about 80 percent of compliance training has been digitalized in the form of CD-ROM training modules. Lockheed-Martin has developed 26 courses, on subjects ranging from labor charging, export controls, kickbacks and gratuities, and material costs, to security, international military sales, insider trading, record retention, harassment in the workplace, and environment, health and safety, among others.

The first CD-ROM compliance training module was developed in 1995, soon after the company's acquisition of GE Aerospace, a pioneer in the use of computer-based training. Lockheed-Martin had determined that uniformity in compliance training was a necessity given the size of its workforce and its geographical breadth. With the GE Aerospace acquisition, the company inherited an analog laser disk technology that was impressive at the time, but not as flexible as modules later developed in a digital format. (See 'Interactive Video Takes Compliance Training To A New Level At GE Aerospace,' *ethikos*, November/December 1992.) The decision was made to upgrade these modules to the digital CD-ROM format—at least as much as could be done.

"Some were easy to convert," recalls Haney. "Others were out of date and had to be created from scratch." One module on procurement integrity, for example, had to be scrapped because a new procurement law was passed. The sexual harassment training module, on the other hand, was easily converted—although, later, in 1998, the title was re-released as "Harassment in the Workplace," embracing other kinds of harassment, not only sexual. Because the training module was already in the digital format, however, these later changes were made relatively easily.

Is all compliance training on CD-ROM, today? "No, depending on the business unit, there can be additional training required beyond what the corporation provides on CD." A military contracting unit, say, may have additional needs. Still, the 80 percent portion on multi-media CD-ROM will probably be sustained. "There will always be local issues. There will always be incremental compliance training" that requires local development and input.

Refresher training via the intranet

While the CD-ROM programs are required for initial compliance training, the intranet can now be used for refresher training, or to demonstrate mastery in a topic. This is possible because the 'refresher' training programs don't use extensive video. A securities lawyer need not go through an entire CD-ROM training module each year to establish that he or she is conversant with insider trading rules, say. That individual can go directly to the final quiz on the intranet with its 20-30 questions that are selected at random from a pool of 50 questions. While some questions—about five to eight—"must" be answered correctly, others can be 'missed' as long as an overall score of 80 percent is achieved.

Test-takers can find out almost immediately if they passed the test. Because corporate training databases are updated promptly, these can be accessed quickly to see if credit has been granted.

The CD-ROM compliance training is now in version 2.0. Unlike the previous version—1.0—special hardware is not required to run it. (The first version required a video capture card.)

The student saves his or her training record on a disk; this record is later uploaded to a central location. When training is available on the intranet, this uploading process will be dispensed with. Results would be sent to the training central automatically—another reason to favor "migration" to the intranet, according to Haney.

CD-ROM vs. the intranet

Why would the company prefer to put the corporate compliance training on its intranet rather than continue with the CD-ROMs? "Flexibility, convenience, and rapid deployment of information," answers Haney.

"If an employee is accessing from a central database, he can be assured of getting the latest training material." The most recent CD-ROM training module might be

version 3.4, for example. But within the vast reaches of the company "there may be someone out there who still has version 3.1." If the training is done via the intranet, however, "we don't have the administrative burden of recalling outmoded modules." Or risk that an outmoded CD could still be used.

The CDs sometimes contain 'news' items—about real companies prosecuted or penalized because of non-compliance. These news items can be updated regularly if the company uses a central database.

Also, with the intranet, "You can take the training wherever you are without having to access a library of CDs."

Costs aren't really a factor, however. CDs are relatively cheap to produce, less than $1 apiece. "Once the database exists, the costs are relatively low." On the intranet site, one has up-front costs for video services, but these costs "are not overly large, and the cost per course delivered should remain where it." Expense-wise, intranet versus CD-ROM is a wash.

Digital training versus classroom training

How do the costs associated with digital compliance training compare with those attached to old-fashioned classroom training?

Many studies have been done on this issue, answers Haney. "The consensus is that training in this manner (i.e., digital) is about 25 percent more efficient in terms of time than traditional classroom training—and the retention rate is higher."

In a traditional class, time is wasted waiting for tardy students to arrive. Nor is there any assurance that once people *do* arrive that they will be "tuned in" to what is being taught. The instructor often has to pace the class to that of the slowest student. Sometimes a lone student can take the class off on a tangent with a particular concern. With digital training, by contrast, "it's self-paced."

A 25 percent labor saving is significant, moreover. It is costly to take someone off the production line, or out of his or her office to attend a training class when that expense is spread across the entire labor force. "That is where the big bucks come in," observes Haney.

"If 100,000 employees take the final quiz, and they take it in ten minutes and avoid sitting in class, or sitting through an entire module, then even assuming a conservative hourly labor rate, our return on investment is very high." And they have assurances, too, about the quality of training, its consistency and timeliness.

'Stay flexible, stay abreast of where the technology is going. But in the final analysis, content is the key.'

Intranet vs. Internet

What about the Internet as opposed to the company's intranet?

As noted, the company was one of the first to post its ethics code on the Internet. Prior to that, in July 1995, the concern's new code of ethics and business conduct was posted on its in-house computer network. In September 1995, "because we had received a lot of outside interest in the new code, we posted it on the Internet, as an experiment."

The thinking at the time was: "If we post it, employees can access it at home. So can shareholders and prospective employees." University ethics courses have made reference to it, notes Haney. "We found it to be a positive experience." It is one of the most visited pages on the Lockheed-Martin website.

What about posting other things, like compliance training modules, then? "We have to think that through. Who is our audience? Does it extend beyond the workforce?" The Internet, unlike the intranet, is open to the outside world.

Lockheed-Martin's Internet ethics site has been visited by numbers of academics, says Haney. Perhaps they might profit from access to the company's training modules, like the one for maintaining a drug-free workplace. Should Lockheed-Martin make such modules generally available? What about a sample module? No conclusion has yet been reached.

But one thing seems clear: The real future of compliance training at Lockheed-Martin seems to be on the company's intranet, not the more public Internet, although the latter, admittedly, offers some public relations opportunities.

When *not* to use technology

It is crucial for a company to know when to use technology—but also when *not* to use it, says Haney. Where might a high-tech approach not be appropriate? One area is ethics awareness training.

At Lockheed-Martin, all employees are required to take annual ethics awareness training. The company uses

In a 1996 survey, employees said that 'discussion of real world ethical dilemmas was the most valuable part of the training.'

the 'train the trainer' model. It begins with the corporation's chairman, who 'trains' his staff. Training then 'cascades' down through the organization. Everyone at Lockheed-Martin is trained within six to eight months. The program is now in its fifth year.

Ethics awareness training could easily be put on a CD-ROM, notes Haney, or conducted through the company's intranet. "Doing it in a meeting, with a manager and employees, is low-tech, but it is much more effective." It makes an impact when a supervisor discusses ethics face-to-face with his or her subordinates.

When the company conducted a follow-up survey after completion of ethics awareness training in 1996, employees said that "discussion of real-world ethical dilemmas was the most valuable part of the training," recalls Haney. That sort of discussion is not likely to be replaced soon by CD-ROM.

What advice does Haney have to other companies taking—or thinking about taking—compliance training digital? "Stay flexible, stay abreast of where the technology is going. But in the final analysis, the content is the key. Don't lose site of those key learning points amidst all the bells and whistles of technology." ❑

International Corruption . . . *Cont'd. from page 4*

tive methods for enhancing public integrity and controlling corruption. The components of this initiative are varied. For example, OGE staff hosted over 150 foreign officials from 35 different countries at our office for briefings about the executive branch system of ethics. OGE offers in-depth expertise on ethics programs by offering technical assistance to countries considering ethic- related initiatives.

This assistance includes informal advice on appropriate strategies for country-specific problems to formal, written analyses of ethics measures, such as draft ethics legislation or codes of conduct. A third example: U.S. foreign policy agencies and various multinational and non-governmental organizations regularly invite OGE staff to participate in anti-corruption programs abroad.

These programs generally focus on rule of law, legal reform and anti-corruption strategies, and OGE representatives at such events frequently serve as the primary experts on preventive systems for controlling corruption.

Some agencies provide ongoing support and guidance to foreign governments as they consider new public integrity initiatives. OGE and the Office of the Inspector General (OIG) at the Department of State, for instance, have initiated a number of joint work projects with the Chinese Ministry of Supervision (MOS), the primary anti-corruption agency in China. These projects have facilitated a mutual exchange of information, enabling OIG-State and OGE to understand how our Chinese counterparts address public corruption and in turn to inform them about the integrity systems in place in the United States. OIG-State and OGE have sent two delegations to Beijing for high level meetings and consultations with MOS officials within the past two years, and have hosted a delegation from the MOS in Washington, DC as well. These meetings have proven highly informative and have created the framework for future cooperation in a number of areas.

Conclusion:

This paper began by contrasting the 1994 International Conference on Ethics in Government with Vice President Gore's Global Forum on Fighting Corruption. In a meaningful way, these two book ends inform the dramatic change in both the dynamic and attitude toward fighting corruption. The leaps and bounds the international community has made in its understanding of corruption, and in the political will to enact strong measures to combat it, has been nothing short of extraordinary. The U.S. Government has been an active agent in nurturing this relatively new consensus and considers corruption a priority in its international policies. We can expect this consensus to broaden and deepen. While much progress has been made, corruption remains one of the most pernicious and harmful enemies democratic governments face today. The United States Government is committed to meeting this challenge face to face, understanding that while corruption cannot be fully eradicated, it can nevertheless be significantly reduced through the strength of our continued efforts. ❑

In Aftermath of the *Carman* Decision, Ombuds 'Privilege' Still Has Validity

by Charles L. Howard and George R. Wratney

A shudder raced through the organizational ombuds community in the summer of 1997 following the Eighth Circuit Court of Appeals' decision in *Carman v. McDonnell Douglas* (114 F3d 790 [8th Circuit 1997]). After years of favorable decisions by federal district courts recognizing a confidentiality privilege for organizational ombuds, *Carman* presented the first federal appellate review of the privilege, and the court flatly refused to recognize the privilege.

Because the confidentiality privilege plays such an important role for organizational ombuds, the central question in the aftermath of *Carman* has been whether the privilege has any continuing validity. Based on our experiences over the last two years, we believe the answer is yes: While *Carman* was correctly decided on its facts, an ombuds confidentiality privilege can still be recognized under Federal Rule of Evidence 501 if the lessons of *Carman* are heeded.

The essential lesson of Carman is that in every case facts need to be presented to the court to prove entitlement to the privilege.

The *Carman* case

Carman was an age discrimination employment case. In the course of discovery, the plaintiff sought disclosure of information from the ombuds, which the company resisted on grounds of an ombuds privilege under Federal Rule of Evidence 501. The district court precluded the plaintiff from obtaining the ombuds' records, but when this issue was raised on appeal, the appellate court reversed the decision of the trial court, finding that the record did not support such a claim. This decision came as a surprise, since one of the first reported cases involving an ombuds confidentiality privilege was *Kientzy v. McDonnell Douglas Corporation,* 133 FRD 570 (E.D. Mo. 1991), also involving the ombuds program at McDonnell Douglas. There are, however, two critical points to a proper understanding of *Carman*.

First, by the time suit was filed in *Carman*, McDonnell Douglas had abolished its ombuds program (see *ethikos* September/October 1997). Thus, the ombuds program no longer had a separate voice inside the company, much less separate counsel. Moreover, counsel for McDonnell Douglas was not fully versed on the history and nuances of the ombuds privilege.

Second, the way in which the privilege was asserted by McDonnell Douglas is important. While not fully apparent from the decision, the appellate record reveals that in response to the plaintiff's request to produce documents, McDonnell Douglas objected to the production of documents from the ombuds on the grounds that they were "immune

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United Technologies Corp. has consistently taken an aggressive approach in asserting ombuds privilege, an approach vindicated by a recent favorable ruling in the Leslie *case.*

from discovery" because the ombuds' activities were considered confidential. This objection was overruled. In a subsequent motion for reconsideration filed by McDonnell Douglas, the company cited two unreported orders from the same federal district court involving the McDonnell Douglas ombuds program in which the privilege had been recognized. The district court reconsidered its prior ruling and, without any analysis on the issue, ordered that McDonnell Douglas did not have to produce the ombuds' documents.

Thus, the record before the appeals court in *Carman* reveals no facts (by testimony, affidavit, or otherwise) concerning the ombuds office, how it operated, or why confidentiality was important. Likewise, the record contained no analysis by the district court. Yet it is a fundamental principle of law that full disclosure of relevant evidence is required, and that any person claiming an exception to this rule, as in the ombuds privilege, bears the burden of proving why he is entitled to an exception. 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.

Aftermath of *Carman*

In contrast to the approach taken by McDonnell Douglas in *Carman*, United Technologies Corporation and its operating units (including Pratt & Whitney and Sikorsky Aircraft) have consistently taken an aggressive approach to providing the trial court with the facts necessary to demonstrate entitlement to a confidentiality privilege.

This began with the evidentiary record presented to the court in *Roy v. United Technologies*, Civil No. H-89-680 (JAC) (D. Conn., May 29, 1990), the first case in which an organizational ombuds privilege was recognized under Federal Rule of Evidence 501. The decision in *Carman* has not changed this approach; rather, it has confirmed our belief that this approach can prevail despite the ruling in *Carman*. Moreover, this approach was vindicated by the recent favorable ruling in *Leslie v. United Technologies Corporation d/b/a Pratt & Whitney*, Case No. 97-8212-CIV (RYSKAMP), Southern District of Florida, West Palm Beach Division. Thus, the essential lesson of *Carman* is that, in every case, facts need to be presented to the court to prove entitlement to the privilege.

Practice Pointers

To meet this burden, we offer the following suggestions:

1. *Know what the standard is.* While different federal circuits may have slightly different tests, the legal analysis of whether a communication privilege exists generally involves the four Wigmore factors (8 John Henry Wigmore, Evidence § 2285 [McNaughton rev. 1961]):

a) the communication must be one made in the belief that it will not be disclosed;

b) confidentiality must be essential to the relationship between the parties;

c) the relationship should be one that society considers worthy of being fostered;

d) the injury to the relationship incurred by the disclosure must be greater than the benefit gained in the correct disposal of the litigation.

2. *The ombuds must present facts to the trial court.* This can be done through affidavits, testimony, and documents in order to give the court the facts necessary to determine that each element in the Wigmore test is satisfied. Since the issue usually arises as a result of a plaintiff's attempt to depose an ombuds or to obtain the ombuds' documents, the privilege typically is asserted in a motion for protective order. In addition to a brief analyzing the facts and legal issues, we usually file an extensive affidavit from the ombuds, together with documents, in which we establish the following:

- *How the company came to create the ombuds program.* For defense industry companies such as United Technologies Corp., we begin with references to the Packard Commission, appointed by President Reagan, and the Defense Industry Initiative, both of which emphasized greater corporate self-governance and reporting. Creation of an ombuds program was one suggestion that arose from these major national policy

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Corporate Compliance Makes The Grade At Australian Law School

By Christine Parker and Angus Corbett

In late 1998, corporate compliance became the subject of a postgraduate course at The Law Faculty at the University of New South Wales in Australia.

The course, which focused on the design and implementation of corporate compliance functions, and regulatory policies to encourage corporate compliance efforts, was titled Corporate Compliance and Self-Regulation: Theory and Practice. It was offered to approximately 30 graduate law students and compliance managers.

(Law students in Australia qualify for admission to the bar by completing a bachelors degree in law. Many go on to a postgraduate masters degree in law after they commence practice in order to augment their knowledge and skills.)

Although offered to postgraduate masters candidates in the Law faculty, the course was unusual in that it was open both to law graduates and graduates of other disciplines who work in compliance or management. It was offered over five Saturdays to make it easier for workers to attend.

The course sought to prepare students for the development and implementation of corporate compliance programs in their workplaces. Attendees included compliance managers in businesses as diverse as financial services, railroads, copyright licensing, waste management and irrigation. Some were private lawyers with a compliance practice in finance, occupational health and safety, or environment law. Still others were private compliance consultants and staff members of regulatory agencies.

Attendees included compliance managers in businesses as diverse as financial services, railroads, copyright licensing, waste management and irrigation.

An interdisciplinary approach

The course took an interdisciplinary approach toward the theory, practice and regulatory policies governing corporate compliance functions. The class frequently split into small discussion or task groups to delve into case studies or to examine questions in greater depth. The thinking was that students could learn as much from each other as from the course teachers.

Dr. Christine Parker, a postdoctoral fellow in the Law Faculty, conceived the idea for the course out of her research on internal corporate compliance functions, corporate citizenship and flexible regulatory strategies. The course gave her a chance to 'reality test' her ideas and research. It gave students and practitioners access to materials, ideas and best practices not otherwise readily available. Mr. Angus Corbett, senior lecturer in the law faculty and an expert in corporate governance, helped teach the course. Invited compliance practitioners included Joseph E. Murphy, an editor of this publication.

Role playing and case studies were used extensively. One afternoon, for example,

Dr. Christine Parker is a postdoctoral fellow in the Law Faculty at the University of New South Wales in Sydney, Australia. Angus Corbett is a senior lecturer in the Law Faculty.

The class looked at the strategic, ethical and economic reasons why companies implement compliance functions.

students grilled a sales representative (played by Australian compliance consultant Brian Sharpe) in an effort to learn how to audit for potential breaches of antitrust law. Another day was spent attempting to solve the compliance problems of a struggling heating-and cooling-products manufacturer (in a case study prepared by compliance practitioner Neill Buck). In another class, three students donned safety helmets as they presented conclusions from their essay on how Australian regulatory policy confounds companies' efforts to introduce occupational health and safety policies.

The formal aims of the course were:

- To understand changing notions of law and legal regulation and how formal law facilitates standards for self-regulation and compliance.
- To understand legal and management requirements for effective design and implementation of corporate self-regulatory and compliance initiatives.
- To develop skills for the effective design and implementation of corporate self-regulatory and compliance initiatives.

The curriculum was split into three segments, outlined below. In the first segment, the class looked at the strategic, ethical and economic reasons why companies implement compliance functions. They also examined the different ways that regulators, courts and legislatures can encourage the implementation of internal compliance functions.

The second and longest segment dealt with the design and implementation of compliance functions. This section drew on the expertise of practitioner presenters as well as 'scientific' best practices and evaluative studies.

In the final, and most challenging, section, the class looked at ways to measure and evaluate the performance of compliance systems, including the 1998 Australian Standard for compliance programs. (See *ethikos*, March/April 1999, for more on the Standard.). The class outline was as follows:

I. Corporate Compliance, Self-Regulation and the Law: Why, When, Where, How?

- What courts, regulators and legislators are saying and doing about compliance
- Case studies in compliance and compliance failure
- Compliance, business performance and strategic management
- The limitations of command and control regulation and the possibilities of business self-regulation
- Ethical issues and self-regulation and compliance

II. Designing And Implementing Compliance And Self-Regulatory Systems

- Designing effective compliance systems
- Best practice compliance programs
- Compliance programs in particular industries and regulatory regimes
- The human element of compliance
- Compliance audits
- Compliance training programs
- Disciplinary systems and industrial relations compliance
- Compliance professionalism
- Risk management and critical control point analysis

III. Evaluating Compliance And Self-Regulatory Programs

- Standards, benchmarking, and continuous improvement
- Regulatory evaluation of compliance and self-regulation
- Performance indicators for compliance
- Evaluation of compliance programs

For their assessment (i.e., grade) students were required to write a 5,000-word essay or project of two parts:

(1) Each student was required to identify and analyze a regulatory or compliance issue and design a program for either an organization, regulator or government to address the issue in a way that promotes compliance. The problem or issue chosen could be a particular compliance issue facing a student's own workplace organization, an issue currently being considered for reform or regulation by government, or the design of a compliance system for a particular regulatory regime. The program for addressing the issue could consist of a compliance program for a particular organization, a new regulatory or enforcement strategy, reforms to the law or any combination of these

Role playing and case studies were used extensively. One afternoon, students grilled a sales representative in an effort to learn how to audit for potential breaches of anti-trust law.

strategies.

(2) Each student was required to reflect upon, justify and evaluate his or her solution to a regulatory or compliance program in the second part of the essay.

This form of assessment was different from the traditional assessment in law courses, and closer to the style of work required in management classes. It was chosen to reflect more accurately the nature of compliance practice which revolves around integrating management and ethical concerns with legal and regulatory responsibilities. Some law graduates found it difficult to master the complexities required of compliance practice, but all came away positive about what they had learnt.

Among the projects: a proposal for a code of practice and compliance systems in the bookmaking industry; a paper aimed at convincing a company's board of directors of the need to commit to an occupational health and safety policy; and an analysis of what was required for environmental compliance for a particular construction site—and how the law could be changed to improve environmental outcomes at the site and others like it.

Most students drew on their work experience to write their papers, and many used their assessment directly as an aid in their daily jobs. In one case, a teacher's suggestion regarding a practitioner's essay led to discovery of a looming compliance problem at the individual's company. (It was swiftly rectified.)

Although the course remains a work in progress, student evaluations at the end were positive. Students were especially pleased about its practical relevance to their individual work. The course will be offered for the second time in the second half of 1999.

For additional information or comments, contact Christine Parker by e-mail at: C.Parker@unsw.edu.au. ❑

Ombuds 'Privilege' . . . *Continued from page 10*

initiatives.

- *How the program was established at the company.* The court needs to know how and why a company decided to create an ombuds office and how it differs from other communication channels in the company. We also describe or attach the ombuds' job description.

- *Why confidentiality is critical to the ombuds from the company's perspective.* Frequently this involves citations to corporate compliance or other policies and references to the Sentencing Guidelines for Organizations of the United States Sentencing Commission.

- *How the program operates within the company.* Included here are the facts describing how the program actually operates, the physical security measures used to protect confidentiality, and operating and record-keeping procedures used to preserve the confidentiality of communications. It is also important to present examples of publicity within the company in which confidentiality was emphasized.

The court needs to know how and why a company decided to create an ombuds office and how it differs from other communication channels in the company.

- *Qualifications, experience, and standards adhered to by the ombuds.* Invariably, this involves reference to The Ombudsman Association's Code of Ethics and Standards of Practice, as well as other relevant experience and qualifications of the ombuds.

- *Specific facts concerning the use of the ombuds program.* We try to inform the court how extensively the ombuds program is used (often by reference to the number of inquiries) and any aggregate statistics by

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Has America Lost Control Over Its Corporations?

By Loren Singer

Corporation Nation; How Corporations Are Taking Over Our Lives and What We Can Do About It; by Charles Derber, 374 Pages, Notes, Index, St. Martin's Press 1998.

The hypothesis is certainly clear from both title and sub-title, and one can also accept the view that two philosophies—laissez-faire capitalism in the days of the 'Robber Barons,' and the populist movements that opposed it at the end of the nineteenth century—are still animate in these times. Both, however, appear in an altered state. The former has all but completed its triumph while taking care not to declare and celebrate its victory, and the latter, fragmented and weakened, has demonstrated very little strength since the days of FDR.

Charles Derber has set out to change the present balance of power, and in *Corporation Nation* he has set forth a grand plan to restore to the people control over their own lives and destiny. This is no simple task, but it may well have been handled better by a different approach.

The author argues that the impotence of labor has brought about the success of corporate governance, and the rise of the 'shadow government.'

The rise of 'shadow government'

The author is a professor of sociology at Boston College, and as such he has a tendency to see three or more sides to many of the problems he discusses in this text. A single-minded approach like that of some of the more radical leaders in decades past might have strengthened the thesis. There were many examples to choose from: John L. Lewis, who forged the CIO, and probably the first PAC; the brothers Reuther of the UAW; even Joe Hill, of the IWW, or Harry Bridges, leader of the longshoremen in San Francisco who shut down that port for months. None of them gave quarter in the labor wars against the most powerful corporate structures of their time. And it is a major part of Mr. Derber's thesis that the impotence of labor has brought about the success of corporate governance, and the rise of what he terms the 'shadow government.'

After a discourse on the history of corporate charters, and an amusing sidelight that notes the competition among various states to offer the most freedom of function to business—Delaware won out over New Jersey, New York, and a number of other states—Mr. Derber illustrates the earliest initiatives by corporations to associate federal and state governments in their own efforts to organize both their markets and their competition. There are other noteworthy details on how easily and often corporate charters were revoked when they "were seen as violating the public trust or exceeding the limited authority they had been expressly delegated."

In a kind of peristaltic movement, the limitations on corporate charters—manufactur-

Loren Singer is the author of *The Parallax View* and other novels. His novel, *Making Good* (Henry Holt & Company) was a 1993 Washington Irving Book Selection. Mr. Singer is book review editor of *ethikos*.

ers qualified for a twenty-year grant, banks for only three—were ended. Eventually, during the so-called Gilded Age, corporations acquired the rights previously held only by individuals; they were granted all of the privileges and protections guaranteed to the rest of the citizenry. This development is believed by many, including Mr. Derber, to be an utterly irrational concept, and the source of many of the ills that affect the nation today. Nevertheless, the Supreme Court decision in 1886 declared that "the corporation should be considered a person entitled to the due process rights guaranteed to all persons by the Fourteenth Amendment." The anti-slavery amendment became "the chief legal instrument for protecting the corporation." In 1899, Delaware established corporations on a foundation of bed rock. It permitted incorporators to place in their certification "any provision they choose to insert." Such a law took up much less space than tank farms, and the filing fees were impressive.

Growing influence

From that point on, the corporation, once the humble subject of the state, grew steadily in power and influence. According to Mr. Derber, it has become a major factor in every facet of American life, dominating the workforce and setting the terms of employment, the levels of pay, and the limits of benefits. The corporation changes factory locations "upon a whim," downsizes and outsources as it pleases. It has made itself more than an equal partner with state and federal governments, and corrupted the political process with its vast financial contributions to both major political parties. In our time, the Democrats, the inheritors of FDR's mass of populist adherents, have moved ever closer to the traditional Republican position vis-à-vis business. How far they have positioned themselves from the era in which Harry Truman had the CEO of Montgomery Ward removed from his office–executive armchair and all—by two federal marshals.

This present association—collusion is implied—has enabled corporations to deliver goods and services that were never a part of their spheres of operation. They are now, by virtue of a common interest in "privatization" and a general interest in reducing the size of government, managing health-care, the environment, education, communications, and even prison systems.

The measure of corporate power appears in a number of statistical inclusions, and some are certainly impressive, if not necessarily applicable: "One hundred sixty-one countries have smaller revenues than Wal-Mart does."

During the so-called Gilded Age, corporations acquired rights previously held only by individuals; they were granted all of the privileges and protections guaranteed to the rest of the citizenry.

Granted. However, so many Third World countries are splintered, ravaged, or poorly governed that such comparatives seem to have little weight. And relocating the chain's operations to Benin or Bhutan would not improve matters very much.

Relocating on a global basis is very much a matter of concern to Mr. Derber as he sets forth a program to limit corporate power through populism. It is not only a complex one, it has a certain amount of conservatism about it, despite the radical attitudes of certain of its founders—LaFollette, Bryan, Theodore Roosevelt are some who come to mind. But the Derber approach is tempered with caution. That is no more than common sense, for the corporation's first line of defense is so strong a bulwark that even union pension plan managers have no wish to attack it: a record of success in raising the living standard in the U.S. to unparalleled levels; placing goods and services, necessary or not, within the grasp of the many; and providing the opportunity to improve their lot. There is also to be considered the powerful matrix of industry that forms the base of the national security—the 'arsenal of democracy' which since World War II has demonstrated its ability to deliver every item necessary to defend the nation and its allies. Under the circumstances, laissez-faire and giantism face little organized opposition.

Countervailing forces

The counterforces, like organized labor, that Mr. Derber suggests take part in putting society once more in control of its ever more invasive corporate behemoths, do not seem ready to undertake the assignment. Nor is it clear they are even necessary. There are still countervailing forces at work on both the national and the local level that assure that business accepts responsibility for damage to the environment, makes an effort to open employment opportunities to all, without regard to race, creed or color, pays a minimum

The anti-slavery amendment became 'the chief legal instrument for protecting the corporation.'

wage, and even refrains from the practice of bribing officials in both this country and abroad.

Also, labor, the group charged with the heaviest obligations in the projected campaign, had, after it reached its own heights of power, transformed its operations into an imitation of life on the corporate executive's level. There were perquisites, conferences, expensive headquarters, and consultants and legal staffs to manage pension plans and write legislation. There was even a fair amount of corruption, and a number craft unions were as lily-white as any corporate board room. If the unions had never been able to fund a competitive labor lobby until long after the corporations had entrenched themselves in Washington, they had some successes: the *New York Times* reported on July 25, 1944, that "The President told the chairman" (of the Democratic convention) to 'clear everything with Sidney.'" Sidney Hillman at the time was Chairman of the Political Action Committee of the CIO, and president of the Amalgamated Clothing Workers.

In his epilogue, Mr. Derber has set out eighteen positive steps toward the formation of a populist movement to "lay the foundation of a new struggle for democracy." They range from quite subjective efforts like practicing self-awareness and the education of oneself and others to the wise use of buying power, and the determination to stand up for one's rights in the workplace, to becoming an activist in opposing any corporation that is making your community "a less civil place to live," joining and voting with a populist group, or investing with a socially conscious approach.

There is nothing strident or emotional about the program, and no evangelical harangue—simply rational ways to apply 'countervailing forces' in order to control the overwhelming power of the corporation. Whether this will inspire millions of couch potatoes to build and man the barricades is doubtful at this time. It may not be simply indifference on the part of the citizenry when joblessness is at a new low, and inflation supposedly well under control. Perhaps it is some lingering belief on the part of the people that Americans are not so many suppliants to be manipulated, but a force to be reckoned with if their well-being or their nation is threatened. Minute Men. ❑

Ombuds 'Privilege' . . . *Continued from page 13*

which the effectiveness of the program is measured. Not to be forgotten is the point that the ombuds has never been compelled to break confidence.

3. *In support of each of the factual allegations in an affidavit, we attach as many documents as we can find.* Among the types of documents are board resolutions, company policies, publications from outside the company, internal memoranda, informational brochures, other publicity (including posters), and statistical reporting summaries.

4. *Prepare in advance.* Since the preparation of these affidavits and the collection of the documents can be time consuming, we suggest that some effort be made to pull together this information in advance so that an effective motion for protective order can be prepared on short notice. Likewise, we suggest that the ombuds retain separate counsel to represent the ombuds in such a motion, since joint representation of the company and the office of the ombuds under these circumstances undermines the principles of confidentiality and independence on which the ombuds programs are established.

Conclusion

The ombuds confidentiality privilege, like any privilege, can be established on the basis of a proper showing of facts supporting it. These facts must be presented to the trial court at the time a motion for protective order is filed, and the trial court must be provided with an analysis of these facts and the established legal principles. While the assertion of a confidentiality privilege is still very much a case-by-case analysis, we believe with a properly designed program, the facts will justify recognition of such a privilege. The challenge for the ombuds and the lawyer is to marshal those facts in an effective manner. ❑

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10. Tom Sebok, "Helping an Organization Understand - and Defend - the Ombuds Confidentiality Privilege," (undated monograph)

D. Other Resources

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2. The Ombudsman Association Code of Ethics and Standards of Practice

3. Standards for the Establishment and Operation of Ombuds Offices American Bar Association Policy, Adopted August 2001

4. Generic College/University Ombudsperson Job Description

5. Uniform Mediation Act, approved by the National Conference of Commissioners on Uniform Laws, August 2001, and approved by the American Bar Association, February 2002

6. Sample state statutes protecting confidentiality of alternate dispute resolution discussions:

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   b. Conn. Gen. Stat. § 52-235d

   c. 12 Okl. St. § 1805 (2003)

7. Model Statutes:

   a. Model Shield Law for Ombudsman (Drafted by Model Shield Law Committee Representing Various Ombudsman Organization - 2/18/97)

   b. Model 2 - Neutral Offices Confidentiality Act, 1999, ERC Fellows Program

8. United States Sentencing Guidelines, § 8A 1.2 comment 3(k)

A

RECYCLED

RECYCLED



Zakee Rahmaan SHABAZZ, a/k/a Gary Eugene Tyson, Plaintiff,

v.

David SCURR and James Menke, Defendants.

Cleo FRANKLIN, Administrator of the Estate of Gary Tyson, Deceased, Plaintiff,

v.

David SCURR, et al., Defendants.

Civ. Nos. 81-399-E, 82-533-E.

United States District Court, S.D. Iowa, C.D.

May 28, 1987.

Separate § 1983 suits were filed against prison officials following inmate's death. Officials of state's "ombudsman" office moved to intervene to assert state law evidentiary privilege against former prison ombudsman employed by plaintiffs in his capacity as operator of private consulting firm. The District Court, Donald E. O'Brien, Chief Judge, held that: (1) limited federal privilege existed which present officials of office could assert against former prison ombudsman to prevent his disclosure in court of communications he received while in that office; (2) privilege did not extend to former prison ombudsman's general knowledge or expertise; and (3) present officers of ombudsman office could not assert former prison ombudsman's state law testimonial immunity.

Ordered accordingly.

1. Witnesses ⇐216(1)

Limited privilege existed under federal law which present officials of state "ombudsman" office could assert against former prison ombudsman to prevent his disclosure in court of complaints he received while serving as ombudsman as well as communications received from state officials while he was investigating complaints or inquiries.

2. Witnesses ⇐217

State law testimonial immunity enjoyed by former state prison "ombudsman" was personal, not official, and could not be invoked by present officers of ombudsman office in order to prevent him from voluntarily testifying concerning exercise of his official duties.

3. Witnesses ⇐216(1)

Limited federal privilege preventing former state prison "ombudsman" from disclosing confidential complaints did not extend to his general knowledge or expertise, even though he may not have been able to achieve that level of expertise without benefit of protected communications.

Robert Wright, Sr., Des Moines, Iowa, for plaintiffs.

Gordon Allen, Asst. Atty. Gen., Des Moines, Iowa, for defendants.

ORDER

DONALD E. O'BRIEN, Chief Judge.

The Court has before it a question of first impression concerning the power of a former prison ombudsman for the Iowa Citizens' Aide Ombudsman Office ("ICA/OO") to act as a witness and a private investigator on behalf of plaintiffs in a federal constitutional case which arose during his tenure as a prison ombudsman. The legal right of the former ombudsman, Mr. Ray Cornell, to serve in these capacities has been challenged by present members of the ICA/OO staff, who believe that Cornell's rights are limited by privileges and immunities created by state law to protect their office. For reasons given below, the Court finds that a limited privilege

exists under federal law [1] which may be asserted against Mr. Cornell by present officials of the ICA/OC. Communications received by Mr. Cornell as prison ombudsman are privileged matters which he cannot repeat in court or while serving as an investigator in this matter. This privilege does not extend to Mr. Cornell's general knowledge or expertise. However, the present ICA/OO officers may not assert Mr. Cornell's state-law testimonial immunity [2] as a citizens' aide. While that immunity did not disappear when Mr. Cornell left office, it is personal, not official, and may be waived by Mr. Cornell if he so chooses.

The office of ICA/OO and the prison ombudsman position were created by an act of the Iowa Legislature in 1973. The most important functions performed by the members of the office begin when a complaint against a state agency or official is received. Iowa Code § 601G.9 authorizes the office to investigate several types of complaints and provides it with significant investigatory powers, including access to state documents and subpoena power. When the office concludes that action is warranted, it may issue a recommendation to the executive or legislative branches. Iowa Code § 601G.16. However, the office has no formal remedial or preventative authority of its own.

From 1973 until 1984, Ray Cornell was the prison ombudsman in the ICA/OO. On September 2, 1981, he was present at the Iowa State Penitentiary when a major disturbance broke out. When officials regained control, they discovered the body of Gary Tyson, also known as Zakee Rahmaan Shabazz, who had been murdered during the uprising. Tyson had filed a § 1983 complaint against prison officials in this court shortly before his death. Following his death, his family members filed a separate § 1983 complaint against prison officials, and these two suits were consolidated and will soon be tried.

Mr. Cornell now operates a private consulting firm providing investigative services and expert testimony in jail and prison cases. He has agreed with plaintiffs' counsel to provide these services at a reduced rate in this case, and plaintiffs' counsel has sought reimbursement from the Court. On April 24, 1987, Susan Voss of the ICA/OO filed a motion on behalf of the office to intervene in order to assert the following state law evidentiary privilege:

> The Citizens' Aide may maintain secrecy in respect to all matters including the identities of the complainants or witnesses coming before the Citizens' Aide, except that the General Assembly, any standing committee of the General Assembly or the Governor may require disclosure of any matter and shall have complete access to the records and files of the Citizens' Aide. The Citizens' Aide may conduct private hearings.

Iowa Code § 601G.8 (1985). The ICA/OO also seeks to invoke the immunity from compelled testimony in § 601G.20, which states that "the Citizens' Aide or any member of the staff [shall not] be compelled to testify in any court with respect to any matter involving the exercise of the Citizens' Aide's official duties except as may be necessary to enforce the provisions of this chapter." The office seeks to prevent Cornell from testifying about matters concerning Gary Tyson and the circumstances of his death which Cornell learned during his tenure. It does not object to his use as a resource or as a witness on prison rules and policies, the daily operation of a prison, or any other general knowledge not otherwise confidential by law.

Because this is a federal case, the legal question regarding the ICA/OO's motion must be resolved according to federal law. In drafting the Federal Rules of Evidence, Congress expressly left the task of defining the scope of evidentiary privileges in federal subject matter cases to the federal courts, asking only that they be governed by "the principles of the common law as they may be interpreted ... in light of reason and experience." Fed.R.Evid. 501. Thus, the fact that an Iowa statute creates

1. *See* discussion of the role of state law in federal evidentiary privileges at p. 91.

2. *See* note 1, *supra*.

a privilege and a testimonial immunity does not automatically mean that this Court can recognize them. But in light of the unique function of the ICA/OO, the law which created that office is the best indication of its purposes. To the extent that those purposes make the office comparable to other individuals and entities already protected by federal privileges, the office deserves similar protection.

[1] As a result of § 601G.8 and other confidentiality provisions, citizens have an expectation that their complaints to the office will only be disclosed to the Governor or the General Assembly, if they are disclosed at all. The basis for a privilege would be much stronger if full confidentiality were required. However, the Court is persuaded that the flow of information to the office from citizens would be threatened if it became known that the statutory assurances of general confidentiality would not be respected in federal court. The office cannot compel citizens and other whistle-blowers to come forward; they must choose to do so. Thus, anything which chills a citizen's willingness to come forward limits the office's effectiveness in the long run and may restrict the spectrum of available information. It has been said that a court's primary consideration in privilege cases should be whether the exclusion of the evidence in question would actually promote the creation of information which might not otherwise exist; if so, the exclusion is justified. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va.L.Rev. 597, 600 n. 9 (1980). The Court finds that complaints received by Ray Cornell as ombudsman are privileged because such confidentiality is necessary to ensure that complaints will be made.

A more difficult question is posed by communications received by Mr. Cornell from state officials while investigating complaints or inquiries. These kinds of communications could be compelled through the office's subpoena power, so that in theory the information can be created one way or another. In practice, however, the willingness of the staff to investigate complaints may diminish if they must go to court whenever a straight answer is needed from a state official. Thus, preserving the confidentiality of communications received during investigations helps to ensure that those communications will take place.

The office also argues that confidentiality is needed to informally resolve problems which arise, and this Court agrees. Courts have a special interest in protecting the office's problem-solving function. This Court spends far too many hours in litigation between prisoners and state officials attempting to remedy problems which could have been prevented or reconciled informally. If state officials become less candid when contacted by an ombudsman out of fear that any admission might be used against them in a subsequent legal action, the power of the office to solve problems will diminish. While informal dispute resolution is seldom protected by privileges, other rules of evidence such as the exclusion of settlement discussions and plea bargain statements reflect "the public policy favoring the compromise and settlement of disputes." (Fed.R.Evid. 408 advisory committee note.) This public policy is an appropriate basis for this Court to respect the confidentiality of communications received by the ICA/OO from state officials.

The Court further believes that the incumbent officials of the ICA/OO are the proper persons to assert this privilege. As the foregoing discussion sets out, the interests to be protected by this privilege are the interests of the office, and not simply of the individuals who perform its tasks. The U.S. Supreme Court has recognized that the privilege protecting communications of a president may be asserted by subsequent holders of that office because "the privilege is not for the benefit of the president as an individual." *Nixon v. Administrator of General Services*, 433 U.S. 425, 449, 97 S.Ct. 2777, 2793, 53 L.Ed.2d 867 (1977). *See also United States v. Reynolds*, 345 U.S. 1, 7, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953) (state secrets privilege "belongs to the government and must be

asserted by it; it can never be claimed nor waived by a private party.").

[2] In its brief, the ICA/OO presented the more sweeping assertion that it could invoke Mr. Cornell's state law immunity from being compelled to testify concerning the exercise of his official duties so as to prevent him from voluntarily testifying. Reasoning again by analogy, the Court finds that the testimonial immunity may be waived by Mr. Cornell. Unlike privileges, testimonial immunities protect persons, rather than communications. This testimonial immunity is similar to the immunity of congressmen and their aides from being "questioned in any other place" about legislative matters. U.S. Const. Art. I, § 6. As the Supreme Court held in *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972), such immunity can only be invoked by the testifying congressman or aide, and may be waived by the congressman. 408 U.S. at 621–22, 92 S.Ct. at 2625. If it is waivable by an individual, it follows that it cannot be asserted by the ICA/OO. Thus, if Mr. Cornell chooses to waive this immunity, neither the Court nor the office can prevent him from doing so.

[3] The Court agrees with the ICA/OO that the privilege protecting confidential communications does not prevent Mr. Cornell from using his general expertise, even though he may not have been able to achieve that level of expertise without the benefit of protected communications. Any chilling effect resulting from his use of this expertise is too speculative to outweigh the value of that expertise. However, the Court recognizes that the distinction between protected communications and general expertise is not a perfect one and that it may require some clarification in particular circumstances.

The Court emphasizes that the privilege for protected communications does not prevent Mr. Cornell from testifying about his own perceptions. For example, in *Green v. Baron*, — F.Supp. —, 80–313–E (S.D. Iowa 1987), Mr. Cornell recently testified that he measured the temperatures in a portion of the Iowa Security Medical Facility in Oakdale. Under § 601G.9, Mr. Cornell had a right to enter the facility to conduct such tests, and officials had no right to bar him. Thus, permitting Mr. Cornell to testify about such perceptions should have no chilling effect.

Furthermore, the privileged nature of communications Ray Cornell received as ombudsman does not prevent the plaintiffs from using other means to prove the existence of facts communicated to him. Plaintiffs assert that "the information surrounding the death of Gary Tyson is now public record" because of subsequent media coverage and criminal trials. Yet this privilege does not bar the plaintiffs from proving these circumstances through nonprivileged evidence, such as court documents and public testimony.[3] "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with [the ombudsman.]" *Upjohn Co. v. United States*, 449 U.S. 383, 395, 101 S.Ct. 677, 685, 66 L.Ed.2d 584 (1981). However, the public revelation of a fact communicated confidentially to Mr. Cornell does not make the communication public, unless the substance of the communication to Mr. Cornell was publicized by the person who communicated it privately to the ombudsman.

The Court believes the parties should respond to this ruling in the following manner. Mr. Cornell must refrain from revealing privileged matters, either as an investigator or witness. However, he may continue to serve in either capacity and may assist plaintiffs' counsel in depositions as long as he abides by the rest of this order when doing so. If Mr. Cornell will be called as a witness, he should be deposed as soon as possible, and counsel for each party shall ask all questions which might require a privileged answer. In responding, Mr. Cornell should make a good-faith attempt not to reveal privileged material, but should be prepared to explain to the Court why the answer would be privileged. Any disputes as to the scope of this order

3. The parties should recognize the significant limitations imposed by the hearsay rules on the use of non-privileged statements made outside of this court.

should be resolved following the deposition, and counsel should expect to present all objections based on privilege at that time.

The Court also believes the plaintiffs' motion to seek reimbursement from the Court for a portion of Mr. Cornell's fee is warranted. This is not a typical prisoner case, and the Court believes Mr. Cornell may be able to assist the plaintiffs' counsel in a way which will significantly decrease the cost of the upcoming trial to the Court and to the defendants. The Court does not intend to make Mr. Cornell dependent upon it for his income, and this order is not intended to set a precedent affecting other cases. The Court merely finds that in the special circumstances of this matter, reimbursement for a fee not to exceed $1,000.00 would be proper. If the plaintiffs prevail either at trial or through a settlement, Mr. Cornell's fee shall be paid from any award, and any amount advanced by the Court shall be repaid.

The ICA/OO has asked the Court to review several documents *in camera* in order to assist it in considering its motions. The Court found it unnecessary to review any documents in reaching this decision. However, if the office believes privileged materials are relevant to any objections it makes during Mr. Cornell's deposition, it should so inform the Court, and the Court shall review them.

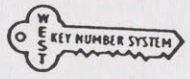
IT IS THEREFORE ORDERED that communications received by Ray Cornell as a prison ombudsman are privileged communications which he cannot repeat in court or while serving as an investigator.

IT IS FURTHER ORDERED that this privilege does not extend to Mr. Cornell's general knowledge and expertise.

IT IS FURTHER ORDERED that the current Citizens' Aide officials may not assert Mr. Cornell's testimonial immunity.

IT IS FURTHER ORDERED that upon a showing that Mr. Cornell has performed the services for which he is seeking reimbursement, the Clerk of Court shall reimburse him at the rate of $20.00 per hour, up to $1,000.00. If the plaintiffs prevail at trial or in a settlement, Mr. Cornell's fee shall be paid from the award, and any amount advanced by the Court shall be repaid.

IT IS FURTHER ORDERED that the ICA/OO's motion for an *in camera* showing is denied at this time, but may be renewed if necessary at a later stage of the proceedings.



RECYCLED

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

- - - - - - - - - - - - - - - - - - -x

MONORANJAN ROY, :

Plaintiff,

vs. : CIVIL H-89-680(JAC)

UNITED TECHNOLOGIES CORPORATION, :

Defendant. :

- - - - - - - - - - - - - - - - - - -x

MAY 29, 1990
NEW HAVEN, CONNECTICUT

B E F O R E:

HON. JOSE A. CABRANES, U.S.D.J.

A p p e a r a n c e s:

For the Plaintiff:

PHILIP L. STEELE, ESQ.
One Linden Place, Suite 312
Hartford, Connecticut 06106

For the Defendant:

JOSEPH C. ZEMETIS, ESQ.
I. CHARLES MATHEWS, ESQ.
United Technologies Corporation
United Technologies Building
Hartford, Connecticut 06101

Appearances (Continued):

For Deponent Ann Bensinger:

CHARLES L. HOWARD, ESQ.
LINDA YODER, ESQ.
Shipman & Goodwin
799 Main Street
Hartford, Connecticut

Paul Collard
Official Court Reporter.

THE COURT: I am now prepared to rule on the Motion for Protective Order, filed May 2, 1990, by the Third-party Deponent Ann Bensinger.

Upon review of the full record before me and consideration of the arguments of counsel, I find that in the particular circumstances presented here it is appropriate to recognize an ombudsman privilege and, therefore, that the motion for protective order should be granted.

I note at the threshold that nothing in plaintiff's Opposition, filed May 15, 1990, or in the arguments of counsel this afternoon, suggests, much less shows, that any of the information which the ombudsman's office seeks to protect have been disclosed to other branches of UTC. Therefore, I reject any claim that movant has waived the asserted privilege or that plaintiff is otherwise prejudiced by its assertion.

Rule 501 of the Federal Rules of Evidence provides in relevant part that:

"Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, 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 the light of reason and experience."

Therefore, Mr. Steele's concern that recognition of a privilege in these circumstances would "create new Connecticut law," see Objection to Protective Order, filed May 15, 1990, is unfounded because this case involves only federal claims and the federal law of privilege.

The federal law of privilege offers scant guidance regarding the ombudsman relationship. The parties have brought to the Court's attention only one case where an ombudsman privilege was claimed. Shabazz vs. Scurr, 662 F. Supp. 90 (Southern District of Iowa 1987) recognized such a privilege for ombudsman communications in a prison context. The court found there "that complaints of prisoners received by the ombudsman as ombudsman are privileged because such confidentiality is necessary to ensure that such complaints will be made ... and further that preserving the confidentiality of communications from staff received during investigations helps to ensure that those communications will take place." Id. at 92. That court also concluded that the privilege was necessary to promote the informal resolution of problems, under the same rationale that confers a privilege on plea bargaining and settlement discussions. Id.

I am mindful that "in enacting Rule 501,

Congress manifested an affirmative intention not to freeze the law of privilege, but to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis, and to leave the door open to change.'" Trammel vs. United States, 445 U.S. 40, 47 (1980) (emphasis added).

I underscore the phrase "on a case-by-case basis" because I am making my ruling this afternoon based on the specific facts of this case -- in particular, based upon the characteristics of the ombudsman's office at UTC, and I do not wish to have my decision misconstrued in the future as having created a novel privilege or standing for any broad proposition. With this caveat, I find that the same concerns that support a finding of privilege for the ombudsman in Shabazz vs. Scurr support finding one here.

The burden is on the party claiming the privilege to establish those facts that are the essential elements of the privileged relationship. See In re Grand Jury Subpoena, 750 F.2d 223, 224 (Second Circuit 1964).

Accordingly, in this case the moving party bears the burden of showing that the ombudsman relationship exhibits the factors that our Court of Appeals has found support finding a common law privilege. Those factors are:

(1) The 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; and (4) the injury to the relationship incurred by the disclosure must be greater than the benefit gained in the correct disposal of the litigation. In re Doe, 711 F.2d 1187, 1193 (Second Circuit 1983)(citing 8 J. Wigmore, Evidence section 2285 at 527 (McNaughton revised edition 1961)).

The movant -- through its arguments today, its submissions, and the extensive affidavit of Ann Bensinger -- has satisfied all four elements of this test. The first element, the expectation that communications with the ombudsman's office would be kept confidential, is demonstrated by the extensive precautions -- such as having an 800 number to prevent tracing calls -- that were taken to ensure confidentiality. See Affidavit of Ann Bensinger, filed May 2, 1990 (hereinafter "Bensinger Affidavit") at Paragraph 15.

The second element, that confidentiality must be essential to the relationship, is provided by the fact that confidentiality -- and the candor it engenders -- was the purpose for establishing an ombudsman's office at UTC and is generally understood to be a defining characteristic of an ombudsman.

The third element, benefit to society from

the program, is satisfied by the fact that UTC and other defense contractors adopted ombudsman programs in response to a general recognition that such programs were necessary to promote accountability among contractors. See Bensinger Affidavit, Exhibits B, L and S. Society clearly benefits from ombudsman confidentiality in this context because that confidentiality both encourages the reporting of waste and fraud and enables many disputes to be resolved informally, without formal legal proceedings or the formality which must be taken or adopted when parties anticipate claims and negotiations will be used in later litigation.

The final element requires that the movant show that its interest in confidentiality outweighs plaintiff's interest in discovery. In re Doe, 711 F.2d at 1193. I find that the ombudsman's office's clearly-demonstrated interest in the confidentiality of communications with it have been met by little or no showing of an interest by plaintiff.

Given the ombudsman's procedures to ensure confidentiality and its announcements of those safeguards, plaintiff must have been aware that his own communications with it would be confidential. Refusing plaintiff access to these communications places plaintiff under no greater burden than defendant, because the ombudsman has not revealed those communications to other branches or

divisions of UTC and has stated its intention not to do so.

Finally, because plaintiff makes no claim that the ombudsman's conduct was discriminatory or otherwise illegal, any relevant information obtained from the confidential communications would be information from branches or about branches or departments of UTC other than the ombudsman's office.

In the absence of any showing, or even specific claim, by plaintiff that he cannot obtain that information more directly from other sources, plaintiff's interest in discovering this information is minimal and is dwarfed by movant's demonstrated interest in preserving confidentiality.

A separate and independent basis for the Court's ruling here in favor of the movant is provided by the theory of implied contract persuasively asserted by the movant in her papers. In finding this separate and independent basis for granting this motion for protective order, the Court again underscores the fact that its findings and rulings on this motion are based on the particular circumstances presented here.

For the reasons stated, the Motion for Protective Order, filed May 2, 1990, is granted.

It is so ordered.

We are adjourned.

RECYCLED

Mary KIENTZY, Plaintiff,

v.

McDONNELL DOUGLAS CORPORATION, Defendant.

No. 90–584 C(1).

United States District Court, E.D. Missouri, E.D.

Jan. 30, 1991.

Former employee brought discrimination against former employer. On company ombudsman's motion for protection from pretrial discovery, the District Court, David D. Noce, United States Magistrate Judge, held that confidential communications made to company ombudsman were protected from disclosure.

Relief granted.

Federal Civil Procedure ⇐1272
Witnesses ⇐196

Confidential communications made to company ombudsman were protected from disclosure in suit by former employee alleging employment discrimination; communications were made in belief that they would be kept confidential, confidentiality was essential to relationships between ombudsman's office and company personnel, relationship between ombudsman's office and company employees and management was worthy of support, and benefits from confidentiality were greater than employee's need for disclosure, which could be satisfied by deposing other witnesses. Fed. Rules Evid.Rule 501, 28 U.S.C.A.

Jerome Dobson, Levin & Weinhaus, St. Louis, Mo., for plaintiff.

Sabrina Wrenn and Dennis Donnelly, Bryan, Cave, McPheeters and McRoberts, St. Louis, Mo., for defendant.

MEMORANDUM AND ORDER

DAVID D. NOCE, United States Magistrate Judge.

This action is before the Court upon the motion of Therese Clemente for an order, under Federal Rule of Civil Procedure 26(c)(1), protecting from pretrial discovery, by both plaintiff and defendant, the communications she received in her position as a company ombudsman of defendant McDonnell Douglas Corporation ("MDC"). MDC argues in support of Clemente's position. Plaintiff argues that any such ombudsman privilege should not include the information sought. In ruling on this motion, the Court has considered the affidavits and exhibits submitted by movant Clemente and the arguments of counsel for her and the parties at a hearing held on January 29, 1991.

Plaintiff Mary Kientzy alleges in this action that MDC terminated her from employment as a security officer on account of her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Missouri Human Rights Act, § 213.055 R.S.Mo. (1986). The parties have consented to the referral of this action to the undersigned United States Magistrate Judge under 28 U.S.C. § 636(c)(3). The trial of the action is set for February 19, 1991.

Plaintiff has noticed Therese Clemente for deposition and would depose other company personnel about their statements to ombudsman Clemente. The record has established that Clemente is employed by defendant as a Senior Staff Assistant in the Ombudsman Program of defendant's subsidiary McDonnell Aircraft Company ("McAir"). Clemente has been employed in the McAir Ombudsman Office since the ombudsman program began in 1985. The purpose of the ombudsman program and office is to mediate, in a strictly confidential environment, disputes between MDC employees and between employees and management.[1]

Plaintiff Kientzy was terminated from employment in August, 1988, following the decision of a company disciplinary committee. After the disciplinary committee made its decision, plaintiff went to Ms. Clemente in her position as ombudsman; MDC nevertheless terminated her. Plaintiff argues that Ms. Clemente received information about plaintiff's situation from company employees, including a member of the disciplinary committee who has since died.

Plaintiff argues that the information received by Clemente is relevant to the trial of the action and is discoverable, on two grounds. First, she argues that the statements made to Clemente by defendant's personnel may evidence discriminatory animus in the decision to terminate her. Second, she argues that the ombudsman program is a company procedure for appealing her dismissal and that the ombudsman thus participated in the final decision to terminate her. For the reasons set forth below, the Court agrees with movant that the confidential communications made to her are protected from disclosure by Federal Rule of Evidence 501.

Rule 501 requires that this Court assay the ombudsman's claim of privilege by interpreting the principles of the common law "in light of reason and experience." Four cardinal factors have been discerned for this purpose:

> (1) the 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; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation.

In re Doe, 711 F.2d 1187, 1193 (2nd Cir. 1983); *Mattson v. Cuyuna Ore Co.*, 178 F.Supp. 653, 654 n. 2 (D.Minn.1959). Each of these four factors is present in this case.

First, ombudsman Clemente received the subject communications in the belief that

1. The resolution of labor-management disputes under an applicable collective bargaining agreement is not within the authority of the ombudsman. Employees and management may also resolve employment disputes in non-confidential discussion.

they would be kept confidential. The McAir ombudsman office is constituted as an independent and neutral entity. It has no authority to make company policy. Its head has the position of company vice-president, independent of the company's human resources and personnel offices. The office has direct access to the company president. Ombudsman Clemente is bound by the Code of Ethics of the Corporate Ombudsman Association, which provides for the confidentiality of communications. The office has adopted procedures to assure such confidentiality. The McAir Ombudsman Office has given its strict pledge of confidentiality to all employees and to the company. All new employees are so advised and defendant has repeatedly restated to its employees that they may rely on the confidentiality of the ombudsman's office. Since it opened in 1985, the McAir ombudsman's office has received approximately 4800 communications. Defendant has sought, but has been refused, access to the ombudsman's files and records regarding plaintiff. The company has indicated it will not request them in the future.

Second, confidentiality of communications is essential to relationships between the ombudsman's office and defendant's employees and defendant's management. The function of the McAir ombudsman's office is receive communications and to remedy workplace problems, in a strictly confidential atmosphere. 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.

Third, the relationship between the ombudsman office and defendant's employees and management is worthy of societal support. The Court takes judicial notice of the fact that MDC and McAir are very large federal government contractors in the aircraft, space, and other industries. It is important that their employees have 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. This is true in spite of the possibility that such actions may be perceived by an employee to be against company or fellow employees' interests.

Fourth, the harm caused by a disruption of the confidential relationship between the ombudsman's office and others in plaintiff's case would be greater than the benefit to plaintiff by disclosure. A successful ombudsman program resolves many problems informally and more quickly than other more formal procedures, including court actions. A court order that Clemente disclose the information communicated to her in confidence, or that her informants disclose what they told her in confidence about plaintiff, would destroy the reputation and principle of confidentiality that the McAir ombudsman program and office now enjoys and needs to perform its function. The utility of that program and office, in resolving disputes in this workplace and thus diminishing the need for more formal resolution procedures, is founded on the confidentiality of its communications to and from company officials and employees. Federal Rule of Evidence 408 has recognized the utility of confidential settlement discussions. *Shabazz v. Scurr*, 662 F.Supp. 90, 92 (S.D.Iowa 1987). The societal benefit from this confidentiality is paramount to plaintiff's need for disclosure.

An ombudsman privilege under Federal Rule of Evidence 501 was recognized by a District Court in this Circuit in *Shabazz v. Scurr, supra.* In that action, which was brought under 42 U.S.C. § 1983 following the death of a state prisoner, a former prison ombudsman was prevented from testifying about confidential statements made to him when he held the position of ombudsman.

In *Monoranjan Roy v. United Technologies Corporation*, Civil Cause No. H–89–680 (JAC), on May 29, 1990, United States District Judge Jose A. Cabranes, in circumstances similar to the case at bar, recognized a privilege from discovery for the defendant's company ombudsman. In so ruling, Judge Cabranes emphasized that

the recognition of the privilege was intended only to apply to that case, thus implementing the Supreme Court's direction that the development of rules of privilege be on a case-by-case basis. *See, Roy, supra,* Transcript of May 29, 1990, proceedings, p. 24, *citing Trammel v. United States,* 445 U.S. 40, 47, 100 S.Ct. 906, 910, 63 L.Ed.2d 186 (1980) (Motion Exhibit E, filed January 16, 1991).

The Court is persuaded in the case at bar that plaintiff's need for relevant information can be satisfied, in spite of the privilege, by deposing all relevant fact witnesses, including the remaining members of the disciplinary committee, about the events leading to plaintiff's termination.[2] Indeed, the depositions of these persons are expected to occur soon. Plaintiff may not ask these witnesses to disclose their statements to the company ombudsman. Plaintiff may ask these witnesses about facts known by them, even though those facts were contained in their statements to the ombudsman. Because there has been no showing that ombudsman Clemente has non-confidential, relevant information about the events leading to plaintiff's termination, plaintiff may not depose her at all.

For the reasons set forth above,

IT IS HEREBY ORDERED that the motion of Theresa Clemente for a protective order is sustained. —



2. Plaintiff's argument that the ombudsman's program was a usual and available company procedure for appealing the decision of the disciplinary committee to terminate her has not been factually supported. Plaintiff has not dis-

RECYCLED

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

MARIANN WAGNER,

Plaintiff,

v

THE UPJOHN COMPANY, a Delaware corporation, qualified in Michigan,

Defendant.

_____/

File No. A91-2156CL
HON. WILLIAM G. SCHMA P25394

FILED
APR 22 1992
9th JUDICIAL CIRCUIT
COUNTY OF KALAMAZOO
KALAMAZOO, MICHIGAN

Mark F. Stuart (P21111)
Attorney for Plaintiff

Peter A. Patterson
Attorney for Defendant

Sharan Lee Levine (P30755)
Attorney for Elizabeth Clark and the Office of the Corporate Ombudsman at the Upjohn Company

_____/

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

The Ombudsman at the Upjohn Company has sought a Protective Order in this case, preventing the deposition of office members, or production of their documents, with reference to the above litigation. This discovery has been sought by Plaintiff.

The Court grants the Motion for a Protective Order. It first appears that the information being sought is equally within the knowledge of the Plaintiff, or available to the Plaintiff from other sources. The Ombudsman has presented legitimate concerns regarding employee safety, job security and equal treatment which

APR 23 1992

would be threatened by a breach of the confidentiality promise of the subject office. If the employee could seek discovery of the office's records and personnel, so could the employer. On balance, this would be highly prejudicial to the dispute resolution services which the office provides.

The Ombudsman's office serves a purpose comparable to the purposes sought to be served by the Community Dispute Resolution Act. MCL 691.115, et seq. In Section Three, the Legislature has indicated its preference for dispute resolution processes which escape the judicial process. This Protective Order advances that purpose.

Plaintiff has expressed concern at Oral Argument over the extent to which discovery would be precluded by a Protective Order. The rule is fairly stated in the case of Kientzy v McDonnell Douglas Corporation, 133 FRD 570 (E.D. Mo 1991). While Plaintiffs may not ask relevant fact witnesses "to disclose their statements to the company Ombudsman, (p)laintiff may ask these witnesses about facts known by them, even though those facts were contained in their statements to the Ombudsman."

Finally, because it is possible that this decision of the Court could be appealed and subsequently overturned, IT IS ORDERED that, contrary to the standard policy of the office, no records

related to the within case may be destroyed until all proceedings with respect to this matter have been concluded, both trial and appellate.

Dated: April 22, 1992

WILLIAM G. SCHMA, Circuit Judge

xc: Mark F. Stuart, Esq.
Peter A. Patterson, Esq.
Sharan Lee Levine, Esq.

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CLERK, U.S. DIST. COURT
WESTERN DIST. OF MICH.
BY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

DOROTHY McMILLAN,

Plaintiff,

v

THE UPJOHN COMPANY,
a Delaware corporation,
qualified and doing business
in the State of Michigan;
CHRISTINE V. LINDEN;
JILL E. ROBINSON;
and
NICHOLAS A. ANDREADIS;
Jointly and Severally,

Defendants.

Case No. 1:92:CV:826

HON. RICHARD A. ENSLEN

COPY

ORDER

The matter before the Court is the motion in limine filed on October 4, 1994, by Petitioner Elizabeth Clark and the Office of the Corporate Ombudsman at The Upjohn Company. Petitioners seek a protective order to prevent the parties from inquiring of Ombudsman office employees about communications made to the Ombudsman's office by Upjohn employees other than plaintiff Dorothy McMillan. The motion has not been opposed by either plaintiff Dorothy McMillan or defendant The Upjohn Company, and given the privilege of confidential communications under Federal Rule of Evidence 501, as well as the policy interests favoring consideration of matters submitted to corporate ombudsmen in confidence as privileged communications,

IT IS HEREBY ORDERED that the motion in limine seeking a protective order is GRANTED;

IT IS FURTHER ORDERED that neither plaintiff nor defendant may seek testimony from employees of the Ombudsman at The Upjohn Company about communications made to the Ombudsman by any employee other than plaintiff.

DATED in Kalamazoo, MI:
March 8, 1995

RICHARD A. ENSLEN
United States District Judge

RECYCLED

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

LARRY AND JODIE KOZLOWSKI

Plaintiff,

vs.

File No. 94-5431-NZ

THE UPJOHN COMPANY, a
Delaware corporation and
DANIEL OLMSTEAD, Individually
and Severally,

COPY

Defendants.

_____/

OPINION AND ORDER

This matter is before the court on the plaintiff's motion to compel deposition. Plaintiff filed this suit on November 3, 1994 alleging violation of Elliott Larsen Civil Rights Act, Michigan Handicapper's Civil Rights Act, MCLA 750.352, intentional infliction of emotional distress, retaliation, loss of consortium and breach of contract.

Plaintiff served a notice of taking deposition on a non party, a private corporate ombudsman for the defendant. Plaintiff also sent request for production of documents and interrogatories to the defendant with the initial complaint. To date the defendant has not responded. The ombudsman has filed a motion for protective order, asserting privilege.

The plaintiff first argues that he waives his privilege, and therefore he asks this court to compel the ombudsman's deposition. The defendant asserts that the privilege is the ombudsman's and

incorporates the ombudsman's brief in support of motion for protective order.

Upon close examination for protective order and the brief in support, the privilege being asserted is the ombudsman's privilege. Her position is that to facilitate open, honest dialogue and cooperative participation from both employee and management, confidentiality is essential. Without complete assurances that both employee and management may negotiate and speak freely without concern of future disclosure, the ombudsman's role in the company and in society would be of little use.

Privilege can be based on statute or common law. There is no statutory provision for an ombudsman, and there is no binding authority cited for a common law privilege. The ombudsman compares her privilege to that of a labor mediator, for which there is a statutory privilege. This court must determine whether preservation of the ombudsman's effectiveness is grounds for privilege consistent with common law. In order to be protected by a common law privilege, the party asserting privilege must show; (1) The 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; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation, IN RE DO, 711 f2D 1187, 1193 (2DcIR 1983).

The defendant asserts that Upjohn's ombudsman's office was

developed to provide a place of complete confidentiality. The pharmaceutical industry use ombudsman as a significant means of providing internal alternative dispute resolution. The brief in support of the protective order analogizes the ombudsman's function to that mediator. Petitioner also cites a case where the court adopted a common law ombudsman privilege under FRE 501, although petitioner does note that the case involved a public ombudsman office created by statute. The petitioner further cites two recent non-binding decisions, one in a Michigan Circuit Court and the other in a U.S. District Court.

The public interest protected by privilege must be substantial if it is to cause this Court to exclude the deposition and the probative value it may have, because it would injure some other cause more than it would help the cause of truth, and because avoidance of that injury is considered of more consequence than the possible harm to the cause of truth. This court must balance two important interests, both critical in their own setting.

To successfully assist employees and employers in the settlement of work place differences, ombudsmen must maintain a reputation for impartiality and parties must feel free to talk without fear that the ombudsman may later disclose what transpired. If ombudsmen were allowed or required to testify, not even the strictest adherence to purely factual matters would prevent evidence from seeming to favor one side or the other. The inevitable result would be that the usefulness of the ombudsman in settling future disputes would be seriously impaired, if not

completely destroyed. The injury to the public interest clearly outweighs the benefit to be derived from making their testimony available under the circumstances before this court.

No person is required to use the ombudsman's services. Once they agree to use those services, all parties must accept the restrictions on subsequent testimony of the ombudsman. Therefore, the ombudsman has a privilege tact the plaintiff cannot waive.

Here communication were made in the belief that they would be confidential, confidentiality was essential to the relationship between the ombudsman and the plaintiff and defendant. The relationship between the ombudsman's office and company employees and management is worthy of support. The benefits from maintaining confidentiality are greater than the plaintiff's need for disclosure.

CONCLUSION

Therefore, the petitioners motion for protective order is GRANTED. Further, plaintiff's motion to compel the ombudsman's deposition is DENIED, as is any request for documents in the possession or control of the ombudsman in her official capacity.

IT IS SO ORDERED.

Dated: August 16, 1995

PETER J. MACERONI

PETER J. MACERONI
CIRCUIT JUDGE

cc: Jan C. Leventer
Sharan Levine
Thomas Hathaway

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46 Cal.Rptr.2d 84, 104 Ed. Law Rep. 439, 95 Cal. Daily Op. Serv. 8279, 95 Daily Journal D.A.R. 14,239
(Cite as: 39 Cal.App.4th 526)
<KeyCite Citations>

MEG GARSTANG, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CALIFORNIA INSTITUTE OF TECHNOLOGY et al., Real Parties in Interest.

No. B088019.

Court of Appeal, Second District, Division 2, California.

Oct 23, 1995.

SUMMARY

In an action for slander and intentional infliction of emotional distress brought by a secretary against her former employer, a private educational institution, and three coworkers, the trial court denied plaintiff's motion to compel further answers to deposition questions posed to three other employees about informal mediation sessions conducted by the employer's ombudsperson. The deponents were instructed by counsel not to answer on the ground that the statements were privileged, since they were made before an ombudsman. (Superior Court of Los Angeles County, No. GC012220, Coleman A. Swart, Judge.)

The Court of Appeal denied plaintiff's petition for a writ of mandate. The court held that although the mediation privilege of Evid. Code, § 1152.5, did not apply, since none of the parties participating in the sessions had executed the written agreement required by Evid. Code, § 1152.5, subd. (c), communications disclosed during the mediation sessions were protected by the qualified privilege set forth in Cal. Const., art. I, § 1 (right to privacy). A proper balancing of the competing values weighed in favor of the right to privacy of the deponents, since the communications related to private affairs and were kept in confidence by the institution. All of the institution's employees were made aware of the ombudsman's status, of the pledge of confidentiality of communications made during ombudsman sessions, and of the guarantee of independence of the ombudsman office. Thus, the trial court properly found that the ombudsman was acting in her official capacity at the time she attempted to resolve the workplace dispute, that the individuals participating in the ombudsman sessions did so believing that their communications would not be disclosed, and that the ombudsman's office was independent of all of the institution's structures. (Opinion by Nott, J., with Boren, P. J., and Fukuto, J., concurring.) *527

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Discovery and Depositions § 34--Protections Against Improper Discovery--Privileges--Ombudsman--Discovery of Private Information:Constitutional Law § 58--First Amendment and Other Fundamental Rights of Citizens--Right of Privacy--Compelled Disclosure of Private Affairs-- Qualified Privilege--Ombudsman Program--Confidentiality of Communications Made to Ombudsman.

In an action for slander and intentional infliction of emotional distress brought by a secretary against her former employer, a private educational institution, and three coworkers, the trial court did not err in denying plaintiff's motion to compel further answers to deposition questions posed to three other employees about informal mediation sessions conducted by the employer's ombudsperson. Although the mediation privilege of Evid. Code, § 1152.5, did not apply, since none of the parties participating in the sessions had executed the written agreement required by Evid. Code, § 1152.5, subd. (c), communications disclosed during the mediation sessions were protected by the qualified privilege set forth in Cal. Const., art. I, § 1 (right to privacy). A proper balancing of the competing values weighed in favor of the right to privacy of the deponents, since the communications related to private affairs and were kept in confidence by the institution. All of the institution's employees were made aware of the ombudsman's status, of the pledge of confidentiality of communications made during ombudsman sessions, and of the guaranty of independence of the

Krivis, Passovoy & Spile, Jeffrey L. Krivis, Michael P. West, Vittal & Sternberg, J. Anthony Vittal, Schiff, Cohn & Staenberg and Joel P. Schiff as Amici Curiae on behalf of Real Parties in Interest.

NOTT, J.

Meg Garstang has petitioned this court for an extraordinary writ of mandate directing the superior court to set aside its order denying her motion to compel further answers to deposition questions.

We are asked to decide whether communications disclosed during mediation sessions before an ombudsperson employed by a private educational institution are privileged. We conclude they are protected by the qualified privilege set forth in this state's Constitution.

I. Factual and Procedural Background

Garstang worked for the California Institute of Technology (Caltech). On April 1, 1994, she sued Caltech and three coworkers, Cathy Fontenette, *530 Kerry Etheridge and Christina Smith for slander and intentional infliction of emotional distress. [FN1]

FN1 Caltech, Fontenette, Etheridge and Smith are the real parties in interest.

According to the complaint, Garstang was hired in 1989 as a secretary and shortly thereafter was promoted to the position of assistant to Russell Giambelluca, a division administrator. In March 1992, she was again promoted. Following these promotions the individual defendants told third persons that Garstang had "traded sexual favors for job advancement." Caltech "approved, consented to and ratified" these false statements.

In 1992 and 1993, Helen Hasenfeld, Caltech's ombudsman, conducted a number of meetings in connection with the rumors being circulated. Ann Bussone, Caltech's director of human resources, Giambelluca, Fontenette and other Caltech employees, including David Stevenson, participated in the Hasenfeld meetings. Garstang believes that during one of the sessions an admission was made that she had been "treated unfairly." Unfortunately, the ombudsman was unable to resolve the situation and Garstang filed suit seeking general, special, and punitive damages.

In preparation for her lawsuit, Garstang deposed Etheridge, Fontenette and Stevenson and questioned them about the Hasenfeld meetings. The deponents were instructed by counsel not to answer on the basis that the statements were privileged because they were made before an ombudsperson.

Garstang moved to compel further responses to those questions regarding Hasenfeld and the deponents' conversations with her, pointing out that California does not recognize an ombudsman privilege.

Caltech and the individual defendants opposed the motion to compel arguing that because the communications were made during mediation proceedings they were privileged pursuant to Evidence Code [FN2] section 1152.5. It was also contended that the California constitutional right to privacy protected the communications.

FN2 All further statutory references are to the Evidence Code unless otherwise indicated.

In denying Garstang's motion, the superior court opined, "[w]ell, the policy of the law, of course, is to settle cases without having to take them through the entire court process. And I think if I were to disregard this privilege, this would hamper [the] process." This petition for writ of mandate followed. *531

II. Discussion

A. Contentions

(1a) Garstang contends the deponents were required to answer questions concerning statements made in Hasenfeld's presence because "there exists no ombudsman's privilege in California."

Real parties concur. They assert, however, that the communications are privileged because they occurred during a "mediation," and are, therefore, protected from discovery pursuant to section 1152.5. Alternatively, real parties contend that the communications are protected by the qualified privilege set forth in article I, section 1 of this state's Constitution.

B. Mediation Privilege

Section 1152.5, as it read at the time of the

ombudsman office. Thus, the trial court properly found that the ombudsman was acting in her official capacity at the time she attempted to resolve the workplace dispute, that the individuals participating in the sessions did so believing that their communications would not be disclosed, and that the ombudsman's office was independent of all of the institution's structures.

(2) Discovery and Depositions § 34--Protections Against Improper Discovery--Privileges--Ombudsman:Constitutional Law § 58--First Amendment and Other Fundamental Rights of Citizens--Right of Privacy--Qualified Privilege.

In California, there is no privilege to refuse to disclose any matter, or to refuse to produce any writing, object, or thing, unless the privilege is created by statute (Evid. Code, § 911, subd. (b)). The privileges contained in the Evidence Code are exclusive, and the courts are not free to create new privileges as a matter of judicial policy. For example, California does not specifically recognize an ombudsman privilege (Evid. Code, § 900 et seq.). However, Cal. Const., art. I, § 1, provides that all people are by nature free ***528** and independent and have inalienable rights, including privacy. This inalienable right is a fundamental interest of our society, essential to those rights guaranteed under the federal Constitution.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 454; See also, 2 Witkin, Cal. Evidence (3d ed. 1986) Witnesses, §§ 1068, 1069, 1071 and Discovery and Production of Evidence, §§ 1609-1610.]

(3) Discovery and Depositions § 33--Protections Against Improper Discovery--Discovery of Private Information:Constitutional Law § 58--First Amendment and Other Fundamental Rights of Citizens--Right of Privacy--Compelled Disclosure of Private Affairs--Balancing of Need for Discovery Against Right of Privacy--Communications Tendered Under Guaranty of Confidentiality.

Although the right to privacy (Cal. Const., art. I, § 1), is not absolute, it may be abridged only when there is a compelling and opposing state interest. One such compelling public need lies in facilitating the ascertainment of truth in connection with legal claims. However, when compelled disclosure of private affairs intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information. And even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must be then a careful balancing of the compelling public need for discovery against the fundamental right of privacy. Further, where the communications were tendered under a guaranty of confidentiality, they are thus manifestly within the Constitution's protected area of privacy.

(4a, 4b) Discovery and Depositions § 34--Protections Against Improper Discovery--Privileges--Ombudsman:Constitutional Law § 58--First Amendment and Other Fundamental Rights of Citizens--Right of Privacy--Qualified Privilege-- Ombudsman Program--Confidentiality of Communications Made to Ombudsman-- Discretion of Ombudsman.

A successful ombudsman program resolves many problems informally and more quickly than other more formal procedures, including court actions. The utility of such a program in resolving disputes in the workplace and thus diminishing the need for more formal resolution procedures is founded on the confidentiality of its communications to and from company officials and employees. In light of the valuable service an ombudsman provides, the privacy interests of individuals participating in an ombudsman program must be afforded constitutional protection (Cal. Const., art. I, § 1). Given the ***529** nature of workplace disputes, an ombudsman must have the discretion to conduct a number of sessions, some of which may involve a single individual, and some of which may involve a number of individuals. At the conclusion of his or her investigation, the ombudsman must decide the likelihood of settlement. If he or she determines that resolution is unlikely, the ombudsman sessions will be terminated. The decision to do so is strictly within the ombudsman's discretion and will not be considered as evidence in any future lawsuit of whether a true mediation was being attempted.

COUNSEL

Hagenbaugh & Murphy, Alan R. Zuckerman and Julie M. DeRose for Petitioner.

No appearance for Respondent.

Morgan, Lewis & Bockius, Andrea Sheridan Ordin, Raymond R. Kepner, Richard C. Rybicki, Hahn & Hahn, William K. Henley, Laura V. Farber and Sandra A. Cooper for Real Parties in Interest.

Hasenfeld meetings, provided as follows:

"(a) Subject to the conditions and exceptions provided in this section, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute:

"(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

"(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

"(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

"(c) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation."

None of the parties participating in the Hasenfeld meetings executed the writing required by section 1152.5, subdivision (c). Thus, even if we assume *532 Hasenfeld was conducting a "mediation" as that term is used in section 1152.5 at the time she endeavored to resolve Garstang's workplace dispute, the mediation privilege is inapplicable. [FN3]

> FN3 Real parties note they invoked the mediation privilege in 1994 -after section 1152.5 was amended to delete the requirement of a writing. They argue, therefore, that the 1994 rather than the 1993 version of the statute is to be applied. We disagree, since the "mediation" sessions in question occurred in 1993. It was then, if at all, that the mediation privilege arose.

Our conclusion does not, however, render the communications discoverable. In our opinion, private institutions have a qualified privilege not to disclose communications made before an ombudsman in an attempt to mediate an employee dispute. That qualified privilege is based on California's constitutional right of privacy.

C. Qualified Privilege

(2) In California there is no privilege to refuse to disclose any matter, or to refuse to produce any writing, object, or thing, unless the privilege is created by statute. (§ 911, subd. (b).) "[T]he privileges contained in the Evidence Code are exclusive and the courts are not free to create new privileges as a matter of judicial policy. [Citations.]" (Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652, 656 [125 Cal.Rptr. 553, 542 P.2d 977].) California, of course, does not specifically recognize an ombudsman privilege. (§ 900 et seq.)

There is, however, a right of privacy set forth in article I, section 1 of this state's Constitution which states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Italics added.) This "inalienable right" is a "fundamental interest" of our society, essential to those rights guaranteed under the federal Constitution. (City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123, 130 [164 Cal.Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219].) (3) "The right to privacy is not absolute, but it may be abridged only when there is a compelling and opposing state interest. [Citations.]" (Kahn v. Superior Court (1987) 188 Cal.App.3d 752, 765 [233 Cal.Rptr. 662].)

One such compelling public need lies in facilitating the "ascertainment of truth" in connection with legal claims. (In re Lifschutz (1970) 2 Cal.3d 415, 425 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1]; Kahn v. Superior Court, supra, 188 Cal.App.3d at p. 765.)

In Board of Trustees v. Superior Court (1981) 119 Cal.App.3d 516 [174 Cal.Rptr. 160], the court faced a similar conflict between the "compelling" *533 state interest in discovery and the parties' "fundamental right" of privacy. In that case, a faculty member of Stanford's school of medicine

sued the university and a coworker for, among other things, libel and "conspiracy to defame." (Id. at p. 523.) Prior to trial the plaintiff demanded to inspect and copy the personnel, tenure, and promotion files of the defendant coworker; all documents regarding his research; all documents compiled by university committees in their investigation of the plaintiff; and the personnel, tenure, and promotion files of the plaintiff himself. (Id. at p. 524.) The trial court allowed partial discovery. The board of trustees sought a writ of mandate which the Court of Appeal issued. The appellate court denied disclosure of the coworker's files on the ground that there was no "compelling state interest" in such disclosure. (Id. at pp. 526-527.) It also denied disclosure of the university committee files concerning the investigation of the plaintiff, on the ground that since those committees had found no misconduct on his part, those files bore no relevance to his lawsuit. (Id. at pp. 527-528.) The court did, however, allow the plaintiff to obtain his own personnel file, with the identities of contributors redacted. (Id. at p. 533.)

In reconciling the competing public values advanced by the parties, the Board of Trustees court set forth two important principles. The first is that "inquiry into one's private affairs will not be constitutionally justified simply because inadmissible, and irrelevant, matter sought to be discovered might lead to other, and relevant evidence." [Citation.] ' "When compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information.' " [Citations.] [¶] And even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must be then a 'careful balancing' of the 'compelling public need' for discovery against the fundamental right of privacy. [Citations.]" (Board of Trustees v. Superior Court, supra, 119 Cal.App.3d at p. 525.) The second principle is that where the communications were tendered under a guaranty of confidentiality, they are thus manifestly within the Constitution's protected area of privacy. (Id. at p. 527.)

(1b) In light of these principles we consider Garstang's request for disclosure of the communications made before Caltech's ombudsman. The participants in the ombudsman sessions were all Caltech employees. Two are named as defendants in this action. All of the participants discussed Garstang and the rumors she alleges were being circulated about her. If Garstang is denied an opportunity to depose these individuals as to what was said in the meetings with the ombudsman, her ability to ascertain the truth in connection with her lawsuit may be impaired. We are of the opinion, however, that a proper balancing of the competing values would here *534 necessarily weigh in favor of the right of privacy of those individuals participating in the ombudsman sessions since the communications related to the private affairs of various Caltech employees, and were maintained in confidence by the institution.

In passing on a problem similar to ours, the court in Kientzy v . McDonnell Douglas Corp. (E.D.Mo. 1991) 133 F.R.D. 570, 572 (Kientzy) reached the same conclusion. There, an individual sought to depose the ombudsman before whom communications were made by fellow employees. The Kientzy court held that communications received during an informal mediation before an ombudsman were privileged because the communication was one made in the belief that it would not be disclosed, confidentiality was essential to the maintenance of the relationship between the parties, the relationship was one that society considers worthy of being fostered, and the injury to the relationship incurred by disclosure would be greater than the benefit gained in the correct disposal of litigation. (Id. at p. 571.) [FN4]

> FN4 The Kientzy case was decided in the federal system which, unlike California, permits the judicial creation of privileges. We find the Kientzy reasoning useful, however, in considering whether, and under what circumstances, a qualified privilege should be extended to communications made before an ombudsman.

Evidence provided by Caltech shows that employees participating in informal mediations before its ombudsman do so in the belief that the communications will not be disclosed. Caltech gives to all employees a strict pledge of confidentiality and assurance that they may rely on the confidentiality, independence and impartiality of the "ombuds" office. [FN5] While Caltech has formal mechanisms for resolving harassment complaints, those members of the Caltech community who elect not to avail themselves of the institute's formal complaint and resolution procedures, may utilize the services of the "ombuds " office which was established in 1986 to

"provide the Caltech community with confidential, informal assistance in resolving intra-campus conflicts, disputes and grievances; in promoting fair and equitable treatment within the Institute, and in fostering the general well-being of the Caltech community." *535

> FN5 Caltech pledges within information distributed to its employees that " [t]he confidences and identities of the people who consult with us will not be passed on to anyone else without express permission to do so, except to the extent required by law."
> Caltech also assures its employees that "[t]he Ombudsperson does not take sides, but considers the rights and interests of all parties involved in a dispute, with the aim of achieving a fair outcome. The Ombudsperson does not arbitrate, adjudicate, or participate in the formal grievance process."
> Employees are also told that "[t]he Ombudsperson will take into consideration interests and concerns of all members of the Caltech community involved in a dispute. The Ombudsperson works toward resolutions of problems based on principles of fairness, without favoritism toward any group or individual. To ensure objectivity, the office is independent of all Institute structures, while reporting to the Provost's Office on administrative and budgetary matters only."

There is no question that confidentiality is essential to the maintenance of the relationship between Caltech's employees and management. As the Kientzy court noted, "[t]he function of [an] ombudsman's office is to receive communications and to remedy workplace problems, in a strictly confidential atmosphere. 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." (Kientzy, supra, 133 F.R.D. at p. 572.)

It is readily apparent that the relationship between the ombuds office and Caltech's employees and management is worthy of societal support. Caltech is a large university, with a diverse student body and work force. It is important that its students and employees have "an opportunity to make confidential statements and to receive confidential guidance, information, and aid to remedy workplace problems" to benefit themselves and their community. (Kientzy, supra, 133 F.R.D. at p. 572.) "This is true in spite of the possibility that such actions may be perceived by an employee to be against company or fellow employees' interests." (Ibid.)

It is also apparent that the harm caused by the disruption of the confidential relationship between the "ombuds" office and others in Garstang's case would be greater than the benefit to Garstang by disclosure. (4a) "A successful ombudsman program resolves many problems informally and more quickly than other more formal procedures, including court actions." (Kientzy, supra, 133 F.R.D. at p. 572.) A court order that those participating in the sessions held by Hasenfeld disclose the information communicated in confidence would destroy the reputation and principle of confidentiality that the Caltech ombudsman program and office now enjoys and needs to perform its function. This is so because the utility of such a program and office "in resolving disputes in [the] workplace and thus diminishing the need for more formal resolution procedures, is founded on the confidentiality of its communications to and from company officials and employees." (Ibid.)

Given the valuable service an ombudsman provides, we are convinced of the propriety of affording constitutional protection to the privacy interests of individuals participating in an ombudsman program such as that established by Caltech. (1c) Garstang contends, however, that under the facts of this case the qualified privilege should not apply because (1) she was "never made aware nor did she ever have an understanding that her meetings with Hasenfeld would be kept confidential;" (2) Hasenfeld did not keep her *536 pledge of confidentiality since she told at least one third person those things talked about in the ombudsman sessions she conducted; (3) Hasenfeld failed to bring " all of the parties together to reach any type of settlement or compromise; " and (4) Hasenfeld was not a neutral person because she is "employed by [Caltech] under their Human Resource umbrella and as such must look out for the best interests of [Caltech]."

The record reveals that every Caltech employee, including Garstang, was made aware of Hasenfeld's status as an ombudsperson, of Caltech's pledge of confidentiality, and that Caltech guaranteed the independence of the ombudsman office. Under these circumstances, and in the absence of evidence indicating that Caltech breached its confidentiality pledge and/or its guaranty that the ombudsman office would be independent, we must uphold the trial court's implied findings that Hasenfeld was acting in her capacity as an ombudsperson at the time she attempted to resolve Garstang's workplace dispute, that the individuals participating in the Hasenfeld meetings (including Garstang) did so believing their communications would not be disclosed, and that the ombudsman's office is independent of all Caltech structures.

Although not well articulated, it appears that Garstang also argues that an ombudsman is restricted in the manner in which he or she is entitled to proceed once approached with a workplace dispute. Garstang suggests that an ombudsman is required to conduct a group discussion, being careful to include those who are directly involved in the dispute, and any coworkers who may have information impacting upon the controversy, and at the conclusion of the meeting, the ombudsman is required to attempt to mediate a settlement.

Although the approach may differ from ombudsman to ombudsman, it seems obvious that before a dispute can be resolved an investigation of the facts is essential. It is only then that the nature of the controversy is revealed and the positions of the parties determined. (4b) Given the nature of workplace disputes, an ombudsman must be given the discretion to conduct a number of sessions-some of which may involve a single individual, and some of which may involve a number of individuals. At the conclusion of his or her investigation, the ombudsman must decide the likelihood of settlement. If he or she determines that resolution is unlikely the ombudsman sessions will be terminated. The decision to do so is strictly within the ombudsman's discretion, and will not be considered as evidence (in any lawsuit which may be filed) of whether a " true" mediation was being attempted.

(1d) The record here discloses that Hasenfeld acted in conformity with the authority conferred upon an ombudsman, to wit, she discussed the *537 problem with various individuals in order to ascertain the facts, and to determine the positions of those involved in the dispute. All this she did in an attempt to resolve a workplace dispute. We conclude, therefore, that the qualified privilege applies.

III. Disposition

The petition for writ of mandate is denied. The temporary stay issued February 2, 1995, is vacated.

Boren, P. J., and Fukuto, J., concurred.

Cal.App.2.Dist.,1995.

Garstang v. Superior Court (California Institute of Technology)

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RECYCLED

Frank J. CARMAN, Appellant,

v.

McDONNELL DOUGLAS CORPORATION, Appellee.

No. 96-3288EM.

United States Court of Appeals, Eighth Circuit.

Submitted April 14, 1997.

Decided June 11, 1997.

Employee sued his former employer, claiming that his termination violated the Age Discrimination in Employment Act, the Missouri Human Rights Act, and the Employee Retirement Income Security Act of 1974 (ERISA). The United States District Court for the Eastern District of Missouri granted summary judgment to employer. Employee appealed. The Court of Appeals, Richard S. Arnold, Chief Judge, held that confidential communications made by employee to company ombudsman who investigated and mediated workplace disputes were not privileged from disclosure.

Reversed and remanded.

1. Federal Civil Procedure ⇐2553

District Court did not abuse its discretion in holding that employee's failure to file affidavit explaining why more discovery was needed defeated any argument that summary judgment was premature in employment discrimination claim against employer. Fed. Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

2. Federal Civil Procedure ⇐1591

District Court did not abuse its discretion, in employment discrimination case, in limiting employee's request for information from employer about past reductions in force to division in which he worked.

3. Federal Courts ⇐776

Scope of privilege and decision whether to establish new privilege are mixed questions of fact and law which Court of Appeals reviews de novo. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

4. Witnesses ⇐196.4

Confidential communications made by employee to company ombudsman who investigated and mediated workplace disputes were not privileged from disclosure in employment discrimination lawsuit; there was no evidence that ombudsman method was more successful at resolving workplace disputes than other forms of alternative dispute resolution, advantages afforded by ombudsman method would not be lost without privilege, and employees would not feel uncomfortable in airing disputes with ombudsman were privilege not recognized. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

5. Witnesses ⇐184(1)

Evidentiary privileges are not lightly created. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

6. Witnesses ⇐184(1)

Party that seeks creation of new evidentiary privilege must overcome significant burden of establishing that permitting a refusal to testify or excluding relevant evidence has public good transcending normally predominant principle of utilizing all rational means for ascertaining truth. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

7. Witnesses ⇐184(1)

First important factor for assessing proposed new evidentiary privilege is importance of relationship that privilege will foster. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

8. Witnesses ⇐184(1)

To justify creation of evidentiary privilege, party must establish that society benefits in some significant way from particular brand of confidentiality that privilege affords. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

Samuel H. Liberman, argued, Clayton, MO, for appellant.

Elizabeth C. Carver, St. Louis, MO, argued (Thomas C. Walsh and Dennis C. Donnelly, St. Louis, MO, on the brief), for appellee.

Before RICHARD S. ARNOLD, Chief Judge, FAGG and MURPHY, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

In October 1992, McDonnell Douglas Aircraft Corporation laid off Frank Carman as part of a reduction in force of its management staff. Carman then sued McDonnell Douglas, claiming that his termination violated the Age Discrimination in Employment Act, the Missouri Human Rights Act, and the Employee Retirement Income Security Act of 1974. In the course of discovery, the District Court denied Carman's request for the production of certain documents, holding that they were protected by the "Ombudsman Privilege." The District Court later granted summary judgment to McDonnell Douglas, a decision which Carman now appeals. Because we hold that the District Court lacked sufficient justification for creating an ombudsman privilege and denying Carman's discovery request, we reverse and remand.

I.

In June 1994, Carman requested 54 sets of documents from McDonnell Douglas. Item No. 53 was a request for "[a]ll notes and documents reflecting data known to ... Clemente [a company ombudsman] ... concerning" the plaintiff, a number of other individuals, and various topics including "[m]eeting notes regarding lay-offs in Plaintiff's Division" and "[m]eeting notes regarding Plaintiff Frank Carman." Appellant's App. 346–47. McDonnell Douglas objected to this and many other requests as vague, overbroad, and irrelevant, and further objected "with regard to documents known to Therese Clemente because her activities as an 'ombudsman' were considered confidential and any information and documents relating to her activities are immune from discovery." *Id.* at 358. In response, plaintiff filed a motion to compel production of certain documents. The Court granted the motion in part and ordered the defendants to produce a number of documents, including those requested in Item No. 53. *Id.* at 360. Two

months later, however, in clarifying its order with respect to Item No. 53, the Court ruled that "defendant is not required to produce documents protected by the Ombudsman Privilege." *Id.* at 362. The Court also held that McDonnell Douglas did not have to produce adverse impact analyses prepared in anticipation of litigation and limited Carman's request for information about McDonnell Douglas's past reductions in force to the McDonnell Douglas Aircraft Company, the component company of McDonnell Douglas Corporation where Carman worked. In February 1996, the Court granted McDonnell Douglas's motion for summary judgment. The Court assumed that Carman had established a prima facie case of age discrimination but held that he had failed to present sufficient evidence that McDonnell Douglas's stated reasons for laying him off were pretextual. This appeal followed.

II.

Carman first contends on appeal that the District Court erred in granting summary judgment before McDonnell Douglas complied with two document requests with respect to which the District Court had granted a motion to compel. The first was a request for various employee personnel files. In its order denying plaintiff's motion to amend or alter the judgment, the District Court found that these records had been made available to the plaintiff prior to the deadline for responding to defendant's summary-judgment motion. This finding was not clearly erroneous, and we uphold it. To establish that this material was not available, Carman points to correspondence between attorneys which was not before the District Court when it ruled on defendant's summary-judgment motion. We grant defendant's motion to strike this evidence, but also note that it does not in any event establish that the District Court's finding was clearly erroneous.

[1] The second group of documents at issue was described in a request for "all employee rating and/or ranking lists or documents used in making lay-offs in McAIR [McDonnell Douglas Aircraft Company] and/or MDA-E [McDonnell Douglas Aerospace East] during 1989 through 1993." Appellant's App. 349. It is undisputed that McDonnell Douglas had not complied with this request before the District Court granted its summary-judgment motion. The District Court held that, assuming that plaintiff did not have all the information he needed to respond to defendant's summary-judgment motion, his failure to file a Rule 56(f) affidavit explaining why more discovery was needed defeats any argument that summary judgment was premature. We cannot say that the District Court abused its discretion in holding Carman to the requirements of Rule 56(f). Nothing in this opinion should be read to prevent the District Court from giving Carman the opportunity on remand to explain why he needs this information.

With respect to the adverse-impact analyses that the District Court protected from discovery, Carman argues that even if they were privileged, McDonnell Douglas should still have produced the data underlying the analyses. As McDonnell Douglas points out, however, other documents that the District Court required McDonnell Douglas to produce would have provided plaintiff with the equivalent of the data underlying the adverse-impact analyses.

[2] The District Court also did not abuse its discretion in limiting Carman's request for information about past McDonnell Douglas reductions in force to the division in which he worked. Company-wide statistics are usually not helpful in establishing pretext in an employment-discrimination case, because those who make employment decisions vary across divisions. Absent some more particularized argument from plaintiff as to how such information might have helped in this case, we cannot say that the District Court abused its discretion in limiting the scope of Carman's discovery request.

III.

[3, 4] We now turn to the issue of the "ombudsman privilege." In the context of this case, the term "ombudsman" refers to an employee outside of the corporate chain of command whose job is to investigate and

mediate workplace disputes.[1] The corporate ombudsman is paid by the corporation and lacks the structural independence that characterizes government ombudsmen in some countries and states, where the office of ombudsman is a separate branch of government that handles disputes between citizens and government agencies. Nonetheless, the corporate ombudsman purports to be an independent and neutral party who promises strict confidentiality to all employees and is bound by the Code of Ethics of the Corporate Ombudsman Association, which requires the ombudsman to keep communications confidential. McDonnell Douglas argues for recognition of an evidentiary privilege that would protect corporate ombudsmen from having to disclose relevant employee communications to civil litigants.[2]

[5, 6] Federal Rule of Evidence 501 states that federal courts should recognize evidentiary privileges according to "the principles of the common law" interpreted "in the light of reason and experience." The beginning of any analysis under Rule 501 is the principle that "the public has a right to every man's evidence." Hardwicke, L.C.J., quoted in 12 *Cobbett's Parliamentary History* 675, 693 (1742) (quoted with approval in *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950)). Accordingly, evidentiary privileges "are not lightly created." *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974). A party that seeks the creation of a new evidentiary privilege must overcome 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 truth." *Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting)).

[7] The first important factor for assessing a proposed new evidentiary privilege is the importance of the relationship that the privilege will foster. The defendant argues that ombudsmen help resolve workplace disputes prior to the commencement of expensive and time-consuming litigation. We agree that fair and efficient alternative dispute resolution techniques benefit society and are worthy of encouragement. To the extent that corporate ombudsmen successfully resolve disputes in a fair and efficient manner, they are a welcome and helpful addition to a society that is weary of lawsuits.

Nonetheless, far more is required to justify the creation of a new evidentiary privilege. First, 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. In recognizing a privilege for the McDonnell Douglas ombudsman's office in 1991, the court in *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 572 (E.D.Mo. 1991), found that the office had received approximately 4,800 communications since 1985, but neither the court nor McDonnell Douglas in the present case provides us with any context to evaluate the significance of this statistic.

Second, McDonnell Douglas has failed to make a compelling argument that most of the advantages afforded by the ombudsman method would be lost without the privilege. Even without a privilege, corporate ombudsmen still have much to offer employees in the way of confidentiality, for they are still able

1. Though it is not entirely clear from the record whether this is still the case, the head of the ombudsman office at McDonnell Douglas Aircraft Company in 1991 held the position of company vice-president. See *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 572 (E.D.Mo. 1991)

2. Though neither party addresses the issue in any depth, McDonnell Douglas seems to argue that the District Court's decision to recognize the privilege is reviewable only for abuse of discretion. We believe, to the contrary, that the scope of a privilege and the decision whether to establish a new privilege are mixed questions of fact and law which we review *de novo*.

to promise to keep employee communications confidential from management. Indeed, 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. More likely, the employee will fear that the ombudsman is biased in favor of the company, and that the ombudsman will tell management everything that the employee says. The denial of an ombudsman privilege will not affect the ombudsman's ability to convince an employee that the ombudsman is neutral, and creation of an ombudsman privilege will not help alleviate the fear that she is not.

We are especially unconvinced that "no present or future [McDonnell Douglas] employee could feel comfortable in airing his or her disputes with the Ombudsman because of the specter of discovery." See Appellee's Br. 45. An employee either will or will not have a meritorious complaint. If he does not and is aware that he does not, he is no more likely to share the frivolousness of his complaint with a company ombudsman than he is with a court. If he has a meritorious complaint that he would prefer not to litigate, then he will generally feel that he has nothing to hide and will be undeterred by the prospect of civil discovery from sharing the nature of his complaint with the ombudsman. The dim prospect that the employee's complaint might someday surface in an unrelated case strikes us as an unlikely deterrent. Again, it is the perception that the ombudsman is the company's investigator, a fear that does not depend upon the prospect of civil discovery, that is most likely to keep such an employee from speaking openly.

McDonnell Douglas also argues that failure to recognize an ombudsman privilege will disrupt the relationship between management and the ombudsman's office. In cases where management has nothing to hide, this is unlikely. It is probably true that management will be less likely to share damaging information with an ombudsman if there is no privilege. Nonetheless, McDonnell Douglas has provided no reason to believe that management is especially eager to confess wrongdoing to ombudsmen when a privilege exists, or that ombudsmen are helpful at resolving disputes that involve violations of the law by management or supervisors. If the chilling of management-ombudsman communications occurs only in cases that would not have been resolved at the ombudsman stage anyway, then there is no reason to recognize an ombudsman privilege.

[8] McDonnell Douglas relies on the analysis of the court in *Kientzy, supra*, apparently one of only two federal courts to have recognized a corporate-ombudsman privilege.[3] We do not find the reasoning of that opinion convincing. For example, the *Kientzy* opinion argues that confidentiality is essential to ombudsman-employee relationships because the function of that relationship is to "receive communications and to remedy workplace problems, in a strictly confidential atmosphere. Without this confidentiality, the office would just be 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." 133 F.R.D. at 572. As we have said, the corporate ombudsman will still be able to promise confidentiality in most circumstances even with no privilege. To justify the creation of a privilege, McDonnell Douglas must first establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords. Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information. The creation of a wholly new evidentiary privilege is a big step. This record does not convince us that we should take it.

IV.

We disagree with the District Court's holding that employee communications to

3. The other case is *Roy v. United Technologies Corp.*, Civil No. H-89-680 (JAC) (D.Conn., May 29, 1990).

Therese Clemente were protected from discovery by an ombudsman privilege. The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion. On remand, the District Court should order the production of the evidence it had believed the privilege protected, unless there are other reasons why discovery of this evidence would not be appropriate. It should then reconsider its ruling on defendant's motion for summary judgment in light of this new evidence and the parties' arguments with respect to its significance.

It is so ordered.



RECYCLED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-8389-CIV-UNGARO-BENAGES

SUSAN VAN MARTIN,

Plaintiff,

vs.

UNITED TECHNOLOGIES CORP., and
PRATT & WHITNEY/GOVERNMENT ENGINES
& SPACE PROPULSION (GESP),

Defendants.
_____/

ORDER ON MOTION FOR PROTECTIVE ORDER

This Cause is before this court on the Motion by Defendant for Protective Order to preclude the depositions of Ombudsman Patricia Lynch and Ombudsman Ann Bensinger (D.E. #44). After reviewing the motion, the response, reply, the memorandum filed by the Offices of the Ombudsman and the file in this cause, it is ORDERED AND ADJUDGED as follows:

The Motion for Protective Order is GRANTED. This court agrees with the analysis in Kientzy v. McDonnell Douglas Corporation, 133 F.R.D. 570 (E.D. Missouri 1991) and finds that the four factors necessary for the establishment of a privilege as set out in Kientzy have been met in this case. See also, National Transportation Safety Board v. Hollywood Memorial Hospital, 735 F.Supp. 423, 424-425 (S.D. Fla. 1990). In accordance with applicable law, this determination of privilege applies to only

this case.

DONE and ORDERED in chambers this 12 day of July, 1996.

PETER R. PALERMO
UNITED STATES MAGISTRATE JUDGE

cc: Honorable Ursula Ungaro-Benages
Frederick W. Ford, Esq.
Patricia E. Lowry, Esq.
Peter A. Sachs, Esq.

UNITED STATES COURT OF APPEALS

Eleventh Circuit

DECISIONS WITHOUT PUBLISHED OPINIONS

The following cases have been decided without formal opinion prepared for publication in the permanent law reports:

	Title	Docket Number	Date of Decision	Disposition	Appeal from and Citation (if reported)
*	U.S. v. Barr	94-2076	4/2/98	Affirmed	M.D.Fla.
*/**	U.S. v. Chavez	94-6824	4/7/98	Affirmed	M.D.Ala.
**	U.S. v. Mejia	95-3684	4/3/98	Affirmed	N.D.Fla.
*/**	U.S. v. Springfield	95-3718	4/2/98	Affirmed	M.D.Fla.
*	U.S. v. Sust	95-4490	4/9/98	Affirmed	S.D.Fla.
**	U.S. v. Goetz	95-5273	4/8/98	Affirmed	S.D.Fla.
**	U.S. v. Hilligoss	95-8474	4/3/98	Affirmed	N.D.Ga.
*	U.S. v. Bedford	96-3406	4/8/98	Affirmed	M.D.Fla.
*	Parson v. State Attorney	96-3667, 96-3668	4/8/98	Affirmed in part, Reversed in part	M.D.Fla.
*	Klein v. Saft America, Inc.	96-3800	4/1/98	Affirmed	N.D.Fla.
*/**	U.S. v. Jeffrey	96-4135	4/6/98	Affirmed	S.D.Fla.
*	U.S. v. Kurlander	96-4716	3/30/98	Affirmed	S.D.Fla.
*	Wright v. U.S.	96-4743	4/3/98	Affirmed	S.D.Fla.
*	Fica v. Lambdin	96-4896	4/3/98	Affirmed in part, Reversed in part	S.D.Fla.
*	U.S. v. Nunes	96-5111	4/3/98	Affirmed	S.D.Fla.
**	U.S. v. Stevens	96-5433	3/31/98	Affirmed	S.D.Fla.
	Van Martin v. United Technologies	96-5447	4/2/98	Affirmed	S.D.Fla.
*/**	McConico v. Conradi	96-6848	4/7/98	Affirmed	N.D.Ala.
*/**	McConico v. White	96-6849	4/7/98	Affirmed	N.D.Ala.
*/**	McConico v. Cunningham	96-6862	4/7/98	Affirmed	N.D.Ala.
*/**	McConico v. Callihan	96-6963	4/7/98	Affirmed	N.D.Ala.
*	Brooks v. Hammac's Garage Inc.	96-7052	4/10/98	Affirmed	S.D.Ala.
**	U.S. v. Rodriguez	96-7061	3/31/98	Affirmed	M.D.Ala.
*	Driver v. AMI Brookwood Medical	96-7131	4/6/98	Affirmed	N.D.Ala.
*	Reeves v. U.S.	96-8915	4/2/98	Affirmed	M.D.Ga.
**	U.S. v. Layton	96-9064	4/3/98	Affirmed	M.D.Ga.

* Fed.R.App.P. 34(a); 11th Cir.R. 34-3.

** Local Rule 36 case.

RECYCLED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUL 1996
Received
Office of University Counsel

FILED
UNITED STATES DISTRICT COURT
DENVER COLO
JUL 2 1996
JAMES R. MANSPEAKER

Civil Action No. 95-S-2929

JENNIFER C. MILLER,

Plaintiff,

v.

REGENTS OF THE UNIVERSITY OF COLORADO; JAMES CORBRIDGE; RODERICK PARK; and OTHER CO-CONSPIRATORS

Defendants.

ORDER

Magistrate Judge Abram

This matter comes before the Court regarding Plaintiff's First Motion for Sanctions, filed April 18, 1996. Plaintiff claims that key documents relevant to Plaintiff's sex discrimination claim were destroyed after the University received Plaintiff's Equal Employment Opportunity Commission ("EEOC") charge in April, 1995. Thomas Sebok, Ombudsperson for the Boulder Campus, testified in deposition that he destroyed seven years of sexual harassment documents in April, 1995. Jima Wendzel, office manager of the Office of the Chancellor, testified that, in June, 1995, she purged Chancellor James Corbridge's calendars, which contained the names and telephone numbers of women whom Plaintiff contacted to arrange dates with Corbridge. Plaintiff asks the Court to impose the following sanctions: 1) the attorneys' fees incurred in bringing this Motion (multiplied by two); 2) the attorneys' fees for the time devoted to discovery (multiplied by two); 3) an adverse inference jury instruction; 4) the preclusion of Defendants' use of pretrial dispositive motions. Motion, at 6.

In order to demonstrate that she is entitled to sanctions, Plaintiff must present evidence that Defendants: (1) destroyed (2) discoverable matter (3) which Defendants knew or should have known (4) was relevant to pending, imminent, or reasonably foreseeable litigation. Gates Rubber Co. v. Bando Chem. Indus., No. 92-S-0136, 1996 WL 264970, at *5 (D. Colo. May 1, 1996) (quoting J. Gorelick et al., Destruction of Evidence, § 3.8, at 88 (1989)). Additionally, the court must consider: "(1) the culpability of the offender, or the alleged mental state which gave rise to the destruction of evidence, and (2) the degree of prejudice or harm which resulted from the actions of the offender." Id. at *6. For example, "[w]here a particular destruction of evidence is found to have been prompted by a malicious intent, and has caused a high degree of prejudice, severe sanctions are easily supportable." Id. at 7. Here, the destruction of documents was done in the normal course of business and without a malicious intent.

With respect to Chancellor Corbridge's calendars, Ms. Wendzel testified in her deposition that the calendars were disposed of as part of the Chancellor's Office's annual purge of documents. The timing of the June, 1995 purge was scheduled to coincide with Chancellor Roderick Park's absence from the office to mitigate the purge's disruptive effects on business. Additionally, students were on vacation in June and available to help out with the purge. At that time, only the 1993 and 1994 calendars were purged. Corbridge's calendars for the years 1988-1992 had been disposed of in previous annual purges. Moreover, although Wendzel saw the EEOC charge when it was received, the EEOC charge alleged that the sexual harassment took place on June 10, 1994 at the earliest.

UNITED STATES COURT OF APPEALS

Tenth Circuit

DECISIONS WITHOUT PUBLISHED OPINIONS

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
Balabanian v. C.I.R.	98-9015	7/22/99	Affirmed	U.S.T.C.
Barnes v. Apfel	98-5150	8/2/99	Reversed	N.D.Okla.
Berget v. Gibson	98-6381	8/5/99	Affirmed	W.D.Okla.
Burland v. Apfel	98-7113	7/28/99	Affirmed	E.D.Okla.
Christian v. Apfel	98-6367	8/2/99	Affirmed	W.D.Okla.
Clark v. National Union Fire Ins. Co.	98-6312	7/23/99	Affirmed	W.D.Okla.
Coggin v. Champion	99-6028	8/13/99	Appeal Dismissed	W.D.Okla.
Cook v. Champion	98-5130	8/5/99	Affirmed	N.D.Okla.
Corbin v. Runyon	98-6288	8/6/99	Affirmed in part, Reversed in part	W.D.Okla.
Douglas v. Scott	99-5062	7/27/99	Appeal Dismissed	N.D.Okla.
Elliott v. Brooks	98-1470	7/20/99	Affirmed	D.Colo.
Gassaway v. U.S.	98-6316	8/10/99	Affirmed	W.D.Okla.
Gatewood v. American Airlines, Inc.	98-5250	8/5/99	Affirmed	N.D.Okla.
Green v. Price	99-1116	8/5/99	Appeal Dismissed	D.Colo.; Appealing after remand 76 F.3d 392
Healey v. Scovone	98-2285	7/26/99	Affirmed	D.N.M.
Hernandez v. The Denver Post	98-1302	7/29/99	Affirmed	D.Colo.
Holliday v. Department of Health and Human Services	98-2204	5/20/99	Affirmed	D.N.M.
Hornsby v. Kaiser	98-5192	8/6/99	Appeal Dismissed	N.D.Okla.; Appealing after remand 145 F.3d 1345
Houston v. Henderson	99-1066	7/27/99	Appeal Dismissed	D.Colo.
Interfab. Ltd. v. Valiant Industrier AS	98-5219	8/3/99	Affirmed	N.D.Okla.
Jackson v. Hargett	98-6419	7/23/99	Appeal Dismissed	W.D.Okla.
Jenkins v. Colorado Dept. of Social Services Div. of Vocational Rehabilitation	98-1469	7/27/99	Affirmed	D.Colo.
Jones v. Zavaras	98-1368	8/3/99	Affirmed	D.Colo.
Kirkland v. Apfel	98-5224	8/13/99	Affirmed	N.D.Okla.
Lampley v. U.S.	98-7186	7/19/99	Affirmed	E.D.Okla.
Mehdipour v. Snider	98-6483	8/12/99	Appeal Dismissed	W.D.Okla.
Miller v. Regents of University of Colorado	98-1012	7/19/99	Affirmed	D.Colo.

Consequently, the EEOC charge did not put Wendzel on notice that seven years worth of calendars were relevant to Plaintiff's claim.

With respect to the complaints filed with the Ombuds Office, Mr. Sebok stated in his Affidavit that, at the time he destroyed the documents, he "had no knowledge that Jennifer Miller had filed a complaint with the EEOC." Response, Attach. B, at ¶ 7. Moreover, Mr. Sebok discarded the hard copies of the complaints only after these complaints were transferred to a computer database. Plaintiff has not put forth a discovery request with respect to the computer database containing the complaints. See Gomez v. Martin Marietta Corp., 50 F.3d 1511, 1519 (10th Cir. 1995) (sanctions not appropriate where plaintiff was given opportunity to review substantial equivalent of destroyed documents). Finally, the complaints are protected from discovery by the "ombudsman privilege." The ombudsman privilege treats as confidential communications received during the course of an investigation in order to ensure that those communications will take place and to encourage informal dispute resolution. Shabazz v. Scurr, 662 F. Supp. 90, 92 (S.D. Iowa 1987). See also Kientzy v. McDonnel Douglas Corp., 133 F.R.D. 570 (E.D. Mo. 1991) (confidentiality is essential to ombudsman office, and information received by office is privileged).

THEREFORE, IT IS ORDERED that Plaintiff's Motion for Sanctions is denied.

DATED at Denver, Colorado, this 2nd day of July, 1996

BY THE COURT:

D.E. Abram
United States Magistrate Judge

UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
DENVER, CO 80294-3576

DONALD E. ABRAM
U.S. Magistrate Judge

844-6408

CERTIFICATE OF MAILING
Civil Action No. 95-S-2929

I hereby certify that a copy of the ORDER dated July 2, 1996 entered by Magistrate Judge D.E. Abram was mailed or delivered personally this 2nd day of July, 1996 to the following persons:

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Sally Heimen
Deputy Clerk

*1999 U.S. App. LEXIS 16712, *; 1999 Colo. J. C.A.R. 4411*

JENNIFER C. MILLER, Plaintiff-Appellant, v. REGENTS OF THE UNIVERSITY OF COLORADO; JAMES CORBRIDGE, Defendants-Appellees.

No. 98-1012

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1999 U.S. App. LEXIS 16712; 1999 Colo. J. C.A.R. 4411

July 19, 1999, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 1999 U.S. App. LEXIS 28605.

PRIOR HISTORY: (D. Colo.). (D.Ct. No. 95-S-2929).

DISPOSITION: AFFIRMED.

CORE TERMS: discovery, hostile work environment, harassment, summary judgment, quid pro quo, sexual, continuing violation, recommendation, tangible, work environment, occurring, sexual harassment, touched, admits, quotation, job duties, duty, limitations period, supervisor, invoke, sexual conduct, inappropriate, ombudsman, unaware, discriminatory act, offensive, pervasive, severe, statute of limitations, qualified immunity

COUNSEL: For JENNIFER C. MILLER, Plaintiff - Appellant: David K. Rees, Rees & Associates, P.C., Denver, CO. Shannon A. Robinson, Denver, CO.

For REGENTS OF THE UNIVERSITY OF COLORADO, Defendant - Appellee: Joanne M. McDevitt. Simon Paul Lipstein, University of Colorado, Denver, CO. Stephen Walsh Zweck-Bronner.

For JAMES CORBRIDGE, Defendant - Appellee: Thomas S. Rice, Alenka Jana Han, Senter, Goldfarb & Rice, Denver, CO.

JUDGES: Before BRORBY, HOLLOWAY, and BRISCOE, Circuit Judges.

OPINIONBY: WADE BRORBY

OPINION: ORDER AND JUDGMENT *

----------Footnotes----------

* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

----------End Footnotes---------- [*2]

Appellant Jennifer Miller brought this action against her former employer the Regents of the University of Colorado ("the University") and her former supervisor James Corbridge alleging sex discrimination in violation of Title VII of the Civil Rights Act of, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1983. The district court granted summary judgment in favor of the University and Mr. Corbridge. Ms. Miller now appeals that ruling and various

discovery limitations imposed by the district court. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Background

Ms. Miller served as an assistant to Mr. Corbridge, the then Chancellor of the University's Boulder campus. During her tenure in the Chancellor's office, Ms. Miller alleges Mr. Corbridge subjected her to both *quid pro quo* and hostile work environment sexual discrimination. The alleged harassment began shortly after she started work in 1988, when Mr. Corbridge "leered" at her as she walked down a public hallway. Shortly thereafter, Mr. Corbridge asked Ms. Miller out for drinks on at least two occasions and invited her to attend "Friday [*3] Afternoon Club" social gatherings at the law school on five to ten occasions. Ms. Miller declined all invitations. Mr. Corbridge stopped extending invitations to Ms. Miller by early 1989. Further, Ms. Miller claims Mr. Corbridge touched her in ways she found inappropriate, including hugging her twice (*id.* at 153-57), standing behind or beside her so closely that their bodies touched on several occasions, and rubbing her back and shoulders a few times. All the allegedly inappropriate touching ended by fall of 1993. Ms. Miller also contends Mr. Corbridge harassed her by requiring her to place phone calls and make appointments with various female acquaintances and, on at least three occasions, asking her to chill wine for after work meetings. Ms. Miller admits Mr. Corbridge never made any overt requests for sexual favors. However, she contends that because she rebuffed his sexual overtures, Mr. Corbridge verbally harassed and humiliated her in front of other employees and reassigned some of her job duties to other employees. At the same time, Ms. Miller claims more "compliant" female employees did not suffer such treatment and, in some cases, Mr. Corbridge allegedly rewarded those [*4] women with job benefits. Mr. Corbridge resigned as Chancellor effective August 1, 1994. Shortly thereafter, Ms. Miller took an extended leave of absence and eventually resigned from the University in April 1995.

In addition to the conduct Mr. Corbridge allegedly directed at her, Ms. Miller also points to Mr. Corbridge's treatment of other female employees as proof of sexual harassment. Some of the alleged incidents Ms. Miller claims she witnessed during her employment, and others she discovered only after filing this suit. Ms. Miller claims she personally witnessed the following events during her employment:

> (1) Mr. Corbridge frequently called and met with three female University employees, Ms. Marie Caldwell, Ms. Lisa Vann and Ms. Mary Jo White. Ms. Miller often placed the calls and arranged the meetings with these women and she surmised Mr. Corbridge had sexual relationships with them. However, Ms. Miller admits she had no personal knowledge of any such relationship during her employment, never overheard Mr. Corbridge's phone conversations with the women, and never observed any of their meetings.
>
> (2) Mr. Corbridge frequently called and met with Ms. Pauline Hale, the University's [*5] Director of Public Relations. Ms. Miller claims she knew Mr. Corbridge was having a sexual relationship with Ms. Hale because they traveled together and lived together. Mr. Corbridge and Ms. Hale married in 1992. Mr. Corbridge required Ms. Miller to assist in planning their wedding.
>
> (3) Mr. Corbridge touched Ms. Jane Branigan, an employee in the Chancellor's office, on the face and hair on one occasion. Ms. Miller also learned that Mr. Corbridge and Ms. Branigan had drinks after work once.
>
> (4) Mr. Corbridge leered at and touched other women throughout Ms. Miller's tenure in the Chancellor's office. Ms. Miller cannot specify the dates on which these incidents occurred or what women they involved.
>
> (5) Ms. Susan Hobson-Panico, a University employee, told Ms. Miller that Mr. Corbridge kissed her during a break in a Regent's meeting. Ms. Miller did not personally witness the alleged kiss.

The evidence Ms. Miller learned about through discovery but had no personal knowledge of during her employment includes:

> (1) Ms. Caldwell's testimony that she had an ongoing sexual relationship Mr. Corbridge.
>
> (2) Former University President Judith Albino's version of a complaint, related [*6] to her secondhand by her executive assistant, that Mr. Corbridge paid unwanted attention to and touched a secretary named "Melissa" who worked in President Albino's office. Ms. Albino also testified to her secondhand knowledge of other rumored complaints against Mr. Corbridge. However, Ms. Albino never revealed the names of those women and Ms. Miller never spoke to the alleged complainants directly.
>
> (3) Ms. Hobson-Panico's testimony that Mr. Corbridge touched her in an inappropriate manner on several occasions including grabbing her scarf, whispering in her ear, kissing her, and putting his arm around her.
>
> (4) Testimony by Ms. Marianne Wesson, a University law professor, that Mr. Corbridge had a

reputation for inappropriate sexual conduct toward female employees and on one occasion touched her thigh during a social gathering off campus.

(5) Testimony by Ms. Emily Calhoun and Ms. Kaye Howe, both University professors, that Mr. Corbridge had a reputation for engaging in inappropriate sexual conduct toward female employees.

Based on this evidence, Ms. Miller's Revised Amended Complaint alleged Title VII *quid pro quo* and hostile work environment claims against the University [*7] and a 42 U.S.C. § 1983 deprivation of civil rights claim against Mr. Corbridge individually.

Discovery was highly contentious. Early in the process, the defendants moved for a protective order due to the "sensitive nature" of Ms. Miller's allegations, the potential for harassment and undue embarrassment, and significant media coverage of the case. n1 After a hearing, the magistrate judge granted the motion and issued an order limiting the scope and subject matter of future depositions and restricting distribution of discovery materials. Despite Ms. Miller's numerous objections, the district court upheld the protective order and discovery continued subject to its limitations. Subsequently, Ms. Miller filed a series of motions to compel in an attempt to obtain testimony from the University's former **ombudsperson,** Ms. Hobson-Panico. The district court denied Ms. Miller's motions to the extent they required Ms. Hobson-Panico to answer questions precluded under the protective order or to reveal information protected by an "**ombudsman** privilege." An "**ombudsman** privilege," the district court held, protects communications made with an expectation of privacy to the University [*8] **ombudsperson.**

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n1 Early in the discovery process, Ms. Miller took the deposition of former University President Judith Albino. Portions of that deposition were leaked to the press which in turn generated several articles in area newspapers.

----------End Footnotes----------

Defendants then filed a motion for summary judgment, which the district court granted on several grounds. First, the district court concluded the statute of limitations barred Ms. Miller's Title VII claims. In the alternative, the district court found Ms. Miller failed to establish she was a victim of actionable sexual harassment under Title VII. The court granted summary judgment on Ms. Miller's § 1983 claim because it was time barred, or, in the alternative, because Mr. Corbridge was entitled to qualified immunity. On appeal, Ms. Miller argues the district erred by: (1) concluding she failed to establish a prima facie case under Title VII and § 1983; (2) concluding her claims were barred by the statute of limitations; (3) concluding Mr. Corbridge was entitled to qualified [*9] immunity; (4) upholding a protective order which improperly limited her discovery rights; (5) limiting discovery pursuant to an **ombudsman** privilege; and (6) limiting her ability to conduct investigation of the case. We address each of these issues in turn.

II. Summary Judgment

A. Title VII Claims

The district court asserted two bases for granting summary judgment on the Title VII claims. First, the court determined Ms. Miller's claims were barred by the statute of limitations, and second, even if they were not, the evidence failed to establish either hostile work environment or *quid pro quo* sexual harassment. On appeal, Ms. Miller argues her claims are not barred by the statute of limitations under the continuing violation doctrine and, further, that she offered sufficient evidence to create a genuine fact dispute on both harassment claims.

We review the district court's grant of summary judgment de novo, applying the same legal standard as the district court. *Penry v. Federal Home Loan Bank*, 155 F.3d 1257, 1261 (10th Cir. 1998), *cert. denied*, 143 L. Ed. 2d 498, 119 S. Ct. 1334 (1999). We "examine the record to determine if any genuine [*10] issue of material fact was in dispute; if not, we determine if the substantive law was correctly applied." *Applied Genetics Int'l v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). In applying this standard, we view the factual record and inferences therefrom in the light most favorable to the nonmoving party. *Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1476 (10th Cir. 1996). However, to survive summary judgment, the nonmoving party may not rest upon the allegations or denials of his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Panis v. Mission Hills Bank*, 60 F.3d 1486, 1490 (10th Cir. 1995), *cert. denied*, 516 U.S. 1160, 134 L. Ed. 2d 192, 116 S. Ct. 1045 (1996). Summary judgment is appropriate if a reasonable trier of fact could not return a verdict for the nonmoving party. *Penry*, 155 F.3d at 1261.

In Colorado, a Title VII claimant must file a charge of discrimination with the Equal Employment Opportunity Commission within 300 days after the alleged unlawful discriminatory practice occurred. n2 42 U.S.C. § 2000e-5 [*11] (e)(1). This filing is a prerequisite to a civil suit under Title VII; *Martin v. Nannie & the Newborns*, 3 F.3d 1410, 1414 (10th Cir. 1993), and claims based on incidents occurring outside the 300-day limitations period are generally time-barred. *Mascheroni v. Board of Regents*, 28 F.3d 1554, 1561-62 (10th Cir. 1994). However, under the continuing violation doctrine, a plaintiff may recover for incidents which occurred outside the statutory time limit if at least one instance of the alleged discriminatory practice occurred within the limitations period and the

earlier acts are part of a "continuing pattern of discrimination." *Martin*, 3 F.3d at 1415 (quotation marks and citation omitted). To determine whether alleged incidents of discrimination constitute a continuing violation we consider three factors:

> (i) subject matter - whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence - whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent [*12] to discriminate.

Martin, 3 F.3d at 1415. A plaintiff may not invoke the continuing violation doctrine by merely alleging that acts occurring outside the statutory time period had a continuing effect within the statutory period. *Id.* At the same time, the discriminatory act occurring within the time period "need not constitute a legally sufficient Title VII claim in itself." *Mascheroni*, 28 F.3d at 1561.

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n2 The 300-day filing period applies to "deferral states" in which the Equal Employment Opportunity Commission defers to the enforcement efforts of a state agency empowered to undertake employment discrimination investigations. 42 U.S.C. § 2000e-5(e)(1). Otherwise, the filing period is 180 days. *Id.*

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In this case, Ms. Miller filed a Charge of Discrimination with the Equal Employment Opportunity Commission on April 5, 1995. Subtracting 300 days from that date results in a limitations period starting June 10, 1994. Because the vast majority [*13] of Ms. Miller's allegations occurred outside of that limitations period, *i.e.*, before June 10, 1994, Ms. Miller attempts to invoke the continuing violation doctrine. To accomplish this, she must demonstrate that Mr. Corbridge engaged in a series of related discriminatory acts, at least one of which occurred *on or after* June 10, 1994. After a thorough review of the record, the district court determined Ms. Miller failed to identify a single discriminatory act occurring after June 10, 1994. The court therefore denied application of the continuing violation doctrine and concluded that Ms. Miller's Title VII claims were time barred. We agree.

As the district court noted, Ms. Miller's claims rest solely upon the alleged conduct of Mr. Corbridge. However, none of her allegations specify discriminatory conduct by Mr. Corbridge on or after June 10, 1994. In fact, the record indicates Mr. Corbridge resigned from the Chancellor's office effective August 1, 1994 and that he was out of the office on vacation for part of June and all of July 1994. *See Purrington v. University of Utah*, 996 F.2d 1025, 1029 (10th Cir. 1993) ("When the person harassing a plaintiff leaves [his] [*14] job, the harassment ends." (Internal quotation marks and citation omitted.)). Ms. Miller argues she "established violations which occurred as late as July or August, 1994." To support this assertion, Ms. Miller contends Mr. Corbridge "continued to be responsible" for her work environment until August 1, 1994. However, the continuing effect of conduct occurring outside the limitations period is insufficient to invoke the continuing violation doctrine. *Martin*, 3 F.3d at 1415.

Ms. Miller also claims that during the summer of 1994, Mr. Corbridge "utilized his power and influence to reward the compliant women ... and punish Miller" by not recommending her for a position with the incoming Chancellor and by reassigning some work duties to other employees. Neither of these allegations is sufficient to invoke the continuing violation doctrine. First, while it does appear Mr. Corbridge made personnel recommendations to the incoming Chancellor, we are not persuaded that Mr. Corbridge's recommendation (or lack thereof) amounts to a discriminatory act. The Equal Employment Opportunity Commission defines sexual harassment to include situations in which the plaintiff's submission [*15] to or rejection of sexual conduct is made a *term or condition of employment* or is used as the basis for an employment decision *affecting the individual* as well as conduct of a sexual nature that unreasonably interferes with the plaintiff's work environment. 29 C.F.R. § 1604.11(a) (emphasis added). In this case, Mr. Corbridge's recommendation did not have an impact on Ms. Miller's work environment or any direct affect on Ms. Miller's employment status. In fact, the new Chancellor, Mr. Roderic Park, retained Ms. Miller despite Mr. Corbridge's allegedly unfavorable recommendation. In any event, it was *Mr. Park* who made the decisions affecting Ms. Miller's employment during his administration and Mr. Park's conduct is not at issue in this case. n3 While we recognize Ms. Miller need not demonstrate the commission of an act constituting a legally sufficient Title VII claim to invoke the continuing violation doctrine, she must at least identify a discriminatory act by Mr. Corbridge that impacted her employment in some manner. n4 *See Mascheroni*, 28 F.3d at 1562.

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n3 Ms. Miller originally included Mr. Park as a defendant in this suit but later voluntarily dismissed him. Ms. Miller admits Mr. Park never sexually harassed her. [*16]

n4 Even if Mr. Corbridge's personnel recommendation and reassignment of duties constituted discriminatory acts within the limitations period, those acts are not sufficient to invoke the continuing violation doctrine. *See Martin*, 3 F.3d at 1415 (listing factors to be considered in assessing continuing violations). The alleged incidents of

harassment were relatively infrequent over the six years of Ms. Miller's employment. More important, the nature of the alleged violations should have triggered Ms. Miller's awareness of the need to assert her rights. Ms. Miller testified that she believed the harassment began shortly after she started work in the Chancellor's office and that the early incidents influenced her perceptions of Mr. Corbridge and led her to believe that his later conduct was also motivated by discriminatory bias. In addition, the vast majority of her allegations center on events occurring between 1988 and 1993. Yet Ms. Miller waited until 1995 to file a complaint. Because Ms. Miller knew of the alleged discrimination as early as 1988, she had a duty to assert her rights at that time, and she may not now rely on the continuing violation doctrine to overcome the statutory filing requirements. *Martin*, 3 F.3d at 1415 n.6 ("If an event or series of events should have alerted a reasonable person to act to assert his or her rights at the time of the violation, the victim cannot later rely on the continuing violation doctrine to overcome the statutory requirement of filing a charge with the [Equal Employment Opportunity Commission] with respect to that event or series of events.").

----------End Footnotes---------- [*17]

Second, we find no factual support for Ms. Miller's allegations regarding Mr. Corbridge's job duty re-assignment in the summer of 1994. Ms. Miller testified Mr. Corbridge reassigned some of her job duties to Ms. White when Ms. White returned to the Chancellor's office after attending law school. Ms. White returned to the Chancellor's office on a full time basis in 1993 - well before June 10, 1994. Ms. Miller also claims her job duties changed during the transition period between Mr. Corbridge and Mr. Park. However, the record shows Mr. Park was responsible for the personnel decisions affecting his term of office, and we find no evidence that Mr. Corbridge reassigned any duties in the summer of 1994.

In sum, we conclude Ms. Miller has failed to allege at least one discriminatory act occurring within the 300-day limitation period and, as such, she cannot invoke the continuing violation doctrine to preserve her claims. Thus, the district court appropriately determined that Ms. Miller's Title VII claims are time-barred. n5 *See Mascheroni*, 28 F.3d at 1562 (concluding the statute of limitations barred plaintiff's Title VII claims because he failed to allege at least one [*18] discriminatory act occurring within the limitation period).

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n5 We agree with the district court's conclusion that Ms. Miller has not presented circumstances under which she is entitled to equitable tolling of the limitations period.

----------End Footnotes----------

Ms. Miller also contends the district court erred in granting the University's motion for summary judgment based on her failure to present sufficient evidence of a hostile work environment or *quid pro quo* sexual harassment. Ms. Miller argues she presented enough evidence to create a genuine issue of material fact on both claims. We disagree. n6

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n6 Although the statute of limitations bar is a sufficient basis upon which to affirm the district court's ruling, we nevertheless address the court's alternative analysis because it is crucial to other issues in this case.

----------End Footnotes----------

To survive summary judgment on her *quid* [*19] *pro quo* claim, Ms. Miller must show that a reasonable jury could find Mr. Corbridge conditioned concrete employment benefits on her submission to sexual conduct. *Martin*, 3 F.3d at 1416. "The gravamen of a quid pro quo sexual harassment claim is that tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from the employee's refusal to submit to the conduct." *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987). Ms. Miller admits Mr. Corbridge never made overt requests for sexual favors. Instead, Ms. Miller contends Mr. Corbridge "punished" her for rebuffing his sexual advances by taking tangible job benefits from her while at the same time rewarding more "compliant" women with job benefits. The tangible job benefits Mr. Corbridge allegedly took from Ms. Miller include: (1) job duties, (2) an employment recommendation to the new Chancellor, and (3) ultimately her job because Mr. Corbridge's conduct caused a mental break down which in turn forced her to quit. n7 None of these allegations is sufficient to create a genuine issue of material fact regarding specific [*20] adverse job consequences Ms. Miller suffered.

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n7 In her brief, Ms. Miller implies that Mr. Corbridge yelled at and humiliated her because she refused his sexual overtures. We agree with the district court that such conduct does not amount to the denial of a "concrete employment benefit" and cannot form the basis of a *quid pro quo* claim. *Martin*, 3 F.3d at 1416.

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First, although the record is somewhat unclear, it appears Ms. Miller's job duties were altered on two occasions. In 1993, Ms. Miller claims Mr. Corbridge assigned some of her duties to Ms. White when Ms. White returned to the Chancellor's office after attending law school. However, as Ms. Miller admits, Ms. White performed those duties before she went to law school, and Mr. Corbridge merely restored them to Ms. White when she returned. Ms. Miller cannot lose tangible job benefits that were never hers to begin with. n8

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n8 Ms. Miller admits her allegations regarding the loss of tangible job benefits prior to August 1994 are "very weak" since prior to that date "what Jennifer Miller had lost in terms of a concrete benefit was admittedly marginal."

----------End Footnotes---------- [*21]

Ms. Miller makes much of the fact that Mr. Corbridge and Ms. White were allegedly having an affair at the time. However, their consensual romantic involvement, if any, is of no consequence. n9 Title VII does not prohibit favoritism shown to a supervisor's paramour because such preferential treatment is based on voluntary romantic affiliation and not gender differences. *See Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1370 (10th Cir. 1997) (concluding plaintiff's allegations that defendant supervisor preselected his paramour for a promotion did not state an actionable Title VII claim because allegations were based on voluntary romantic affiliation and not gender differences). Thus, even assuming Mr. Corbridge and Ms. White were romantically involved and that Mr. Corbridge favored Ms. White in some manner, such favoritism would not present an actionable *quid pro quo* claim.

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n9 Both Ms. White and Mr. Corbridge deny any such involvement.

----------End Footnotes----------

The second reassignment of duties allegedly occurred [*22] during the transition from Chancellor Corbridge to interim Chancellor Roderic Park. However, the record shows Mr. Corbridge merely made recommendations to the incoming Chancellor and that Mr. Park was responsible for the personnel decisions affecting his term of office. Ms. Miller admits Mr. Park did not discriminate against her and, therefore, she cannot base her *quid pro quo* claim on his decisions.

We also conclude Mr. Corbridge's employment recommendation to Mr. Park and Ms. Miller's resignation from the University are not denials of "concrete employment benefits." Mr. Corbridge's recommendation to Mr. Park was just that - a recommendation. Mr. Park was free to act on that recommendation or not. Regardless, the recommendation itself had no direct, tangible impact on Ms. Miller's job. *Cf. Sanders v. Casa View Baptist Church*, 134 F.3d 331, 338 (5th Cir.) (affirming summary judgment against plaintiffs on their *quid pro quo* claim where evidence revealed that defendant's alleged conduct had no tangible affect on plaintiffs' jobs), *cert. denied*, 119 S. Ct. 161 (1998). Rather, it is Mr. Park's actions that impacted Ms. Miller's job duties and, [*23] as we stated above, Mr. Park's actions cannot serve as a basis for Ms. Miller's *quid pro quo* claim. Likewise, Ms. Miller cannot transform her decision to resign into the loss of a concrete employment benefit by alleging Mr. Corbridge caused her to quit. Mr. Corbridge no longer worked in the Chancellor's office when Ms Miller resigned and it was therefore impossible for him to condition her continued employment on submission to sexual conduct. Thus, Ms. Miller has failed to present sufficient evidence that she suffered a tangible, adverse job consequence as a result of her failure to submit to unwelcome sexual advances. For these reasons, the district court did not err in granting summary judgment on her *quid pro quo* claim.

We next consider Ms. Miller's hostile work environment claim. A hostile work environment occurs when unwelcome sexual conduct unreasonably interferes with an employee's performance or creates an intimidating, hostile, or offensive work environment. *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1412 (10th Cir. 1997) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)). [*24] To survive summary judgment, Ms. Miller must show that a rational jury could find the harassment so severe or pervasive as to alter the conditions of the her employment and create an abusive working environment. *Smith*, 129 F.3d at 1412. The conduct must be both objectively and subjectively abusive. *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1071 (10th Cir. 1998). Ms. Miller must also produce evidence that "the conduct at issue was not merely tinged with offensive sexual connotations but actually constituted discrimination because of sex." *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201 (1998) (internal quotation marks omitted). To determine whether an environment is hostile or abusive, we examine the totality of the circumstances including factors such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). [*25] Conduct which merely engenders offensive feelings or amounts to normal job stress does not violate Title VII. *See Smith*, 129 F.3d at 1412; *Trujillo v. University of Colo. Health Sciences Ctr.*, 157 F.3d 1211, 1214 (10th Cir. 1998).

Ms. Miller fails to make the required showing. As the district court noted, many of Ms. Miller's allegations center on incidents she was not aware of during her employment. However, to establish a genuine issue of material fact as to whether she was subject to a hostile work environment, Ms. Miller may rely only on conduct she was aware of during her employment. n10 *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 782 (10th Cir. 1995). Considering only that evidence, we are unable to conclude that a rational jury could find the alleged harassment severe or pervasive enough to constitute an objectively hostile work environment. As Ms. Miller admits, her allegations contain none of the "hallmarks" of a sexually hostile work environment claim such as overt requests for sexual favors, lewd remarks or sexual comments about her body or clothing, jokes of a sexual nature, or display of sexually oriented [*26] materials. *Trujillo*, 157 F.3d at 1214 (concluding plaintiff failed to establish a racially hostile work environment where there was no evidence of physically threatening or humiliating activity, racial slurs, or ridicule). The unwelcome touching and leering directed at Ms. Miller was relatively infrequent and completely ceased by the fall of 1993. *See Penry*, 155 F.3d at 1263 (concluding gender-based incidents occurring sporadically over a three year period were insufficient to establish a hostile work environment). Moreover, the touching was relatively mild in character - it did not involve intimate body parts, nor was it physically threatening. *See, e.g., Adusumilli v. City of Chicago*, 164 F.3d 353, 361 (7th Cir. 1998) (concluding incidents during which a co-worker allegedly touched plaintiff's arm, fingers, and buttocks were too mild and infrequent to establish a hostile work environment). In fact, many of Ms. Miller's co-workers testified that while Mr. Corbridge had a "friendly" style and frequently touched male and female employees during conversations, his touching was neither sexual nor offensive. Mr. Corbridge's alleged touching [*27] of other women, including Ms. Branigan and Ms. Hobson-Panico, is likewise too infrequent and mild in character to establish a hostile work environment.

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n10 Because the severity-pervasiveness standard is an inquiry aimed at establishing whether *the plaintiff* experienced an abusive environment, we consider only that conduct *the plaintiff* was aware of during the time at issue. *See Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 782 (10th Cir. 1995). This is true whether we are evaluating the evidence from the plaintiff's subjective viewpoint or a reasonable person's objective viewpoint. Either way the focus remains on the conduct experienced by the plaintiff. *See, e.g., Smith*, 129 F.3d at 1413-14 (examining plaintiff's work environment from a subjective and objective point of view).

----------End Footnotes----------

Ms. Miller's other allegations also lack the severity or pervasiveness necessary to establish a work environment "permeated with discriminatory intimidation, ridicule and insult." [*28] *Smith*, 129 F.3d at 1414 (internal quotation marks and citation omitted). Mr. Corbridge's invitations to attend University social gatherings and after work drinks were infrequent and confined to the first few months of Ms. Miller's six-year tenure in the Chancellor's office. The fact that Mr. Corbridge directed Ms. Miller to arrange phone calls and meetings is also not indicative of a hostile work environment. It was Ms. Miller's job to place phone calls and arrange meetings for the Chancellor, and we fail to see how directing an employee to perform regular job duties amounts to harassment. Ms. Miller claims she was forced to "enable [Mr. Corbridge] in his romantic endeavors," and testified "it was offensive that I would have to arrange his social life .... That wasn't in my job description. That wasn't something I felt that I should have to do." Yet, Ms. Miller admits she never witnessed any of the calls or meetings, and we find no evidence that she was in any way subject to their content, romantic or otherwise. Her unsupported speculation about what did occur does not transform the Chancellor's request that she perform her regular job duties into evidence of a hostile [*29] or abusive work environment.

Viewing the totality of the circumstances, including the general work atmosphere and the specific conduct directed at Ms. Miller and others, we find insufficient evidence of either severe or pervasive harassment. As the district court noted, Ms. Miller's evidence shows nothing more than her subjective opinion that Mr. Corbridge's behavior was inappropriate for a boss. Such opinions are not actionable under Title VII. The district court correctly granted summary judgment on the hostile work environment claim.

B. § 1983 Claim.

In granting Mr. Corbridge's motion for summary judgment on Ms. Miller's § 1983 claim, the district court again asserted two bases for its decision. The court concluded Mr. Corbridge was entitled to qualified immunity or, in the alternative, that the claim was barred by the relevant statute of limitations. After reviewing the district court's grant of summary judgment de novo and applying the same legal standard as the district court, *Penry*, 155 F.3d at 1261, we conclude the district court properly determined that Mr. Corbridge is entitled to qualified immunity.

Qualified immunity shields government officials [*30] performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutionality rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Before reaching the qualified immunity issue, however, we must first determine whether Ms. Miller's allegations, if accepted as true, state a claim for violation of any rights secured under the Constitution. *Abeyta v. Chama Valley Indep. Schl. Dist.*, 77 F.3d 1253, 1255 (10th Cir. 1996). We will not reach the qualified immunity issue if Ms. Miller's claims are not actionable. *Abeyta*, 77 F.3d at 1255. Ms. Miller has the burden to "show with particularity facts and law establishing the inference that defendant violated a constitutional right." *Id.* (quotation marks and citation omitted). "More is required to state a claim for a constitutional violation ... than for a statutory

claim under Title VII." *Id.* at 1256.

Ms. Miller claims Mr. Corbridge violated the Equal Protection Clause by committing both *quid pro quo* and [*31] hostile work environment sexual harassment. However, as discussed above, Ms. Miller's evidence does not sufficiently demonstrate that Mr. Corbridge committed actionable harassment under Title VII. Because she cannot demonstrate that Mr. Corbridge's conduct violated Title VII, her constitutional claim based on the same conduct fails as well. *See id.* Thus, the district court did not err in granting summary judgment on Ms. Miller's § 1983 claims.

III. Discovery Limitations

In relevant part, the protective order limited discovery by: (1) prohibiting deposition questions based on rumor and innuendo; (2) requiring deponents to identify where or from whom they obtained the information testified to, when they obtained the information, and the nature of the information; (3) limiting discovery concerning Mr. Corbridge's alleged improprieties to employees of the Chancellor's office and employees over whom Mr. Corbridge had direct supervision; and (4) limiting discovery to the time frame of Ms. Miller's employment in the Chancellor's office. The district court also made discovery rulings that prohibited Ms. Miller from questioning witnesses about Mr. Corbridge's inappropriate conduct if [*32] the conduct occurred outside the office, and if Ms. Miller was unaware of it during her employment. The court offered two primary bases for imposing these discovery limitations: (1) the excluded information was not relevant to Ms. Miller's claims, and (2) the limitations served to protect both parties and non-parties from annoyance, embarrassment, intimidation and oppression. Ms. Miller argues the court improperly limited her ability to discover relevant information about Mr. Corbridge's alleged improper sexual conduct. She contends such information is relevant to establish the "nuances" of her hostile work environment, to prove motive and discriminatory intent, as well as the University's vicarious liability for Mr. Corbridge's actions. In addition, Ms. Miller claims the district court mischaracterized relevant evidence about Mr. Corbridge's conduct as rumor and innuendo.

We review the district court's discovery order for abuse of discretion. *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995). We will not disturb the trial court's ruling "absent a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds [*33] of permissible choice in the circumstances." *Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848, 853 (10th Cir. 1996) (internal quotation marks and citation omitted). A court abuses its discretion if its ruling is arbitrary, capricious, whimsical, or manifestly unreasonable. *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999). An erroneous discovery ruling will not lead to reversal unless the error affected the substantial rights of the parties. *Frontier Ref., Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 705 (10th Cir. 1998).

We agree with the district court that it has wide discretion to limit the scope of discovery based on the rights and needs of the parties. *See Gomez*, 50 F.3d at 1520. Specifically, the federal rules give district courts the power to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26 (b)(2)(iii). District courts may also issue a protective order if "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). The district court is in the best [*34] position to weigh these variables and determine the appropriate limits because, unlike an appellate court, the district court has the ability to view firsthand the progression of the case, the litigants, and the impact of discovery on parties and nonparties. *Cf. Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (concluding that the abuse of discretion standard is appropriate in reviewing a trial court's evidentiary rulings because the trial court has the firsthand ability to view the witness or evidence and assess credibility and probative value).

In this case, the district court weighed the significant burdens Ms. Miller's proposed discovery would place on both parties and non-parties against the potential relevance of the information sought, concluded the burdens outweighed the benefits, and imposed limitations accordingly. We agree that much of the information excluded, including reports of conduct based on rumors and innuendo, and other women's experiences that were remote in time and attenuated from Ms. Miller's experiences, has limited relevance to Ms. Miller's claims. *See Hirase-Doi*, 61 F.3d at 782 (concluding plaintiff may only rely on [*35] evidence of conduct she was aware of to prove the existence of a hostile work environment). We also agree that inquiries into such conduct could and did unduly harass, intimidate and disparage parties and non-parties to this case. Furthermore, we note the district court allowed Ms. Miller significant discovery regarding people and events that did directly affect her employment and work environment. n11 *See Gomez*, 50 F.3d at 1520 (concluding the district court did not abuse its discretion in limiting discovery in Title VII case were plaintiff was provided abundant discovery).

----------Footnotes----------

n11 We find no merit in Ms. Miller's argument that the district court erroneously prohibited her from interviewing witnesses on Ms. Albino's "list." The list contains names of women that Ms. Albino claims might have suffered sexual harassment on the Boulder campus. The only names the district court refused to reveal where those of women whose alleged complaints Ms. Albino heard of through the campus "rumor mill." We find no abuse of discretion in that decision. The remaining names Ms. Miller already knew, Ms. Albino could not identify, or the court allowed to be revealed. Ms. Miller was free to interview those remaining women. The district court merely cautioned her to make sure the testimony would be useful before interviewing them.

Ms. Miller also claims the court erroneously prevented her from having ex parte communications with former Chancellors of the University. However, Ms. Miller failed to cite to or include a transcript of the district court's oral ruling. We therefore decline to review the issue. *See McGinnis v. Gustafson*, 978 F.2d 1199, 1201 (10th Cir. 1992) (refusing to review issue because appellant's failure to include transcript of the district court's oral ruling "raises an effective barrier to informed, substantive appellate review."); *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1540 n.3 (10th Cir.), *cert. denied*, 519 U.S. 928, 136 L. Ed. 2d 216, 117 S. Ct. 297 (1996) ("We may refuse to review alleged error if the party seeking review fails to include and reference the portion of the record wherein their objection and the district court's ruling thereon may be found." (Internal quotation marks and citation omitted.)).

----------End Footnotes---------- [*36]

However, we must address some concerns we have with the district court's analysis regarding relevancy. Under the federal rules, a party may obtain discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1). Of course, information need not be admissible to be considered relevant for discovery purposes. Rather the information sought must "appear[] reasonably calculated to lead to the discovery of admissible evidence." *Id.* In its analysis, the court seems to imply that all evidence regarding Mr. Corbridge's conduct toward other women which Ms. Miller was unaware of during her employment was irrelevant to Ms. Miller's Title VII claims. While we agree the evidence has limited value to Ms. Miller in this case, such evidence is not totally irrelevant to a harassment claim under Title VII.

For example, in a hostile work environment claim, a plaintiff must show (1) that the harassment was severe or pervasive enough to alter the terms, conditions or privilege of employment and (2) that the harassment stemmed from discriminatory animus. *Trujillo*, 157 F.3d at 1214. We have previously held [*37] that a plaintiff may not rely on evidence of conduct he or she was unaware of to establish element number one - the severity and pervasiveness of the harassment. *See Hirase-Doi*, 61 F.3d at 782; *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 171 (10th Cir.), *cert. denied*, 519 U.S. 983, 136 L. Ed. 2d 335, 117 S. Ct. 437 (1996). However that evidence may be relevant to establishing element number two - discriminatory intent. *See Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990) (holding that testimony of other employees about their treatment by the defendant is relevant to the issue of discriminatory intent). The relevance of such testimony is not affected by the plaintiff's knowledge of conduct because it is offered to show the defendant's state of mind rather than the plaintiff's experiences in the workplace. *See Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 110-11 (3d Cir. 1999) (concluding evidence of defendant supervisor's harassment of other women was relevant to show motive in plaintiff's hostile work environment claim even though plaintiff had no personal knowledge of the events). [*38] Of course, the court may exclude such testimony if the witness' statements have no logical or reasonable connection to the plaintiff's circumstances. *See Curtis v. Oklahoma City Pub. Schl. Bd. of Educ.*, 147 F.3d 1200, 1217 (10th Cir. 1998).

Conduct the plaintiff was unaware of might also be relevant to prove an employer's liability for sexual harassment by one of its employees. There are three bases for holding an employer liable under Title VII: (1) if the employee's conduct occurred within the scope of his employment, (2) if the employer knew or should have known about the employee's conduct and failed to respond in a reasonable manner, and (3) if the employee acted with apparent authority. *See Wright-Simmons v. City of Okla. City*, 155 F.3d 1264, 1269-70 (10th Cir. 1998). Evidence of a supervisor's harassment of other women may be relevant to establish employer liability under the second basis, even if the plaintiff was unaware of it, so long as the harassment was similar in nature and close in time to plaintiff's experiences. *Hirase-Doi*, 61 F.3d at 783-84; *see also Hurley*, 174 F.3d at 111 (concluding evidence of [*39] other acts of harassment and widespread sexism is probative of whether defendant employer knew or should have known that sexual harassment was occurring, regardless of whether plaintiff employee had knowledge of the incidents). In addition, a supervisor's conduct may be relevant under the third basis, to rebut the employer's affirmative defense that it exercised reasonable care to prevent and correct the supervisor's behavior. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 2292-93, 141 L. Ed. 2d 662 (1998) (discussing the apparent authority basis for employer liability and the affirmative defense available to employers if no tangible employment action is taken).

Thus, evidence of the defendant's conduct which the plaintiff was unaware of at the time is not *a priori* irrelevant to a hostile work environment claim. Nonetheless, we find the district court's failure to consider the potential relevance of such evidence in this case to be harmless error. None of the information the district court excluded would have saved Ms. Miller's claims from summary judgment. As we discussed above, the court properly determined that Ms. Miller failed to sufficiently [*40] demonstrate harassment severe or pervasive enough to constitute a hostile work environment. The only evidence Ms. Miller could have used to make this showing was conduct she was aware of during her employment. *See Hirase-Doi*, 61 F.3d at 782. Information about Mr. Corbridge's conduct outside Ms. Miller's work environment and conduct she was unaware of at the time would not have created a genuine fact issue regarding the severity and pervasiveness of the alleged harassment. n12 The same is true for her *quid pro quo* claim. The district court granted summary judgment on that claim because Ms. Miller failed to identify a tangible job benefit. None of the excluded information pertains to Ms. Miller's employment or the specific job benefits she allegedly lost. Thus, we cannot say that the district court's ruling, even if erroneous, affected the substantial rights of the parties or precluded a fair trial. As such, we find no abuse of discretion warranting reversal. *See Frontier Refin.*, 136 F.3d at 705 (concluding that an erroneous discovery ruling

requires reversal only if it affected the substantial rights of the parties); *Gaines v. Ski Apache*, 8 F.3d 726, 730 (10th Cir 1993) [*41] ("The trial court has broad discretion regarding its control of discovery, and we will find that discretion to have been abused only when a denial of discovery precludes a fair trial." (Internal quotation marks and citation omitted.); *Miller v. United States*, 710 F.2d 656, 666 (10th Cir.) (concluding trial court made no prejudicial error in limiting discovery where there were no facts plaintiffs could have developed to avoid dismissal of their claim), *cert. denied*, 464 U.S. 939, 78 L. Ed. 2d 316, 104 S. Ct. 352 (1983).

----------Footnotes----------

n12 We recognize that Ms. Miller could have used that evidence to prove Mr. Corbridge's discriminatory intent. However, proof of motive or lack thereof was not a key issue in the district court's decision. Moreover, evidence of motive would not change the ultimate outcome in this case because, even if we assume that all of the conduct Ms. Miller witnessed was in fact motivated by discriminatory intent, we are still unable to conclude that a rational jury could find that conduct sufficiently severe or pervasive. *Cf. Penry*, 155 F.3d at 1263 (concluding plaintiff's evidence, including both gender-motivated conduct and conduct that merely had gender-related implications, was insufficient to defeat summary judgment of her hostile work environment claim).

----------End Footnotes---------- [*42]

For the same reason, we affirm the district court's ruling regarding the **ombudsman** privilege. It is clear that neither Colorado law nor federal law, including the decisions of this circuit, recognize an **ombudsman** privilege. Other federal courts have gone both ways on the issue. *Compare Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 793-94 (8th Cir. 1997) (concluding complaints registered with a corporate **ombudsman** office were not privileged) *with Shabazz v. Scurr*, 662 F. Supp. 90, 92 (S.D. Iowa 1987) (concluding communications received by prison **ombudsman** were privileged). We find it unnecessary to address the issue here because the district court's ruling does not affect the substantial rights of the parties. The information precluded under the privilege concerns other employees' work experiences and other employee's complaints of discriminatory conduct. It does not relate to the work environment Ms. Miller experienced nor the tangible job benefits she lost and, therefore, could not have saved her Title VII or § 1983 claims from summary judgment.

Accordingly, we **AFFIRM** the district court's discovery rulings and order granting summary judgment [*43] in favor of the University and Mr. Corbridge.

Entered by the Court:

WADE BRORBY

United States Circuit Judge

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MILLER v. REGENTS OF THE UNIV. OF COLORADO, 1999 U.S. App. LEXIS 16712

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Citation: 1999 U.S. App. LEXIS 28605

*188 F.3d 518; 1999 U.S. App. LEXIS 28605, **

JENNIFER C. MILLER, Plaintiff-Appellant, v. REGENTS OF THE UNIVERSITY OF COLORADO; JAMES CORBRIDGE, Defendants-Appellees.

No. 98-1012

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

188 F.3d 518; 1999 U.S. App. LEXIS 28605

July 19, 1999, Filed

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: (D. Colo.). (D.Ct. No. 95-S-2929).

Reported in Full-Text Format at: **1999 U.S. App. LEXIS 16712.**

OPINION: AFFIRMED.

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MILLER v. REGENTS OF THE UNIV. OF COLORADO, 188 F.3d 518

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 97-8212-CIV-GOLD
U.S. Magistrate Judge Snow

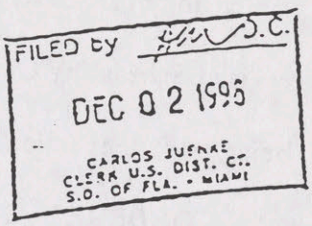
SHARON LESLIE,

Plaintiff,

vs.

UNITED TECHNOLOGIES CORPORATION d/b/a PRATT & WHITNEY, a foreign corporation,

Defendant.



OMNIBUS ORDER

BEFORE THE COURT are multiple pending motions, including the parties' Joint Motion for Extension of Discovery Cutoff [D.E. # #32 and 65], Defendant Pratt & Whitney's Motion to Supplement Its Defenses [D.E. #36], Plaintiff's Motion to Reinstate Retaliation Claims [D.E. #37], Motion for Leave to File Memorandum in Excess of 20 Pages [D.E. #54], Motion for Protective Order filed by the Offices of the Ombudsman of United Technologies Corporation and Pratt & Whitney [D.E. #55], Defendant's Motion to Strike Plaintiff's Emotional Injury Claim [D.E. #69], and [Plaintiff's] Motion for Enlargement of Time [D.E. ##98 and 104].[1] The Court addresses the respective motions as follows:

[1] The motion is entitled "Appellant's Motion for Enlargement of Time in Which to File Initial Brief." However, Plaintiff amended her motion to reflect the proper relief requested, which was an enlargement of time to respond to Defendant's Motion for Summary Judgment [D.E. #104]. Accordingly, both these motions will be addressed in tandem.

Joint Motion for Extension of Discovery Cutoff

The parties moved jointly to extend the time within which to conduct discovery. Subsequent to filing the Joint Motion for Extension of Discovery Cutoff [D.E. #32] and the Agreed Motion for Extension of Discovery Cut-Off and Dispositive Motion Cut-Off [D.E. #65], this Court entered a revised Scheduling Order which extended the dates, thereby granting the requested relief. There being no further action required by this Court concerning these matters, it is accordingly

ORDERED AND ADJUDGED that the parties' Joint Motion for Extension of Discovery Cutoff [D.E. #32] and Agreed Motion for Extension of Discovery Cut-Off and Dispositive Motion Cut-Off [D.E. #65] are hereby GRANTED *nunc pro tunc*.

Defendant Pratt & Whitney's Motion to Supplement Its Defenses

Defendant Pratt & Whitney has moved to supplement its affirmative defenses. Defendant seeks to include affirmative defenses of set-off and that the injuries of which Plaintiff complains were caused by parties other than Defendant.

Plaintiff has not filed a response to this motion. Pursuant to Rule 7.1(c) of the Local Rules for the Southern District of Florida, the Court may grant a motion by default for failure to file an opposing memorandum. Although the Court prefers to decide matters on their merits, after reviewing Defendant's argument and the relevant law, and not having been advised that Plaintiff finds Defendant's requested supplementation objectionable, the Court finds Defendant's motion should be granted. Accordingly, it is

ORDERED AND ADJUDGED that Defendant Pratt & Whitney's Motion to Supplement

F.2d at 466. An omitted claim of discrimination is reasonably related to claims included in the administrative charge if: (1) investigation of the unnamed claim could reasonably have been expected to grow out of the EEOC's investigation of the named charge; or (2) the EEOC actually investigated the unnamed claim in the course of investigating the named claim. See Mulhall v. Advance Security Inc., 19 F.3d 586, 589, n.8 (11th Cir. 1994); Evans, 696 F.2d at 928-29.

Because Plaintiff did not include her retaliation claim in her charge with the EEOC, this Court must determine whether the retaliation claim falls into one of the recognized exceptions. Plaintiff has not produced any evidence that the EEOC investigated any retaliatory conduct by Defendant. Therefore, this claim is permissible only if Defendant's retaliation could have reasonably grown out of the EEOC's investigation of the discrimination charges. However, Plaintiff's charges of racial discrimination do not refer to a retaliation claim, and other courts have found that retaliation and discrimination claims are not reasonably related. See Malarkey v. Texaco, Inc., 983 F.2d 1204, 1209 (2d Cir. 1993) (discriminatory non-promotion retaliation claim was not reasonably related to discriminatory promotion claim); Cabiness v. YKK (USA), Inc., 859 F. Supp. 582, 587 (M.D. Ga. 1994), aff'd, 98 F.3d 1354 (11th Cir. 1996) (retaliation claim not reasonably related to discriminatory termination claim). Since Plaintiff's retaliation claim is not reasonably related to her racial discrimination claim, dismissal of this claim was appropriate for her failure to exhaust administrative remedies.

Even assuming Plaintiff's retaliation claim were not barred by her failure to comply with proper administrative procedures, she could not prevail on this claim. The Eleventh Circuit has

recently ruled that the protected activity which triggers a Title VII retaliation claim is the "unlawful employment practice investigation conducted by the [EEOC] or its designated representative." Clover v. Total System Servs., Inc., 157 F.3d 824, 829 (11th Cir. 1998). Therefore, even if Defendant did retaliate against Plaintiff for verbalizing her perceptions of discriminatory conduct to Defendant, which the Court does not concede occurred, Plaintiff's retaliation claim, without more, does not violate Title VII's anti-retaliation provision. Only when the retaliation was the direct result of an employee's participation in an EEOC investigative proceeding will the anti-retaliation relief under 42 U.S.C. § 2000e-3 be available.

Therefore, in addition to Judge Ryskamp's reasoning and opinion in dismissing the retaliation claim in Count I, Plaintiff's retaliation claim must fail under the analysis set forth by the Eleventh Circuit in Clover. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's Motion to Reinstate Retaliation Claims [D.E. #37] is DENIED.

Motion for Protective Order filed by the Offices of the Ombudsman

To avoid disclosure of confidential information, counsel for the Offices of the Ombudsman of United Technologies Corporation and Pratt & Whitney sought a protective order precluding discovery of confidential information in the possession of the Ombudsman Office. Plaintiff sought this information through the deposition of Patricia Lynch, the Ombudsman for Pratt & Whitney. The Ombudsman Office also sought leave to file a memorandum in support of its motion for protective order which exceeded the twenty page limitation.

The Court is without benefit of responses by Plaintiff. As previously stated, Local Rule 7.1(c) permits the Court to grant the motions by default in the absence of opposing memoranda. However, the memorandum of law, which exceeds twenty pages, has been filed and considered by the Court. Moreover, grounds for granting the motion, other than by default, are available in the case law which addresses this issue and that which counsel for the Office of the Ombudsman has provided in its memorandum. Accordingly, it is

ORDERED AND ADJUDGED that the Motion for Leave to File Memorandum in Excess of 20 Pages [D.E. #54] is GRANTED *nunc pro tunc*. It is further

ORDERED AND ADJUDGED that the Motion for Protective Order filed by the Offices of the Ombudsman of United Technologies Corporation and Pratt & Whitney [D.E. #55] is GRANTED.

Defendant's Motion to Strike Plaintiff's Emotional Injury Claim

Defendant has moved this Court to strike Plaintiff's claims of emotional injury. Defendant's request is predicated on Plaintiff's failure to disclose pertinent discovery information, which impeded Defendant's ability to prepare its defense. Defendant contends that Plaintiff concealed the identity of a practitioner who treated Plaintiff for depression, and who provided potentially damaging evidence which would tend to contravene Plaintiff's claims that the emotional injuries caused her to become totally disabled and, that Plaintiff's failure to comply with the doctor's therapeutic protocol exacerbated Plaintiff's injuries. Defendant argues that the willful nature of this discovery violation warrants dismissal of Plaintiff's emotional injury claim.

In opposition, Plaintiff avers that the failure to disclose the identity of the physician was negligent, not willful. Plaintiff further argues that the omission was due to her severely debilitated emotional condition, and that it was harmless, since Defendant ultimately discovered the identity of the physician in time to conduct necessary discovery. Thus, Plaintiff urges that granting Defendant's motion and striking the claim would constitute an abuse of discretion.

Although the Court finds Plaintiff's reasons for the concealment of the physician's identity disingenuous, it will not grant the draconian relief of dismissing the claim at this time. In reviewing the record, Plaintiff's failure to disclose appears more willful than negligent. She failed to disclose a physician whom Plaintiff saw almost a dozen times during the pendency of this litigation, while she disclosed a doctor who saw Plaintiff on one occasion in 1995.

Rule 37 of the Federal Rules of Civil Procedure authorizes federal courts to sanction parties, and counsel, whose conduct is violative of the discovery rules. These sanctions include the striking of pleadings, as well as monetary sanctions. Nevertheless, Rule 37 instructs that such sanctions are for violating a Court order, not mere discovery requests. Since no order was entered, Rule 37 cannot provide Defendant with the relief it requests. However, Defendant will be permitted to brief the Court on the propriety of awarding its attorneys' fees and costs related to the filing of the motion to strike and those that were incurred in preparing for Dr. King's deposition in light of the alleged prejudice Plaintiff's conduct has inflicted upon Defendant's ability to properly defend itself in this action. Defendant's submission, if any, shall include legal authority which is binding on this Court and the schedule of fees and costs shall be supported by a duly verified affidavit attesting to the

reasonableness of the fees and costs. Plaintiff shall be granted an opportunity to respond to Defendant's submission.

In addition, the Court strongly admonishes Plaintiff not to conceal information concerning matters relevant to the issues raised in this action. Plaintiff is reminded that, pursuant to the Federal Rules of Civil Procedure, parties to civil proceedings are under a continuing obligation to supplement, amend, and correct prior discovery disclosures throughout the pendency of the proceedings. See Fed. R. Civ. P. 26(e). Further conduct of the sort described in Defendant's motion to strike will not be tolerated and will result in harsh sanctioning commensurate with the willfulness of the violation and the prejudicial effects realized. In light of the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Motion to Strike Plaintiff's Emotional Injury Claim [D.E. #69] is DENIED.

[Plaintiff's] Motion for Enlargement of Time

Plaintiff requested additional time to prepare her memorandum in opposition to Defendant's Motion for Summary Judgment. Initially, Plaintiff's motion was entitled "Appellants' Motion for Enlargement of Time in Which to File Initial Brief" [D.E. #98]. Recognizing her error, Plaintiff filed an Amended Motion for Enlargement of Time in Which to Respond to Defendant's Motion for Summary Judgment [D.E. #104].

Since the filing of these motions, Plaintiff has filed her memorandum in opposition to Defendant's motion for summary judgment. Therefore, it is

ORDERED AND ADJUDGED that "Appellants' Motion for Enlargement of Time in

Which to File Initial Brief' [D.E. #98] is DENIED AS MOOT. It is further

ORDERED AND ADJUDGED that Plaintiff's Amended Motion for Enlargement of Time in Which to Respond to Defendant's Motion for Summary Judgment [D.E. #104] is GRANTED *nunc pro tunc.*

DONE and ORDERED in Chambers at Miami, Florida, this 2 day of December, 1998.

ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

copies furnished:

United States Magistrate Judge Snow

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANTHONY FIORE,	:	
Plaintiff,	:	
v.	:	Civil Action No. 97-4261(JWB)
PHARMACIA & UPJOHN COMPANY and DONALD BELOTE, an Individual,	:	**OPINION**
Defendants.	:	

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Pharmacia & Upjohn and
Elizabeth Clark)

BISSELL, District Judge

This matter comes before the Court on non-party petitioners the Office of the Corporate Ombudsman (the "Office") at Pharmacia & Upjohn ("P&U" or the "Company") and the retired Corporate Ombudsman, Elizabeth Clark's ("Clark" or the "Ombudsman") appeal of the Honorable Magistrate Judge Haneke's September 3, 1998 Order. Plaintiff Anthony Fiore ("Fiore") filed suit in this Court on August 8, 1997, alleging that defendant P&U violated various common law and statutory duties by not permitting him to participate in a severance program purportedly made available to other like employees. The present motion arises out of plaintiff's desire to depose Clark, the former Ombudsman with whom plaintiff had conferred regarding his claim. On September 3, 1998, Magistrate Judge Haneke denied the Office's application for a protective order and ordered that Clark appear for and give testimony at her deposition. Petitioners presently seek to vacate the Order and protect the Ombudsman's confidential communications from a discovery subpoena and from a subpoena to testify at trial.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Plaintiff

Plaintiff was hired by The Upjohn Company, defendant P&U's predecessor company, as a sales associate in 1965 and continued to work there until his retirement in 1997. (Compl., ¶¶ 1-2). With a brief interruption, plaintiff worked as a clinical research associate ("C.R.A.") from 1981 until he retired. (Id., ¶¶ 3-7).

In or about July 1995, defendant P&U underwent a corporate merger and/or restructuring, resulting in the name change from the Upjohn Company to the Pharmacia & Upjohn Company. (Id., ¶ 10). In December 1995, defendant established the Merger Employee Transition Assistance ("META") program to facilitate the reorganization process. (Id., ¶ 14). The META program provided benefits to qualifying employees who elected to leave P&U under pre-designated terms. (Id., ¶ 15).

Although plaintiff was allegedly qualified to participate in the program and had requested on numerous occasions to "take" the META program and receive its benefits, defendant denied his entry into the program. (Id., ¶¶ 15-20). Plaintiff asserts that this denial constituted age discrimination in violation of 29 U.S.C. § 623 et seq., and the New Jersey Law Against Discrimination,

N.J.S.A. 10:15-1,[1] as well as a breach of contract and breach of the implied covenant of good faith and fair dealing.

Prior to his retirement, plaintiff had contacted Elizabeth Clark, P&U's then-Corporate Ombudsman, to discuss his META claims. Plaintiff wanted Clark to investigate his claim and to convince "management" to reconsider its denial of his request for benefits. (Fiore Aff., Aug. 21, 1998, ¶ 2). After some initial telephonic communications with Clark, plaintiff met with Clark and was informed that management would not discuss his claim and that his only remedy was to resign and to sue. (Id., ¶ 5). According to plaintiff, Clark also indicated to him that she felt that his claim had merit. (Id., ¶ 6).

II. The Office of the Corporate Ombudsman at Pharmacia & Upjohn

The Office was created by The Upjohn Company in 1968. (Clark Aff. dated Sept. 28, 1998, annexed to petitioners' brief as Exh. 1, at ¶ 4). The Office does not have the authority to make corporate policy or to decide disputes. (Id.) Elizabeth Clark was the Corporate Ombudsman in the Office at P&U, as well as The Upjohn Company, between 1986 and August 1997, when she retired. (Id., ¶ 2).

The Office is designed to be an independent and neutral body. (Id.) In addition to being organizationally separated

---

[1] Plaintiff was 55 years of age when he applied for the META program. (Compl. at 6).

from any other P&U department, like human resources or the legal department, the Office is physically separated from the other P&U offices or plant buildings. (Id., ¶¶ 7-8). Although there are other venues through which employees may relay their grievances or concerns to management, the Ombudsman's office was designed to provide a confidential alternative for employees who did not wish to go directly to their supervisor, or the Human Resources Representative, or the Chief Compliance Officer. (Id., ¶ 9).

Should an employee choose to go through the Office, he may do so anonymously. Moreover, in addition to stressing the confidential nature of the communications in the employee handbook and publications, the Office also facilitates confidentiality by: (1) being available during early morning and evening hours so that an employee need not visit during work hours; (2) providing a 24-hour pager system so that the ombudsman may be reached immediately at any time; (3) agreeing to meet with an employee at a mutually agreed-upon site near the employee's location; and (4) mailing all correspondence from the Office to the employee's home address. (Id., ¶ 11).

According to Clark, she began every new case by following a memorized "script" as to the essential elements of the relationship. (Id., ¶ 17).

> I explained to the employee that all the communications with the Office are confidential, that neither the employer nor the employee can waive the privilege of

> confidentiality; the privilege is vested with the Office. I pointed out that I would share information with specified individuals necessary to resolve the conflict or concern only with the express permission of the visitor. I also confirmed with the visitor that any matter discussed with the Ombudsman is "off the record" and does not constitute formal notice to the Company. I also explained that the Ombudsman does not make decisions with respect to an employee's status and is not in the chain of command at management level. On the contrary, the Ombudsman's authority is limited to "investigation, clarification, and recommendation."

(Id., ¶ 17). As to the Ombudsman's investigative role, Clark testified that

> I gathered information and sometimes maintained handwritten notes while matters were pending. In an employment dispute, or in a situation in which an employee perceives he/she is the recipient of unfair treatment, I encouraged direct constructive dialogue between the employee and management, coaching employees or acting as a shuttle diplomat until the parties communicated together. At other times, I investigated corporate practices or reviewed the conduct of members of management pursuant to complaints made by the employees. Such inquiries or communications, were made with [the] express consent of the employee.

(Id., ¶ 18). Finally, as to the maintaining of records, Clark testified that

> [t]he Office maintains only information essential for handling an open file, such as the Ombudsman's handwritten notes. I never accepted any original documents from employees, following a uniform practice of copying any document proffered and returning the original to the employee. Records were

> destroyed upon the termination of an employee for whatever reason. Records of active employees were destroyed routinely shortly after the case was resolved. The Ombudsman does not have any information generated within the Company that does not exist in other files within the Company. Also, the Ombudsman does not have any documents from an employee which were not in the possession of the employee at the time of the meeting.

(Id., ¶ 20).

III. Plaintiff's Subpoena for Discovery and Deposition

As noted above, plaintiff filed suit in this Court on August 8, 1997. On or about June 22, 1998, Sharan Levine,[2] independent counsel for the Corporate Ombudsman at Pharmacia & Upjohn, was notified that plaintiff was attempting to serve a discovery subpoena upon the retired Ombudsman, Elizabeth Clark. (Levin Cert. dated Sept. 28, 1998, ¶ 2). While notifying plaintiff's counsel, Angelo Garubo, that the Ombudsman did not normally testify in proceedings and that no Ombudsman files existed, Levine nevertheless agreed to accept service on behalf of Clark, if necessary. (Id., ¶¶ 4, 6).

On July 20, 1998, Levine received a discovery subpoena for Clark and on July 23, 1998, Levine received a letter from plaintiff's counsel requiring Clark's testimony. (Id., ¶¶ 7, 8, copy of letter annexed as Exh. 3).

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[2] Levine has retained the law firm of Becker, Epstein and Green to sponsor her admission pro hac vice and to act as local counsel. (Levine Cert., ¶ 16).

After plaintiff's attorneys rejected Levine's proposal to proceed with discovery pending the Ombudsman's request for relief from the subpoena, Levine wrote to Magistrate Judge Haneke to notify him of the situation and her intention to seek the Court's protection. (Id. at 12). On August 14, 1998, with the Court's permission, plaintiff submitted a letter seeking protection for Clark. (Id. at 12).

By Order dated September 3, 1998, Magistrate Judge Haneke denied Levine's request for a protective order.

On September 9, 1998, plaintiff and defense counsel called Levine to schedule the Ombudsman's deposition. (Id. at 13). Though Levine had not yet received the September 3, 1998 Order, she advised counsel that the Ombudsman intended to appeal the Order to the district court. Due to the impending discovery deadline of October 15, 1998, Levine offered to bring Clark to New Jersey if she were compelled to testify and after all other discovery had been concluded. (Id.) Defense counsel objected; plaintiff's counsel agreed to this proposal. (Id.)

ANALYSIS

I. Standard of Review

A United States Magistrate Judge has broad discretion in deciding a discovery motion. See Fed. R. Civ. P. 72(a). Such a determination may be overturned only if there is an "abuse of discretion or legal error." (Id., quoting National Gateway

Telecom, Inc. v. Aldridge, 701 F. Supp. 1104, 1119 (D.N.J. 1988), aff'd, 879 F.2d 858 (3d Cir. 1989)). Thus, the Court would have to find that Magistrate Haneke's Order violated the law or was palpably in error in order to set it aside. "This test displays considerable deference to the determination of magistrates in such matters." 7 Moore's Federal Practice ¶ 72.03(7.-3) at 72-42 (1989).

On appeal from such an order, the scope of this Court's review is narrow. Local Rule 72.1(c)(1)(A) governs appeals from non-dispositive orders of United States Magistrate Judges. It directs the Court to consider an appeal from a non-dispositive magistrate's order and set aside any portion of it found to be "clearly erroneous or contrary to law." See also 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1120 (3d Cir. 1986), cert. denied, 484 U.S. 976 (1987). A finding is "clearly erroneous" when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985); see also Republic of Philippines v. Westinghouse Elec. Corp., 132 F.R.D. 384, 387 (D.N.J. 1990) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

II. The Magistrate Judge did not Abuse His Discretion by Denying Petitioner's Application for a Protective Order

Non-party petitioner asserts that the Magistrate Judge erred by denying her request for a protective order from plaintiff's discovery subpoena and from having to testify. In support of its position, plaintiff proffers two arguments. First, plaintiff argues that the circumstances of this case warrant the Court's recognition of a common law privilege, pursuant to Fed. R. Evid. 501, of all communications made to the Corporate Ombudsman. In the alternative, petitioner asserts that Magistrate Judge Haneke should have granted the protective order under an implied contract theory. Although petitioners' arguments are somewhat persuasive, they fail to convince the Court that the Magistrate Judge's decision was an abuse of his discretion.

Perhaps most damaging to petitioner's appeal is the simple fact that there is no binding authority that would compel the Magistrate Judge to recognize an ombudsman privilege or to protect communications with a corporate ombudsman. The Court's research failed to reveal any Third Circuit or New Jersey state law cases either recognizing an ombudsman privilege or granting a protective order in order to preserve the confidentiality of communications made to an ombudsman. Although petitioner submitted an assortment of reported and unreported cases recognizing the ombudsman, privilege, See Krefesky v. Panasonic Communications and Systems, Inc., 169 F.R.D. 54 (U.S.D.J. 1996);

Roy v. United Technologies Corp., Civil Case No. 89-680 (D. Conn. 1990), the only federal circuit court to have addressed the issue flatly rejected the recognition of such a privilege. See Carman v. McDonnell Douglas Corp., 114 F.3d 790 (3d Cir. 1997). In the absence of any clear, binding authority compelling the Magistrate Judge to grant the protective order, the question then becomes whether the unique facts of this case so overwhelmingly advise the recognition of an ombudsman privilege that the Magistrate Judge's failure to do so constituted an abuse of discretion. The Court does not find the facts here to sustain that burden.

Petitioner argues that Magistrate Judge Haneke should have recognized a privilege pursuant to Fed. R. Evid. 501 for communications between employees and the Ombudsman.[3] Though not insurmountable, the burden of establishing such a privilege is a

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[3] Fed. R. Evid. 501 provides that:

> [e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

difficult one given the reluctance of courts to recognize testimonial privileges. As the Supreme Court recently noted:

> [t]he common law principles underlying the recognition of testimonial privileges can be stated simply. "'For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'"

Jaffee v. Redmond, 518 U.S. 1, 9 (1966) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting 8 John H. Wigmore, Evidence § 2192, at 64 (3d ed. 1940)). In light of the above, exceptions should be recognized only when there is a "'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting Elkins v. United States, 364 U.S. 206, 234 (1960)).

Under New Jersey law, four conditions must be present before a privilege may be recognized:

1. The communications must originate in a confidence that they will not be disclosed.

2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

3. The relation must be one which in the

opinion of the community ought to be sedulously fostered.

4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

McGuinness v. Barnes, 294 N.J. Super. 519, 523 (Law Div. 1994) (quoting 8 Wigmore Evid. Sec. 2285 (McNaughton re. 1961)).

As to the first prong, the Court is persuaded that a significant number of employees contacting the Office do so with the expectation of privacy. The Court is not persuaded, however, that confidentiality is absolutely essential to the relationship between employees and the Ombudsman. First, while those employees who wish to "whistle-blow" may very well expect and rely upon the Ombudsman's guarantee of confidentiality, the petitioner has not sufficiently established that these cases constitute the majority, or even a significant, portion of those cases that come before the Ombudsman. As described in the Management Training Course excerpt submitted, the Ombudsman's primary function is to "simply clarify the rationale for a particular decision." (See "Excerpt from Management Training Course," Plaintiff's Br., Exh. 5). If this is true, the confidentiality of communications may be less important or even irrelevant to the majority of P&U employees.

Similarly, the excerpt submitted states that the Ombudsman is authorized to investigate certain employee matters and to

advocate the employee's position to the Company "when ... there is a reasonable question about the administration of Upjohn policy or practice. (Id.) It is difficult for the Court to find that confidentiality would be expected, or even desired, in these cases, given that the employee actually hopes that the Ombudsman will advocate his or her position to the management. Indeed, plaintiff's case is a prime example of one in which absolute confidentiality is not sought and its absence, under limited circumstances, would not deter the employee's resort to the Office.

Just recently, the Eighth Circuit confronted a case very similar to the present. In Carman v. McDonnell Douglas Corp., 114 F.3d 790 (8th Cir. 1997), the plaintiff employee, who had been laid off as part of a reduction-in-force program, brought suit against his former employer for age discrimination. (Id. at 791). On appeal, one issue before the court was whether the district court erred in denying plaintiff's request for the production of documents by recognizing an "ombudsman privilege." (Id.) The Eighth Circuit concluded that under the circumstances of that case, the recognition of ombudsman privilege was not warranted. (Id. at 794-95). In the course of discussing whether the preservation of confidentiality was essential to the employee-ombudsman relationship, the court observed that:

> [e]ven without a privilege, corporate ombudsmen still have much to offer employees

> in the way of confidentiality, for they are still able to promise to keep employee communications away from management. Indeed, 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. More likely, the employee will fear that the ombudsman is biased in favor of the company, and that the ombudsman will tell management everything that the employee says. The denial of an ombudsman privilege will not affect the ombudsman's ability to convince an employee that the ombudsman is neutral, and creation of an ombudsman privilege will not help alleviate the fear that she is not.

Carman, 114 F.3d at 793-94. Further, the court noted that:

> An employee either will or will not have a meritorious complaint. If he does not and is aware that he does not, he is no more likely to share the frivolousness of his complaint with a company ombudsman than he is with a court. If he has a meritorious complaint that he would prefer not to litigate, then he will generally feel that he has nothing to hide and will be undeterred by the prospect of civil discovery from sharing the nature of his complaint with the ombudsman. The dim prospect that the employee's complaint might someday surface in an unrelated case strikes us as an unlikely deterrent. Again, it is the perception that the ombudsman is the company's investigator, a fear that does not depend upon the prospect of civil discovery, that is most likely to keep such an employee from speaking openly.

(Id. at 794). Despite petitioner's protestations, the Court finds the Eighth Circuit's analysis equally applicable to the present case as well.

Nor has petitioner convinced the Court that the third and

fourth prongs support an ombudsman privilege. As to the third prong and whether "society" would consider an ombudsman privilege worthy of being fostered, the Court finds the arguments for and against such a privilege to stand in equipoise. On one hand, society has a clear interest in the resolution of internal employment disputes without resorting to the courts and costly litigation. On the other hand, society has an equally compelling interest in the disclosure of relevant evidence, especially in cases like the present where the ombudsman may retain knowledge or information relevant to plaintiff's claim. As the Third Circuit noted:

> Testimonial privileges contravene the well-established principle that "'the public ... has a right to every man's evidence' and, therefore, 'must be strictly construed and 'accepted only to very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principles of utilizing all rational means of ascertaining the truth.'"

In re Grand Jury Investigation, 918 F.2d 374, 383 (3d Cir. 1990) (quoting Trammel v. United States, 445 U.S. 40, 46 (1989) (internal citations omitted)).

Finally, the Court finds that in balancing the interests of the respective parties, the equities weigh slightly heavier for the plaintiff. In this case, the Ombudsman informed plaintiff that although she felt his claim had merit, management was still unwilling to discuss his META claims with him. As such, it is

evident that the Ombudsman retains information relevant, if not critical, to plaintiff's claim. While it is also clear that the Office has an interest in preserving its policy of absolute confidentiality, the Court is not convinced that any harm incurred from the Ombudsman's testimony in this action outweighs either the plaintiff's interest in adequately preparing his case or the public's interest in the correct disposal of litigation.

For the reasons discussed above, the Court does not find the Magistrate Judge's decision not to recognize an ombudsman privilege to be clearly erroneous or contrary to law.

Alternatively, petitioner argues that a protective order should have been granted under an implied contract theory. According to petitioner, a protective order was required to preserve the confidentiality relied upon by the parties in three implied contracts between P&U employees and the Company, between the employees and the Ombudsman, and finally between the Company and the Ombudsman. While creative, petitioner failed to proffer a single reported case either by or within the Third Circuit, or by a New Jersey court, subscribing to such a theory as a basis for a protective order from testifying. Of those cases that petitioner does cite, all were distinguishable from the present case and none would have clearly compelled Magistrate Judge Haneke to grant the protective order.

Although petitioner has proffered arguable reasons why an

ombudsman privilege should be recognized, the scope of this Court's review is narrow. The Court may only reverse a magistrate judge's order if it was clearly erroneous or contrary to law. In this case, there is still not a single binding federal or state law case recognizing an ombudsman-employee privilege or confidentiality. Nor are petitioner's arguments so compelling as to indicate an abuse of discretion by the Magistrate Judge for failing to grant the protective order. Thus, the Court cannot conclude that Magistrate Judge Haneke acted contrary to law by denying petitioner's application for a protective order and ordering her to testify at her deposition.

CONCLUSION

For the foregoing reasons, the Court determines that Magistrate Judge Haneke did not act contrary to law by denying petitioner's application for a protective order. Accordingly, the Court denies petitioner's appeal from the Magistrate Judge's September 3, 1998 Order. The Order accompanying and reflecting this Opinion will also include a provision reopening discovery in this matter through and including September 30, 1999.

JOHN W. BISSELL
United States District Judge

DATED: July 20, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANTHONY FIORE, :

Plaintiff, :

v. :

PHARMACIA & UPJOHN COMPANY and DONALD BELOTE, an Individual, :

Defendants. :

Civil Action No. 97-4261(JWB)

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 26th day of July, 1999,

ORDERED that the appeal of non-parties The Corporate Ombudsman at Pharmacia & Upjohn and Elizabeth Clark from Magistrate Judge Haneke's September 3, 1998 Order be, and it hereby is denied; and it is further

ORDERED that discovery be, and it hereby is, reopened through and including September 30, 1999.

JOHN W. BISSELL
United States District Judge

RECYCLED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-7206-CIV-JORDAN

KEVIN SMITH,

Plaintiff,

vs.

AMERICAN EXPRESS COMPANY,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court on the following pretrial motions filed by the parties to the above captioned case. Upon review of these motions, all responses and replies thereto, the court file and applicable law, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Protective Order (D.E. 64) filed on November 16, 1999 is GRANTED. In so ruling, the Court finds that the four factors necessary for the establishment of the corporate ombudsman privilege as set forth in Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570 (E.D. Mo. 1991) have been satisfied in this case; see also Leslie v. United Technologies Corp. d/b/a Pratt & Whitney, Case No. 97-8212-CIV-GOLD (S.D. Fla. 1988) and Van Martin v. United Technologies Corp., et al., Case No. 95-8389-CIV-UNGARO-BENAGES (S.D. Fla. 1996) (granting motions for a protective order precluding the depositions of a corporate ombudsman). Accordingly, the parties are precluded from deposing Thomas Barnette concerning any confidential communications

between the Offices of the Ombudsman and any employee of American Express.

2. Defendant's Motion to Stay (D.E. 69) filed on November 22, 1999 is GRANTED consistent with this Court's Order of the same date.

3. Defendant's Motion for Enlargement of Time in Which to File Defendant's Responses Per Court Order (D.E. 77) filed on December 8, 1999 is GRANTED, nunc pro tunc. Accordingly, defendant shall have up to and including December 17, 1999 in which to file supplemental responses to Plaintiff's Interrogatories and Requests for Production.

DONE AND ORDERED in Chambers at Miami, Florida this 3, 2 day of January, 2000.

Ted E. Bandstra
United States Magistrate Judge

Copies furnished to:
Honorable Adalberto Jordan
Allen R. Tomlinson, Esq.
Charles L. Howard, Esq.
Ralph G. Patino, Esq.
Carmen Rodriquez, Esq.

RECYCLED

Re: Solorzano v. Shell Chemical Company- Case Summary on Ombudsman Issues

Procedural History

Solorzano, representing himself, filed suit in federal court in Louisiana alleging employment discrimination against Shell Chemical Company on the basis of age and national origin in violation of Title VII and the Age Discrimination and Employment Act ("ADEA"). The case was referred to a federal magistrate judge for disposition.

In the course of discovery, Solorzano sought information relating to his use of the Shell RESOLVE Program, which requires mediation of a dispute before an employee is allowed to file suit in court. Counsel for Shell objected to this request on the grounds that, "the only documents maintained with regard to Solorzano's claim under the Shell RESOLVE Program are the materials for use at the mediation of this dispute. These materials are confidential under the terms of the program."

Solorzano filed a motion to compel the production of documents and answers to interrogatories on several discovery issues, including the documents on the Shell RESOLVE Program. On this issue, Solorzano cited Carman v. McDonnell Douglas, 114 F3d 790 (8th Cir. 1997) and claimed that Shell had inappropriately asserted that the records were confidential and privileged. Shell responded to the motion to compel but did not specifically address the dispute over the Shell RESOLVE documents or the existence of an ombudsman privilege. The court denied the plaintiff's motion to compel, but the plaintiff subsequently moved for a clarification of the court's order, for sanctions against Shell, and for a court-supervised discovery conference--all of which Shell opposed. The court denied the motions for clarification and for sanctions but ordered the court-supervised discovery conference to be held

on July 6, 2000, at the court. Following that conference, the court ordered Shell to produce certain categories of documents requested by plaintiff, including the Shell RESOLVE documents, by July 20, or to file its objections or a motion for protective order by that date.

On July 20, Shell filed a supplemental response to the plaintiff's request for production of documents; and on the Shell RESOLVE issue, Shell produced a brochure, other nonconfidential material describing the Shell RESOLVE Program, and copies of TOA Code of Ethics and Standards of Practice. Shell supplemented its previous objection by stating:

> "Shell Chemical previously objected on the grounds that under the terms of the Shell Chemical RESOLVE program all files are confidential. Shell Chemical maintains that objection here. The Shell Chemical ombuds are not agents of the company. They operate as a neutral third parties, and they function under rules of confidentiality which were made known to Solorzano prior to entering into any discussion with the ombuds. Undersigned counsel does not represent the Shell Chemical RESOLVE program as that program has its own outside legal counsel. No one in Shell Chemical, other than persons working in the RESOLVE program, have access to any RESOLVE files."

Shell also moved on July 20 for a protective order on three issues, one of which related to the Shell RESOLVE Program. In addition to reiterating the basis for its objection to producing the Shell RESOLVE documents and citing to the nonconfidential documents produced by Shell, Shell's counsel stated:

> "Undersigned counsel does not represent the Shell Chemical RESOLVE program as that program has its own outside legal counsel. Shell Chemical urges this Court to review the documents produced so that the necessity of maintaining the confidentiality for the sake of the entire program be understood. Moreover, alternative dispute resolution efforts and the communications that occur therein are generally recognized to be confidential. See, e.g., 28 USC§652(d); LR 16.3.1E. Shell Chemical urges this Court to deny Solorzano's request for these communications. Alternatively, Shell Chemical would request that this Court allow the independent legal counsel for the RESOLVE program to be allowed twenty-one days to brief the issue."

Unfortunately, Shell RESOLVE and its independent counsel were not alerted to the existence to this discovery dispute until less than a week before the July 20 deadline and were

not able to review the pleadings that had been filed prior to that time or the company's motion for protective order before the motion was filed. Independent counsel, however, did confer with Shell's counsel shortly before the motion for protective order was filed, and the language requesting an opportunity for Shell RESOLVE's counsel to brief the issue was added. In addition, independent counsel for Shell RESOLVE wrote directly to the court on July 26 concurring with the claim of privilege, citing four unreported decisions recognizing the ombudsman privilege and requesting additional time to address the issues with affidavits and briefs if it would be of assistance to the court.

The court did not respond to the Shell RESOLVE request, however, and ruled on the discovery issues on August 14. After finding that Shell had not waived its claim of privilege, the court considered the issue of whether there is an ombudsman privilege. The court said that there was none.

In analyzing the issue, the court first considered whether a Louisiana statute granting confidentiality to written and oral communications in mediation should apply to the case, but rejected application of the state statute on the grounds that the federal law of privilege applies in federal court even where there are pendent state law claims. The court then turned to the question of whether there is a federal statutory or common law privilege. Notwithstanding the citation to four unreported federal district orders or opinions recognizing an ombudsman privilege given to the court in the letter of July 26, the court stated:

> "Shell has not pointed out the existence of any such legal privilege, beyond the assertion of it in the Resolve Program documents, and the Court's own research has located none. See Miller v. Regents of the Univ. of Colo., 188 F.3d 518, 1999 WL 506520, at *15 (10th Cir. July 19, 1999)(federal law does not recognize ombudsman's privilege) (unpubl. opin. avail. on Westlaw); Carmann v. McDonnell Douglas Corp., 114 F.3d 790, 795 (8th Cir. 1997)(same)."

After finding "an absence of federal law on the subject [of an ombudsman privilege]," the court considered whether the "policy of the Louisiana Mediation Act is sufficiently compelling to be applied as a matter of federal common law." The court cited Jaffe v. Redmond, 518 U.S. 1 (1996), for the proposition that creation of privileges in federal court under Fed. R. Evid. 501 is not favored and then relied principally on the Supreme Court's ruling in University of Pa. v. Equal Employment Opportunity Comm'n., 493 U.S. 182 (1990) (rejecting a "peer review" privilege under Fed. R. Evid. 501 for university tenure deliberations). The court ended this analysis with a lengthy quote from Carman. The court then ordered the company to mark "confidential" and to produce any mediation or other records of the Shell RESOLVE Program under a protective order which limited their use to this litigation.

On August 26, independent counsel for Shell RESOLVE filed a motion for reconsideration of the court's discovery order and, in light of the motion for reconsideration, tendered the documents at issue under seal solely to the court and not to the plaintiff. The court granted summary judgment for Shell on August 31, and in a footnote in the summary judgment opinion noted that the documents at issue were produced only to it under seal and were reviewed in camera and found to be immaterial to the resolution of the motion for summary judgment. The motion for reconsideration was subsequently denied.

Discussion

The magistrate judge's refusal to recognize an ombudsman privilege under Fed. R. Evid. 501 was based on an incomplete factual record before the court and on dicta from two

court of appeals decisions that are distinguishable. Moreover, the court failed to acknowledge that other district courts have recognized an ombudsman privilege, including two cases that were decided after the Eighth Circuit's decision in Carman.

Like Carman, this case was decided by the judge on an incomplete record. Counsel for Shell RESOLVE did not have an opportunity to present affidavits and brief the issue of confidentiality either under Fed. R. Evid. 501 or any alternate theory, such as an implied contract. In Carman, virtually no factual basis for the privilege was presented either to the district court or to the court of appeals. Although some general information about the program was presented in Solorzano, the Court did not have a complete record of how the program was established, how it operates or why confidentiality is so important before ruling on the ombudsman privilege issue. A more complete factual record and legal analysis would have enabled the court to distinguish the holding in Carman (which was only that the record before the court in that appeal did not establish an ombudsman privilege) and to consider the implied contract basis for confidentiality.

Moreover, in citing Miller v. Regents of The University of Colorado, 1999 U.S. App. LEXIS 16712 (10th Cir. 1999), the judge relied on even more tenuous authority. In Miller, a motion for a protective order filed by the ombudsman on the grounds of an ombudsman privilege was granted by the district court. When summary judgment was later granted for the university defendants, the plaintiff appealed and raised the issue of an ombudsman privilege. Even though the appeals court stated that neither Colorado law nor federal law recognized an ombudsman privilege, it also stated that "[w]e find it unnecessary to address the [ombudsman privilege] issue here because the district court's ruling does not effect the substantial rights of

the parties." Accordingly, any comments on the existence of an ombudsman privilege are dicta and not controlling. Finally, Miller is an unpublished decision of the Tenth Circuit, citation to which is disfavored under the Tenth Circuit's rules.

Aside from the references to Carman and Miller, the court engaged in no other analysis on the ombudsman privilege issue. Instead, much of the court's opinion focused on whether a privilege based on the policy reflected in Louisiana's Mediation Act should be recognized under federal common law. That is an issue quite separate from the ombudsman privilege issue and an adverse ruling on that issue should not be fatal to the recognition of an ombudsman privilege.

Thus, while the court's discussion in Solorzano is unfortunate, counsel should be able to distinguish it in much the same way Carman has been distinguished for being based on an incomplete factual record. At least two federal courts have recognized an ombudsman privilege since Carman was decided in cases where a complete factual record and legal analysis were presented to the court. Moreover, it is also significant that even with the court's ruling in Solorzano, confidential documents were not disclosed to the plaintiff. Solorzano does serve as a useful reminder, however, that ombuds must have their own counsel involved early in discovery disputes and that ombuds and their counsel must present both a complete factual record and a detailed legal analysis, including possible alternate grounds for preserving confidentiality, in order to prevail on confidentiality issues.

by Charles L. Howard, Shipman & Goodwin LLP
One American Row, Hartford, CT 06103-2819 Telephone: 860-251-5616

10/31/2000: 276640 v.01

RODRIGO M. SOLORZANO, SR. VERSUS SHELL CHEMICAL COMPANY
CIVIL ACTION NO. 99-2831 SECTION "L" (2)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OFLOUISIANA

2000 U.S. Dist. LEXIS 12072; 83 Fair Empl. Prac. Cas. (BNA)1481

August 14, 2000, Decided
August 14, 2000, Filed, Entered

DISPOSITION: [*1] Shell's Motion for Protective Order GRANTED IN PART AND DENIED IN PART. Plaintiff's motion to compel a more complete response to Request No. 15.23 DENIED.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant moved for a protective order in connection with three of plaintiff's document requests in an age discrimination action and plaintiff filed a reply asking for a more complete response to one production request.

OVERVIEW: In the discovery phase of his age discrimination claim, plaintiff had requested drug records of another employee, the personnel records of another employee, and any files maintained on plaintiff by an ombudsman program. Defendant sought a protective order for these documents. The court granted defendant's motion for a protective order as to the drug testing and personnel records of other employees because the other employees were not disciplined or terminated in circumstances similar to plaintiff's or in a relevant time period. Thus, the documents were irrelevant to plaintiff's claim. Defendant was not entitled to a protective order for the ombudsman program records because the records were not privileged under federal common law or state statute and the court declined to find a new privilege. Thus, defendant was ordered to produce those documents. Plaintiff's motion to compel a more complete response was denied because defendant's response that it did not have any additional documents was sufficient.

OUTCOME: Motion for protective order granted in part because drug test and personnel records of other employees were irrelevant to plaintiff's age discrimination claim and denied in part because records of ombudsman program were not privileged; motion for more complete response denied since defendant's response was sufficient.

CORE TERMS: ombudsman, state law, confidentiality, peer review, protective order, federal law, disclosure, ombudsmen, similarly situated, discovery, confidential, federal common law, disciplined, rule of decision, declining, pendent, Louisiana Mediation Act, dispute resolution, motion to compel, terminated, mediator, Employment Act, federal question, time period, tested positive, memorandum, mediation, workplace, Disabilities Act, defamation claim

CORE CONCEPTS -

Labor & Employment Law: Employee Privacy: Drug & Alcohol Testing
The drug testing records of another employee are extremely sensitive and confidential, and need be produced only if relevant in subject and time frame to the subject matter of plaintiff's action. In the employment discrimination context, such documents are relevant only if the other employee was similarly situated to the other employee and the alleged discrimination against plaintiff occurred in nearly identical circumstances to the favorable treatment afforded to the other employee. Anecdotes about other employees cannot establish that discrimination was a company's standard operating procedure unless those employees are similarly situated to the plaintiff.

Civil Procedure: Discovery or Disclosure: Relevance
Labor & Employment Law: Employee Privacy: Drug & Alcohol Testing
Relevancy of another employee's drug testing records necessarily diminishes as the time between the plaintiff's discipline for drug use, and that imposed upon a co-employee, increases. Discovery requests as to historic company

records must be tailored to encompass a reasonable time period both before and after the discriminatory event being alleged. Discovery limited to two years preceding an employee's termination has been found to be reasonable.

Civil Procedure: Discovery or Disclosure: Privileged Matters
Under Fed. R. Evid. 501, privilege questions are generally governed by common law unless otherwise required by federal law. Thus, privilege questions are governed by the federal courts' interpretation of federal common law except when state law supplies the rule of decision, in which case state law on privilege governs.

Civil Procedure: Discovery or Disclosure: Privileged Matters
Fed. R. Evid. 501 makes it clear that state privilege law will apply in diversity cases, and that federal privilege law will apply in federal question cases. However, in federal question cases where pendent state law claims have been asserted, the rule is equivocal.

Civil Procedure: Discovery or Disclosure: Privileged Matters
The weight of authority among courts that have confronted the issue of what law governs under Fed. R. Evid. 501 in the context of discovery is that the federal law of privilege governs even where the evidence sought might be relevant to pendent state law claims.

Civil Procedure: Alternative Dispute Resolution: Validity of ADR Methods
See La. Rev. Stat. Ann. § 9:4101(C)(5).

Civil Procedure: Alternative Dispute Resolution: Validity of ADR Methods
See La. Rev. Stat. Ann. § 4112(A).

Civil Procedure: Alternative Dispute Resolution: Validity of ADR Methods
See La. Rev. Stat. Ann. § 4112(B)(1).

Civil Procedure: Alternative Dispute Resolution: Validity of ADR Methods
See La. Rev. Stat. Ann. § 4112(B)(2).

Civil Procedure: Discovery or Disclosure: Privileged Matters
In the absence of federal law on the subject of whether a privilege in requested documents exists, the court may consider whether the policy of a state statute is sufficiently compelling, in light of reason and experience, to be applied as a matter of federal common law.

Civil Procedure: Discovery or Disclosure: Privileged Matters
Privileges are strongly disfavored in federal practice, and any privilege must be strictly construed since testimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence. Though Fed. R. Evid. 501 authorizes recognition of new privileges, the courts are not inclined to exercise this authority expansively.

Civil Procedure: Discovery or Disclosure: Privileged Matters
In deciding whether to recognize a new federal privilege, the court should balance the public's need for the full development of relevant facts in federal litigation against the countervailing demand for confidentiality in order to achieve the objectives underlying the privilege in issue. The balance does not often favor recognition of a new privilege unless it promotes sufficiently important interests to outweigh the need for probative evidence.

Labor & Employment Law: Employment Discrimination: Age Discrimination: State & Federal Statutes
Title VII and the Age Discrimination in Employment Act contain no privilege for ombudsmen's records. Whether the public interest would be served by an ombudsman's privilege in federal cases requires a weighing of interests more appropriate for the Congress than the courts.

Civil Procedure: Discovery or Disclosure: Privileged Matters
To justify the creation of a privilege, a defendant must first establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords. Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information.

COUNSEL: RODRIGO M SOLORZANO, SR, plaintiff, Pro se, Kenner, LA.

For SHELL CHEMICAL COMPANY, defendant: Kathleen Friel Hobson, Liskow & Lewis, New Orleans, LA.

For SHELL CHEMICAL COMPANY, defendant: L. Chris Butler, L. Chris Butler, Attorney at Law, Houston, TX.

JUDGES: JOSEPH C. WILKINSON, JR., UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: JOSEPH C. WILKINSON, JR.

OPINION: ORDER AND REASONS

Defendant, Shell Chemical Company ("Shell"), provided plaintiff, Rodrigo M. Solorzano, with supplemental responses to plaintiff's document requests, as previously ordered by the Court. Record Doc. No. 31. However, Shell filed a Motion for Protective Order in connection with three of plaintiff's document requests and provided the Court with some documents for review in camera. Record Doc. No. 37. Solorzano filed a timely Memorandum in Opposition to Shell's Motion for Protective Order. Record Doc. No. 39. He also filed a Reply to Defendant's Supplemental Responses of July 20, 2000, in which he objects to Shell's response to one of his document requests. [*2] Record Doc. No. 36. The Court construes this pleading as a motion to compel a more complete response.

Having considered the complaint, the record, the written submissions of the parties and the applicable law, IT IS ORDERED that Shell's motion is GRANTED IN PART AND DENIED IN PART, as follows. IT IS FURTHER ORDERED that plaintiff's motion to compel a more complete response to Request No. 15.23 is DENIED.

I. SHELL'S MOTION FOR PROTECTIVE ORDER

A. Request No. 15.32

Shell's motion is GRANTED as to Request No. 15.32. The drug testing records of another employee are extremely sensitive and confidential, and need be produced only if relevant in subject and time frame to the subject matter of plaintiff's action. In the employment discrimination context, such documents are relevant only if the other employee was "similarly situated" to Solorzano and the alleged discrimination against plaintiff occurred in "nearly identical" circumstances to the favorable treatment afforded to the other employee. Wyvill v. United Cos. Life Ins. Co., 212 F.3d 296, 302 (5th Cir. 2000); Krystek v. University of Miss., 164 F.3d 251, 257 (5th Cir. 1999);[*3] Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995); Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991). "Anecdotes about other employees cannot establish that discrimination was a company's standard operating procedure unless those employees are similarly situated to the plaintiff." Wyvill, 212 F.3d at 302.

Solorzano states that the other employee whose records he seeks was similarly situated because he was an hourly employee of the same "rank" as plaintiff and was subject to the same company policies. However, Shell represents in its memorandum that the other employee was disciplined six years before plaintiff. According to Shell, the other employee tested positive for drugs, was given an opportunity to undergo rehabilitation pursuant to Shell's written substance abuse policy and then was terminated in June 1992 after he tested positive for drugs a second time. By contrast, Solorzano's employment was terminated six years later after Shell determined that he had failed to cooperate with the substance abuse policy by failing to provide an unadulterated urine specimen and had falsified his consent form to[*4] the drug test by attesting that the specimen was unadulterated. Unlike the other employee, plaintiff never tested positive for drugs. These employees were not similarly situated in terms of the circumstances under which they were disciplined.

Moreover, "relevancy . . . necessarily diminishes as the time between the Plaintiff's discipline, and that imposed upon a co-employee, increases." Onwuka v. Federal Express Corp., 178 F.R.D. 508, 517 (D. Minn. 1997). Discovery requests as to historic company records must be tailored to encompass a "reasonable time period" both before and after the discriminatory event being alleged. Id. at 516-17. Discovery limited to two years preceding an employee's termination was found to be reasonable in cases cited by the Onwuka court. See id. at 517. In the instant case, five years between disciplinary incidents is not a relevant time period. Because the other employee was not disciplined or terminated in

circumstances similar to plaintiff's or in a relevant time period, evidence concerning the other employee's discipline or termination is irrelevant. 212 F.3d at 302-03.

B. Request No. 16

Shell's[*5] motion is also GRANTED as to Request No. 16. Solorzano seeks the personnel records of another employee who was disciplined by being given a one-day "Decision Making Leave" pursuant to Shell's "Positive Discipline Policy" for falsification of records in connection with performance of his job. The Court has conducted an in camera review of the employee's personnel file. Specifically, the employee was charged with falsifying an entry in a log by stating that he had changed the "screen packs" in some equipment when he had not actually done so. According to Shell's memorandum, this employee worked in a different department from Solorzano and had a different supervisor. The Decision Making Leave was given to the other employee more than five years before Solorzano was terminated. Again, under the authorities cited above, this employee was neither similarly situated to plaintiff nor disciplined in nearly identical circumstances in a relevant time period.

C. Request No. 15.8

In Request No. 15.8, plaintiff requested any files maintained on him regarding his claims under Shell's RESOLVE Program, which is an ombudsman program. Shell objects that this information is confidential and protected [*6]by an ombudsman's privilege. For the following reasons, Shell's motion is DENIED as to this document request, except that the documents must be produced subject to the protective order below.

In support of its objection to Request No. 15.8, Shell provided to plaintiff and the Court various explanatory materials about the RESOLVE Program, including the 1985 Ombudsman Association Code of Ethics and the 1995 Ombudsman Association Standards of Practice. These materials are replete with references to the neutral, third-party status of the ombudsman and the promised confidentiality of the RESOLVE Program. The materials declare that the ombudsman is not an agent of Shell and that Shell management has no access to any RESOLVE files. Under the Ombudsman Association Code and Standards of Practice, the ombudsman claims a privilege, which cannot be waived by any participant in the dispute resolution process. Independent legal counsel for the RESOLVE Program has written to the Court, advising that the Program asserts its privilege, and has requested time to brief the issues on behalf of the Program, if necessary. Record Doc. No. 38.

Solorzano asserts first that no ombudsman privilege exists under[*7] federal common law. Second, if such a privilege exists, he argues that it has been waived because Shell disclosed information from the Program to the Equal Employment Opportunity Commission ("EEOC") in connection with plaintiff's complaint before the EEOC.

Plaintiff's second argument is unavailing. It is clear from the written materials he provided to the Court that both he and Shell management representatives attended the meeting on November 25, 1997, facilitated by the ombudsman. Plaintiff's Appendix B. Because both he and Shell were present at the meeting, no confidentiality was breached when Shell reported the existence and the general tenor of the meetings to the EEOC. No substantive communications were revealed. Id.

On the other hand, plaintiff's first argument has merit. Under Fed. R. Evid. 501, privilege questions are generally governed by common law unless otherwise required by federal law. Thus, privilege questions are governed by the federal courts' interpretation of federal common law except when state law supplies the rule of decision, in which case state law on privilege governs. Fed. R. Evid. 501; Hancock v. Hobbs, 967 F.2d 462, 466 (11th Cir. 1992);[*8] Robertson v. Neuromed. Ctr., 169 F.R.D. 80, 81-82 (M.D. La. 1996); Soriano v. Treasure Chest Casino, Inc., 1996 U.S. Dist. LEXIS 19185, *4, No. 95-3945, 1996 WL 736962, at *2 (E.D. La. Dec. 23, 1996).

In the instant case, Solorzano has clearly stated claims arising out of federal anti-discrimination laws. Amended Complaint, Record Doc. No. 2. He may also have stated a defamation claim under Louisiana law. Id. PP VI(9), IX(2). Federal law provides the rule of decision on plaintiff's federal claims, while state law provides the rule of decision on his state law claim, if he has one. "Rule 501 makes it clear that state privilege law will apply in diversity cases, and that federal privilege law will apply in federal question cases. However, in federal question cases where pendent state law claims have been asserted, the rule is equivocal." In re Combustion, Inc., 161 F.R.D. 51, 53 (W.D. La. 1995), aff'd, 161

F.R.D. 54 (W.D. La. 1995) (citing Hancock, 967 F.2d at 466; Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992); American Civil Liberties Union of Miss., Inc. v. Finch, 638 F.2d 1336, 1343 (5th Cir. Unit A March 1981)).[*9]

"The weight of authority among courts that have confronted this issue in the context of discovery is that the federal law of privilege governs even where the evidence sought might be relevant to pendent state law claims." Robertson, 169 F.R.D. at 82-83 (citing Hancock, 967 F.2d 462 at 466; von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 141 (2d Cir. 1987); Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100, 104 (3d Cir. 1982); Memorial Hosp. v. Shadur, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981); In re Combustion, Inc., 161 F.R.D. at 54; Pagano v. Oroville Hosp., 145 F.R.D. 683, 687 (E.D. Cal. 1993), overruled in part on other grounds by Jaffee v. Redmond, 518 U.S. 1, 8, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996), as stated in Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1170 (C.D. Calif. 1998), aff'd, 216 F.3d 1082, 2000 WL 420636 (9th Cir. 2000)); accord Folb, 16 F. Supp. 2d at 1169; Smith v. Smith, 154 F.R.D. 661, 671 (N.D. Tex. 1994).[*10]

If state law governs privilege questions in the instant case, Louisiana has an alternative dispute resolution statute known as the Louisiana Mediation Act (the "Act") whose confidentiality terms could conceivably apply to ombudsmen. The Act defines "mediation" as "a procedure in which a mediator facilitates communication between the parties concerning the matters in dispute and explores possible solutions to promote reconciliation, understanding, and settlement." La. Rev. Stat. § 9:4101(C)(5). Although the Act is designed to apply to civil cases filed in state court after January 1, 1998, its confidentiality provision applies to "all oral and written communications and records made during mediation, whether or not conducted under this Chapter and whether before or after the institution of formal judicial proceedings." Id. § 4112(A) (emphasis added). Such communications and records "are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding." Id. Further, the "parties, counsel and other participants therein . . . are not subject to process or subpoena, issued in any judicial or administrative procedure, which requires the[*11] disclosure of any communications or records of the mediation," id. § 4112(B)(1), and the "mediator is not subject to subpoena and cannot be required to make disclosure through discovery or testimony." Id. § 4112(B)(2).

For the reasons stated by the cases cited above, I agree "that the federal law of privilege provides the rule of decision with respect to privilege issues affecting the discovery of evidence in this federal question case involving pendent state law claims." n1 In re Combustion, Inc., 161 F.R.D. 51 at 53. Accordingly, I find that the Louisiana Mediation Act, assuming it creates a privilege for ombudsmen, does not apply in this action. See Syposs v. United States, 179 F.R.D. 406, 409 (W.D.N.Y. 1998) (state's medical peer review privilege does not apply in action under Federal Tort Claims Act); Robertson, 169 F.R.D. at 82 (state's hospital peer review records privilege does not apply in case brought under Americans with Disabilities Act with pendent state law claims); King v. Conde, 121 F.R.D. 180, 187 (E.D.N.Y. 1988) (state law protecting personnel records of police officers from disclosure not[*12] applicable in federal civil rights action).

----------Footnotes----------

n1 If plaintiff has not actually stated a state law defamation claim, then the federal common law of privilege clearly applies.

----------End Footnotes----------

The Court must next consider whether any federal privilege, either statutory or common law, applies to the records that Shell seeks to protect. Shell has not pointed out the existence of any such legal privilege, beyond the assertion of it in the Resolve Program documents, and the Court's own research has located none. See Miller v. Regents of the Univ. of Colo., 188 F.3d 518, 1999 WL 506520, at *15 (10th Cir. 1999) (federal law does not recognize ombudsman's privilege) (unpubl. opin. avail. on Westlaw); Carman v. McDonnell Douglas Corp., 114 F.3d 790, 795 (8th Cir. 1997) (same).

In the absence of federal law on the subject, the Court may consider whether the policy of the Louisiana Mediation Act is sufficiently compelling, in light of reason and experience, to be applied as a matter of federal common[*13] law. Jaffee v. Redmond, 518 U.S. 1, 8, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996); Robertson, 169 F.R.D. at 84. The Supreme Court recently reaffirmed that

privileges are strongly disfavored in federal practice, and any privilege must be strictly construed since "testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" Though Rule 501 authorizes recognition of new privileges, the courts are not inclined to exercise this authority expansively

. . . .

Id. at 82 (quoting University of Pa. v. Equal Employment Opportunity Comm'n, 493 U.S. 182, 189, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990); citing American Civil Liberties Union, 638 F.2d at 1344).

In deciding whether to recognize a new federal privilege, the Court should balance "the public's need for the full development of relevant facts in federal litigation against the countervailing demand for confidentiality in order to achieve the objectives underlying the privilege in issue." The balance does not often favor recognition of a new privilege[*14] unless it "promotes sufficiently important interests to outweigh the need for probative evidence."

Syposs v. United States, 179 F.R.D. 406, 409 (W.D.N.Y. 1998) (quoting 2 J. Weinstein, M. Burger & J. McLaughlin, Weinstein's Evidence P 501[03], at 39-41; University of Pa., 493 U.S. at 189), adhered to on reconsideration, 63 F. Supp. 2d 301, 302 (W.D.N.Y. 1999).

Certainly the Louisiana Mediation Act addresses issues in the relations between mediators and their clients and in the confidentiality of their communications and records that the Louisiana legislature has deemed worthy of protection. However, Title VII and the Age Discrimination in Employment Act, under which Solorzano brings his federal claims, are broadly remedial statutes, which set forth an integrated, multi-step enforcement procedure designed to be initiated by laymen. University of Pa., 493 U.S. at 190; E.E.O.C. v. Commercial Office Prods. Co., 486 U.S. 107, 123-24, 100 L. Ed. 2d 96, 108 S. Ct. 1666 (1988); Williams v. CIGNA Fin. Advisors Inc., 197 F.3d 752, 761 (5th Cir. 1999). The Supreme Court, in declining[*15] to create a privilege for educational peer review materials in Title VII cases, found it significant that Congress "[did] not carve out any special privilege [in Title VII] relating to peer review materials." University of Pa., 493 U.S. at 191. By the same token, Title VII and the Age Discrimination in Employment Act contain no privilege for ombudsmen's records. "Whether the public interest would be served by [an ombudsman's] privilege in federal cases requires a weighing of interests more appropriate for the Congress than the courts." Syposs, 179 F.R.D. at 409.

This Court, like many others, is reluctant to find a new privilege that may undermine the federal interests at stake in plaintiff's claims brought under federal law. See University of Pa., 493 U.S. at 189 (declining to create privilege against disclosure of peer review materials in Title VII case); United States v. One Parcel of Prop., 930 F.2d 139, 141 (2d Cir. 1991) (state law protecting disclosure of erased arrest records not recognized as federal privilege); Pickett v. Woodland Heights Gen'l Hosp., 1997 U.S. Dist. LEXIS 10009, No. 9:96-175(TH), 1997 WL 394822,[*16] at *2 (E.D. Tex. June 18, 1997) (peer review privilege inapplicable in antitrust case); Robertson, 169 F.R.D. at 83 (when Congress recognized substantial costs of disability discrimination and made its elimination a matter of substantial governmental interest through the Americans with Disabilities Act, court would not create peer review privilege); Smith, 154 F.R.D. at 675 (declining to recognize federal mediator's privilege in RICO, securities fraud and common law fraud case despite existence of such privilege under Texas law); Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 830 F. Supp. 80, 81 (D.P.R. 1993) (refusing to apply state law accountant-client privilege); Pagano, 145 F.R.D. at 689-90, 695 (declining to recognize state law physician-patient and medical peer review privileges); Swarthmore Radiation Oncology, Inc. v. Lapes, 1993 U.S. Dist. LEXIS 17555, No. 92-3055, 1993 WL 517722, at *3 (E.D. Pa. Dec. 1, 1993) (policies reflected in state peer review statute incompatible with federal interest in fair competition embodied in antitrust laws).

The Eighth Circuit in Carmann appears to be the only appellate[*17] court to have considered whether to create a federal ombudsman's privilege. n2 The Court's reasons for rejecting the proposed privilege are persuasive.

. . . . We agree that fair and efficient alternative dispute resolution techniques benefit society and are worthy of encouragement. To the extent that corporate ombudsmen successfully resolve disputes in a fair and efficient manner, they are a welcome and helpful addition to a society that is weary of lawsuits.

Nonetheless, far more is required to justify the creation of a new evidentiary privilege. First, [defendant] 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. . . .

Second, [defendant] has failed to make a compelling argument that most of the advantages afforded by the ombudsman method would be lost without the privilege. Even without a privilege, corporate ombudsmen still have much to offer employees [*18] in the way of confidentiality, for they are still able to promise to keep employee communications confidential from management. . . . The denial of an ombudsman privilege will not affect the ombudsman's ability to convince an employee that the ombudsman is neutral, and creation of an ombudsman privilege will not help alleviate the fear that she is not. . . .

. . . . To justify the creation of a privilege, [defendant] must first establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords. Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information.

Id. at 793-94. The Eighth Circuit found that the "strong presumption" had not been overcome in that case brought under the Age Discrimination in Employment Act, the Employee Retirement Income Security Act and state antidiscrimination law.

----------Footnotes----------

n2 In Carmann, as in the instant case,

the term "ombudsman" refers to an employee outside of the corporate chain of command whose job is to investigate and mediate workplace disputes. The corporate ombudsman is paid by the corporation and lacks the structural independence that characterizes government ombudsmen in some countries and states, where the office of ombudsman is a separate branch of government that handles disputes between citizens and government agencies. Nonetheless, the corporate ombudsman purports to be an independent and neutral party who promises strict confidentiality to all employees and is bound by the Code of Ethics of the Corporate Ombudsman Association, which requires the ombudsman to keep communications confidential.

Id. at 792-93.

----------End Footnotes----------
[*19]

I am particularly reluctant to recognize such a privilege as a matter of federal common law when a narrowly drawn protective order of the type included later herein, short of recognition of a broad-ranging privilege, will suffice to accommodate any need for confidentiality of the records that might be responsive to plaintiff's discovery request.

Accordingly, IT IS ORDERED that Shell must produce documents responsive to Request No. 15.8 within ten days of entry of this order, subject to the following protective order. All files maintained on Solorzano regarding his claims under Shell's RESOLVE Program produced in accordance with this order must be marked and kept confidential and used only for purposes of this litigation and must not be disclosed to any one except parties to this litigation, the parties' counsel and experts retained in connection with this litigation. All persons to whom such information is disclosed must sign an affidavit that must be filed into the record, agreeing to the terms of the protective order and submitting to the jurisdiction of this Court for enforcement of those terms. If any party seeks to add other terms to this protective order, counsel must [*20]confer immediately and submit by motion any proposed protective order.

II. PLAINTIFF'S MOTION TO COMPEL A MORE COMPLETE RESPONSE TO REQUEST NO. 15.23

In its supplemental response to plaintiff's Request No. 15.23, requesting minutes of meetings of the Shell Taft Plant Redesign Implementation Team, Shell states that it has previously produced some documents and that an additional

search revealed no other documents. Solorzano states that he "has a problem with this answer" because "he finds it unusual that a key Taft team left no documentation," and he asks that he be permitted to conduct his own search. Record Doc. No. 36, P7. The Court construes this as a motion to compel a more complete response.

Plaintiff's motion to compel is DENIED. Shell cannot produce what it does not have. Its response is sufficient.

New Orleans, Louisiana, this 14th day of August, 2000.

JOSEPH C. WILKINSON, JR.

UNITED STATES MAGISTRATE JUDGE

RECYCLED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
NOV - 9 2000
ROBERT D DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST OF OKLA.
BY _____ DEPUTY

JANIE SUE ROUSE, et al.,

Plaintiffs,

v.

HALLIBURTON ENERGY SERVICES, INC. a corporation,

Defendant.

Case No. CIV-99-1030-A

DOCKETED

REPORT AND RECOMMENDATION

The Office of the Dispute Resolution Program ("ODRP"), a non-party, has filed a motion seeking a protective order. *See* Motion for Protective Order (Aug. 4, 2000) ("Motion"). The Plaintiffs have responded and this matter is at issue. *See* Plaintiffs' Response to the Motion for Protective Order of the Non-Party Dispute Resolution Program (Sept. 29, 2000) ("Response"). The presiding district judge has referred the matter for a report and recommendation. The undersigned recommends that the presiding district judge deny the Motion.

I. BACKGROUND

A. The Halliburton Dispute Resolution Program

In 1997, the Defendant implemented the Halliburton Dispute Resolution Program ("HDRP"). In January 1998, the Defendant informed all of its United States employees that they must accept the terms of the HDRP in order to continue their employment. These terms

prevent Halliburton employees from filing lawsuits involving employment disputes, requiring resolution of such disputes through the HDRP.

The HDRP creates four options for the resolution of employee disputes. These options include two "internal" options (an "Open Door Policy" and the "Conference") and two "external" options ("Mediation" and "Arbitration"). *See* Brief in Support of Non-Party DRP's Motion for Protective Order at p. 8 (Aug. 4, 2000) ("ODRP Brief"). The Defendant employs ombudsmen as part of the HDRP to provide "informal, neutral and confidential assistance" to employees using the HDRP's internal options. *See id.* The HDRP requires these ombudsmen to maintain strict confidence regarding any information received from Halliburton employees.

B. Procedural History

The Plaintiffs are former employees of the Defendant, claiming terminations in violation of federal and Oklahoma law.[1] *See* Original Complaint (July 19, 1999). According to the Plaintiffs, the Defendants formed the HDRP to deceive employees. *See id.* at pp. 7-13. The Plaintiffs asked the Court to declare the HDRP invalid and to allow remedies for the terminations which fell outside of the program. *See id.* at pp. 12-13.

The Defendant moved for dismissal of the Plaintiffs' declaratory claims involving the HDRP. *See* Defendant Halliburton Energy Services, Inc.'s Motion for Partial Dismissal Pursuant to Rule 12(B)(6) of the Federal Rules of Civil Procedure and Brief in Support (Dec.

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[1] The federal statutes include: (1) the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34; (2) the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461; and (3) the Family and Medical Leave Act, 29 U.S.C. 29 U.S.C. §§ 2601-54.

17, 1999). The Defendant also sought enforcement of the HDRP's provisions requiring arbitration of all disputes. *See* Defendant Halliburton Energy Services, Inc.'s Motion to Compel Arbitration and to Dismiss or Stay Proceedings in this Court Pending Such Arbitration and Brief in Support Thereof (Dec. 17, 1999). The Court granted the Defendant's motion to dismiss with respect to the Plaintiffs' claims for declaratory relief, but granted the Plaintiffs leave to amend. *See* Order at pp. 4-14 (Feb. 9, 2000) (Alley, J.). The Court deferred consideration of the Defendant's motion to compel arbitration. *See id.* at p. 14.

The Plaintiffs amended their complaint, adding claims that the HDRP was illegal and fraudulent. *See* Corrected Second Amended Complaint at pp. 27-29 (Feb. 28, 2000) ("Corrected Second Amended Complaint"). The Plaintiffs also alleged that the HDRP was not used as confidential means to resolve disputes. *See id.* According to the Plaintiffs, once an employee spoke with an HDRP ombudsman about an employment dispute, the ombudsman would disclose the contents of the communication. *See id.* As a result, the Plaintiffs alleged that the HDRP involved a process in which the Defendant would identify "trouble maker" employees and retaliate through adverse employment decisions. *See id.*

The Defendant moved to dismiss these fraud claims pursuant to Fed. R. Civ. P. 12(b)(6). *See* Defendant Halliburton Energy Services, Inc.'s Motion for Partial Dismissal of Plaintiffs' Corrected Second Amended Complaint and Brief in Support (Mar. 13, 2000). The Court denied the Defendant's motion, holding that the Plaintiffs had stated viable claims

of actual and constructive fraud with respect to the HDRP. *See* Order at pp. 2-9 (May 24, 2000) (Alley, J.).

The Plaintiffs served discovery requests on the Defendant. In these requests, the Plaintiffs sought information involving the HDRP. *See* Plaintiff's First Set of Interrogatories at pp. 5-7 Nos. 3, 7, 13-14 (served June 15, 2000) (attached as Exhibit 1 to Motion); Plaintiff's First Request for Production of Documents at pp. 6-9 Nos. 1-2, 11-14, 19 (served June 15, 2000) (attached as Exhibit 1 to Motion). Moreover, the Plaintiffs requested materials prepared and maintained by HDRP ombudsmen. Subsequently, the ODRP sought a protective order, and the Defendant joined in the Motion.[2]

II. CONSIDERATION OF THE MOTION

The movants argue that the Motion should be granted on three grounds. First, they contend that this Court should recognize an ombudsman privilege. *See* ODRP Brief at pp. 14-26. Second, the movants argue that the HDRP contractually mandates the confidentiality of communications and materials involving employee complaints made to the HDRP. *See* ODRP Brief at pp. 27-28. Third, the movants claim that the employee contracts incorporate statutes requiring confidentiality of the communications and materials. *See id.* at pp. 28-30. The Court should reject all of these arguments for purposes of the present motion.

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[2] The Plaintiffs contend that the Motion is procedurally flawed on three grounds: (1) It is premature; (2) the ODRP lacks capacity to obtain the requested relief; and (3) the Defendant's attempt to join the Motion was ineffective. *See* Response at pp. 3-8. The undersigned recommends denial of the Motion on separate grounds. *See infra* pp. 4-18. Therefore, the Court need not consider the Plaintiffs' procedural challenges to the Motion.

A. The Ombudsman Privilege

The ODRP and the Defendant contend that this Court should recognize an ombudsman privilege. Their argument embodies two more specific contentions: (1) Recognition of this privilege is consistent with Rule 501 of the Federal Rules of Evidence and decisional law; and (2) the elements for the privilege are present. The Plaintiffs counter that this Court should not recognize the ombudsman privilege based on the lack of support in the federal law. The undersigned agrees with the Plaintiffs.

1. Rule 501 of the Federal Rules of Evidence

Rule 501 of the Federal Rules of Evidence provides the general rule regarding privileges. *See* Fed. R. Evid. 501. Rule 501 provides in part that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.* The rule also provides that in civil actions, when the element of a claim or defense is determined by state law, privileges "shall be determined in accordance with State law." *Id.* Therefore, Rule 501 merely provides the starting point to determine the availability of a privilege. Contrary to the Defendant's suggestion, the rule itself does not support the creation of an ombudsman privilege.

The Court should apply Rule 501 to determine whether state or federal law governs the broader issue of whether an ombudsman privilege exists. The Plaintiffs have invoked federal question jurisdiction and federal law supplies the rule of decision for many of their claims. *See* Corrected Second Amended Complaint at pp. 3, 12-25. However, the Plaintiffs

also raise pendent claims arising under state law. *See id.* at pp. 23, 26-29. The information sought by the Plaintiffs could bear on all of the claims, which implicate both federal and state law. *See* Plaintiff's First Set of Interrogatories at pp. 5-7 Nos. 3, 7, 13-14 (served June 15, 2000) (attached as Exhibit 1 to Motion); Plaintiff's First Request for Production of Documents at pp. 6-9 Nos. 1-2, 11-14, 19 (served June 15, 2000) (attached as Exhibit 1 to Motion). In such situations, courts have consistently held that privilege issues are governed by federal law. *See, e.g., Bulow v. Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982); *see also Hinsdale v. City of Liberal*, 961 F. Supp. 1490, 1493-96 (D. Kan.) (noting that all circuits that have directly addressed this issue have held that the federal law of privilege governs discoverability in federal question cases even when the requested evidence bears on state law claims), *aff'd*, 981 F. Supp. 1378 (D. Kan. 1997). Therefore, this Court should apply the federal law of privilege to determine the availability of an ombudsman privilege "in the light of reason and experience." Fed. R. Evid. 501.

2. Decisional Law Relating to the Ombudsman Privilege

The movants argue that decisional law supports recognition of an ombudsman privilege. In support, the movants cite *Jaffee v. Redmond*, 518 U.S. 1 (1996) and several cases from other jurisdictions, most of which are unpublished. The Plaintiffs deny that these authorities support recognition of the asserted privilege. The undersigned agrees with the Plaintiffs.

a. Consideration of *Jaffee v. Redmond*, 518 U.S. 1 (1996)

In *Jaffee*, the United States Supreme Court considered whether it should recognize a privilege protecting confidential communications between a psychotherapist and her patient. *See Jaffee v. Redmond*, 518 U.S. 1, 9-18 (1996). Applying federal privilege law, the Supreme Court underscored the general rule that evidentiary privileges are disfavored in light of the presumption favoring the disclosure of relevant information. *See id.* at 9. With this vantage point, the Supreme Court considered whether the privilege "'promote[d] sufficiently important interests to outweigh the need for probative evidence.'" *See id.* at 9-10 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

In recognizing the privilege, the Court concluded that a psychotherapist privilege promoted sufficiently important interests to outweigh the need for probative evidence. *See id.* at pp. 9-18. However, the Supreme Court also noted that new privileges must be developed on a case-by-case basis. *See id.* at 18. Therefore, although *Jaffee* acknowledges the potential for new privileges, it does not directly support recognition of an ombudsman privilege.

b. Consideration of Other Decisional Law

The Tenth Circuit Court of Appeals has stated that federal law, "including the decisions of this circuit," do not "recognize an ombudsman privilege." *Miller v. Regents of the University of Colorado*, 188 F.3d 518, 1999 WL 506520, Westlaw op. at 15 (10th Cir.

July 19, 1999) (unpublished op.). This decision is persuasive,[3] weighing heavily against recognition of the ombudsman privilege here. *See infra* p. 11 & note 7.

The movants cite nine district court opinions and two state court opinions in support of their position that federal law supports recognition of an ombudsman privilege.[4] *See* ODRP Brief at pp. 17-19. These authorities are neither controlling nor persuasive. *Cf.* Comment, *Corporate Ombudsmen and Privileged Communications: Should Employee Communications to Corporate Ombudsmen Be Entitled to Privilege?*, 61 U. Cin. L. Rev. 653, 654 (1992) ("The few courts to grant privilege for ombudsman communications have explicitly limited their holding to the facts of those cases.").

The movants primarily rely on *Roy v. United Technologies Corp.*, Case No. H-89-680 (D. Conn. May 29, 1990). In *Roy*, United States District Judge Jose Cabranes considered whether an ombudsman privilege should be recognized. Judge Cabranes applied four factors developed by Professor Wigmore to determine whether such a privilege should be recognized. These factors included the following: (1) the 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; and (4) the injury to the relationship caused by

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[3] *See* Tenth Cir. R. 36.3(B).

[4] These cases are identified and discussed below. *See infra* pp. 8-12.

the disclosure must outweigh the benefit from the correct disposition of the litigation.[5] *See* Transcript at pp. 24-25, *Roy v. United Technologies Corp.*, Case No. H-89-680 (D. Conn. May 29, 1990) (citing *In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983)).

Judge Cabranes considered these factors and decided to recognize an ombudsman privilege. *See* Transcript at pp. 25-27, *Roy v. United Technologies Corp.*, Case No. H-89-680 (D. Conn. May 29, 1990). In concluding that the fourth element had been met, Judge Cabranes noted:

> I find that the ombudsman's office's clearly-demonstrated interest in the confidentiality of communications with it have been met by little or no showing of an interest by plaintiff.
>
> . . . .
>
> [B]ecause plaintiff makes no claim that the ombudsman's conduct was discriminatory or otherwise illegal, any relevant information obtained from the confidential communications would be information from branches or about branches or departments of UTC other than the ombudsman's office.
>
> In the absence of any showing, or even specific claim, by plaintiff that he cannot obtain that information more directly from other sources, plaintiff's interest in discovering this information is minimal and is dwarfed by movant's demonstrated interest in preserving confidentiality.

Id. at pp. 26-27.

Roy is not binding here. Moreover, *Roy* is not persuasive for two reasons. First, the Plaintiffs claim in part that the HDRP is illegal and was formed to perpetrate a fraud. *See supra* p. 3. In addition, the Plaintiffs contend that HDRP ombudsmen reveal purported

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[5] The movants argue that the asserted privilege satisfies these four elements which provides an independent basis for this Court to recognize an ombudsman privilege. *See* ODRP Brief at pp. 21-27. This contention is discussed below. *See infra* pp. 15-16.

confidential communications concerning employment disputes, which allowed the Defendant to identify problem employees and retaliate against them. *See id.* The Plaintiffs also state that the requested information is unavailable from other sources and is the most important evidence with respect to the claims involving the HDRP. *See* Response at p. 3. The decision to recognize an ombudsman privilege in *Roy* was based in part on the absence of these factors. *See supra* pp. 9-10. Therefore, *Roy* is distinguishable.

Second, the decision in *Roy* was expressly limited to its facts, including the unique provisions of the ombudsman's program before the court. Judge Cabranes qualified his decision by stating:

> I am making my ruling this afternoon based on the specific facts of this case - in particular, based upon the characteristics of the ombudsman's office at UTC, and I do not wish to have my decision misconstrued in the future as having created a novel privilege or standing for any broad proposition.

Transcript at p. 24, *Roy v. United Technologies Corp.*, Case No. H-89-680 (D. Conn. May 29, 1990). Therefore, the movants' reliance on *Roy* is misguided.

The other decisions cited by the movants are equally unpersuasive. One of the two published federal cases cited by the movants is *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987). In *Shabazz*, the court recognized an ombudsman privilege. *See* 662 F. Supp. at 91-94. However, the court based its ruling on an Iowa statute that established such a privilege.

See id. Oklahoma has no comparable statute.[6] Therefore, *Shabazz* is not applicable or persuasive.

The only other published federal case cited by the movants is *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991), *rev'd on other grounds*, 990 F.2d 1051 (8th Cir. 1993). In *Kientzy*, the court applied the factors and reasoning employed in *Roy* and recognized an ombudsman privilege. *See id.* at 572-74. Moreover, the court noted that the facts were similar to those in *Roy*. *See id.* As discussed above, *Roy* is not persuasive here. In addition, the Eighth Circuit Court of Appeals has rejected *Kientzy*, refusing to recognize an ombudsman privilege. *See Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 793-95 (8th Cir. 1997) (reversing the district court's recognition of an ombudsman privilege and noting that "[w]e do not find the reasoning of [*Kientzy*] convincing").

The movants also rely on *Miller v. Regents of the University of Colorado*, Case No. 95-S-2929, slip op. at 3 (D.C. Colo. July 2, 1996) (unpublished op.). However, following the magistrate judge's opinion cited by the movants, the Tenth Circuit of Appeals rejected the existence of an ombudsman privilege under federal law. *See supra* pp. 7-8. Thus, the movants' reliance on the magistrate judge's decision in *Miller* is misplaced.[7]

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[6] The ODRP states that Oklahoma recognizes a mediation privilege. *See* ODRP Brief at pp. 29-30. However, this privilege would not apply to information about employee disputes preceding and post-dating the actual mediation. *See* Okla. Stat. tit. 12, § 1805(A) & (C).

[7] The ODRP contends that the magistrate judge's order remains "good law" because the Tenth Circuit did not address the applicability of an ombudsman privilege. *See* Reply Brief in Support of Non-Party DRP's Motion for Protective Order at p. 6 (Oct. 13, 2000). This argument is plainly invalid. The ODRP acknowledges that the Tenth Circuit affirmed on other grounds. *See* ODRP Brief at p. 18 As noted above, the Tenth Circuit stated that federal law does not recognize an ombudsman

The ODRP and the Defendant also rely on three other unpublished cases in the Southern District of Florida. These decisions either rest on the reasoning in *Kientzy* or involve the identical ombudsman's program before the court in *Roy*. *See* ODRP Brief at p. 18 (citing *Smith v. American Express Co.*, Case No. 98-7206 (S.D. Fla. Jan. 3, 2000) (unpublished op.); *Leslie v. United Technologies Corp.*, Case No. 97-8212 (S.D. Fla. Dec. 2, 1998) (unpublished op.); *Martin v. United Technologies Corp.*, Case No. 95-8389 (S.D. Fla. July 17, 1996) (unpublished op.)). For the reasons stated above, these authorities are not persuasive. *See supra* pp. 8-11.

The movants also base their argument on decisions resting on state law grounds or involving an unopposed motion for a protective order. *See, e.g., Garstang v. Superior Court of Los Angeles County*, 39 Cal. App. 4th 526, 533-36 (Cal. Ct. App. 1995) (recognizing an ombudsman privilege based upon a provision in the California Constitution); *Kozlowski v The Upjohn Co.*, Case No. 94-5431 (Macomb Co., Mich. Cir. Ct. Aug. 18, 1995) (unpublished op.) (concluding that an ombudsman privilege existed in an action brought under state law); *McMillan v. The Upjohn Co.*, Case No. 1:92:CV:826 (W.D. Mich. Mar. 14, 1995) (unpublished op.) (noting that the petitioner's motion for a protective order based on an ombudsman privilege was not opposed). Therefore, these authorities are not persuasive.

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privilege. *See supra* pp 7-8. Under these circumstances, the magistrate judge's order provides no support for the Motion. *Cf. Negron v. Caleb Brett U.S.A., Inc.*, 212 F.3d 666, 670 n.2 (1st Cir. 2000) (declining to express view on the validity of a district court's holding which had been affirmed on other grounds in an unpublished decision).

In contrast, *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997), is persuasive. In *Carman*, an employee sued his former employer, claiming that his termination violated the ADEA, ERISA and state law. During discovery, the plaintiff requested documents from his former employer's ombudsman concerning himself and other employees regarding layoffs. The defendant refused to produce such documents, in part based on confidentiality of the requested materials and an ombudsman privilege. The defendant, relying on *Kientzy*, claimed that the confidentiality of the requested material was essential to preservation of the employee-ombudsman relationship. The defendant also argued that confidentiality was essential to enable employees to communicate with ombudsmen without the fear of retaliation.

The plaintiff moved to compel production of the documents. The district court denied the plaintiff's request for production, holding that the documents were protected by an ombudsman privilege.

In reversing the district court, the Eighth Circuit Court of Appeals refused to recognize an ombudsman privilege.[8] *See id.* at 792-95. The appeals court first noted that privileges are neither favored nor lightly created and that a strong presumption exists for disclosure of all relevant information. *See id.* at 793. The court applied the standard reaffirmed by the United States Supreme Court in *Jaffee* and noted:

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[8] The ombudsman program in *Carman* was substantially similar to the HDRP. *See* ODRP Brief at pp. 3-11, *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 792-93 (8th Cir. 1997).

> To justify the creation of a privilege [the defendant] must first establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords. Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information.

Id. at 794.

In concluding that the defendant had failed to make such a showing, the appeals court stated:

> [The defendant] has failed to make a compelling argument that most of the advantages afforded by the ombudsman method would be lost without the privilege. Even without a privilege, corporate ombudsmen still have much to offer employees in the way of confidentiality, for they are still able to promise to keep employee communications confidential from management. Indeed, 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. More likely, the employee will fear that the . . . ombudsman will tell management everything that the employee says. The denial of an ombudsman privilege will not affect the ombudsman's ability to convince an employee that the ombudsman is neutral, and creation of an ombudsman privilege will not help alleviate the fear that she is not.
>
> We are especially unconvinced that "no present or future [McDonnell Douglas] employee could feel comfortable in airing his or her disputes with the Ombudsman because of the specter of discovery." An employee either will or will not have a meritorious complaint. If he does not and is aware that he does not, he is no more likely to share the frivolousness of his complaint with a company ombudsman than he is with a court. If he has a meritorious complaint that he would prefer not to litigate, then he will generally feel that he has nothing to hide and will be undeterred by the prospect of civil discovery from sharing the nature of his complaint with the ombudsman. The dim prospect that the employee's complaint might someday surface in an unrelated case strikes us as an unlikely deterrent.

Id. at 793-94 (citations omitted).

An ombudsman privilege is not supported by any controlling state or federal law. *Carman* appears to be the only published federal appellate decision that has directly addressed the merits of an ombudsman privilege. This decision is persuasive, particularly in light of the Tenth Circuit's statement in *Miller* that federal law does not recognize an ombudsman privilege. *See Solorzano v. Shell Chemical Company*, 2000 WL 1145766, Westlaw op. at 5-6 (E.D. La. Aug. 14, 2000) (applying *Carman* and declining to recognize an ombudsman privilege). *Miller* and *Carman* weigh heavily against recognition of an ombudsman privilege here, when the plaintiffs have directly challenged the legality of the program.

3. Consideration of the Four Elements

The ODRP and the Defendant also argue that this Court should recognize an ombudsman privilege based on satisfaction of the elements in *Roy* and its progeny. *See* ODRP Brief at pp. 21-27. As discussed above, these factors include: (1) the 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;[9] (3) the relationship

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[9] The ODRP argues that confidentiality is essential to maintenance of the ombudsman program. *See* ODRP Brief at pp 21-22. One commentator recently disagreed, stating that limited disclosure may enhance the ombud process. She stated:

> Although such unbridled disclosures should not be countenanced, providing the ombudsperson with limited discretion to disclose confidential information to specific high-ranking officers or directors when absolutely necessary, while protecting as much as possible the identity of the individuals involved, may provide the ombudsperson with the ability to produce a just result and effect structural or systems change. Obviously, permission to disclose confidential information is preferable, and a trusted, skilled ombudsperson is well-positioned to obtain such permission. But in

should be one that society considers worthy of being fostered; (4) the injury to the relationship incurred by the disclosure must outweigh the benefit gained from the correct disposition of the litigation. *See supra* pp. 8-9.

The movants do not explain why this Court should adopt this four-element test over the standard announced in *Jaffee*. *See supra* p. 7. However, even if the Court were to apply these elements and conclude that the movants have satisfied the first three, they have not done so for the fourth element. As discussed above, some of the Plaintiffs' allegations directly involve the legality, operation and function of the HDRP. *See supra* p. 3. The Plaintiffs also claim that the requested information is unavailable from other sources and involves "the most important evidence available" with respect to the legality of the HDRP. *See* Response at pp. 2-3. Accordingly, the benefit to the Plaintiffs from disclosure would outweigh any harm from disclosure.[10]

> rare instances, the ombudsperson should be authorized to make limited disclosure even without permission taking care to withhold information which would reveal party identities.

Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 Ohio St. J. on Disp. Resol. 95, 138-39 (1996). The Court need not decide the importance of confidentiality to the ombuds program

[10] The ODRP and the Defendant, citing *Jaffee*, argue that this Court should ignore the facts of this case and instead weigh the overall benefits of recognizing the privilege against the general benefits of compelling disclosure. *See* ODRP Brief at p. 26. However, the movants rely on some authorities, which were decided on the specific facts before the court. *See supra* pp. 8-12. In addition, although *Jaffee* cautions that courts should not undergo a balancing test with respect to the psychotherapist privilege, it does not hold that courts should create blanket privileges without considering the facts of each case. Indeed, the Supreme Court noted that "we do not doubt that there are situations in which the privilege must give way" and "it is neither necessary nor feasible to delineate [the psychotherapist's privilege] in a way that would 'govern all conceivable future questions in this area.'" *Jaffee v. Redmond*, 518 U.S. 1, 18 & n.19 (1996) (citations omitted)

B. The Contract Between the Plaintiffs and the Defendant

The movants also argues that this Court should recognize an ombudsman privilege based on the contract between the Defendant and the Plaintiffs. *See* ODRP Brief at pp. 27-28. The movants contend that this Court has already concluded that when the Plaintiffs chose to continue their employment with the Defendant, they accepted the terms of the HDRP. *See id.* at p. 27 (citing Order (Feb. 9, 2000) (Alley, J.)). The movants claim that "[a] necessary corollary of this ruling is that all employees, including plaintiffs, are bound by the well-publicized condition of confidentiality that defines the [H]DRP."[11] ODRP Brief at pp. 27-28. This argument is incorrect.

Following this Court's Order of February 9, 2000, cited by the movants, the presiding district judge denied the Defendant's motion to dismiss the Plaintiffs' fraud claims. *See* Order at pp. 2-9 (May 24, 2000) (Alley, J.). In this order, Judge Alley noted that the Plaintiffs had amended their claims to include allegations that the HDRP was invalid on grounds of fraud. *See id.* at p. 6. Judge Alley also noted that the HDRP, which included an

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Nonetheless, when viewing the propriety of an ombudsman privilege, the Court finds that the factors favoring disclosure outweigh any benefit from the asserted privilege. *See supra* pp. 15-16.

In the alternative, the movants argue that under the facts of this case, the Court should recognize an ombudsman privilege. *See* ODRP Brief at pp. 26-27. However, as noted above, the benefit of disclosure to the Plaintiffs outweighs any harm relating to the HDRP. *See supra* pp. 15-16. Accordingly, under either approach, the Court should not recognize the asserted privilege here.

[11] The movants also cite *Roy* in support of their claim that the contracts between the Defendant and the Plaintiffs mandate confidentiality. This reliance on *Roy* is misguided. As noted above, the *Roy* claimants did not challenge the legality of the ombudsman program, as the Plaintiffs have done in the present case. *See supra* pp. 9-10. As a result, *Roy* does not support the movants' argument.

agreement to arbitrate all employment disputes, implicated state law principles governing contracts. *See id.* Oklahoma law recognizes both actual and constructive fraud, either of which will render a contract unenforceable. *See id.* at pp. 6-9. Therefore, Judge Alley held that the Plaintiffs had stated a fraud claim that survived the Defendant's motion to dismiss. *See id.* at p. 9.

The import of Judge Alley's ruling is that the Plaintiffs might be able to demonstrate fraudulent inducement of the Plaintiffs to accept the terms of the HDRP. The requested protective order would effectively prevent the Plaintiffs from pursuing a legal theory which Judge Alley has already upheld on a motion to dismiss. Accordingly, the Court cannot conclude as a matter of law that the Plaintiffs are bound by the confidentiality provisions of the HDRP. Under Judge Alley's ruling on the motion to dismiss, this issue appears to create an issue of fact.

C. Statutory Provisions Incorporated Into the HDRP

The movants contend that the HDRP incorporated statutes providing that any communications involving a Halliburton employee and ODRP staff remain confidential. *See* ODRP Brief at pp. 28-29; *see also* Tex. Civ. Prac. & Rem. §§ 154.053, 154.073. As discussed above, the validity of the confidentiality provisions creates a factual issue. *See supra* pp. 17-18. This Court cannot resolve that factual issue under the guise of a protective order, which would prevent the Plaintiffs from pursuing discovery on their challenge to the confidentiality provisions.

III. OTHER ISSUES RAISED BY THE PARTIES

The parties have raised several other issues. For example, the Plaintiffs have outlined proposed terms for an agreed protective order that they contend would preserve the confidentiality of the requested materials. *See* Response at p. 12. The Defendant argues that it has produced much of the information sought by the Plaintiffs,[12] claiming that this Court should not order it to produce other requested materials. *See* Defendant Halliburton Energy Services, Inc.'s Reply to Plaintiffs' Response to the Motion for Protective Order of the Non-Party Dispute Resolution Program at pp. 3-4 (Oct. 13, 2000).

The court record indicates that the Defendant has objected to the Plaintiffs' discovery requests. The Plaintiffs have not filed a motion to compel. Accordingly, none of the remaining issues raised by the parties is properly before the Court.[13] *Cf.* Fed. R. Civ. P. 26(c) (stating that upon denial of a motion for a protective order, the court may order compliance with discovery requests).

IV. RECOMMENDATION

For the reasons discussed above, the undersigned recommends denial of the "Motion for Protective Order" (Doc. No. 67). The Court should not assess attorney fees or costs against the ODRP or the Defendant because the motion was substantially justified. *See* Fed. R. Civ. P. 26(c), 37(a)(4).

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[12] The Plaintiffs state that they have not served the ODRP with a subpoena. *See* Response at pp. 4-5.

[13] The Court need not decide whether any of the requested information should be redacted. The movants have sought a blanket order preventing access to any information relating to the HDRP.

V. NOTICE OF RIGHT TO OBJECT

Any party may file written objections to this report and recommendation. For an objection to be considered, it must be filed with the Clerk of the United States District Court by November 29, 2000. *See* 28 U.S.C.A. § 636(b)(1); W.D. Okla. LCvR 72.1(a). If a party does not file written objections by November 29, 2000, he will waive any right to appellate review over the recommended ruling. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

VI. STATUS OF THE REFERRAL

This report and recommendation terminates the referral.

ENTERED this 9th day of November, 2000.

Robert E. Bacharach

ROBERT E. BACHARACH
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
NOV 29 2000
ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY _____ DEPUTY

JANIE SUE ROUSE, DONALD E. BAILEY, and WILLIAM PTOMEY, on their own behalf and on behalf of other similar situated persons,	)	
Plaintiffs,	)	Case No. CIV-99-1030-A
v.	)	
HALLIBURTON ENERGY SERVICES, INC.,	)	
Defendant.	)	

OBJECTIONS OF NON-PARTY HALLIBURTON DISPUTE RESOLUTION PROGRAM TO RECOMMENDED RULING OF MAGISTRATE JUDGE BACHARACH

INTRODUCTION

Plaintiffs are three former employees of defendant Halliburton Energy Services, Inc., ("HES") who claim that their employment was terminated in violation of federal and state law. In their Corrected Second Amended Complaint, plaintiffs allege that the Halliburton Dispute Resolution Program ("HDRP") was illegal and fraudulent.

Plaintiffs served discovery requests on defendant seeking, among other things, the identity of all persons who have used the HDRP and all records of all communications with the HDRP. See Plaintiffs' Interrogatory Nos. 3, 7, 13, and 14 and Requests to Produce Nos. 2, 11, 12, and 19. Defendant produced a substantial amount of statistical and nonconfidential information in response to these discovery requests but objected to disclosing information that has been considered privileged and confidential under the HDRP, including information that is only available from the Office of the Dispute Resolution Program ("ODRP") and not otherwise available to management or anyone outside of the HDRP. Because the ODRP was created under

a plan as an independent and confidential office, independent counsel for the ODRP moved for a protective order to limit such disclosure.

On November 9, 2000, Magistrate Judge Bacharach issued a recommended ruling that this Court deny the HDRP's Motion For Protective Order. The recommended ruling concludes that an ombudsman's privilege is not supported by federal precedent and that plaintiffs may pursue the requested discovery to establish their claim that the HDRP "was formed to perpetrate a fraud." Report and Recommendation ("Report") at 9.

The ODRP objects to Magistrate Judge Bacharach's recommended ruling on the following grounds: (1) it erroneously relies on two federal appeals court cases to conclude that there is no ombudsman privilege; (2) it fails to properly consider the well established Wigmore test to determine whether a privilege should be recognized and disregards the factual record before this Court; and (3) it fails to consider statutory provisions which require confidentiality and nondisclosure of much of the information sought by plaintiffs. Moreover, additional facts obtained through depositions of the plaintiffs--and not available for consideration by the Magistrate Judge--compel rejection of the Magistrate Judge's recommended ruling because plaintiffs have not demonstrated even a prima facie case of fraud and the information they seek from the ODRP would not be responsive to their claims of fraud.

Finally, in the alternative, in light of the significant interests at stake in the HDRP which has been used by over 4,600 employees, the ODRP requests that the Court either defer ruling on the present motion while permitting other nonconfidential discovery to be completed to ascertain whether plaintiffs can demonstrate that they have a prima facie case of fraud, or to permit the discovery of confidential and privileged information to proceed only if the Court concludes that

plaintiffs have made a prima facie showing of fraud and an in camera review of the information and documents establishes that they are relevant to plaintiffs' fraud claims.

ARGUMENT

1. The Magistrate Judge Erroneously Relied On Two Appeals Court Cases To Conclude That There Is No Ombudsman Privilege.

The recommended ruling concludes that there is no ombudsman privilege by relying heavily on language from Miller v. Regents of the University of Colorado, 188 F.3d 518, 1999 WL 506520 (10th Cir. 1999), and Carman v. McDonnell Douglas, 114 F.3d 790 (8th Cir. 1997). Neither of these decisions is persuasive authority for the nonrecognition of such a privilege here.

The Magistrate Judge repeatedly cites Miller for the proposition that federal law "do[es] not 'recognize an ombudsman privilege.'" Report at 7, 15, quoting Miller, 1999 WL 506520 at *15. The Report continues, "[t]his decision is persuasive, weighing heavily against recognition of the ombudsman privilege here." Id. at 8.[1] However, Miller contains no holding with regard to the existence of an ombudsman privilege. The Tenth Circuit's passing reference to the privilege is nothing more than dictum, as the Court concluded that the plaintiff's discovery requests were inappropriate for other reasons and expressly refused to reach the issue of privilege. 1999 WL 506520 at *15.[2]

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[1] It should also be noted that Miller is an unpublished decision, citation to which is disfavored under the Tenth Circuit's rules, and is not binding precedent except under narrow circumstances not present here. Tenth Cir. R. 36.3(B) should not apply to justify citation to this opinion because the factual and procedural disparities between that case and this one do not give Miller "persuasive value."

[2] The entirety of the Tenth Circuit's analysis of the privilege issue was as follows:

> [W]e affirm the district court's ruling regarding the ombudsman privilege. It is clear that neither Colorado law nor federal law, including the decisions of this court, recognize an ombudsman privilege. Other federal courts have gone both ways on the issue. Compare Carman v. McDonnell Douglas Corp., 114 F.3d 790,

The Miller court's dicta on the ombudsman privilege rests squarely on the Eighth Circuit's decision in Carman. See n.2 supra. But much of the opinion in Carman is also dicta because the Carman court had no factual record before it and held only that "[t]his record does not convince us that we should [recognize an ombudsman privilege]." 114 F.3d at 794. Since it is beyond dispute that a party asserting a privilege has the burden of demonstrating entitlement to it, Carman was probably correctly decided. The statements of the court there, however, cannot be imported here, where there is a complete factual record that refutes the unsupported assumptions by the Eighth Circuit panel that decided Carman.[3]

In light of the absence of any factual record in Carman, the conclusion of the Magistrate Judge that "[t]he ombudsman program in Carman was substantially similar to the HDRP" (Report at 13 n. 8) is erroneous. To the contrary, the affidavit of Janet Hill and other exhibits in the record before this Court fully describe the nature of the HDRP, including the program's

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> 793-94 (8th Cir. 1997) (concluding complaints registered with a corporate ombudsman office were not privileged) with Shabazz v. Scurr, 662 F. Supp. 90, 92 (S.D. Iowa 1987) (concluding communications received by prison ombudsman were privileged). We find it unnecessary to address the issue here because the district court's ruling does not affect the substantial rights of the parties. . . .

1999 WL 506520 at *15 (emphasis added). Of course, as noted in the ODRP's initial brief, there are a substantial number of federal decisions in which discovery requests served on an ombudsman have been denied because of an ombudsman privilege. See, e.g., Smith v. American Express Co., No. 98-7206 (S.D. Fla. Jan. 3, 2000); Leslie v. United Technologies Corp., No. 97-8212 (S.D. Fla. Dec. 2, 1998); Martin v. United Technologies Corp., No. 95-8389 (S. D. Fla. July 17, 1996); Roy v. United Technologies Corp., No. H-89-680 (D. Conn. May 29, 1990).

[3] Similarly, in Solarzano v. Shell Chemical Co., 2000 WL 1145766 (E.D. La. Aug. 14, 2000), cited in the Magistrate's Report at 15, the magistrate judge there also did not have the benefit of a complete record regarding the defendant's dispute resolution program when it addressed the ombudsman privilege and also relied on Miller and Carman. The magistrate judge, however, noted in his decision granting summary judgment to Shell that the disputed documents were produced to it under seal and that the court had reviewed them in camera before finding them to be immaterial to the summary judgment motion. Order and Reasons at 2, n.2. (Copy attached as Exhibit A.)

extensive precautions to ensure confidentiality, the importance of confidentiality as a defining characteristic of the program, and the benefits that the program creates for employees of HES. These facts vitiate reliance on either Carman or Miller and make this case far more similar to the ombudsman program considered by Judge Cabranes in Roy v. United Technologies Corp., Civil No. H-89-680 (JAC) (D. Conn. May 29, 1999) (Exh. 2 to Brief in Support of Non-Party DRP's Motion For Protective Order ("HDRP's Brief") at pp. 25-26), the seminal decision recognizing the ombudsman privilege. At the very least, these facts warrant undertaking the time-honored analysis set forth by Professor Wigmore to determine whether a privilege should be recognized.

2. The Magistrate Judge Did Not Properly Apply The Wigmore Test To Determine The Existence Of The Ombudsman Privilege.

Although the Magistrate Judge acknowledged the four-part Wigmore test for determining the existence of a privilege (Report at 8-9, 15-16), he truncated the analysis, and by relying on plaintiffs' claim that information from the ODRP was "'[t]he most important evidence available'" and "unavailable from other sources" (Report, at 16) concluded that "the benefit to the Plaintiffs would outweigh any harm from disclosure." Id. His analysis should not be adopted because: (1) it fails to consider the other elements of the Wigmore test, including both the benefits of the HDRP to society and the defendant, as well as the injury to important societal interests and the defendant from such compelled disclosure; (2) it fails to take into account evidence developed since the filing of the motion for a protective order--and not available to the magistrate judge--that bears directly on plaintiffs' fraud claims; and (3) it considers as a part of the Wigmore test analysis the plaintiffs' fraud claims, whereas a proper analysis requires consideration of whether an ombudsman privilege exists apart from a specific claim of fraud and then, if a privilege is

recognized, evaluates whether the fraud claim is an exception to any such privilege, much as courts have done in connection with the crime-fraud exception to the attorney-client privilege.

a. The Magistrate Judge Failed To Analyze All Four Prongs Of The Wigmore Test.

After observing that the ODRP failed to explain why the Wigmore test should be used rather than that articulated in Jaffee v. Redmond, 518 U.S. 1 (1996),[4] the Magistrate Judge stated that even if "the movants have satisfied the first three [elements of the Wigmore test], they have not done so for the fourth element." Report at 16. By so truncating the analysis of the first three elements, the Magistrate Judge shortchanged the considerations relevant to the fourth element.

The affidavit of Janet Hill and related exhibits irrefutably establish that communications with the HDRP have been made in the belief that they will not be disclosed and that this confidentiality is both required by the plan documents and is essential to the operation of the HDRP.[5] The factual record also demonstrates that the HDRP serves both important societal and company-wide interests by fostering informal dispute resolution and by assisting the company to comply with the United States Sentencing Guidelines. For a major international corporation with

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[4] The Wigmore test is arguably more rigorous than that used by the Supreme Court in Jaffee since the Supreme Court refused to do a balancing analysis specific to the facts before it in that case. See HDRP Brief at 15-16. An ombudsman privilege should be recognized, however, under either analysis.

[5] As Janet Hill states in her affidavit:

> The assurance of confidentiality is one of the ways that the DRP encourages employees to come forward with their concerns, issues, and disputes. . . . In most cases, [employees] are very concerned about the confidentiality of the program and want to be certain that the DRP does indeed offer them a "safe" environment to vent, complain or raise an issue with the Ombudsman. . . . The assurance of confidentiality is also critical to the Ombudsman's ability to obtain assistance at all levels of the organization to resolve an employee's issue.

Hill Aff. ¶23.

over 100,000 employees worldwide, these are extremely important considerations. If this Court were to allow discovery of the confidential information of the HDRP, Halliburton would likely be subjected to similar requests for disclosure by others. Such a result would destroy the program and undermine the trust that has grown over the several years of the program's operation, which is reflected in the thousands of inquiries to the HDRP that have been confidentially maintained. See Hill Aff. ¶¶ 33. These are the interests that hang in the balance against compelled disclosure, but the Magistrate Judge does not appear to have accorded them weight.[6]

Instead, the Court relied on secondary sources, see Report, n. 9 at 15-16 and Report at 8, to conclude that confidentiality is not essential to an ombudsman program. Yet, these sources are both outdated and not reflective of the specific facts before this Court. And, while the Magistrate Judge stated that movants urged ignoring the specific facts of this case, Report at 16, n.10, just the opposite is true. Movants have asserted that, based on the facts of this case, the overall prejudice to the HDRP from disclosure outweighs any prejudice from nondisclosure. This is especially true in light of plaintiffs' failure to otherwise develop even a prima facie case of fraud and the possibility that, even if a privilege were recognized, some limited disclosure could be available to plaintiffs if they were able to do so. See Argument 2(c), infra.

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[6] A thorough analysis of the Wigmore test is particularly important here because an adverse ruling on the ODRP's motion may also cast doubt on the confidentiality of ombudsman programs at other major international corporations, where the ombudsman privilege has previously been upheld. See cases cited at note 2, supra.

b. Recently Developed Evidence Refutes Plaintiffs' Fraud Claim And Must Be Considered In Any Balancing Test.

Properly considered, the four elements of the Wigmore test therefore weigh heavily in favor of the recognition of an ombudsman's privilege here. The additional information recently developed in discovery regarding the plaintiffs' claim of fraud--information that was not available to the Magistrate Judge--further strengthens that conclusion. The Magistrate Judge relied in large measure on plaintiffs' claims that the HDRP is a fraudulent enterprise, i.e., that "HDRP ombudsmen reveal purported confidential communications regarding employment disputes, which allowed the Defendants to identify problem employees and retaliate against them." Report at 9-10. Yet, plaintiffs' deposition testimony reveals that they lack any evidence to support this claim of fraud.[7]

Two of the three plaintiffs, William Ptomey and Donald E. Bailey, testified that they had had no contact with the DRP, much less any information that the program was operated unlawfully. At his deposition, Ptomey testified that he had had no contact with the DRP during his employment with HES apart from attending a meeting at which the nature of the program was explained to him. Deposition of William Ptomey at 11. Ptomey testified that he had never lodged a complaint against the DRP (id. at 12), never interacted with anyone who had used the DRP (id. at 14), had no personal knowledge of any breach of confidentiality associated with the DRP (id. at 14-15), and had never been told by anyone of a breach of confidentiality by the DRP (id. at 15). Ptomey also acknowledged that, since he never used the DRP, he clearly had never been retaliated against for participating in the program. Id. at 23.

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[7] See Defendant Halliburton Energy Services, Inc.'s Objections to Magistrate Bacharach's Report and Recommendation and the attached excerpts of the deposition transcripts of plaintiffs.

Plaintiff Donald E. Bailey also testified that he had had "no specific dealings" with the DRP and therefore had no information that he had been defrauded by the program. Deposition of Donald E. Bailey at 16. He stated that he had never tried to make any contact with the DRP (id.) and was not aware of any instance in which a person associated with the DRP had breached an assurance of confidentiality (id. at 28). Bailey testified that he did not believe that he had been defrauded in any way by the activities of the DRP. Id. at 43-44.

Plaintiff Janie Sue Rouse, the only one of the three plaintiffs who actually contacted the DRP, testified that she had had only two brief telephone conversations with DRP employees, during which she indicated that she wished to talk with someone "about discrimination." Deposition of Janie Sue Rouse at 48-50. She stated, however, that no one had ever called her back. Id. Following her termination, Rouse worked briefly at a temporary position. Id. at 54-55. She contends that a Halliburton employee told her that the supervisor of this temporary position did not want her working at his facility "because of – something to do with the dispute resolution and of a complaint that I had filed." Id. at 54. Rouse had finished her temporary position at that time, however, and she was unable to identify any specific job opening that she was denied because of alleged retaliation. Id. at 54, 60-61. Further, although Rouse contended in interrogatory responses that the HDRP had breached the promise of confidentiality with regard to three other employees, she testified at her deposition that she had no knowledge of any breach of confidentiality as to these persons. Id. at 75, 76, and 92.

Taken as a whole, this evidence falls woefully short of supporting plaintiffs' claims that the HDRP is a fraudulent enterprise that has been used systematically to identify "troublemaker" employees who are then subjected to retaliatory job actions. See Report at 3. The testimony of plaintiffs, moreover, bears directly on the analysis under the Wigmore test. With no other

evidence to demonstrate why the HDRP information is so critical to their claims, the record of their nonuse, relatively little connection with, and lack of knowledge of the HDRP must be weighed against the significant impact that compelled disclosure would have on the program for both the defendant and the thousands of other employees who have benefited by its use. With consideration of the plaintiffs' testimony, the analysis of the Wigmore factors should lead to recognition of the ombudsman privilege.

c. Plaintiffs' Fraud Claims Are More Properly Considered In Determining Whether There Should Be An Exception To The Ombudsman Privilege.

The Wigmore test is not novel; and while a proper application of the Wigmore test based on the uncontroverted facts before this Court leads to recognition of an ombudsman privilege, plaintiffs are not without a remedy to obtain information relevant to legitimate claims of fraud. Indeed, there is an established body of analogous law that provides a procedure for balancing the interests protected by a privilege while also providing a mechanism for piercing that privilege where it has been fraudulently used. The standards and procedures for asserting a crime-fraud exception to the attorney-client privilege are equally applicable in this context and provide a means for discovery of information that would be relevant to legitimate fraud claims.

Under the crime-fraud exception to the attorney-client privilege, a party seeking to pierce the privilege "must present prima facie evidence that the allegation of attorney participation in crime or fraud has some foundation in fact." Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995). If the Court, in the exercise of its discretion, determines that this prima facie showing has been made, it may conduct an in camera review of the information at issue "but only if a party requesting such a review makes a showing of a factual basis adequate to support a good faith belief by a reasonable person that in camera review of the documents may reveal

evidence to establish that the crime-fraud exception applies." Id., citing United States v. Zolin, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed 2d 469 (1989). Such a test preserves the important policies underlying the privilege but prevents the privilege from being used to bar discovery of evidence where the threshold prima facie showing has been met. The ODRP urges that these standards and procedures be applied in the present case.

Plaintiffs have failed, however, to meet the threshold requirement of a prima facie showing. Their deposition testimony reveals that they have no factual basis for their claims of fraud. At most, they may have identified an isolated case of breach of the confidentiality provisions of the HDRP. This falls short of the required showing. See also In Re Grand Jury Subpoena (Jane Roe and John Doe), 144 F.3d 653, 660 (10th Cir. 1998) ("substantial and competent" evidence required to establish prima facie case for crime-fraud exception to the attorney-client privilege).

Even if plaintiffs had made the required showing, however, the information in the ODRP is not likely to assist plaintiffs to prove their claim that the HDRP was illegally and fraudulently created. Documents relating to the creation of the program have already been produced by defendant and are neither confidential nor solely in the hands of the ODRP. The most that the ODRP could add is records of external mediations and arbitrations both completed and pending and notes of ombudsman communications where the matter is still under discussion (and so no external mediation or arbitration has been sought) or where a case has been closed since September, 2000. All other ombudsman communications were destroyed routinely, as provided in the HDRP.[8] Since plaintiffs have not been employed by defendant

[8] See Reply Brief in Support of Non-Party DRP's Motion For Protective Order, Exh. 3.

since 1998 and never actually used the external mediation or arbitration provisions of the HDRP, none of these records would relate to them or reach back in time to be relevant to their fraud theories.

Under these circumstances, the Court should recognize the ombudsman privilege and grant the motion for a protective order since plaintiffs have not made a prima facie showing of a fraud exception to the privilege. If the Court is not inclined to grant the motion for a protective order on the present factual record, the ODRP urges the Court to defer ruling on it while plaintiffs engage in discovery of nonconfidential information in order to be given an opportunity to make a prima facie showing. And finally, the ODRP urges the Court to conduct an in camera review (either itself or by special master) of the information in dispute if a prima facie showing is made to determine whether it establishes fraud before ordering any disclosure to plaintiffs.[9]

3. The Magistrate Judge Failed To Consider Texas And Oklahoma Statutes That Independently Bar Disclosure Of Materials Relating To The HDRP.

As described in ODRP's initial brief (at 28-30), the Dispute Resolution Plan and Rules in effect during plaintiffs' employment incorporate confidentiality provisions contained in Texas and Oklahoma statutes that protect communications made in the course of alternative dispute resolution proceedings from disclosure. See Tex. Civ. Prac. & Rem. §§ 154.053, 154.073; 12 O.S. § 1805 (OSLM 1999). The Magistrate Judge failed to consider the effect of these state statutes as an independent body of law that supports the issuance of a protective order.

Section 154.053 of the Texas Civil Code provides that a "person appointed to facilitate an alternative dispute resolution procedure . . . shall at all times maintain confidentiality with

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[9] Further, an in camera review is precisely the procedure required by Texas law to resolve questions of confidentiality regarding materials created during a dispute resolution proceeding. See Tex. Civ. Prac. & Rem. §§ 154.073. Exh. G to Hill Aff.

respect to communications relating to the subject matter of the dispute" and that, unless the parties agree otherwise, "all matters" relating to such procedures "are confidential and may never be disclosed to anyone." Ex. G to Hill Aff. Section 154.073 of the Texas Code provides that "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential [and] is not subject to disclosure. . . ." Id. Oklahoma's civil statute confers confidential status on any communications relating to a mediation, providing that "[a]ny information received by a mediator or a person employed to assist a mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential." 12 O.S. § 1805 (OSLN 1999).

The Magistrate Judge considered these statutory provisions only as part of the contract of employment between plaintiffs and HES, noting that "[a]s discussed above, the validity of the confidentiality provisions creates a factual issue." Report at 18.[10] Although the ODRP has asserted that the requirements of these statutes are incorporated by reference in the HDRP, these statutes nevertheless remain an independent source of law governing applicable dispute resolution communications. As such, they operate independent of any contractual provision to support the issuance of a protective order here. As a matter of state law, all Texas employees of HES are entitled to broad protection against disclosure of any communications or information relating to a complaint they submitted to the HDRP. Similarly, Oklahoma employees are entitled to protection from disclosure of any information or materials relating to the mediation of their claims. Since the Magistrate Judge did not address this issue, his recommended ruling should

not be accepted. Accordingly, even in the absence of an ombudsman privilege, any disclosure should be limited to information or documents not protected by state law and, at a minimum, a protective order should be issued to safeguard such materials.

CONCLUSION

For the foregoing reasons, the DRP respectfully requests that the Court grant its motion for a protective order.

Respectfully submitted,

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[10] Of course, given the absence of any colorable evidence of fraud, the Magistrate Judge's conclusion that plaintiffs are entitled to pursue discovery to establish that they were fraudulently induced to accept the terms of the HDRP is questionable.

Certificate of Service

This is to certify that on this 29th day of November, 2000, that a copy of the foregoing Objections of Halliburton Dispute Resolution Program to Recommended Ruling of Magistrate Judge Bacharach was mailed, postage prepaid, to:

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED
JAN 17 2001
ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY _____ DEPUTY

JANET SUE ROUSE, et al.,

Plaintiffs,

v.

HALLIBURTON ENERGY SERVICES, INC.,

Defendant.

No. CIV-99-1030-A

DOCKETED

ORDER

This matter is before the Court for review of the Report and Recommendation of United States Magistrate Judge Robert E. Bacharach issued November 9, 2000. Defendant Halliburton Energy Services, Inc. and non-party Halliburton's Office of Dispute Resolution Program (ODRP) have timely objected, and at the Court's request, plaintiffs have responded. For reasons that follow, the Court adopts Judge Bacharach's Report and Recommendation.

Although numerous arguments are presented, a single issue is raised by the objections: Whether the Court should recognize a new evidentiary privilege – an ombudsman's privilege – to shield from discovery records maintained by ODRP. This issue arises from ODRP's Motion for Protective Order, in which defendant has joined. The motion concerns discovery requests served on defendant by plaintiffs that seek the discovery of information and documents maintained by ODRP. Judge Bacharach recommends the rejection of an ombudsman's privilege under the circumstances and, thus, denial of the motion.

Standard of Decision

As a preliminary matter, the Court must determine the proper standard of decision for the issue presented. Plaintiffs correctly state that the discovery dispute was referred to Judge Bacharach under 28 U.S.C. § 636(b)(1)(A), which anticipates that the magistrate will make a ruling that is subject to modification by the Court only if shown to be clearly erroneous or contrary to law. *See id.*; Fed. R. Civ. P. 72(a). However, the referral order also stated that the matter was referred for "Report and Recommendation" (Order of Aug. 11, 2000), as ordinarily is done under 28 U.S.C. § 636(b)(1)(B). Accordingly, Judge Bacharach issued a report rather than an order. Under § 636(b)(1)(B), the timely filing of objections to a report triggers a duty of the Court to make a de novo determination. *See id.*, Fed. R. Civ. P. 72(b). In this instance, however, the two statutes mandate the same standard of review – de novo – because the issue presented is a legal one. The only difference is that § 636(b)(1)(B) permits the consideration of additional evidence that was not presented to the magistrate. Both objectors argue that deposition testimony given after ODRP's motion was filed weighs in favor of recognizing the asserted privilege. As explained below, however, the Court finds that this evidence plays no part in resolving the privilege question.

In federal court, evidentiary privileges generally are governed by Fed. R. Evid. 501. This rule mandates the application of a federal common law of privileges, except "in civil actions and proceedings, with respect to a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law." Fed. R. Evid. 501. Judge Bacharach determines that the Court should apply federal law here

because plaintiffs' complaint asserts both federal and state law claims and the information sought by plaintiffs "could bear on all the claims." (Report & Recom. at 6.) The Court agrees that federal law should apply, but it reaches this conclusion for different reasons.

This case essentially has been bifurcated into two phases. Before plaintiffs' claims for relief under federal and state employment laws can be litigated, the Court must decide whether they are subject to arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-16. As the parties have framed the issue, the arbitrability of plaintiffs' claims depends solely on the validity of Halliburton's Dispute Resolution Program (DRP). In an effort to invalidate the program, plaintiffs have filed a declaratory judgment action, which, following the Court's rulings on dismissal motions, involves only claims of fraud in defendant's inducing plaintiffs to accept the program. (Order of May 24, 2000, at 9.) The current trial setting and discovery are limited only to these fraud claims, for which the Court has looked to state law (namely, Oklahoma law) to supply the rules of decision. (Order or May 24, 2000, at 6-7.) State law applies to the substantive issues before the Court, however, only as provided by the Federal Arbitration Act, 9 U.S.C. § 2, and to the extent that state law does not conflict with federal arbitration law.[1]

"The effect of [§ 2 of the Act] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 24 (1983). "[S]tate law may be applied 'if that law arose

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[1] Section 2 declares written arbitration agreements to "be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2.

to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)). "Courts may not, however, invalidate arbitrate agreements under state laws applicable only to arbitration provisions." *Id.* at 687; *see also Southland Corp. v. Keating*, 465 U.S. 1, 16 & n.11 (1984) (federal law preempts a state law that "undercut[s] the enforceability of arbitration agreements"). In the Court's view, because the substantive issues underlying the present discovery dispute are governed by federal arbitration law, which simply incorporates general state law principles, the controversy is primarily governed by federal law, and federal law also should determine the privilege of a witness or person from whom information relevant to the issues is sought. Accordingly, the Court will apply federal law to decide the question whether to recognize an ombudsman privilege.[2]

Discussion

ODRP first challenges Judge Bacharach's reliance on two appellate court decisions as persuasive authority for not recognizing an ombudsman privilege, *Miller v. Regents of Univ. of Colo.*, No. 98-1012, 1999 WL 506520 (10th Cir. July 19, 1999), and *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997). ODRP argues that statements in these opinions concerning the privilege are merely dicta and that the factual record in this

[2] Moreover, a choice of law problem arises only if federal and state laws dictate different answers to the privilege question. "If such a conflict on the privilege exists, then an analytical solution must be worked out to accommodate the conflicting policies embodied in the state and federal privilege law." *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1369 (10th Cir. 1997). As explained below, the Court is unconvinced that either federal or relevant state law supports an ombudsman privilege, so no conflict in privilege rules is presented. *Id.*

case distinguishes the DRP from the ombudsman program in *Carman*. (Obj'n Non-Party Halliburton Dispute Resolution Program to Recom. Ruling [hereafter, ODRP Obj'n] at 3-4.)

The Court agrees with ODRP that *Miller* contains no answer, or suggested resolution, to the question whether a new privilege for ombudsmen should be recognized. The court of appeals found "it unnecessary to address the issue" because the district court's order denying the plaintiff access to information under the privilege did not affect the outcome of the case and so would not warrant reversal; the district court had properly entered judgment against the plaintiff on employment discrimination claims and the protected information "could not have saved her . . . claims from summary judgment." *Miller*, 1999 WL 506520 at **15. The court of appeals simply acknowledged that it had not previously recognized an ombudsmen privilege and that "[o]ther federal courts have gone both ways on the issue." *Id.*

The Court disagrees with ODRP's position, however, that *Carman* lacks persuasive value. The Eight Circuit squarely addressed in that case the question whether to recognize a new evidentiary privilege for corporate ombudsmen and expressly rejected the privilege. ODRP seeks to distinguish *Carman* on factual grounds. This effort, however, focuses not on differences between the ombudsmen programs in the two cases, but on statements by the court in *Carman* that the defendant had failed to justify the creation of the new privilege. From these statements, ODRP argues without further support that "the *Carman* court had no factual record before it" and the "absence of any factual record" explains, and probably justifies, the result reached there. (ODRP Obj'n at 4.) Here, ODRP asserts that the Affidavit of Janet Hill and record exhibits describing the DRP, the importance of confidentiality, and

the benefits of the program to Halliburton's employees dictate a different result. The Court is not convinced that the outcome of *Carman* would have been affected by more information in these areas, assuming such information was lacking in that case. In the end, the Eighth Circuit was unpersuaded that "society [would benefit] in some significant way from the particular brand of confidentiality that the privilege affords." *Carman*, 114 F.3d at 794-95. Under Supreme Court precedent, this conclusion prevented recognition of the privilege.

In a recent case creating a new evidentiary privilege, the Supreme Court stated: "Exceptions from the general rule disfavoring testimonial privileges may be justified . . . by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Thus, the question posed was whether the asserted "privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence . . . .'" *Id.* at 9-10 (quoting *Trammel*, 445 U.S. at 51). The Court reached an affirmative answer by concluding that a psychotherapist-patient privilege serves important private and public interests while "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Id.* at 11. The private interest identified was effective psychotherapeutic treatment, which would be "difficult if not impossible" without patients' assurance of confidential and privileged communication. *Id.* at 10. The public interest at stake was appropriate treatment of individuals with mental or emotional problems: "The mental health of our citizenry, no less than its physical health, is a public good of

transcendent importance." *Id.* at 11. On the other hand, "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access – for example, admissions against interest by a party – is unlikely to come into being." *Id.* at 12.

This Court, like Judge Bacharach in his Report, concludes that recognition of a corporate ombudsman privilege is unwarranted under the analysis articulated in *Jaffee*.[3] The ombudsmen at issue are "the staff" of ODRP, which provides an "independent, neutral, and confidential channel to assist employees to resolve disputes at Halliburton . . . ." (Mot. Protective Order at 2; Br. Supp. Non-Party DRP's Mot. Protective Order [hereafter ODRP Br.] at 2-3.)[4] ODRP observes "a strict pledge of confidentiality to both the employees and the company," and "[t]his confidentiality policy has been communicated repeatedly to all employees." (ODRP Br. at 21.) The Court accepts for purposes of argument the propositions that confidentiality is "a defining characteristic of the DRP" and that the ombudsmen "could not function effectively" without a promise of confidentiality. (ODRP Br. at 20.) Nevertheless, the Court is unconvinced that the private and public interests served by recognizing an evidentiary privilege for communications with ombudsmen outweighs "the likely evidentiary benefit" without the privilege. *Jaffee*, 518 U.S. at 11.

The Court does not doubt that corporate ombudsmen provide a valuable service to employees and employers and that protecting confidential communications among them

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[3] Although Judge Bacharach did not directly apply *Jaffee*, he did so indirectly by relying on the analysis of *Carman* and observing that the Eighth Circuit "applied the standard reaffirmed by the United States Supreme Court in *Jaffee*." (Report & Recom. at 13.)

[4] The group currently includes four trained advisors, a dispute resolution analyst, and an administrative assistant. (ODRP Br. at 7.)

would further important private interests in promoting workplace harmony. The existence of an effective system of informally resolving workplace disputes may also serve laudable public purposes. ODRP identifies the public interests at stake to include reduced litigation, workforce well-being, and effective prevention or detection of criminal law violations. (ODRP Br. at 22-24.) One might add to this list the avoidance or remedy of violations of other laws (such as employment or safety laws) and a more productive workforce. These public interests are far less compelling, however, than ones furthered by established privileges, such as attorney-client ("observance of law and administration of justice," *Jaffee*, 518 U.S. at 11), spousal ("marital harmony," *id.*) and psychotherapist-patient ("mental health of [the nation's] citizenry," *id.*). The widespread impact of effectual legal advice, marriages, and mental health treatment dwarfs the effect of corporate ombudsman programs, which remain relatively few and involve only a small segment of American society.[5]

The evidence to be gained without an ombudsman's privilege, on the other hand, has considerable importance. As a neutral and independent observer of employment disputes, an ombudsman is in a unique position to provide information about those disputes in litigation. Because the ombudsman may witness relevant events as they happen (or, at least, hear about them soon afterward), he or she will be able to confirm, deny, or elaborate on the accounts provided by litigants when they get to court, which accounts often come in diametric versions and require the factfinder to make a credibility choice. ODRP argues that

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[5] ODRP's evidence shows that similar programs have been adopted by other large companies. (Hill Aff. at 5) However, with operating costs exceeding one million dollars per year (Hill Aff. at 21), most employers may be unable or unwilling to follow their lead.

lack of a privilege would so impair ombudsmen's effectiveness that neither employees nor management would confide in them and so no evidentiary benefit would be realized. (ODRP Br. at 25-26.) This argument rests on affidavit testimony of Janet Hill, manager of the DRP, that a promise of confidentiality is vital to the program's ability to function because many employees desire anonymity and secrecy and because participants would not speak freely, or perhaps even participate at all, without assurance that their identities and communications will be protected. (ODRP Br. at 21-25.) This testimony fails to distinguish, however, between a volunteered breach of confidentiality and a compelled disclosure of relevant information in subsequent litigation.

While a DRP participant may be very concerned about information remaining confidential during the dispute resolution process or upon its conclusion, he or she is likely to feel much differently if private resolution fails and litigation ensues. In that event, the litigants may and often do want access to contemporaneous information about their dispute, just as they routinely seek access to EEOC investigative files. The privilege advocated by ODRP, however, belongs to the ombudsman and not to employees; individual employees could not waive the privilege, and ODRP's policy is not to exercise its right of waiver. (Hill Aff. at 14.) Further, the damage done by compelled disclosures in situations now protected by a privilege differs greatly from the likely harm from disclosures by corporate ombudsmen. Confidences entrusted to a lawyer, spouse, or psychotherapist may be intensely personal and entirely unknown to third parties. In contrast, information relayed to a corporate ombudsman concerns workplace disputes, which necessarily involve more than one person. Friction only occurs when two or more people have differing views. Notably, Halliburton's DRP offers

four basic options: (1) the Open Door Policy, which encourages employees "to engage in discussions through the chain of command but . . . give[s] access to an 'Employee Hotline' that provide[s] employees with 'free, expert and confidential advice' from specially trained employee 'Advisors' about 'how to solve problems informally within the company and the external options . . .'" (ODRP's Br. at 4-5, quoting Hill Aff. at 9); (2) the Internal Conference, which is a meeting between the employee, other involved persons, and the advisor aimed at choosing a mutually agreeable way to resolve a dispute, including informal resolution, internal mediation, or external options (Hill Aff., Ex. L at 9); (3) External Mediation; and (4) External Arbitration. (Hill Aff. at 12-13.) Only the "Employee Hotline" portion of the first option can occur entirely in secret. All other aspects of the program involve more than a single employee and an ombudsman, and cannot realistically promise complete confidentiality. Finally, when the DRP applies, an employee will be required to arbitrate any dispute that remains unresolved, and thus litigation with its accompanying procedures for formal discovery and compelled disclosure will not arise.

For all of these reasons, the Court finds that a new privilege for corporate ombudsmen should not be created. Having reached this conclusion, other objections raised by ODRP and defendant also fail. For example, ODRP's second objection faults Judge Bacharach for engaging in a flawed alternative analysis under the four-part "Wigmore test" advocated in support of its motion. However, this test was not adopted in *Jaffee*. To the extent Judge Bacharach chose to address it, this discussion was unnecessary to his decision.

Defendant urges the Court to consider plaintiffs' alleged inability to establish an evidentiary need for the information sought. Halliburton contends that plaintiffs' fraud claims lack a factual basis and so should not be allowed to negate the asserted privilege.[6] ODRP similarly argues that plaintiffs cannot demonstrate a need for its evidence.[7] These arguments have no bearing on the *Jaffee* analysis.

The Supreme Court expressly rejected in *Jaffee* a proposed qualification of the newly recognized privilege with a "balancing component" under which the psychotherapist-patient privilege "would not apply if, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests." *Jaffee*, 518 U.S. at 7 (internal quotation omitted)). The Court reasoned:

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Id. at 17-18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) . Here, plaintiffs' need for ODRP's evidence does not determine whether an ombudsman's privilege should be recognized.

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[6] To the extent defendant makes a relevancy argument for nondisclosure, this argument is premature and immaterial to the present issue, which involves only a claim of privilege. Plaintiffs have recently filed a motion to compel that challenges other asserted objections to disclosure.

[7] ODRP makes this argument in support the proposition that, if a privilege is recognized, plaintiffs' fraud claims might be considered as a possible exception to the privilege.

Finally, ODRP urges the application of state privilege statutes of Texas and Oklahoma under the theory that a provision of the DRP dictates that result and that Halliburton employees located in these two states are entitled to the protection of their respective state's laws. It argues that the statutes prohibit disclosure of the materials plaintiffs seek. Texas procedures incorporated into the DRP cannot be forced upon plaintiffs until the applicability of the DRP has been resolved, and the resolution of this debate depends on the success of plaintiff's declaratory action. As to Oklahoma statutes that arguably apply to procedures within this state, the only cited statute solely applies to "information received by a mediator or a person employed to assist a mediator." Okla. Stat. tit. 12, § 1805. A "mediator" is "any person certified pursuant to the provisions of the Dispute Resolution Act . . . ." *Id.* at § 1802. As ODRP candidly admits, however, it is not involved in any mediations.[8] Thus, this statute does not apply to information received by ODRP.

Conclusion

Because the Court finds no merit in the objections, it ADOPTS the Report and Recommendation as modified by this Order. The Motion for Protective Order, filed by ODRP on August 4, 2000, and joined by defendant on September 25, 2000, is DENIED.

WAYNE E. ALLEY
United States District Judge

[8] Although ODRP "assists employees who wish to resort to external mediation or arbitration to resolve their workplace disputes," its involvement in these proceedings is limited to administering "payment of invoices and related matters for those employees who use these options." (Mot. Protective Order at 2)

RECYCLED

RECYCLED

Jenice TORRES, Plaintiff–Appellant,

v.

Leonard PISANO, Individually and as Associate Director of Maintenance and Operations of the New York University Dental Center, Defendant–Appellee,

New York University, Stephen Heller, Individually and as Administrative Vice President for Administrative Services of New York University, Defendants–Cross–Claimants–Appellees,

Eugene Coe, Individually and as Facilities Manager of the New York University Dental Center, Defendant–Cross–Claimant–Cross–Defendant–Appellee.

No. 1137, Docket 96–7939.

United States Court of Appeals,
Second Circuit.

Argued March 26, 1997.

Decided June 3, 1997.

Female employee of Puerto Rican background brought suit against university and university officials, alleging sexual and racial harassment, and retaliation in violation of federal and state statutes. Employee also asserted negligence based on failure to supervise alleged harasser and prevent creation of a hostile working environment. The United States District Court for the Southern District of New York, Louis L. Stanton, J., granted summary judgment in favor defendants, and plaintiff appealed. The Court of Appeals, Calabresi, Circuit Judge, held that: (1) plaintiff established prima facie case that male manager's conduct created a hostile work environment; (2) facilities manager at university's dental center was not at a sufficiently high level in management hierarchy

of university for his actions to be imputed automatically to university, for purposes of hostile environment harassment claim; (3) plaintiff failed to establish university's liability on ground that manager used his authority to further the harassment or that he was aided in accomplishing the harassment by existence of agency relationship; (4) knowledge of the harassment could be imputed to university based on knowledge obtained by associate director of maintenance facilities who was harasser's supervisor; (5) associate director did not breach his duty to remedy racial and sexual harassment by honoring employee's request to keep the matter confidential and to refrain from taking action until a later date, precluding university's liability; (6) requests by university officials that employee drop charge of harassment filed with the Equal Employment Opportunity Commission (EEOC) did not constitute "retaliation" under Title VII; and (7) negligence claim was barred by exclusivity provision of state workers' compensation law.

Affirmed.

1. Civil Rights ⇐145, 167

Female employee of Puerto Rican background established prima facie case that male supervisor's conduct created a sexually and racially hostile work environment, based on allegations that supervisor repeatedly referred to her as a "dumb cunt," suggested that she was in the habit of performing oral sex for money, ridiculed her pregnancy, commented on her anatomy and his desire to have sex with her, allowed friends of his who visited him at the office to make crude sexual remarks about her, repeatedly called her a "dumb spic," and told her that she should stay home, go on welfare, and collect food stamps like the rest of the "spics."

2. Civil Rights ⇐145, 167

For purposes of racial or sexual harassment claim, "hostile work environment" exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter conditions of victim's employment.

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights ⇐145, 167

Whereas liability for quid pro quo harassment is always imputed to employer, plaintiff seeking to recover from an employer for hostile work environment must demonstrate some specific basis to hold employer liable for conduct of its employees.

4. Civil Rights ⇐145, 371

Employer will be held liable for the harassment perpetrated by one of its supervisors if: supervisor was at a sufficiently high level in the company; or supervisor used his actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship; or employer provided no reasonable avenue for complaint; or employer knew or should have known of the harassment but unreasonably failed to stop it.

5. Civil Rights ⇐371

Facilities manager at university's dental center was not at a sufficiently high level in management hierarchy of university for his actions to be imputed automatically to university, for purposes of hostile environment harassment claim; manager was merely a low-level supervisor whose actions could not automatically be imputed to his employer.

6. Civil Rights ⇐371

In order to establish employer liability for hostile environment harassment on theory that supervisor exploited the agency relationship in committing harassment, plaintiff must allege facts which establish a nexus between harasser's supervisory authority and the harassment.

7. Civil Rights ⇐371

Female employee who alleged that male facilities manager at university's dental center subjected her to sexual and racial harassment failed to establish university's liability on ground that manager used his authority to further the harassment or that he was aided in accomplishing the harassment by the existence of agency relationship; fact that because manager was the highest ranking official at dental center, he could come to work

while intoxicated, was too attenuated a nexus between supervisory authority and the harassment to attach liability.

8. Civil Rights ⇐145, 167

Employer may not stand by and allow employee to be subjected to a course of racial and/or sexual harassment by co-workers or supervisors; rather, once employer has knowledge of the harassment, the law imposes upon employer a duty to take reasonable steps to eliminate it.

9. Civil Rights ⇐145, 167

Company official's actual or constructive knowledge of sexual or racial harassment will be imputed to employer when official is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company, or official is charged with a duty to act on the knowledge and stop the harassment.

10. Civil Rights ⇐145

Where supervisor who gained notice of harassment was supervisor of harasser, e.g., had the authority to hire, fire, discipline, or transfer him, knowledge of the harassment will be imputed to employer on ground that employer vested in supervisor the authority and the duty to terminate the harassment.

11. Civil Rights ⇐145, 167

Knowledge of sexual and racial harassment of female employee by facilities manager of university's dental center could be imputed to university based on knowledge of the harassment obtained by assistant director of maintenance who, when promoted to associate director, became harasser's supervisor; although record indicated that assistant director was not harasser's supervisor when he initially learned of, but failed to act on, the harassment, university was responsible for director's failure to act as of date of his promotion.

12. Civil Rights ⇐145, 167

University official did not breach his duty to remedy racial and sexual harassment of female employee by lower level male manager by honoring employee's request to keep the matter confidential and to refrain from taking action until a later date, precluding university's liability, where employee's letters to official recounted only a few relatively minor incidents of harassment and did not convey the full extent of the abuse, and employee was the only victim of manager's racial and sexual harassment.

13. Master and Servant ⇐30(6.10)

To establish a prima facie case of unlawful retaliation under Title VII, plaintiff must show: participation in a protected activity known to defendant; employment action disadvantaging plaintiff; and a causal connection between the protected activity and the adverse employment action. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e–3(a).

14. Colleges and Universities ⇐8(1)
Master and Servant ⇐30(6.10)

Requests by university officials that employee drop charge of racial and sexual harassment filed with the Equal Employment Opportunity Commission (EEOC) did not constitute "retaliation" under Title VII, absent evidence that employee suffered adverse employment action after she refused requests. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e–3(a).

See publication Words and Phrases for other judicial constructions and definitions.

Ben M. Arai, Bronx, N.Y., for Plaintiff–Appellant.

Terrance J. Nolan, New York City (S. Andrew Schaffer, of counsel), for Defendants–Appellees.

Before: NEWMAN, Chief Judge, CALABRESI, Circuit Judge, and HURLEY,* District Judge.

CALABRESI, Circuit Judge.

This is a case of hostile work environment harassment, in which the plaintiff-employee

* The Honorable Denis R. Hurley, of the United States District Court for the Eastern District of New York, sitting by designation.

has established a prima facie case and has demonstrated that the defendant-employer knew of the harassment but did not act to stop it forthwith. In it, we are called upon to determine whether the employer can be held liable despite the fact that the victim specifically asked the person to whom she reported the harassment to keep the matter confidential and to refrain from taking action for the time being. The question is by no means an easy one, and its resolution will necessarily depend on the specific circumstances surrounding the harassment. In the instant case, we conclude that the undisputed evidence establishes that the employer behaved reasonably in honoring the plaintiff's request and in failing to take immediate action. We therefore affirm the district court's grant of summary judgment.

BACKGROUND

Plaintiff Jenice Torres, a Puerto Rican woman, was employed at the New York University ("NYU") Dental Center (the "Dental Center") from 1990 to 1994 as an Administrative Secretary to Eugene Coe, the Dental Center's Facilities Manager. Of the approximately thirty employees under Coe's command at the Dental Center at that time, Torres was the only woman. Torres alleges (and many of her co-workers corroborate) that during the course of Torres' employment, Coe constantly harassed her on the basis or her sex and race. Specifically, Torres claims that Coe: 1) "habitually referred to [Torres] as a 'dumb cunt' or 'dumb spic' in the office"; 2) made insulting remarks about the size of Torres' breasts and buttocks; 3) made sexual innuendos towards Torres; 4) crudely indicated to other employees his desire to have sex with Torres; 5) frequently told Torres that she should stay home, go on welfare, and collect food stamps like the rest of the "spics"; 6) remarked to other people that when Torres called in sick she was "probably out sucking cocks to earn extra money"; 7) ridiculed Torres' pregnancy, calling her "beer belly" and suggesting that she was not smart enough to use birth control; and 8) allowed friends of his who visited him at the office to tell people that Torres "gave a blowjob to every man who came into the office," and to throw money on the table and mockingly order Torres to strip. Coe was apparently in the habit of consuming large amounts of alcohol nearly every day at lunch, which often exacerbated his abusive behavior.

Intimidated by Coe, Torres was afraid to complain to Coe's supervisors. Although she mentioned the matter to coworkers, Torres said nothing to NYU's upper management during the first three years of her employment, and she declined to file a formal harassment charge with NYU or with her union. Finally, in September 1993, Leonard Pisano, the Assistant Director of Maintenance of Academic Facilities at NYU, heard of Coe's abusive conduct from one of Torres' coworkers. Pisano called Torres in to meet with him. At that meeting, he suggested to Torres that she file a written complaint. When Torres failed to do so, Pisano reiterated that request in December 1993 or January 1994. Around that same time, Pisano was promoted to Associate Director of Academic Facilities, a position that made him Coe's direct supervisor.

On February 23, 1994, Torres put her complaints in writing, in the form of a handwritten letter that she sent to Pisano. In the letter, Torres wrote: "First of all I would like to apologize for not writing sooner as we had originally discussed. It has taken me quite a while to gather courage and strength to begin this letter." She continued: "I have never felt so intimidated by anyone until I started working for Mr. Eugene Coe." She explained that she had not complained to Coe's supervisors because she knew that they were his friends. She "thought there wasn't anyone to turn to until [she] met [Pisano]." In the letter, Torres did not recount many specific allegations of harassment. Instead, she listed the ways in which Coe mistreated numerous employees, and offered a general criticism of Coe as a man and a boss. At the close of the letter, Torres explained that "[t]here is so much more, but it will take some time" to explain. She added, "Len, I hope and ask you to please keep this confidential until we both speak about this matter."

Three days later, at Pisano's request, Torres sent Pisano a second letter. This letter recounted ten episodes of harassment, such as Coe's remarking to Torres (whom he knew was a married, extremely religious woman) that "[b]lack men are known for their big penis [sic] and white men are know[n] to have it small, but it doesn't matter the size it's how you use it." The rest of the letter again accused Coe of playing favorites among employees and otherwise misusing his authority.

Pisano met with Torres to discuss the situation in March 1994. At that time, Torres again, in her own words, "told him to keep this confidential." Relying on that request, Pisano did nothing until late June 1994, when he called Torres in to meet with Stephen Heller, NYU's Assistant Vice President for Administrative Services. After hearing Torres' story, Heller referred her to a counselor to help her cope with the harassment. Later that month, while Coe was on vacation, Heller and Pisano met with Torres to inform her that she would be receiving a transfer to Pisano's office effective before Coe's return. Torres never worked with Coe again.

Shortly thereafter, Torres filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). In late August 1994, both Pisano and Heller separately asked Torres to drop her EEOC charge. She declined to do so.

In August 1994, Heller confronted Coe about his behavior and commenced an investigation, which culminated in Coe's termination on September 1, 1994. The following month, Torres was transferred, on her own request, to a position as a departmental secretary at the NYU Medical Center. She received a $6,500 raise in her annual salary.

In early March 1995, Torres received a right-to-sue letter from the EEOC. Three months later, she brought this suit against Coe, Pisano, Heller, and NYU, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, the New York State Human Rights Law, N.Y.EXEC.LAW §§ 290 *et seq.*, and the New York City Human Rights Law, N.Y.C. ADMIN. CODE §§ 8–101 *et seq.*[1] The complaint also set forth various claims for relief under the common law of torts.

On January 17, 1996, relying on this court's holding in *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir.1995), that, despite the statute's language to the contrary, individuals cannot be held liable under Title VII, Judge Stanton granted summary judgment and judgment on the pleadings dismissing Torres' Title VII and Title IX claims against Pisano, Heller, and Coe in their individual capacities. *See Torres v. New York Univ.*, No. 95 Civ. 4106, 1996 WL 15691 (S.D.N.Y. Jan.17, 1996). Judge Stanton also elected to dismiss the pendant state law claims against the individual defendants.

Judge Stanton's January 17 ruling left NYU as the only remaining defendant. On July 15, 1996, Judge Stanton granted NYU's motion for summary judgment on all counts, concluding that NYU could not be held liable for Coe's harassment, that there was no evidence that NYU retaliated against Torres for filing charges with the EEOC, and that Torres' common law negligence claim was barred by New York's workers compensation statute. *See Torres v. New York Univ.*, No. 95 Civ. 4106, 1996 WL 393565 (S.D.N.Y. July 15, 1996).

This appeal followed.[2]

1. We have repeatedly noted that claims brought under New York State's Human Rights Law are analytically identical to claims brought under Title VII. *See, e.g., Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 714–15 & n. 6 (2d Cir. 1996). It has been suggested that "the 'legislative history' of the [New York City Human Rights Law] makes clear that it is to be even more liberally construed than the federal and state anti-discrimination laws." *Burger v. Litton Indus., Inc.*, No. 91–Civ. 0918, 1996 WL 421449, at *19 (S.D.N.Y. Apr.25, 1996), *report adopted*, No. 91 Civ. 0918, 1996 WL 609421 (S.D.N.Y. Oct.22, 1996). It has also been suggested that "[i]n terms of imputing liability to the employer, the [New York State Human Rights Law] imposes a stricter standard than Title VII." *Bush v. Raymond Corp.*, 954 F.Supp. 490, 496 n. 3 (N.D.N.Y. 1997). But we need not consider those issues here, as Torres has not challenged the district court's dismissal of her state and city human rights claims on appeal.

2. While Torres' notice of appeal initially indicated that she was appealing from both the January

DISCUSSION

I

Summary judgment is proper when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We review a grant of summary judgment *de novo*, drawing all factual inferences and resolving all ambiguities in favor of the nonmoving party. *See Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1535 (2d Cir.1997). Applying this standard, we find that NYU cannot be held liable for Coe's harassment, and for that reason we affirm the judgment of the district court.

II

Title VII prohibits discrimination on the basis of race and sex with respect to the "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e–2(a)(1).[3] It is now accepted that this language "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment" and to forbid sexual harassment in the workplace. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (internal quotation marks omitted). A plaintiff seeking relief for sexual harassment may proceed under two theories: 1) *quid pro quo* harassment; and 2) hostile work environment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404–05, 91 L.Ed.2d 49 (1986). The same is true for racial harassment. *See Harrison v. Metropolitan Gov't. of Nashville and Davidson County*, 80 F.3d 1107, 1118 (6th Cir.) ("[T]he elements and burden of proof that a Title VII plaintiff must meet are the same for racially charged harassment as for sexually charged harassment."), *cert. denied*, — U.S. —, 117 S.Ct. 169, 136 L.Ed.2d 111 (1996); *cf. Snell v. Suffolk County*, 782 F.2d 1094, 1102–3 (2d Cir.1986) (applying sexual harassment case law in a Title VII racial harassment case). In the instant case, Torres alleges that Coe's conduct created a racially and sexually hostile work environment.

III

[1] As an initial matter, NYU claims that Torres' allegations of harassment do not, as a matter of law, suffice to establish the existence of a hostile work environment. We emphatically reject this contention.

[2] A hostile work environment exists "[w]hen the workplace is permeated with dis-

17, 1996 and the July 15, 1996 orders, her brief on appeal challenges only the district court's grant of summary judgment to NYU.

3. Title IX provides that "[n]o person in the United States shall, on the basis of sex, ... be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a). We have held that Title VII principles apply in interpreting Title IX. *See Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248 (2d Cir.1995) ("In reviewing claims of discrimination brought under Title IX by employees, whether for sexual harassment or retaliation, courts have generally adopted the same legal standards that are applied to such claims under Title VII."); *see also Preston v. Com. of Virginia ex rel. New River Community College*, 31 F.3d 203, 207 (4th Cir.1994) ("We agree that Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX."). Accordingly, what is said below with respect to Title VII applies to Torres' Title IX claims as well.

While this court has previously indicated in *dicta* that "Title IX has been construed to prohibit gender discrimination against both students enrolled in federally supported educational programs and employees involved in such programs" and that any "aggrieved individual has an implied right of action for injunctive relief or monetary damages," *Murray*, 57 F.3d at 248 (citation omitted), it should be noted that the only circuit to have decided the question has concluded that an employee of an educational institution has no private right of action for employment discrimination under Title IX. *See Lakoski v. James*, 66 F.3d 751, 754 (5th Cir.1995) ("Given the availability of a private remedy under Title VII for aggrieved employees, we are unwilling to [find] ... an implied private right of action for damages under Title IX for employment discrimination. Doing so would disrupt a carefully balanced remedial scheme for redressing employment discrimination by [university] employers ...."), *cert. denied*, — U.S. —, 117 S.Ct. 357, 136 L.Ed.2d 249 (1996); *see also Cooper v. Gustavus Adolphus College*, 957 F.Supp. 191, 193 (D.Minn.1997). We need not reach that question here, as we conclude below that, even if she does have a private right of action under Title IX, Torres cannot establish NYU's liability for Coe's harassment.

criminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris*, 510 U.S. at 21, 114 S.Ct. at 370 (citation and internal quotation marks omitted). Conduct that is "merely offensive" and "not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Id.*

NYU argues that Torres has done no more than allege a handful of incidents of inappropriate behavior that, as a matter of law, were not so pervasive as to meet this objective test. *See Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992) ("The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief."); *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577 (2d Cir.1989) ("The incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive."). While we agree with the principle that isolated,[4] minor episodes of harassment do not merit relief under Title VII, we disagree with its applicability in this case.

In her deposition testimony, Torres alleged that Coe constantly harassed her—so often that she "lost count"—but that she could recall the exact dates and circumstances of only a few incidents of harassment. As such, she may find it difficult to convince a jury that pervasive harassment in fact took place, and that a reasonable employee in her shoes would have found her working environment hostile. But this court cannot say as a matter of law that Coe's alleged conduct did not suffice to create a hostile work environment. If a jury were to credit Torres' general allegations of constant abuse, which were confirmed by her coworkers, it could reasonably find pervasive harassment, even in the absence of specific details about each incident. *See Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1456 (7th Cir.1994) ("[Plaintiff] maintains that she was subjected to almost daily comments, gestures, and innuendo of a sexual nature whenever [the supervisor] was in the office, which by all accounts was at least a majority of the time. Yet because [plaintiff] is unable to recite [the supervisor's] specific comment on each occasion, [the employer] contends that we are limited to the five incidents she has detailed. But we think there is sufficient evidence in the record to corroborate [plaintiff's] charge of ongoing conduct to require a trial on that issue."); *Fernot v. Crafts Inn, Inc.*, 895 F.Supp. 668, 677 (D.Vt.1995) ("The fact that the testimony indicated that [the supervisor] was 'always' making sexual remarks and regularly leered at [the plaintiff], rather than giving specific dates, does not negate its role in establishing a work environment of sufficiently pervasive sexual harassment."). *See generally DiLaurenzio v. Atlantic Paratrans, Inc.*, 926 F.Supp. 310, 314 (E.D.N.Y.1996) (noting that the pervasiveness of harassing conduct "is the sort of issue that is often not susceptible of summary resolution").

If the allegations made by Torres are true, she will surely be able to establish that she reasonably found her working environment hostile and abusive. In fact, in light of Coe's repeated statements, which are quoted above, and which are sufficiently offensive that we decline to repeat them here, we find it patently offensive that NYU is willing to concede in its brief only "that several of these incidents as related by plaintiff, if true, were inappropriate, tasteless attempts at humor and conversation, *that could be considered not the best behavior by some people*" (emphasis added).

The fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious of cases. *See Harris*, 510 U.S. at 22, 114 S.Ct. at 370 (stating that "Title VII comes into play before the harassing conduct leads to a nervous breakdown," and noting that the "appalling conduct" alleged in prior cases should not be taken to "mark the boundary of what is actionable"). Harassed employees do not have to be Jackie Robin-

4. Of course, even a single episode of harassment, if severe enough, can establish a hostile work environment. *See Tomka*, 66 F.3d at 1305 ("[E]ven a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for the purposes of Title VII liability.").

son, nobly turning the other cheek and remaining unaffected in the face of constant degradation.[5] They are held only to a standard of reasonableness. Whenever the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse, it is actionable under Title VII, so long as the employee subjectively experienced a hostile work environment. *See id.* at 21, 114 S.Ct. at 370.

A reasonable woman[6] would find her working conditions altered and abusive when her own supervisor repeatedly referred to her as a "dumb cunt," suggested that she was in the habit of performing oral sex for money, ridiculed her pregnancy, commented on her anatomy and his desire to have sex with her, and allowed friends of his who visited him at the office to make crude sexual remarks about her.[7] Likewise, a reasonable Puerto Rican would find a workplace in

5. Despite having to endure continuous abuse and racial discrimination upon breaking Major League Baseball's color barrier fifty years ago, Jackie Robinson was able to compile a .297 batting average, lead the league in stolen bases, and earn the Rookie of the Year award. *See* CHARLES C. ALEXANDER, OUR GAME: AN AMERICAN BASEBALL HISTORY 202–03 (1991).

6. *See Newton v. Department of the Air Force*, 85 F.3d 595, 599 (Fed.Cir.1996) (citing and parenthetically quoting *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir.1991) ("Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment.")); *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir.1995) ("Whether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics."); *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 753 (3d Cir.1995) (noting that the relevant question is whether "the discrimination would have detrimentally affected a reasonable person of the same protected class in that position"); *Dey*, 28 F.3d at 1456 ("[T]he incident on the elevator ... would no doubt be even more frightening to a reasonable woman in Dey's position who, prior to that incident, had endured more than two years of verbal harassment."); *Burns v. McGregor Electronic Indus., Inc.*, 989 F.2d 959, 962 n. 3 (8th Cir.1993) ("[I]n hostile environment litigation under Title VII, the appropriate standard is that of a reasonable woman under similar circumstances."); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir.1987) ("In a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be 'the reasonable woman' since the plaintiff in this type of case is required to be a member of a protected class and is by definition female."); *Carrillo v. Ward*, 770 F.Supp. 815, 822 (S.D.N.Y.1991) (citing *Ellison*, 924 F.2d at 879); *cf. Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1179 (2d Cir. 1996) (noting that "the public has frequently been reminded, by courts and commentators, that the subjective sensibilities of an alleged victim may be a relevant consideration in determining whether conduct by a supervisor or a coworker is legally sanctionable") (citing *Ellison*, 924 F.2d at 878–79). *But see DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir.) ("The test is an objective one, *not* a standard of offense to a 'reasonable woman.' "), *cert. denied*, — U.S. —, 116 S.Ct. 473, 133 L.Ed.2d 403 (1995). The court in *DeAngelis* based its decision—that the objective test does not include consideration of the perspective of a "reasonable woman"—on the Supreme Court's use of the "reasonable person" test in *Harris*. *See DeAngelis*, 51 F.3d at 594. But given that the Supreme Court refused to consider the issue in *Harris*, we do not see how that decision can be taken to have foreclosed the use of a more contextualized objective standard. *See Harris*, 510 U.S. at 22–23, 114 S.Ct. at 370–71 (noting that the Court need not address the EEOC's proposed harassment regulations) (citing 58 Fed.Reg. 51266, 51269 (1993) ("The 'reasonable person' standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability.")); *see also Crowe v. Wiltel Communications Sys.*, 103 F.3d 897, 900 (9th Cir.1996) (explaining that there is no conflict between a standard that takes into account "the perspective of a reasonable person[] ... with the same fundamental characteristics as plaintiff" and the Supreme Court's decision in *Harris*).

In light of *Harris*, several courts have found that a district court does not err in instructing the jury as to a "reasonable person" standard, rather than a "reasonable woman" standard. *See Watkins v. Bowden*, 105 F.3d 1344, 1356 & n. 22 (11th Cir.1997); *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir.1996). We do not consider that issue here. We do note, however, that the Ninth Circuit has found that a district court complies with *Harris* by instructing the jury to use the standard of "a reasonable person[] ... with the same fundamental characteristics as plaintiff." *See Crowe*, 103 F.3d at 900.

7. It is not only "a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity," *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir.1995) (Posner, C.J.), who would take substantial offense at Coe's com-

which her boss repeatedly called her a "dumb spic" and told her that she should stay home, go on welfare, and collect food stamps like the rest of the "spics" to be hostile. Torres has therefore established a strong prima facie case of sexual harassment.

The fact that many of Coe's statements were not made in Torres' presence is, in this case, of no matter; an employee who knows that her boss is saying things of this sort behind her back may reasonably find her working environment hostile. *Cf. Kotcher*, 957 F.2d at 61, 63 (finding that a supervisor who often pretended to masturbate and ejaculate at an employee behind her back had created a hostile work environment); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir.1997) (emphasizing "that sex-based comments need not be directed at a plaintiff in order to constitute conduct violating Title VII"); *Reynolds v. Atlantic City Convention Ctr. Auth.*, Civ. A. No. 88–4232, 1990 WL 267417, at *4 (D.N.J. May 26, 1990) (granting an employer's motion for summary judgment in part because there was no evidence that the plaintiffs knew what was said about them behind their backs), *aff'd*, 925 F.2d 419 (3d Cir.1991).

IV

Despite the existence of a jury question as to whether Coe's conduct created a hostile work environment, we affirm the district court's conclusion that, as a matter of law, NYU may not be held liable for that conduct.

[3] Whereas liability for *quid pro quo* harassment is always imputed to the employer, a plaintiff seeking to recover from an employer for hostile work environment must demonstrate some specific basis to hold the employer liable for the conduct of its employees. *See Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir.1994). The Supreme Court has declined to announce a definitive rule on employer liability in hostile work environment cases. *See Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408. Instead, the Court has instructed us to look to common law principles of agency. *See id.*

Relying on the imperfect analogy to agency law, and specifically on the Restatement of Agency, courts have had difficulty establishing coherent rules in this area. While cautioning that "[a] rule of employer liability deriving from traditional agency principles cannot be reduced to a universal, pat formula," we have summarized the law in this circuit thusly:

> [A]n employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; consequently, . . . the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Kotcher*, 957 F.2d at 63.

ments. And in any event, judges should be careful to remember that American popular culture can, on occasion, be highly sexist and offensive. What *is*, is not always what is right, and reasonable people can take justifiable offense at comments that the vulgar among us, even if they are a majority, would consider acceptable. *See Reed*, 95 F.3d at 1179 ("It cannot be denied that we live in a time of significant cultural change, in which varieties of coarse conduct once taken for granted in the American workplace appear to be subject to punishment under the law."); *King v. Hillen*, 21 F.3d 1572, 1582 (Fed.Cir.1994) ("[N]o principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside of the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment."); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir.1990) (" '[W]hile Title VII does not require that an employer fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinion in a way that abuses or offends their co-workers.' ") (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir.1988)).

Karibian, 14 F.3d at 780 (some citations omitted). We have also noted that "[a]t some point . . . the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company." *Kotcher*, 957 F.2d at 64.

[4] To recap, an employer will be held liable for the harassment perpetrated by one of its supervisors if:

a) the supervisor was at a sufficiently high level in the company, or

b) the supervisor used his[8] actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship, or

c) the employer provided no reasonable avenue for complaint, or

d) the employer knew (or should have known)[9] of the harassment but unreasonably failed to stop it.[10]

A. Sufficiently High Level in the Hierarchy

[5] While it is not clear where the line that we mentioned in *Kotcher*—above which a supervisor is at a sufficiently high level in the management hierarchy of the company for his actions to be imputed automatically to the employer—is to be drawn,[11] we find that Coe's position did not cross it. As the highest ranking official at the remote Dental Center, Coe occupied no higher a position in the employer's hierarchy than did the supervisor whose actions we did not impute to the employer in *Kotcher*. *See Kotcher*, 957 F.2d at 64 (noting that the supervisor was the highest ranking company official at the employment site, but did not occupy a position in the upper echelon's of the company's management).[12] As such, Coe was merely a

8. We use the male pronoun since the context of this case, and most harassment cases, is that of a male supervisor and a female victim. We do not doubt that in other contexts, the genders can be different.

9. An employer can be held liable if it had constructive notice of the harassment, that is, if officials sufficiently high in the management hierarchy should have gained knowledge of it through the exercise of reasonable care. *See, e.g., Murray*, 57 F.3d at 249–50; *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir.1994) ("The proper analysis for employer liability in hostile environment cases is what management-level employees knew or should have known. . . .").

10. In a thorough discussion of employer liability under the Restatement of Agency, the Tenth Circuit has recently noted that an employer could also conceivably be held liable for a supervisor's harassment under section 219(1) of the Restatement, which provides that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." RESTATEMENT (SECOND) AGENCY § 219(1) (1958) [hereinafter RESTATEMENT]. As the Tenth Circuit noted, however, liability will rarely attach under this provision because "sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business," *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir.1997) (internal quotation marks omitted). *But see Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 182–84 (6th Cir.1992) (noting that, in the Sixth Circuit, a supervisor who has the authority to hire or fire the victim of harassment acts within the scope of his employment whenever the harassment takes place at the office during working hours and is foreseeable).

11. It appears that a supervisor may cross that line in two different ways. First, the official may be so high-ranking that the law will consider his acts to be the employer's acts. *See Hunter v. Allis–Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir.1986) (explaining that "[s]ince the acts of a corporation are acts of human beings, to say that the 'corporation' has committed some wrong (rather than just that it is liable under the doctrine of respondeat superior for an employee's wrong) simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong; the deliberate act of such a person is the corporation's deliberate act."). Second, the official may be so high-ranking that the law will conclusively presume that the employer's upper management had constructive notice of the harassment. *See Kotcher*, 957 F.2d at 64. In the latter situation, the employer will be held liable only if it did not act reasonably to stop the harassment as soon as it had constructive notice. *See infra* Part IV.D.2. It has been suggested that knowledge should be imputed to the employer whenever the harassment was committed by a supervisor. *See, e.g.*, Glen Allen Staszewski, Note, *Using Agency Principles in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 VAND.L.REV. 1057, 1081–82 (1995). But we rejected that position in *Kotcher*.

12. In fact, *Kotcher* indicates that the fact that the harasser was the highest ranking official at a remote location cuts *against* automatically imputing his actions to the employer, since other members of the corporate hierarchy would be less likely to discover the harassment. *See Kotcher*, 957 F.2d at 64 ("[T]he district court could reasonably have found that the company.

"low-level supervisor" whose actions cannot automatically be imputed to his employer.

B. Use of Authority or the Agency Relationship

Although Coe was Torres's supervisor, there is no evidence that he used his authority to further the harassment or that he was aided in accomplishing the harassment by the existence of the agency relationship. It is true that, "[i]n a sense, a supervisor is always aided in accomplishing the tort by the existence of the agency because his responsibilities provide proximity to, and regular contact with, the victim." *Gary v. Long*, 59 F.3d 1391, 1397 (D.C.Cir.) (internal quotation marks omitted), *cert. denied*, — U.S. —, 116 S.Ct. 569, 133 L.Ed.2d 493 (1995). But that proves too much, as it would allow the exception to swallow the rule. *See id.* It is likewise the case that the supervisor is always aided by the employment relationship because the employee will fear the repercussions that might result from her complaining or resisting. But this exception too, if applied in the absence of specific evidence that the supervisor used his authority to place the employee in a position in which she felt that she could not complain without facing adverse consequences, would swallow the rule and negate our holding in *Kotcher*.[13]

[6, 7] Thus, in order to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff "must allege facts which establish a nexus between the supervisory authority" and the harassment. *Tomka*, 66 F.3d at 1306. While this is not an onerous requirement, we conclude that Torres has not met it. Cases in which it has been held that the supervisor was aided in the harassment by the existence of the agency relationship have universally involved a more direct use of authority than Torres has pointed to in this case. *See, e.g., id.* at 1306–07 (supervisor convened business dinner and implied that employees were required to attend; supervisor then fostered alcohol consumption at the dinner, which led to sexual assault); *Karibian*, 14 F.3d at 776 (supervisor told plaintiff that she "owed him" for all that he had done for her as her supervisor, and varied "her raises, hours, autonomy and flexibility" according to her responsiveness to his sexual advances); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1352–53 (4th Cir.1995) ("[Plaintiff] specifically testified that [her supervisor] relied upon the authority vested in him by [the employer] to coerce her to comply with his demands. [The supervisor] assertedly told [plaintiff] that if she failed to submit to him she would lose her job, and [plaintiff] testified that she knew that if she had reported [the supervisor's] conduct to anyone she would have been fired."); *DiLaurenzio*, 926 F.Supp. at 315–16 (supervisor ordered employees to call plaintiff at her home to harass her on days when she was sick; supervisor also threatened to retaliate against any employee who complained). The best argument that Torres can muster is that it was only because he was the highest ranking official at the Dental Center that Coe could come to work while intoxicated, and that, in that sense, Coe's position as supervisor facilitated the harassment. This theory is too attenuated to attach liability.[14]

whose main office was in Rochester, did not have constructive notice of [the supervisor's] behavior in Oswego.").

13. *But see* Staszewski, *supra*, at 1094 (arguing that "[i]f the harasser is acting in a supervisory capacity when he creates a hostile work environment, he will necessarily be aided by the agency relation, and liability should properly be imputed to the employer"); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV.L.REV. 1449, 1461 (1984) (using agency principles to argue that "[c]ourts should hold employers liable for all acts of sexual harassment committed by supervisory personnel"). Whatever the merits of the position advocated by these commentators, the Supreme Court has rejected the suggestion that "employers are always automatically liable for sexual harassment by their supervisors." *Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408.

14. The Tenth Circuit has articulated a means by which an employer could be held liable under the first clause of section 219(2)(d) of the Restatement, which provides for liability if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority." RESTATEMENT, *supra*, § 219(2)(d). According to the Tenth Circuit:

> [T]o recover, a plaintiff must show that the employer manifested in the supervisor the authority to act on its behalf, that such manifes-

C. Reasonable Avenue for Complaint

As the district court correctly explained, Torres cannot impute liability to NYU on the ground that it did not provide a reasonable opportunity to complain:

> Torres does not seem to dispute that NYU provided a reasonable avenue for complaint. She knew about NYU's written sexual harassment policy, but did not file a complaint with any of the people designated to receive them. She also knew that the collective bargaining agreement which governed her employment contained an anti-discrimination provision and a grievance mechanism, but she did not file a grievance.

Torres, 1996 WL 393565, at *2.

D. Knowledge and Inaction

[8] The law is clear that "an employer may not stand by and allow an employee to be subjected to a course of racial [and/or sexual] harassment by co-workers" or supervisors. *Snell*, 782 F.2d at 1104 (citation and internal quotation marks omitted). Rather, once an employer has knowledge of the harassment, the law imposes upon the employer a "duty to take reasonable steps to eliminate it." *Id.*

Torres first discussed the harassment with Pisano in September 1993. She sent him two letters on the subject in February 1994. Yet nothing was done about the harassment until late July 1994, when Torres was transferred to another department. In the meantime, Coe continued to harass Torres. It is primarily on this basis that Torres seeks to hold NYU liable.

1) NYU's knowledge

As the district court noted, implicit in Torres' argument that NYU knew of the harassment and did nothing about it is the assertion that Pisano's knowledge of the harassment should be imputed to NYU. Relying on our statement that "[f]or the knowledge of a supervisor to be imputed to the company, that supervisor must be at a sufficiently high level in the hierarchy of the company" that he or she "qualif[ies] as a proxy for the company," *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir.1996), the district court ruled in the instant case that "[t]here is no evidence in the record about Pisano's position in the NYU management hierarchy, an issue on which Torres has the burden of proof," *Torres*, 1996 WL 393565, at * 2, and accordingly held that Pisano's knowledge could not be imputed to NYU. On this point, we disagree with the district court. We believe that there is ample evidence in the record to establish that Pisano's knowledge was attributable to NYU.

[9] An official's actual or constructive knowledge of harassment will be imputed to the employer when principles of agency law so dictate. That will be the case when a) the official is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company, *see Van Zant*, 80 F.3d at 715;[15] or b) the official is charged

> tation resulted in harm to the plaintiff, and that the plaintiff acted or relied on the apparent authority in some way. The first element is established whenever an employer vests its supervisor with the authority to control significant aspects of the work environment. The second element is satisfied by demonstrating [that] the supervisor subjected plaintiff to sexual harassment. The third element (that plaintiff acted or relied on the apparent authority of her supervisor) is the most difficult to prove and will often hinge upon whether the employer has a formal policy against sexual harassment. When an employer lacks a formal written grievance policy, a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in the harassment or leaving her job. In contrast, if an employer has taken steps to remove any possible inference that a supervisor has authority to sexually harass his subordinates, the victim is likely aware the harassment is not authorized and reliance on apparent authority will be difficult to establish.
>
> *Harrison*, 112 F.3d at 1444 (citations, brackets, and internal quotation marks omitted); *see also Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 108–110 (3d Cir.1994); *Watts v. New York City Police Dep't*, 724 F.Supp. 99, 106 n. 6 (S.D.N.Y.1989). Liability cannot attach on those grounds in the instant case, however, as it is undisputed that Torres knew of NYU's harassment policy and its availability.

15. *Cf. Hunter*, 797 F.2d at 1422 ("Since the acts of a corporation are acts of human beings, to say that the 'corporation' has committed some wrong (rather than just that it is liable under the

with a duty to act on the knowledge and stop the harassment, *see* RESTATEMENT (SECOND) AGENCY § 272 cmt. a (1958) [hereinafter RESTATEMENT] ("The liability of a principal because of the knowledge of the agent is based upon the existence of a duty on the part of the agent to act in light of the knowledge which he has."); or c) the official is charged with a duty to inform the company of the harassment, *see id.* at § 275 ("[T]he principal is affected by the knowledge which an agent has a duty to disclose to the principal or to another agent of the principal to the same extent as if the principal had the information.").

[10, 11] We agree with the district court that the record makes it difficult to determine whether Pisano was at a sufficiently high level in NYU's management hierarchy to qualify as a proxy for the employer. But leaving that question aside, we conclude that Pisano's knowledge can be imputed to NYU under the rule that, where the person who gained notice of the harassment was the supervisor of the harasser (*e.g.*, had the authority to hire, fire, discipline, or transfer him), knowledge will be imputed to the employer on the ground that the employer vested in the supervisor the authority and the duty to terminate the harassment. *See, e.g., Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015–16 (8th Cir.1988); *Lamb v. Household Credit Servs.*, 956 F.Supp. 1511, 1517 (N.D.Cal. 1997); *cf. Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir.1996) (refusing to hold the employer liable in part because the harassed employee did not complain to her supervisor's (the harasser's) supervisor). The record indicates that Pisano was not Coe's supervisor at the time at which he initially learned of, but failed to act on, the harassment. It is undisputed, however, that Pisano did become Coe's supervisor sometime in early 1994, *before* he received Torres' letters of complaint. Accordingly, NYU is responsible for Pisano's failure to act as of the date of his promotion.

Moreover, even before he became Coe's supervisor, Pisano's knowledge could potentially have been imputed to NYU on the ground that Pisano had a duty to inform the company of the harassment:

> Taken as a whole, the cases demonstrate that for purposes of Title VII, "management-level employees" [that is, employees whose knowledge can be imputed to the employer] encompass two groups of persons: first, supervisors possessing substantial authority and discretion to make decisions concerning the terms of the harasser's or harassee's[16] employment; and second, non-management employees charged with substantial responsibility for relaying employee complaints to management, particularly where management is located away from the workplace. If a co-worker has knowledge of a harassee's complaint, but that co-worker lacks authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the harassee's employment, the co-worker's inaction does not spark employer liability *unless that co-worker has an official or strong de facto duty to act as a conduit to management for complaints about work conditions.*

Lamb, 956 F.Supp. at 1517 (emphasis added); *see also* RESTATEMENT, *supra*, at § 275.

In the instant case, while Pisano did not have supervisory authority over either Coe or Torres before his promotion in early 1994,

doctrine of respondeat superior for an employee's wrong) simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong; the deliberate act of such a person is the corporation's deliberate act."). Likewise, the failure to act on the part of a high-ranking corporate official is the corporation's failure to act.

16. The applicability in this circuit of the rule that the knowledge of a supervisor possessing authority over the terms of the *harassee's* employment will be imputed to the employer is uncertain. We may have suggested in *dicta* in *Van Zant* that an employer is not necessarily liable when the plaintiff informs her immediate (low-level) supervisor of the harassment, and the supervisor fails to act. *See Van Zant*, 80 F.3d at 715–16. It is not, however, clear from the facts of that case whether the plaintiff's immediate supervisor had authority over the terms of her employment. Given the principles of agency law set out above, the correct rule would appear to be that an employer is liable for the knowledge of the harassee's supervisor if that supervisor was empowered (that is, charged with a duty) to protect the harassee from further harm.

the fact that Pisano sought out Torres and approached her about the harassment, seemingly on behalf of NYU, suggests that Pisano was "charged with substantial responsibility for relaying employee complaints to management," particularly because here "management [was] located away from the workplace." And even if Pisano was not formally charged with such a duty, Torres may reasonably have believed that he was. According to Torres, Pisano gave her the impression that she could count on him to help her resolve the situation. More importantly, NYU may have structured its management hierarchy in such a way as to suggest to Torres that Pisano was empowered to help her. Pisano himself admitted in deposition testimony that Torres might have felt that he was the correct person with whom to speak "because ... the situation with our department and how it is structured" could have led her to believe "that th[is] was an avenue to get help." If Torres could show reliance upon a reasonable impression, created by NYU, that Pisano was under a duty to help her, Pisano's knowledge could be imputed to NYU. *See* RESTATEMENT, *supra*, at § 273 ("*Except where there is reliance upon the appearance of agency*, a principal is not bound by knowledge of an agent concerning matters as to which he has only apparent authority.") (emphasis added).

We therefore conclude that, as a matter of law, NYU is responsible for Pisano's knowledge as of the date at which Pisano became Coe's supervisor, and that the record would support a finding that NYU is responsible for Pisano's knowledge even before that date. In other words, NYU knew of the harassment, but did not immediately act to stop it. This does not, however, end our inquiry.

2) NYU's Response

[12] NYU can be held liable only if Pisano did not fulfill his duty to take reasonable steps to remedy the harassment. *See Snell*, 782 F.2d at 1104. The standard is essentially a negligence one, *see* RESTATEMENT, *supra*, § 219(2)(b), "and reasonableness ... depends among other things on the gravity of the harassment alleged," *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir.1995). On the uncontroverted facts of this case, we conclude that Pisano's failure to act cannot be termed unreasonable.

When Torres first discussed the harassment with Pisano, she asked him not to speak about the matter with anyone. Pisano explained in his deposition:

> Q: Did you investigate at that time?
>
> A: No, I didn't.
>
> Q: Why didn't you?
>
> A: Jenny [Torres] asked me not to do anything. She called me up and told me some things on the phone, and I said[,] ["]well, what do you want to do about it[?"] and she said[,] ["]nothing, I just wanted someone to talk about it,["] and I said[,] ["]you can call me any time you want to, if you need help let me know.["]

Pisano repeatedly suggested to Torres that she should pursue her complaint in writing. But when Torres finally sent a letter to Pisano, she closed with a heartfelt request—"Len, I hope and ask you to keep this confidential until we both speak about this matter"—and thanked Pisano for his "confidentiality" and his time. Torres never followed up that letter by authorizing Pisano to take action, at least not prior to her conversation with Heller, at which point the harassment was promptly terminated. To the contrary, Torres admits that, in a follow-up conversation with Pisano in March 1994, she again specifically "told him to keep this confidential."

Despite her request for confidentiality, Torres later testified in a deposition that she fully expected Pisano to act to rectify the situation, and that all that she meant in requesting confidentiality was that she did not want Pisano to speak freely about the matter "with people who have no business knowing what is going on." But in evaluating the reasonableness of Pisano's conduct, Torres' understanding is not determinative. What *is* relevant is what Torres said to Pisano, and Pisano's reasonable understanding of what she meant. It is undisputed that Torres, on more than one occasion, asked Pisano to keep the matter "confidential." Pisano explained his understanding of that request

when he was asked why he failed to take action:

> A: Because of Jenny. She asked me not to. She asked me again, not to speak to anyone when she had written me those letters in February of [1994]. She specifically wrote in the letters, I'm afraid, please don't say anything to anyone. I felt that I was the only person she had turned to at this point regarding this problem, and to betray her trust in the matter would do harm rather than good.

We therefore have before us a situation in which an intimidated and embarrassed employee was finally able to gather the strength to complain about the harassment that she had been enduring, but specifically asked the supervisor to whom she complained to keep the matter confidential and to refrain from taking action until a later date. Does a supervisor breach his duty to remedy the harassment by honoring the employee's request? That is not a question that we can answer categorically. Its resolution will vary from case to case.

There is certainly a point at which harassment becomes so severe that a reasonable employer simply cannot stand by, even if requested to do so by a terrified employee. But that is not this case. There are, for example, no allegations here of any serious physical or psychological harm that would have occurred if the employer did not act forthwith. And the law will not presume in every case that harassed members of Title VII's protected classes do not know what is best for themselves and cannot make reasonable decisions to delay—at least for a time—pursuing harassment claims, perhaps for privacy or emotional reasons, until they are ready to do so.

Likewise, there may be cases in which a supervisor or co-worker is harassing a number of employees, and one harassed employee asks the company not to take action. In those cases, the employer's duty to the other employees would take precedence, and the company would most likely not be justified in honoring a single employee's request not to act. But that too is not this case.

What then of this case? By asking Pisano to keep the matter confidential, Torres placed him in a difficult situation. She wrote in her letter: "I thought there wasn't anyone to turn to until I met you. I finally found someone to confide in." Had Pisano ignored her request and pursued a harassment complaint—in the face of Torres' own conscious decision not to do so—he would have breached her trust. There will be cases in which an employer is forced to do that. But this is not one of them. Torres' letters to Pisano recounted only a few relatively minor incidents of harassment; they did not come close to conveying the full extent of the abuse subsequently alleged in this lawsuit. Moreover, Torres was the only victim of Coe's racial and sexual harassment. She was the only female employee in Coe's office at the Dental Center, and there is no indication in the record that any other employees were being harassed by Coe in violation of Title VII. On these facts, it must be said as a matter of law that Pisano behaved reasonably in honoring Torres' request for confidentiality and in failing to act immediately to end the harassment. Accordingly, while NYU is liable for Pisano's actions, Pisano did not breach his duty to protect Torres from further harassment.

V

On separate occasions in August 1994, Pisano and Heller each asked Torres to drop her EEOC charge. Torres argues that these requests, which she characterizes as demands, constituted retaliation for her having complained about Coe's harassment. We reject this argument.

[13] It is unlawful for an employer to retaliate against an employee for filing a charge pursuant to Title VII. *See* 42 U.S.C. § 2000e–3(a). To establish a prima facie case of unlawful retaliation, a plaintiff must show: "i) participation in a protected activity known to the defendant; ii) an employment action disadvantaging the plaintiff; and iii) a causal connection between the protected activity and the adverse employment action." *Tomka*, 66 F.3d at 1308.

[14] While it is undisputed that Torres' filing of an EEOC charge constituted participation in a protected activity, Torres cannot

show that she suffered an adverse employment action. Torres claims that Pisano's and Heller's requests left her feeling "frightened" and "intimidated," but she has not shown, as she must, that she suffered "a materially adverse change in the terms and conditions of employment." *McKenney v. New York City Off-Track Betting Corp.*, 903 F.Supp. 619, 623 (S.D.N.Y.1995).

We have held that "[r]easonable defensive measures do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee and result in differential treatment," so long as they "do not affect the complainant's work, working conditions, or compensation." *United States v. New York City Transit Auth.*, 97 F.3d 672, 677 (2d Cir.1996).

It is conceivable that a demand to withdraw an EEOC charge could constitute retaliation, if it truly had so great an effect on the plaintiff as to alter the conditions of her employment in a material way. For instance, repeated and forceful demands accompanied even by veiled suggestions that failure to comply would lead to termination, discipline, unpleasant assignments or the like, might in some circumstances affect an employee's working conditions. But here Torres admits that Heller and Pisano did not repeat their requests, that she in fact refused their requests, and that she suffered no negative consequences as a result of having turned them down. As such, Torres did not experience an adverse employment action. Indeed, taken as a whole, Pisano's and Heller's reaction to Torres' complaint materially *improved* the conditions of her employment. Torres was transferred at her request and given a substantial raise. And the man who harassed her was fired.

VI

Torres also alleges that NYU should be held liable under the common law of negligence, based on its failure to supervise Coe and to prevent the establishment of a hostile working environment. As the district court properly found, that claim is barred by New York's Workers' Compensation Law, which provides: "The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee ... when such employee is injured or killed by the negligence or wrong of another in the same employ." N.Y.WORK.COMP.LAW § 29(6); *see also Burlew v. American Mut. Ins. Co.*, 63 N.Y.2d 412, 482 N.Y.S.2d 720, 722, 472 N.E.2d 682, 684 (1984) (holding that a claim of negligence against an employer is barred by workers compensation).

Workers' compensation exclusivity does not, however, preclude an employee's suit if the employer committed an intentional tort or another person committed such an intentional wrong at the employer's direction. *See Acevedo v. Consolidated Edison Co.*, 189 A.D.2d 497, 596 N.Y.S.2d 68, 70–71 (1993). But that exception is obviously not applicable to Torres' claim of *negligence*. *See Chrzanowski v. Lichtman*, 884 F.Supp. 751, 756 (W.D.N.Y.1995) ("Plaintiffs argue that their claims fall under the intentional tort or wrong exception. However, the claims at issue are pled in terms of negligence, not intentional wrong.... The negligence claims are clearly barred by the exclusivity provision."); *cf. Hart v. Sullivan*, 84 A.D.2d 865, 445 N.Y.S.2d 40, 41 (1981) (analyzing sexual harassment and discrimination in the workplace claims under the workers' compensation statute, and dismissing them because the lack of willfulness on the part of the corporate employer—as opposed to the harassing co-workers—necessitated the conclusion that the complaint against the employer was barred by workers' compensation), *aff'd*, 55 N.Y.2d 1011, 449 N.Y.S.2d 481, 434 N.E.2d 717 (1982).

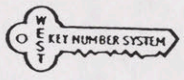
In disputing this conclusion, Torres cites no cases. She argues instead that workers' compensation exclusivity should not bar Title VII harassment suits. Of course it shouldn't, nor could it under the Supremacy Clause. U.S. CONST. art. VI, cl. 2. But it can and does bar state common law negligence claims.

CONCLUSION

Torres has made out a prima facie case of serious racial and sexual harassment. But she has not shown that NYU, through its agent Pisano, acted unreasonably in honoring

her request to keep the matter confidential, rather than taking immediate action to stop the harassment. Her hostile work environment claim against NYU must accordingly fail. So too must her claims of retaliation and negligence.

The district court's grant of summary judgment is therefore affirmed.



RECYCLED

United States Court of Appeals,
Ninth Circuit.

Oksana OLESZKO, Plaintiff-Appellant,
v.
STATE COMPENSATION INSURANCE FUND, David Howard, and Dora Cooke, Defendants-Appellees.

No. 99-15207.

Argued and Submitted Oct. 4, 2000
Filed March 20, 2001

State employee brought action under Title VII against the State Compensation Insurance Fund (SCIF) and her individual supervisors, alleging sexual harassment, reverse race and national origin discrimination, and retaliation. The SCIF's Employee Assistance Program (EAP) refused to produce records or to testify about the substance of communications with other employees on the ground that the communications were privileged. The United States District Court for the Northern District of California, Vaughn R. Walker, J., denied employee's motion to compel discovery, and employee appealed. The Court of Appeals, D.W. Nelson, Circuit Judge, held that the psychotherapist-patient privilege extends to communications with EAP personnel.

Affirmed.

West Headnotes

[1] Witnesses ⚿214.5
410k214.5

Psychotherapist-patient privilege extended to communications between employers and unlicensed counselors employed by State Compensation Insurance Fund's (SCIF) Employee Assistance Program (EAP), and employee asserting Title VII claim against SCIF was thus not entitled to discover such communications to show pattern of sex and race discrimination and retaliation. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[2] Witnesses ⚿214.5
410k214.5

The psychotherapist-patient privilege extends to unlicensed counselors employed by Employee Assistance Programs (EAP), because EAPs work to address serious national problems, and confidentiality is necessary in order for EAPs to function effectively and to protect this gateway to mental health treatment by licensed psychiatrists, psychologists, and social workers.

***1154** Peter G. Lomhoff, Oakland, California, for the plaintiff- appellant.

***1155** David L. Bacon, Thelen, Reid & Priest, Los Angeles, California, for the defendants-appellants.

Bruce Celebrezze and Graziella Walsh Coggan, Celebrezze & Wesley, San Francisco, California, for the defendants-appellees.

William F. Krebs, Galland, Kharasch, Greenberg, Fellman & Swirsky, Washington, D.C., for amicus curiae Employee Assistance Professional Associations, Inc., in support of defendants-appellees.

Appeal from the United States District Court for the Northern District of California; Vaughn R. Walker, District Judge, Presiding. D.C. No. CV-95-00516-VRW.

Before: D.W. NELSON, THOMPSON, and TROTT, Circuit Judges.

D.W. NELSON, Circuit Judge:

Oksana Oleszko appeals the denial of her motion to compel discovery from the State Compensation Insurance Fund's ("SCIF") Employee Assistance Program ("EAP"). [FN1] The district court concluded that the federal psychotherapist-patient privilege protected the requested information from disclosure. *See Jaffee v. Redmond,* 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

FN1. We address the remaining issues raised on appeal in a memorandum disposition filed concurrently.

I.
BACKGROUND

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This case arose from Oleszko's Title VII claim against the SCIF and her individual supervisors, in which she alleged sexual harassment, reverse race and national origin discrimination, and retaliation. Oleszko sought discovery from the SCIF's EAP in an attempt to show a pattern of sex and race discrimination and retaliation on the part of the SCIF. The SCIF's EAP refused to produce records or to testify about the substance of communications with other employees on the ground that the communications were privileged under Federal Rule of Evidence 501 and the Supreme Court's holding in *Jaffee v. Redmond,* 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337. The district court agreed and denied Oleszko's motion to compel discovery on June 5, 1997. Oleszko now appeals the district court's order denying discovery.

Employee Assistance Programs are worksite-based programs designed to assist employees in identifying and resolving personal issues, ranging from health, marital, and financial concerns to substance abuse and emotional problems. Employee Assistance Professionals Association Standards for Employee Assistance Programs, Part II: Professional Guidelines ("EAPA Standards") at 1. EAPs began in the 1970s as alcohol and drug treatment programs but have substantially broadened their scope and have become increasingly prevalent at all different types of workplaces. Michael T. French et al., Factors that Influence the Use and Perception of Employee Assistance Programs at Six Worksites, 2 J. of Occupational Health Psychol. 312, 312 (1997) ("Six Worksites"). Today, 45 percent of all full-time workers have access to EAPs. Terry C. Blum & Paul M. Roman, U.S. Dep't of Health and Human Servs., Cost-Effectiveness and Preventive Implications of Employee Assistance Programs ("Cost Effectiveness") 2 (1995). Over 17,000 employers have adopted EAPs. Brief of Amicus Curiae, Employee Assistance Professionals Association, at 2. The number of EAPs in Fortune 500 companies has more than tripled since 1972. Bureau of National Affairs, Inc., Employee Assistance Programs: Benefits, Problems, and Prospects 11 (1987). Ninety-five percent of such companies currently offer their employees counseling and referral services through EAPs. Paul M. Heck, *The Evolving Role of EAPs in Managed Behavioral Healthcare: A Case Study of DuPont, *1156 in* The Employee Assistance Handbook 291, 291 (James M. Oher ed., 1999).

EAP counselors help to resolve issues affecting employee health and well-being by providing comprehensive assessments and short-term counseling, referring clients for appropriate treatment where necessary, and providing follow-up services. Arlene A. Darick, *Clinical Practices and Procedures, in* The Employee Assistance Handbook 3, 4-12. EAPs have been shown to reduce absenteeism, on- the-job-accidents, and worker's compensation claims, and to improve work performance. Cost Effectiveness at 13.

The SCIF's EAP is staffed by a coordinator and three consultants. Although no one on the staff is a licensed psychiatrist, psychologist, or social worker, all of the consultants have backgrounds in psychology or social work, including relevant clinical and/or field experience. [FN2] In addition, all SCIF EAP staff members regularly participate in ongoing training and education on EAP-related issues.

FN2. Unlike the SCIF's program, many EAPs do have licensed psychologists, psychiatrists, or social workers on staff. *See* Brief of Amicus Curiae, at 3, n. 2 (noting that the licensed social worker who provided psychotherapy to the defendant in *Jaffee v. Redmond* was employed by the city's EAP).

Confidentiality is a key component of the EAP. According to the Employee Assistance Professionals Association, "EAPs are committed to maintaining confidentiality" and "[p]rogram success and credibility hinge, to a large extent, on employee confidence that the EAP respects individual privacy and adheres to confidentiality requirements and procedures." EAPA Standards at 2. [FN3] At the SCIF's EAP, that confidentiality policy is strictly enforced. Only EAP personnel have access to EAP files, which are kept in a locked cabinet in the EAP office, and all EAP records are shredded after five years.

FN3. Studies of employee attitudes toward EAPs support the EAPA's claim. At least two studies have shown that many employees view confidentiality as an important prerequisite to their use of an EAP. *See* Six Worksites at 323; Michael M. Harris & Mary L. Fennell, Perceptions of an Employee Assistance Program and Employees' Willingness to Participate, 24 J. of Applied Behavioral Sci. 423, 432, 434 (1988).

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II.
DISCUSSION

A. The Psychotherapist-Patient Privilege: *Jaffee v. Redmond*

This case concerns the scope of the federal psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee v. Redmond,* 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337. We must decide whether the district court erred in concluding that SCIF employee communications with EAP personnel are privileged. *See United States v. Blackman,* 72 F.3d 1418, 1423 (9th Cir.1995) (a district court's rulings regarding the scope of a privilege are reviewed de novo).

Jaffee v. Redmond involved a 42 U.S.C. § 1983 lawsuit against Mary Lu Redmond, a police officer who received extensive counseling from a licensed clinical social worker after she shot and killed a man while responding to a disturbance at an apartment complex. 518 U.S. at 4-5, 116 S.Ct. 1923. During discovery, the decedent's estate sought access to the social worker's notes from her counseling sessions with Redmond. *Id.* at 5, 116 S.Ct. 1923. The Supreme Court denied discovery of the notes, reasoning that the important public and private interests in protecting confidential communications to one's psychotherapist outweighed any evidentiary benefit that would result from denial of the privilege. *Id.* at 11-12, 116 S.Ct. 1923.

[1] While the *Jaffee* decision created an absolute privilege for "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment" and extended the privilege to licensed social workers engaged ***1157** in psychotherapy, *id.* at 15, 116 S.Ct. 1923, it explicitly left to later courts the task of "delineat[ing][the] full contours" of the privilege. *Id.* at 18, 116 S.Ct. 1923 (internal quotations omitted). The question we face is whether the psychotherapist- patient privilege recognized in *Jaffee* extends to unlicensed counselors employed by the SCIF's EAP. We hold that it does.

Although no federal circuit court has previously addressed this question, our conclusion that the psychotherapist-patient privilege extends to communications made to EAP counselors is supported by two district court opinions that have also extended the psychotherapist-patient privilege to unlicensed counselors. In *Greet v. Zagrocki,* 1996 WL 724933, *2 (E.D.Pa.1996), the court held that EAP personnel were covered under the privilege recognized in *Jaffee. United States v. Lowe,* 948 F.Supp. 97, 99 (D.Mass.1996), extended the psychotherapist-patient privilege to rape crisis counselors who were neither licensed psychotherapists nor social workers but were under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist, or psychotherapist.

The contrary cases on which Oleszko relies are easily distinguished. In *Carman v. McDonnell Douglas Corp.,* 114 F.3d 790 (8th Cir.1997), the Eighth Circuit held that communications to an ombudsman employed to resolve workplace disputes without litigation were not protected by the psychotherapist-patient privilege. *Id.* at 791. The court concluded that the resolution of workplace disputes prior to litigation was not a sufficiently important interest to justify the creation of a new evidentiary privilege. *Id.* at 793. The EAP, by contrast, assists in resolving employees' mental health problems, which *Jaffee* unequivocally determined to be a "public good of transcendent importance." 518 U.S. at 11, 116 S.Ct. 1923.

Oleszko also argues that *United States v. Schwensow,* 151 F.3d 650 (7th Cir.1998), counsels against extending the psychotherapist-patient privilege to EAPs. In *Schwensow,* the Seventh Circuit held that statements made to volunteer telephone operators at an Alcoholics Anonymous office were not protected by the psychotherapist-patient privilege because the volunteers did not act or hold themselves out as counselors, were not licensed or trained in counseling, and did not confer in a fashion resembling a psychotherapy session. *Id.* at 657. Unlike the telephone operators in *Schwensow,* the EAP's purpose is to provide counseling. EAP personnel are trained as counselors, are held out as counselors in the workplace, and, like psychotherapists, their job is to extract personal and often painful information from employees in order to determine how best to assist them.

B. Extending the Psychotherapist-Patient Privilege

In extending the psychotherapist-patient privilege to

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licensed clinical social workers, the *Jaffee* majority concluded that "[t]he reasons for recognizing a privilege for treatment by psychiatrists apply with equal force to treatment by ... clinical social worker[s]." 518 U.S. at 15, 116 S.Ct. 1923. The Court focused on three main rationales for extending the privilege. First, it pointed out that social workers provide a significant amount of mental health treatment. *Id.* at 15-16, 116 S.Ct. 1923. Second, it explained that social workers often serve the poor and those of modest means who cannot afford a psychiatrist or psychologist, "but whose counseling sessions serve the same public goals." *Id.* at 16, 116 S.Ct. 1923. Third, the Court noted that the vast majority of states extend a testimonial privilege to licensed social workers. *Id.* at 16-17, 116 S.Ct. 1923.

[2] The reasons for recognizing a privilege for treatment by psychiatrists or social workers apply equally to EAPs. EAPs, like social workers, play an important role in increasing access to mental health treatment. *Cf.* Six Worksites at 312 (describing the growth of EAPs since the ***1158** 1970s). Growing numbers of EAPs help employees who would otherwise go untreated to get assistance. The availability of mental health treatment in the workplace helps to reduce the stigma associated with mental health problems, thus encouraging more people to seek treatment. EAPs also assist those who could not otherwise afford psychotherapy by providing and/or helping to obtain financial assistance. [FN4]

> FN4. Many companies even *require* assessment by an EAP before they will pay for mental health treatment for their employees. Ellen Schultz, *If Your Firm Uses Counselors, Remember Your Secrets Could Be Used Against You,* Wall St. J., May 26, 1994, at C1. Refusing to recognize an EAP-client privilege would force these employees to reveal confidences that would not be protected by privilege in order to access mental health treatment.

As a majority of the Supreme Court recognized in *Jaffee,* the provision of mental health services has significantly changed in the last quarter century. 518 U.S. at 16 n. 16, 116 S.Ct. 1923. EAPs embody what may be viewed as a team approach to providing mental health services. Thus, although EAP personnel at the SCIF do not engage in psychotherapy themselves, they serve as a primary link between the troubled employee and psychotherapeutic treatment. [FN5] As part of the mental health "team," they have access to much of the same highly sensitive information that is protected by privilege when revealed to a treating psychiatrist or social worker. To protect only disclosures made during psychotherapy while exposing those same disclosures to discovery when made to another member of the mental health team in order to access psychotherapy would significantly undermine the psychotherapist-patient privilege. [FN6]

> FN5. Unlike the social worker in *Jaffee,* personnel at the SCIF's EAP are not professionally licensed. Because of the rapid growth of EAPs, states are only just beginning to establish licensing requirements for EAP personnel. *See, e.g.,* N.C. Gen Stat. § 90-503; Tenn.Code Ann. § 62- 42-104. There is currently no state licensing system for EAPs in California. As state laws begin to catch up with the rapid growth in EAPs, more states will undoubtedly establish licensing programs and state licensure may, in turn, become a more relevant factor in determining whether a particular EAP is legitimate.

> FN6. This point becomes more clear if we consider an EAP, such as the one in *Jaffee,* whose staff includes licensed psychiatrists, psychologists, or social workers. In that case, sensitive information regarding an employee will likely be shared between unlicensed EAP counselors and licensed therapists on staff. Indeed, such an office would probably maintain one file containing the assessment and treatment notes for a given employee. To recognize a privilege only for the licensed counselors would force EAP personnel to choose between communicating with each other in order to provide the best possible treatment for the employee and protecting privileged information.

Although the majority of state legislatures have yet to create a specific privilege for the confidential communications to EAP counselors, a number of states have begun to recognize such a privilege. *See* Conn. Gen.Stat. § 52- 146n (West 2000) (recognizing a privilege for communications between state judicial department employees and EAP counselors); Ind.Code Ann. § 25-40-2- 2

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(West 2001) (recognizing a privilege for communications between a client and an employee assistance professional); N.H. Rev. Code Ann. § 21-I:52-a (2000) (confidential communications between state employees and EAP representatives are privileged); Or.Rev.Stat. § 181.860 (1999) (prohibiting confidential communications in a peer support counseling session for emergency service providers or law enforcement personnel to be used in adjudicatory proceedings); R.I. Gen. Laws § 28-6.8-1 (2000) ("No employer shall release the name, address, or otherwise breach the confidentiality of information obtained through an employee's participation in an employer assistance program, except where the information is related to a crime which must otherwise be reported by law."); Tenn.Code. Ann. § 62-42-115 (2000) ("The confidential relations and communications between a licensed employee assistance professional and client are the same as those provided by law for licensed psychologists, psychological examiners, ***1159** physicians, and social workers."); *see also Lara v. City of Albuquerque,* 126 N.M. 455, 458-59, 971 P.2d 846, 849-50 (Ct.App.1998) (including within the state psychotherapist- patient privilege confidential communications to EAP counselors made for the purpose of diagnosis or treatment). [FN7]

FN7. Additional legislation at both the state and federal level also reflects societal recognition of the benefits of EAPs. The Drug Free Workplace Act of 1988 (41 U.S.C. § 701 et seq.) requires federal contractors and federal grant recipients to establish drug-free awareness programs which inform employees about the availability of EAPs. 41 U.S.C. § § 701(a)(1)(B)(iii) & 702(a)(1)(B)(iii) (West 2001). A number of states have also implemented drug-free workplace statutes in order to maximize productivity and reduce the costs associated with substance abuse by employees. *See, e.g.,* Ala.Code § 25-5-330 (2001); Ark.Code Ann. § 11-14-101 (1999); Cal. Gov't Code § 19816.16 (West 2001); Fla. Stat. Ann. § 112.0455 (West 2001); Ga.Code Ann. § 34-9-410 (2000); Idaho Code § 72-1701 (2000); 30 Ill. Comp. Stat. Ann. 58 0/3 (West 2001); S.C.Code Ann. § 44-107-30 (2000); Tenn.Code Ann. § 50-9-101 (2000). Similarly, a provision of the Small Business Act (15 U.S.C. § 631 et seq.) that provides aid to small businesses to establish drug-free workplace programs requires that such programs include employee access to confidential EAPs. 15 U.S.C. § 654 (West 2001). Recognizing the importance of EAPs in promoting the safety and productivity as well as the health and well-being of their employees, both the federal government and many states have implemented confidential EAPs for public employees. *See, e.g.,* 5 U.S.C. § 7904 (requiring that the head of each Executive agency establish an EAP for that agency); Fla. Stat. Ann. §§ 110.1091 & 125.585; Me. Rev. St. Ann. tit. 5 § 957 (West 1999); N.H.Rev.Stat. Ann. § 21-I:52-a (2000); Mass. Gen. L. Ann. ch. 7 § 28B (West 2000); Minn.Stat. Ann. § 43A.319 (West 2000); N.Y. Mental Hygiene Law § 41.54 (McKinney 2000); N.D. Cent.Code § 44-04-18.1 (1999); Okla. Stat. tit. 74 § 840-2.10 (2000); Wash. Rev.Code Ann. § 41.04.700 (West 2000).

III. CONCLUSION

EAPs work to address serious national problems, from substance abuse and depression to workplace and domestic violence. Given the importance of the public and private interests EAPs serve, the necessity of confidentiality in order for EAPs to function effectively, and the importance of protecting this gateway to mental health treatment by licensed psychiatrists, psychologists, and social workers, we hold that the psychotherapist-patient privilege recognized in *Jaffee v. Redmond* extends to communications with EAP personnel.

AFFIRMED.

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LEXSEE 206 frd 306

JANE STUDENT 1, etc., et al., Plaintiffs, v. CHARLES WILLIAMS, et al., Defendants.

CIVIL ACTION 01-0036-RV-S

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, NORTHERN DIVISION

206 F.R.D. 306; 2002 U.S. Dist. LEXIS 464; 58 Fed. R. Evid. Serv. (Callaghan) 1103

January 7, 2002, Decided

January 7, 2002, Filed

DISPOSITION:
Defendants William's motion to compel granted in part and denied in part. Cahaba's motion to quash subpoena granted in part and denied in part.

COUNSEL:
For JANE STUDENT 1, JANE STUDENT 2, JANE STUDENT 3, JANE STUDENT 4, plaintiffs: Mary A. Goldthwaite, Karen Sampson Rodgers, McPhillips, Shinbaum & Gill, LLP, Montgomery, AL.

For CHARLES WILLIAMS, PENNY WILLIAMS, defendants: Mark S. Boardman, Dana Jeanae Bolden, Boardman, Carr & Weed, P.C., Chelsea, AL.

For SADIE MOSS, JAMES CARTER, ROBERT CARTER, defendants: James R. Seale, Elizabeth Brannen Carter, Esq., Hill, Hill, Carter, Franco, Cole & Black, P.C., Clyde C. Owen, Jr., Montgomery, AL.

For LINDA JOHNSON, SELMA CITY SCHOOL BOARD, ROSA M. JOYCE, JAMES WARE, JOHN BARNES, NANCY BENNETT, JAMES E. TERRY, JR., CARRIE WILSON, DENNIS CANTRELL, CANDI DUNCAN, BENJAMIN GIVAN, defendants: James R. Seale, Elizabeth Brannen Carter, Esq., Hill, Hill, Carter, Franco, Cole & Black, P.C., Montgomery, AL.

KATIE A. HIMES, movant, Pro se, Selma, AL.

JUDGES:
WILLIAM H. STEELE, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY:
WILLIAM H. STEELE

OPINION:

ORDER

This matter is again before the Court on a motion to quash subpoena filed by non-party Cahaba Center for Mental Health and Mental Retardation ("Cahaba") and on a motion to compel filed by defendants Charles and Penny Williams ("the Williams defendants"). (Docs. 37, 39). The subpoenas seek all records maintained by Cahaba concerning any of the four plaintiffs. (Doc. 52 at 2). The parties appear to agree that the records of six specific individuals presently or formerly employed by Cahaba are encompassed in the records sought by subpoena. (Doc. 39 at 2-3; Doc. 48 at 4).

By order entered December 6, 2001, the Court held that the federal law of privilege applies and directed the parties to submit additional briefing concerning the scope of the privilege as applicable to this case. (Doc. 49). The parties have done so, (Docs. 52,53), and the pending motions are now ripe for resolution.

The Supreme Court established a federal psychotherapist privilege applicable to licensed psychiatrists, licensed psychologists and licensed social workers in *Jaffee v. Redmond, 518 U.S. 1, 15, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996).* It is uncontroverted that four of the six employees at issue carry some form of

professional license. n1 It is also uncontroverted that the other two employees are not licensed in any relevant field. n2 The Williams defendants acknowledge that licensed social workers fall within the federal privilege but argue that licensed professional counselors do not. (Doc. 52 at 1). The plaintiffs, in turn, argue that unlicensed professionals are covered by the privilege. (Doc. 53 at 2-4). The Court rejects both positions.

> n1 The Williams defendants maintain that Wayne Williams, Peggy Williams, Emma Peoples and Martha Morrison are all licensed professional counselors. (Doc. 46 at 3). The plaintiffs represent that, while Wayne and Peggy Williams are licensed professional counselors, Peoples and Morrison are licensed social workers. (Doc. 48 at 4). The parties have introduced no evidence in support of their assertions, but the resolution of the pending motions is not affected by this omission.
>
> n2 The plaintiffs describe Godfrey Lyons and Connie Wiltbanks only as possessing advanced degrees. (Doc. 48 at 4).

The Williams defendants offer no rationale for their position, and the Court discerns none. The *Jaffee* Court identified three reasons for extending the psychotherapist privilege to licensed social workers: (1) they "provide a significant amount of mental health treatment"; (2) "their clients include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist ... but [their] counseling sessions serve the same public goals"; and (3) "the vast majority of States explicitly extend a testimonial privilege to licensed social workers." *518 U.S. at 15-17.* Each of these rationales applies as well to licensed professional counselors.

First, licensed professional counselors provide a significant amount of mental health treatment. The very title reflects that such persons engage in the profession of "counseling," and the purpose of the psychotherapist privilege is to "allow individuals to receive confidential counseling." *Jaffee v. Redmond, 518 U.S. at 11 n.10.* Indeed, this consideration applies with more force to licensed professional counselors than it does to licensed social workers; while a social worker has a wide range of duties, many of which have nothing to do with counseling, the licensed professional counselor's primary if not exclusive mission is to provide such counseling.

Second, the counseling provided by licensed professional counselors "serve[s] the same public goals" as that provided by licensed psychiatrists and psychologists. The Supreme Court identified the public good underlying the psychotherapist privilege as that of promoting "the mental health of our citizenry," and the private good as that of encouraging the development of the confidential relationship between professional and patient that makes possible the advancement of the public good. *518 U.S. at 10-11.* By fostering the private goal of confidentiality, applying the privilege to licensed professional counselors promotes the public good as it does with respect to licensed social workers.

Third, the Court's non-exhaustive research reveals that over 30 states have recognized a privilege explicitly covering licensed (or certified or registered) professional counselors. n3 Some of the jurisdictions that do not expressly recognize such a privilege appear not to license professional counselors to begin with. Moreover, every state that does not expressly protect communications with licensed professional counselors does protect communications with mental health professionals and counselors, n4 marriage, family and/or child counselors, n5 and/or rape, sexual assault and/or domestic violence counselors. n6 The definitions of these terms in many cases is broad enough to encompass licensed professional counselors; even where they are not, the extension of a privilege to similar sorts of counselors indicates the states' recognition that confidential communications with counselors merit protection.

> n3 *See* Ala. R. Evid. 503A; Alaska R. Evid. 504; Ariz. Rev. Stat. § § 32-3283, -3301; Ark. Code Ann. § § 17-27-301, -311; Colo. Rev. Stat. § § 12-43-218, 13-90-107(g); Conn. Gen. Stat. 52-146s; Del. Code Ann. tit. 24, § 3019; Ga. Code Ann. § 24-9-21; Idaho R. Evid. 517; 225 Ill. Comp. Stat. Ann. 107/75; Kan. Stat. Ann. § 5810; Ky. R. Evid. 506; Me. Rev. Stat. Ann. tit. 32, § § 13851, 13862; Md. Code Ann., Courts and Judicial Proceedings § 9-109.1; Mich. Comp. Laws Ann. § 333.18117; Miss. Code Ann. § 73-30-17; Mo. Ann. Stat. § 337.540; Mont. Code Ann. § § 37-23-201, -301; Neb. Rev. Stat. § 27-504; N.J. Stat. Ann. § 45:8B-49; N.C. Gen. Stat. § § 8-53.8, 90-330; N.D. Cent. Code § § 43-47-01, -09; Ohio Rev. Code Ann. § 2317.02(G); Okla. Stat. Ann. tit. 59, § 1910; Or. R. Evid. 507; S.C. Code Ann. § 40-75-190; S.D. Codified Laws § 36-32-27; Tenn. Code Ann. § 63-22-114; Utah R. Evid. 506; Va. Code Ann. § 8.01-400.2; W. Va. Code § 30-31-13; Wis. Stat. Ann. § 905.04; Wyo. Stat. Ann. § 33-38-109.
>
> n4 *See* Fla. Stat. Ann. § 90.503; Ind. Code § § 25-23.6-6-1, 25-23.6-1-3.8; Iowa Code Ann. § 622.10; La. Code Evid. Ann. art. 510; N.M. Stat. Ann. § § 61-9A-3(L), -27; R.I. Gen. Laws § § 5-

63.2-18, 9-17-24; Tex. R. Evid. 510; Vt. R. Evid. 503, Vt. Stat. Ann. § 3261; Wash. Rev. Code Ann. § § 18.19.020(3), -.180.

n5 *See* Cal. Evid. Code § 1010; D.C. Code Ann. § § 7-1201.01(11), 14-307(a); Nev. Rev. Stat. § § 49.247, 641A.060.

n6 *See* Haw. R. Evid. 505.5; Mass. Gen. Laws Ann. ch. 233, § § 20J, 20K; Minn. Stat. § 595.02(k); N.H. Rev. Stat. Ann. § 173-C:2; N.Y.C.P.L.R. 4510; 23 Pa. Cons. Stat. Ann. § 6116; 42 Pa. Cons. Stat. Ann. § 5945.1.

The recognition of federal privileges is to be governed by the principles of the common law as interpreted by federal courts "in the light of reason and experience." Fed. R. Evid. 501; *accord Jaffee v. Redmond, 518 U.S. at 8, 13.* The "reason" supplied by the Supreme Court in *Jaffee,* and the "reason and experience" of the states outlined above, support the protection of confidential communications with licensed professional counselors. Accordingly, the Court concludes that the federal psychotherapist privilege extends to licensed professional counselors.

In *Oleszko v. State Compensation Insurance Fund, 243 F.3d 1154* (9th Cir.), *cert. denied, 122 S. Ct. 208, 151 L. Ed. 2d 148 (2001),* the Ninth Circuit "held that the psychotherapist-patient privilege recognized in *Jaffee v. Redmond* extends to communications with EAP personnel." *Id. at 1159.* The plaintiffs rely primarily on *Oleszko* for the proposition that the federal privilege extends to unlicensed persons such as Wiltbanks and Lyons. (Doc. 53 at 2-4). n7

n7 The plaintiffs also cite *Greet v. Zagrocki, 1996 U.S. Dist. LEXIS 18635, 1996 WL 724933 (E.D. Pa. 1996),* and *United States v. Lowe, 948 F. Supp. 97 (D. Mass. 1996).* The *Greet* Court, however, offered no explanation for its conclusion that *Jaffee* "compels" extension of the privilege to EAP files. *Lowe* noted only that a thin majority of states protects communications with rape counselors to some degree, without considering the importance of a licensing requirement in defining the scope of a federal privilege. *Olezsko* is the only case to cite either opinion for a relevant proposition.

The personnel at issue in *Oleszko* were shown to have "backgrounds in psychology or social work, including relevant clinical and/or field experience" and to "regularly participate in ongoing training and education on EAP-related issues," and they were "trained as counselors, were held out as counselors in the workplace and, like psychotherapists, their job was to extract personal and often painful information from employees in order to determine how best to assist them." *243 F.3d at 1156-57.* The plaintiffs, despite months to research the issue and a court order encouraging them to do so, have made no similar showing concerning Wiltbanks and Lyons.

Nor is the Court persuaded that *Oleszko* was correctly decided even on its very different facts. As a telling threshold matter, the Ninth Circuit did not acknowledge the bedrock principle that American jurisprudence is firmly biased in favor of testimony and against privilege such that, "whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974).*

Second, the *Oleszko* Court missed the significance of the Supreme Court's limitation of the privilege to licensed professionals. This restriction was not required by the facts of the case, because the case did not involve a psychiatrist or psychologist, licensed or unlicensed. Had it believed such a privilege appropriate, the Court could have extended the privilege to unlicensed psychiatrists and/or psychologists, as some states have done. That the Court did not do so suggests that it considered the professionals' licensed status to be an important prerequisite to the privilege.

Among other functions, the licensing requirement establishes a bright line for the boundaries of the privilege, so that both professional and patient may be clear about the confidentiality of their communications. Moreover, the *Jaffee* Court identified the overriding public good justifying the privilege as that of promoting the mental health of the citizenry; licensure provides a minimum, if rough, measure of assurance that the privilege is implicated only when the patient communicates with one who, by satisfying the requirements for licensure, has demonstrated some threshold level of ability to assist the patient in improving her mental health. Thus, for example, the 1992 advisory committee notes accompanying proposed Federal Rule of Evidence 501 emphasized that limiting the privilege to "licensed" psychologists "is believed to be justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories." 56 F.R.D. 183, 243 (1972).

Third, the *Oleszko* Court ignored the *Jaffee* Court's emphasis on the status of state privilege laws in determining whether to create or expand a federal privilege. While the *Jaffee* Court stressed the importance of finding a "consensus" of state privilege law favoring the privilege, *518 U.S. at 13,* the *Oleszko* Court established an EAP privilege even though only seven or eight states have done so. *243 F.3d at 1158-59.*

The Court's research reveals that there is no consensus among the states that unlicensed professionals such as social workers and professional counselors are covered by the privilege; rather, there is near unanimity that the privilege does *not* extend to such unlicensed persons. Of the 46 jurisdictions the Supreme Court identified as recognizing a social worker privilege, n8 all but eight expressly limit the scope of the privilege to persons actually licensed, registered or certified as social workers. n9 The tale is similar with respect to professional counselors. This state experience does not support, but rather weighs against, extension of the privilege to unlicensed professionals.

n8 *See 518 U.S. at 17 n.17.*

n9 *See* Ariz. Rev. Stat. § 32-3283; Ark. Code Ann. § 17-103-107; Del. Code Ann. tit. 24, § 3913; Fla. Stat. Ann. § 90.503; Ga. Code Ann. § 24-9-21; Idaho Code § 54-3213; 225 Ill. Comp. Stat. Ann. 20/16; Ind. Code § § 25-23.6-1-3.8, 25-23.6-6-1; Iowa Code Ann. § 622.10; Kan. Stat. Ann. § 65-6315; Ky. R. Evid. 507; La. Code Evid. Ann. art. 510; Me. Rev. Stat. Ann. tit. 32, § 7005; Md. Code Ann., Courts and Judicial Proceedings § 9-121; Mass. Gen. Laws Ann. ch. 112, § 135A; Mich. Comp. Laws Ann. § § 333, 18513; Minn. Stat. § 595.02(g); Miss. Code Ann. § § 73-53-7, -29; Mo. Ann. Stat. § 337.636; Mont. Code Ann. § 37-22-401; Neb. Rev. Stat. § § 71-1,304, -1,335; Nev. Rev. Stat. § § 49.251, -.252; N.H. Rev. Stat. Ann. § § 330-A:18, -A:32; N.J. Stat. Ann. § 45:15BB-13; N.M. Stat. Ann. § 61-31-24; N.Y.C.P.L.R. 4508; N.C. Gen. Stat. § 8-53.7; Ohio Rev. Code Ann. § 2317.02(G); Okla. Stat. Ann. tit. 59, § 1261.6; Or. Rev. Stat. § 40.250; R.I. Gen. Laws § 5-39.1-4; S.C. Code Ann. § 19-11-95; S.D. Codified Laws § 36-26-30; Tenn. Code Ann. § 63-23-107; Va.Code Ann. § 8.01-400.2; Wash. Rev. Code Ann. § § 18.19.020, -.180; W. Va. Code § 30-30-12; Wyo. Stat. Ann. § § 33-38-106, -109. Seven jurisdictions extend the privilege to persons reasonably believed to be licensed as social workers. *See* Cal. Evid. Code § § 1010, 1014; Conn. Gen. Stat. § 52-146q; D.C. Code Ann. § § 7-1201.01, 14-307; Tex. R. Evid. 510; Utah R. Evid. 506; Vt. R. Evid. 503; Wis. Stat. Ann. § 905.04. One jurisdiction appears to protect communications with an unlicensed social worker regardless of the client's reasonable belief as to her licensure. *See* Colo. Rev. Stat. § § 12-43-218, 13-90-107(g).

In summary, the Court concludes that the federal psychotherapist privilege does not extend to unlicensed social workers or unlicensed professional counselors. n10

n10 Because neither Lyons nor Wiltbanks is alleged to be a psychiatrist or psychologist, it is unnecessary to consider whether actual licensure is a prerequisite to the federal privilege as to such professionals.

The psychotherapist privilege attaches only to "confidential communications between [the licensed professional] and her patient in the course of diagnosis and treatment" or "in the course of psychotherapy." *Jaffee v. Redmond, 518 U.S. at 15.* The Williams defendants argue that the plaintiffs have not shown either that the communications at issue are confidential or that they were made in the course of psychotherapy. (Doc. 52 at 2-3).

With respect to confidentiality, Jane Student 2 was seen by several licensed professional counselors at Cahaba, a mental health facility. Because these individuals were identified in the plaintiffs' initial disclosures, it may be assumed that they saw Jane Student 2 in connection with alleged mental injuries resulting from the defendants' alleged wrongful conduct. This was not a casual encounter, and the Williams defendants have offered no reason to believe that communications between Jane Student 2 and the licensed professional counselors and licensed social workers at Cahaba could have been anything other than confidential. On the present evidence and argument, the Court cannot conclude that the communications at issue were not confidential. n11

n11 Should depositions or other discovery in this action cast doubt on the confidentiality of these communications, the Williams defendants may timely seek to revisit the issue.

With respect to the "course of psychotherapy," the *Jaffee* Court limited the privilege to communications "between" the patient and her psychotherapist. *518 U.S. at 15.* As in *Jaffee*, this protects the conversations themselves from disclosure, as well as the psychotherapist's notes of such conversations. *Id. at 18.* It also necessarily protects information from such conversations appearing in records prepared by someone other than the psychotherapist (as long as the third person's receipt of the information does not destroy confidentiality and thus the privilege). As the Williams defendants note, they have requested *all* of Cahaba's records concerning the plaintiffs, (Doc. 52 at 2), and some -- billing records, as an obvious example -- almost certainly may be produced without disclosing any communications between the plaintiffs and the four licensed social workers and professional counselors at issue.

The parties' briefing proceeded on the understanding that Jane Student 2 was the only plaintiff to be seen by anyone connected with Cahaba. In their most recent filing, however, the plaintiffs suggest that other plaintiffs may also have been seen at Cahaba. (Doc. 53 at 4-5). The Court's reasoning and ruling apply with equal force with respect to all four plaintiffs.

For the reasons set forth above and in the Court's previous order, the Williams defendants' motion to compel is **granted** to the extent that Cahaba is **ordered,** within 14 days of the date of entry of this order, to produce all documents responsive to the Williams defendants' subpoenas other than those documents or portions of documents reflecting communications between any of the plaintiffs and Wayne Williams, Peggy Williams, Emma Peoples and/or Martha Morrison, made during a counseling session or otherwise for the purpose of obtaining or providing psychotherapy. In all other respects, the Williams defendants' motion to compel is **denied.** Cahaba's motion to quash subpoena is **granted** in part and **denied** in part as set forth above.

DONE and ORDERED this 7th day of January, 2002.

WILLIAM H. STEELE

UNITED STATES MAGISTRATE JUDGE

RECYCLED

LEXSEE 16 F. Supp. 2d 1164 at 1174

SCOTT FOLB, Plaintiff, v. MOTION PICTURE INDUSTRY PENSION & HEALTH PLANS, et al., Defendants.

CASE NO. CV 97-1663 RAP (CWx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 F. Supp. 2d 1164; 1998 U.S. Dist. LEXIS 18094; 50 Fed. R. Evid. Serv. (Callaghan) 760

July 7, 1998, Decided

July 8, 1998, Filed; July 10, 1998, Entered

DISPOSITION:
[1]** Plaintiff's Objections to Magistrate Judge's order SUSTAINED with respect to underlying legal reasoning and OVERRULED with respect to magistrate judge's ultimate decision to deny plaintiff's motion to compel production of mediation brief and communications between counsel privy to mediation.

COUNSEL:
For SCOTT FOLB, plaintiff: Douglas J Rovens, Rovens Lamb & Yocca, Los Angeles, CA.

For MOTION PICTURE INDUSTRY PENSION & HEALTH FUNDS, HARLEY NMI BLANKENSHIP, FRANK DICKENSON, defendants: Gordon E Krischer, O'Melveny & Myers, Los Angeles, CA.

For MOTION PICTURE INDUSTRY PENSION & HEALTH FUNDS, HARLEY NMI BLANKENSHIP, FRANK DICKENSON, defendants: Catherine B Hagen, Larry Andrew Walraven, Brent J North, Andrea J Restivo, O'Melveny & Myers, Newport Beach, CA.

JUDGES:
Richard A. Paez, United States District Judge.

OPINIONBY:
Richard A. Paez

OPINION:

[*1166] ORDER ON PLAINTIFF'S OBJECTIONS TO ORDER AFTER HEARING OF MAGISTRATE JUDGE ON MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY DEBORAH SAXE, ESQ. AND BY HADSELL & STORMER PURSUANT TO SUBPOENAS

I.

Introduction and Factual Background

Plaintiff Scott Folb contends that defendants discriminated against him on the basis of gender and retaliated **[**2]** against him because he objected when Directors of the Motion Picture Industry Pension & Health Plans (the "Plans") violated fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"). Defendants allegedly relied on a complaint that Folb had sexually harassed another employee, Vivian Vasquez, as a pretext to discharge him for his whistle-blowing activities.

The Plans allegedly promoted Folb several times while he worked for them. Folb became the Administrative Director in January 1996. After Folb took certain actions regarding Vasquez' access to the new computer software system, Vasquez allegedly filed a complaint about his management action. Folb claims Vasquez filed her sexual harassment complaint only after she was told plaintiff had discretion to make the managerial decision about which she had initially complained. Folb's complaint describes in detail the events leading to defendants' decision to terminate Folb's employment, including the Plans' allegedly anomalous

decision to hire Deborah Saxe, an outside attorney, to investigate Vasquez' sexual harassment claim.

With respect to his alleged whistle-blowing activities, Folb claims he objected to and **[**3]** reported, among other things: (1) use of Clinicorp Managed Health Care (and its successor, Alignis, Inc.), as the Plans' exclusive chiropractic service provider when defendant Frank Dickenson's wife was an officer of Clinicorp and then Alignis; (2) improper payments to Clinicorp and Alignis; (3) failure to conduct a bidding process and payment of non-competitive rates; (4) exposure of the Plans to taxes, fees and unnecessary expenditure by continued use of Alignis despite its violation of California's Knox-Keene Health Care Services Act; (5) unsolicited 85% increase in the composite rate paid to Alignis on HMO contracts; (6) demands from the Plans' directors that companies in which they had an interest or with which they were affiliated be given preferential treatment; (7) use of Plan assets to pay for personal expenses; and (8) retention of counsel with a conflict of interest, refusal to accept insurer's **[*1167]** defense, and engagement of separate counsel at excessive rates.

The Court previously denied plaintiff's motion to remand this action to state court because plaintiff's first claim for relief relates to and is preempted by ERISA. In addition, the Court denied plaintiff's motion to **[**4]** remand his supplemental state law claims because to do so would require unnecessary duplication of effort and waste judicial resources.

Pending before the Court are Plaintiff's Objections to Order after Hearing of Magistrate Judge on Motion to Compel Production of Documents by Deborah Saxe, Esq. and by Hadsell & Stormer pursuant to Subpoenas ("Objections"). Magistrate Judge Woehrle denied plaintiff's motion to compel production of a mediation brief and related correspondence regarding settlement negotiations between the Plans and Vivian Vasquez, the employee who accused Folb of sexual harassment.

In approximately February 1997, Vasquez and the Plans attended a formal mediation with a neutral in an attempt to settle Vasquez' potential claims against defendants arising out of the alleged sexual harassment. Vasquez and the Plans signed a contract agreeing to maintain the confidentiality of the mediation and all statements made in it. Vasquez' counsel prepared a mediation brief and provided copies to opposing counsel and to the mediator. The parties apparently did not reach an agreement during the mediation. After the mediation, counsel presumably engaged in further settlement negotiations **[**5]** and the parties ultimately settled Vasquez' potential claims against the Plans. At some point, counsel for the Plans, Lawrence Michaels of Mitchell, Silberberg & Knupp provided Saxe with a copy of the mediation brief. Neither Vasquez nor her attorneys, Hadsell & Stormer, authorized the Plans to provide a copy of the mediation brief to Saxe.

Saxe refused to produce the mediation brief in response to Folb's subpoena, asserting that the confidentiality of the brief is protected under FED. R. EVID. 408 and CAL. EVID. CODE § 1119. Likewise, Hadsell & Stormer refused to produce either the mediation brief or documents relating to settlement negotiations with the Plans on behalf of Vasquez. Folb sought to compel production of (1) Vasquez' mediation brief; (2) correspondence between Vasquez' counsel and counsel for the Plans regarding mediation or other settlement discussions; and (3) notes to the file prepared by Vasquez' counsel regarding settlement communications. Folb argues that the Plans are trying to take a position in this litigation that is inconsistent with the position he believes they took in settlement negotiations with Vasquez. Folb suggests that the Plans will argue that he **[**6]** was properly terminated for sexually harassing Vasquez, despite the fact that they may have argued in mediation or settlement negotiations with Vasquez that she was never sexually harassed at all. Magistrate Judge Woehrle denied Folb's motion to compel production, and Folb filed the pending Objections.

Upon consideration of the parties' moving, opposition, reply and supplemental papers, Hadsell & Stormer and Saxe's separate oppositions to plaintiff's objections and supplemental papers, and the oral arguments of counsel, the Court considers Folb's Objections and modifies the magistrate judge's order in accordance with FED. R. CIV. P. 72. While the Court concludes that the magistrate judge did not err in ruling that the motion to compel production of the mediation brief should be denied, the legal foundation for that ruling must comport with the analysis set forth in the Supreme Court's decision in *Jaffee v. Redmond, 518 U.S. 1, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996)* (recognizing psychotherapist-patient privilege under FED. R. EVID. 501). In addition, the Court finds that Folb is entitled to discover information relating to any settlement negotiations conducted after the conclusion **[**7]** of the formal mediation session.

II.

Discussion

A. Standard of Review

Under *28 U.S.C. § 636*(b)(1)(A), a district court may reconsider a magistrate judge's determination of non-dispositive, pretrial matters if the magistrate's order is **[*1168]** "clearly erroneous or contrary to law."

Similarly, FED. R. CIV. P. 72(a) provides that "the district court judge to whom the case is assigned shall consider [timely] objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." FED. R. CIV. P. 72(a). n1 To conclude that a magistrate judge's decision is clearly erroneous, the district court must arrive at a "definite and firm conviction that a mistake has been committed." *Federal Sav. & Loan Ins. Corp. v. Commonwealth Land Title Ins. Co., 130 F.R.D. 507 (D.D.C. 1990)*. n2

n1 Local Rule 3.3.01 of the Local Rules for the Central District of California also provides for review of those portions of a magistrate judge's decision that are "clearly erroneous or contrary to law."

n2 Because "issues of relevancy ... are traditionally left to the discretion of the trial court," such issues do not come under the "clearly erroneous" standard set forth in § 636(b)(1)(A). *Geophysical Systems Corp. v. Raytheon Co., Inc., 117 F.R.D. 646, 647 (C.D. Cal. 1987)* (reversing magistrate judge's order denying motion to compel discovery). Instead, where the magistrate's decision concerns an evidentiary question of relevancy, "the Court must review the magistrate's order with an eye toward the broad standard of relevance in the discovery context. Thus, the standard of review in most instances is not the explicit statutory standard, but the clearly implicit standard of abuse of discretion." Id.; see also In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the *High Court of Justice, Chancery Division, England, 147 F.R.D. 223, 225 (C.D. Cal. 1993)* (citing *Geophysical, 117 F.R.D. at 647)*.

[8]**

FED. R. CIV. P. 72 requires the objecting party to file and serve objections within 10 days after being served with the magistrate judge's order. A party who fails to file timely objections to a magistrate judge's ruling on a nondispositive motion within ten days forfeits the right to challenge the ruling. *Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1174 n. 1 (9th Cir. 1996)*.

B. Application

1. Timeliness of Plaintiff's Objections

Under FED. R. CIV. P. 6(e), where service of an order is by mail, "3 days shall be added to the prescribed period." Here, the magistrate judge's order was served by mail, so plaintiff had thirteen days to file and serve objections. In addition, "when the period of time prescribed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." FED. R. CIV. P. 6(a) (including Thanksgiving Day as "legal holiday"). Magistrate Judge Woehrle's order was served on November 20, 1997. Excluding weekends and Thanksgiving Day, the last day to file and serve objections was December 10, 1997. Consequently, plaintiff's Objections filed and served on December 10, 1997 were timely.

2. Applicable [9] Law**

Because the parties have not fully briefed the issue of ERISA preemption, the Court assumes, without deciding, that plaintiff's state law claims are not preempted by ERISA. n3 All of plaintiff's claims are premised on his contentions that he never sexually harassed Ms. Vasquez and that he was wrongfully terminated. Plaintiff's motion to compel seeks information relating to the mediation and settlement negotiations between the Plans and Vasquez. Plaintiff hypothesizes that the Plans asserted in settlement negotiations with Vasquez that Folb did not sexually harass her at all. Such information would be relevant here because it would tend to make it more likely that the Plans terminated Folb for some reason other than that he had sexually harassed Vasquez. Because the mediation brief and the communications relating to settlement negotiations between the Plans and Vasquez are arguably relevant to both plaintiff's federal and state law claims, the Court must determine whether state or federal law controls disclosure.

n3 Plaintiff asserts state law claims for wrongful termination in violation of public policy - gender discrimination; breach of written contract; breach of oral contract; breach of implied contract; intentional and negligent infliction of emotional distress; invasion of privacy; and fraud.

[10]**

Federal Rule of Evidence 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory **[*1169]** authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in

the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law applies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The language of Rule 501 raises a difficult question regarding which law shall apply when evidence is relevant both to "an element of a claim or defense" controlled by state law and to a federal law claim. As the Supreme Court noted in Jaffee, "there is disagreement concerning the proper rule in cases such as this in which both federal and state claims are asserted in federal court and the relevant evidence would be privileged under **[**11]** state law but not under federal law." *Jaffee, 518 U.S. at 16 n.15.* That disagreement appears to center on the proper interpretation of Rule 501's mandate that the federal courts recognize state privileges only in cases in which "State law provides the rule of decision." FED. R. EVID. 501.

In the Ninth Circuit, however, the question appears to have been resolved. "In federal question cases with pendent state law claims, the law of privilege is governed by 'the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'" *Religious Technology Center v. Wollersheim, 971 F.2d 364, 367 n.10 (9th Cir. 1992)* (refusing to apply California litigation privilege in copyright action with pendent state law claims); see also *Roberts v. Heim, 123 F.R.D. 614, 620-21* (reviewing cases holding federal common law of privileges governs all privilege issues in federal question case with pendent state law claims). The Ninth Circuit's position is supported by the suggestion in the Advisory Committee Notes to Rule 501 that state law applies only in diversity cases. Other recent cases addressing the issue have likewise concluded **[**12]** that the federal law of privilege is paramount in federal question cases "even if the witness-testimony is relevant to a pendent state law count which may be controlled by a contrary state law privilege." n4 *Hancock v. Hobbs, 967 F.2d 462, 467 (11th Cir. 1992)* (per curiam) (following predominant view); see also *Hancock v. Dodson, 958 F.2d 1367, 1373 (6th Cir. 1992)* (following *Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978)); Smith v. Smith, 154 F.R.D. 661, 670-71 (N.D. Tex. 1994)* (considering, without ruling on, issue of federal mediation privilege).

> n4 Indeed, concerns about whether state or federal privilege law should apply are heightened where the federal question presented is one of exclusive federal jurisdiction. Consequently, where evidence is relevant to both state and federal questions, the federal common law of privileges should apply to protect the exclusive federal concerns central to ERISA even if Rule 501 might otherwise require application of state law to pendent state claims.

[13]**

The leading commentators are in accord. Weinstein succinctly suggests that "in federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in the litigation." 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501.02[3][b] (Matthew Bender 2d ed. 1997) (citing *Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978)).* Like Weinstein, Wright & Graham assert that the simplest resolution of the problem is to conclude that because the provision requiring federal courts to look to state law of privileges in certain circumstances is an exception to the general rule that federal privilege law applies in federal court, "courts should always follow the federal rule when the same evidence is relevant to both a state and federal claim." 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5434 at 862 (1980). Although Wright & Graham note that most early decisions have taken that approach, they go on to suggest that "the strength of these precedents is somewhat diluted by the practice of some courts of applying state law under **[**14]** the guise that it is simply being used to 'guide' development of the federal common law." Id., § 5434 (1998 Supp. at 473).

[*1170] Here, Magistrate Judge Woehrle's order takes the approach of these more recent cases, relying on California law as a matter of comity to shape the federal common law. Magistrate Judge Woehrle held that although state law privileges do not govern in cases presenting federal questions, California's mediation privilege, CAL. EVID. CODE § 1119, applies in this action as a matter of comity because it is consistent with federal interests. n5 Folb v. Motion Picture Industry Pension and Health Plans, CV 97-1663 RAP (CWx), March 18, 1998 Civil Minutes Hon. Carla Woehrle, United States Magistrate Judge (citing *Pagano v. Oroville Hospital, 145 F.R.D. 683, 687-88 (E.D. Cal. 1993)* (holding pendent state law claims governed by federal privilege law but state law should be applied where provisions of state privilege can be harmonized with federal discovery law); *Cook v. Yellow Freight System, Inc., 132 F.R.D. 548, 550 (E.D. Cal. 1990)* (holding federal law of privilege applies in federal question cases and applying underlying policy of Rule 408 to protect documents **[**15]** related to settlement

negotiations from discovery); *Kelly v. City of San Jose, 114 F.R.D. 653, 656 (N.D. Cal. 1987)* (holding federal courts should look to interests behind state privileges as a matter of comity and adopting balancing test for official information privilege concerning information in police files)).

n5 In her March 18, 1998 minute order, Magistrate Judge Woehrle clarified her ruling with respect to the mediation brief and settlement negotiations. In her initial order, issued November 18, 1997, Judge Woehrle simply stated that *Cook, 132 F.R.D. at 553-54,* required a showing of particular relevance to an issue in the litigation to justify breaching the confidentiality of the parties' settlement negotiations. Judge Woehrle concluded that the communications at issue did not "contain relevant information justifying their disclosure." Folb v. Motion Picture Industry Pension and Health Plans, CV 97-1663 RAP (CWx), November 18, 1997 Civil Minutes Hon. Carla Woehrle, United States Magistrate Judge.

[16]**

In light of the foregoing controlling and persuasive authority and the counsel of the leading treatises on the Federal Rules of Evidence, the Court concludes that Magistrate Judge Woehrle erred as a matter of law in applying the California mediation privilege "as a matter of comity." n6 While much of Judge Woehrle's reasoning runs parallel to the elements of the test set forth in Jaffee and its predecessors, federal courts are bound to strictly apply that test in adopting a new federal privilege and may not conduct a more ad hoc analysis of the relationship between the experience of the forum state and various federal interests. To the extent the authority relied upon by the magistrate judge suggests federal courts should look to the law of the forum state as a matter of comity in determining the contours of federal privilege law, that authority is disapproved by Jaffee. See *Jackson v. County of Sacramento, 175 F.R.D. 653 (E.D. Cal. 1997)* (correctly holding Cook and Pagano overruled by Jaffee to the extent those cases suggest federal privilege law is informed primarily by the law of the forum state as a matter of comity rather than by the law of the 50 states **[**17]** in the aggregate as evidence of reason and experience).

n6 As the Court explains below, however, Judge Woehrle was clearly correct that Jaffee requires federal courts to consider the experience of the states, including the forum state, in determining whether to recognize a new federal common law privilege. See *Jaffee, 518 U.S. at 14-15.*

Because the federal common law of privileges governs both federal and pendent state law claims in federal question cases, the Court must decide whether to adopt a federal mediation privilege under FED. R. EVID. 501.

3. Federal Mediation Privilege

The federal courts are authorized to define new privileges based on interpretation of "common law principles ... in the light of reason and experience." *Jaffee, 518 U.S. at 8.*

The general mandate of Rule 501 was substituted by the Congress for a set of privilege rules drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by **[**18]** [the Supreme] Court.... In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its **[*1171]** purpose rather was to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis ... and to leave the door open to change.

Trammel v. United States, 445 U.S. 40, 47, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980) (internal marks and citations omitted). Nonetheless, that authority must be exercised with caution because the creation of a new privilege is based upon considerations of public policy. In general, the appropriate question is not whether a federal mediation privilege should exist in the abstract, but whether "(1) the need for that privilege is so clear, and (2) the desirable contours of that privilege are so evident, that it is appropriate for this court to craft it in common law fashion, under Rule 501." *In re Grand Jury, 35 V.I. 516, 103 F.3d 1140, 1154 (3d Cir. 1997)* (quoting *Jaffee, 518 U.S. at 35* (Scalia, J., dissenting)), cert. denied, *Roe v. U.S., 520 U.S. 1253, 117 S. Ct. 2412, 138 L. Ed. 2d 177 (1997).*

The general rule is that the public is entitled to every **[**19]** person's evidence and that testimonial privileges are disfavored. Id. Consequently,

we start with the primary assumption that there is a general duty to give what testimony one is capable of giving.... Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a "public good transcending the normally predominant

principle of utilizing all rational means for ascertaining the truth."

Jaffee, 518 U.S. at 9 (quoting *Trammel, 445 U.S. 40 at 50)*. To determine whether an asserted privilege constitutes such a public good, in light of reason and experience, the Court must consider (1) whether the asserted privilege is "rooted in the imperative need for confidence and trust[;]" (2) whether the privilege would serve public ends; (3) whether the evidentiary detriment caused by exercise of the privilege is modest; and (4) whether denial of the federal privilege would frustrate a parallel privilege adopted by the states. Id. at 9-13.

a. Need for Confidence and Trust

The existing Federal Rules provide an important backdrop against which to view the role of a mediation privilege in protecting confidentiality and trust between **[**20]** disputants. FED. R. CIV. P. 26(b) provides that "it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Recognizing the broad sweep of Rule 26, several courts have looked to FED. R. EVID. 408 for protection of settlement negotiations, whether conducted with the assistance of a mediator or in private. See, e.g., *Young v. State Farm Mutual Automobile Ins. Co., 169 F.R.D. 72, 76, 79 (S.D.W.V. 1996)* (weight of authority and Rule 26(b) impose greater burden to establish relevancy to gain discovery of inadmissible, non-privileged confidential settlement documents). Rather than applying Rule 501, the Young court and its progenitors have improperly established a heightened standard under Rule 408, and they apply that standard to provide a semi-privilege to confidential settlement agreements and negotiations.

Rule 408 provides that "evidence of conduct or statements made in compromise negotiations is [] not admissible." Viewed in combination with FED. R. CIV. P. 26(b), Rule 408 only protects disputants from disclosure of information to the **[**21]** trier of fact, not from discovery by a third party. Consequently, without a federal mediation privilege under Rule 501, information exchanged in a confidential mediation, like any other information, is subject to the liberal discovery rules of the Federal Rules of Civil Procedure, at least where jurisdiction is premised on a federal question and the material sought in discovery is relevant to the federal claims presented.

To determine whether there is a need for confidentiality in mediation proceedings, the Court looks first to judicial and Congressional pronouncements on the issue. No federal court has definitively adopted a mediation privilege as federal common law under Rule 501. In one of the leading cases on the treatment of confidential communications in mediation, however, the Ninth Circuit approved revocation of a subpoena that **[*1172]** would have required a Federal Mediation and Conciliation Service ("FMCS") mediator to testify in a National Labor Relations Board ("NLRB") enforcement proceeding. *National Labor Relations Board v. Joseph Macaluso, Inc., 618 F.2d 51, 52 (9th Cir. 1980)*. Relying on United States policy favoring resolution of labor disputes through collective bargaining **[**22]** and on Congress' creation of government facilities for mediation, the Ninth Circuit in Macaluso concluded that "the public interest in maintaining the perceived and actual impartiality of federal mediators does not outweigh the benefits derivable from [the mediator's] testimony." *Id. at 54* (citing *29 U.S.C. § 171*(a)(b)); see also *Local 808, Building Maintenance Service & Railroad Workers v. National Mediation Board, 281 U.S. App. D.C. 231, 888 F.2d 1428, 1435-36 (D.C. Cir. 1990)* (finding National Mediation Board action was not in bad faith and suggesting confidential and privileged information may be communicated to mediator in private sessions); *Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees, 117 F.R.D. 485 (D. Maine 1987)* (following Macaluso).

The Ninth Circuit's conclusion that requiring a federal mediator to disclose information about the mediation proceedings would inevitably impair or destroy the usefulness of the FMCS in future proceedings is equally applicable in the context of private mediation. Admittedly, the express federal interest in preserving a labor mediation system establishes a stronger basis for a mediator privilege **[**23]** in the context of NLRB proceedings. Nonetheless, mediation in other contexts has clearly become a critical alternative to full-blown litigation, providing the parties a more cost-effective method of resolving disputes and allowing the courts to keep up with ever more unmanageable dockets.

Focusing on the role of the mediator, the Macaluso court emphasized that "the purpose of excluding mediator testimony ... is to avoid a breach of impartiality, not a breach of confidentiality." *Macaluso, 618 F.2d at 56 n. 3*. Nevertheless, rules protecting the confidentiality of mediation proceedings and rules protecting the actual or perceived impartiality of mediators serve the same ultimate purpose: encouraging parties to attend mediation and communicate openly and honestly in order to facilitate successful alternative dispute resolution.

Conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some

other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify **[**24]** about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side.

Id. at 55. Whether information divulged in mediation proceedings is disclosed through the compelled testimony of a mediator or the compelled disclosure of documents conveyed to or prepared by the mediator, the side most forthcoming in the mediation process is penalized when third parties can discover confidential communications with the mediator. Refusing to establish a privilege to protect confidential communications in mediation proceedings creates an incentive for participants to withhold sensitive information in mediation or refuse to participate at all.

Today, the Court is faced with a somewhat more attenuated concern: whether the "imperative need for confidence and trust" that would support creation of a privilege protecting confidential communications with a mediator should extend so far as to protect all oral and written communications between the parties to a mediation. Before delving into the heart of the matter, we must also clarify **[**25]** what constitutes "mediation" for purposes of the Court's analysis today. Given the facts presented by the parties before the Court, we need only consider whether communications between parties who agreed in writing to participate in a confidential mediation with a neutral third party should be privileged and whether that privilege should extend to communications between the parties after they have concluded their formal mediation with the neutral.

[*1173] Several commentators have suggested that successful mediation requires open communication between parties to a dispute. See, e.g., Alan Kirtley, "The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest," *1995 J. DISP. RESOL. 1, 8, 16* (collecting sources indicating weight of scholarly authority suggests confidentiality is essential to mediation). Kirtley argues that

without adequate legal protection, a party's candor in mediation might well be 'rewarded' by a discovery request or the revelation of mediation information at trial. A principal purpose of the mediation privilege is to provide mediation parties **[**26]** protection against these downside risks of a failed mediation.

Id. at 9-10. In general, however, the academic literature provides little analysis of whether communications disclosed to the opposing party in the course of mediation proceedings should be accorded the same level of protection as private communications between one party and the mediator.

One self-described "heretical" commentator has expressed doubt over the need for a mediation privilege to protect confidentiality in mediation.

Although most mediators assert that confidentiality is essential to the process, there is no data of which I am aware that supports this claim, and I am dubious that such data could be collected. Moreover, mediation has flourished without recognition of a privilege, most likely on assurance given by the parties and the mediator that they agree to keep mediation matters confidential, their awareness that attempts to use the fruits of mediation for litigation purposes are rare, and that courts, in appropriate instances, will accord mediation evidence Rule 408 and public policy-based protection.

Eric D. Green, "A Heretical View of the Mediation Privilege," 2 OHIO ST. J. **[**27]** ON DISP. RESOL. 1, 32 (1986) (arguing campaign to obtain blanket mediation privilege rests on "faulty logic, inadequate data, and shortsighted professional self-interest.").

Another author takes the position that, while a certain level of confidentiality may be necessary to make mediation effective, "it is wrong to assume that mediation needs absolute confidentiality." Kevin Gibson, "Confidentiality in Mediation: A Moral Reassessment," *1992 J. DISP. RESOL. 25, 26.* Gibson suggests that although parties may be more guarded in the absence of confidentiality provisions, open mediations are as successful as confidential mediations when measured by the settlement rate. *Id. at 41* (citing American Bar Ass'n, ABA Dispute Resolution Directory 145-50 (L. Ray, B. Davis, M. Shuffleton & A. Clare, eds., 1983) (discussing three Ohio programs that settled over 75% of mediated cases)); see also Note, "Making Sense of Rules of Privilege under the Structural (Il)logic of the Federal Rules of Evidence," *105 HARV. L. REV. 1339 (1992)* (suggesting protection of communications in mediation should take form of confidentiality contracts, procedural limitations on discovery, and use of work product **[**28]** doctrine) [hereinafter "Structural Il(logic)"].

Legal authority on the necessity of protecting confidential communications between the parties to a mediation is sparse. In an early decision by the Second Circuit, the court stated:

if participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, noncommital manner more suitable to poker players in a high-stakes game than adversaries attempting to arrive at a just solution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements and withdrawals of some appeals and to the simplification of issues in other appeals, thereby expediting cases at a time when the judicial resources of this Court are sorely taxed.

Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928 (2d Cir. 1979) (denying request for damages and costs on appeal from district court's confirmation of arbitration award where party seeking costs **[*1174]** relied upon confidential information from formal settlement conference **[**29]** with the court's Staff Counsel); see also *Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992)* (admonishing counsel for breach of confidentiality and holding confidentiality essential to proper functioning of appellate settlement conference program); *Willis v. McGraw, 177 F.R.D. 632, 633 (S.D.W.V. 1998)* (following Lake Utopia and denying motion to enforce settlement); Richard Chernick, "Confidentiality in the Mediation Process," CA13 ALI-ABA 603, 606 (1996) (quoting Lake Utopia and discussing confidentiality of mediation proceedings under California and federal law).

At least one district court has concluded that confidential information disclosed in alternative dispute resolution ("ADR") proceedings is privileged. See *United States v. Gullo, 672 F. Supp. 99, 104 (W.D.N.Y. 1987)*. In Gullo, the court found that the confidentiality provision in New York's Community Dispute Resolution Centers Program served to ensure the effectiveness and continued existence of the program. Id. Looking to Rule 501, the court concluded, on balance, that the privilege afforded under New York law should be recognized by the federal court. Id. Having concluded that **[**30]** the information was protected, the Gullo court suppressed evidence in a criminal proceeding of all statements made during the dispute resolution process, as well as the terms and conditions of the settlement. Id.

Other New York district courts have impliedly approved a federal mediation privilege by sanctioning attorneys for disclosing information revealed during mediation proceedings conducted pursuant to the district court's mediation program. *Bernard v. Galen Group, Inc., 901 F. Supp. 778, 782-84 (S.D.N.Y. 1995)* (sanctioning attorney for intentionally disclosing to the court settlement offers made in mediation proceeding); *Cohen v. Empire Blue Cross & Blue Shield, 178 F.R.D. 385 (E.D.N.Y. 1998)* (sanctioning attorney for violating confidentiality provisions of court-annexed mediation program). Focusing directly on the need for confidentiality between parties to a mediation, another court applied state law to protect the confidentiality of disclosures made during participation in the district court's mediation program. *Doe v. State of Nebraska, 971 F. Supp. 1305, 1307 (D. Neb. 1997)* (applying Nebraska law and district court's mediation plan). That court reasoned **[**31]** that:

> if any comments about the dispute made during the negotiation process were later to be construed as admissions, or even to be used to show bias, as permitted in FED. R. EVID. 408, the posturing of the parties in the negotiations could well reduce or eliminate any likelihood of settlement, or even serious negotiation, for the parties would be extremely cautious about advancing a settlement proposal that might be used against them. Thus, they may never get beyond their "positions," even if they both may genuinely want to settle their dispute.
>
> Id.

Likewise, several of the district court decisions relied upon by the magistrate judge and discussed above hold that settlement communications between parties should be privileged in one fashion or another, whether the information was communicated in the course of a formal mediation with a neutral or simply in private settlement negotiations between the parties. See, e.g., *Cook, 132 F.R.D. at 550* (applying underlying policy of Rule 408 to protect documents related to settlement negotiations from discovery); see also *Garstang v. Superior Court, 39 Cal. App. 4th 526, 531-32 (2d Dist. 1995)* (settlement negotiations **[**32]** protected under California's constitutional right of privacy even though parties had not executed written confidentiality agreement required to invoke California's mediation privilege); *Butta-Brinkman v. FCA Int'l, Ltd., 164 F.R.D. 475, 476-77 (N.D. Ill. 1995)* (holding defendant not required to turn over confidential settlement agreements reached in other sexual harassment cases in absence of showing plaintiff will be unable to obtain the relevant information through other discovery); but see *In re March 1994 Special Grand Jury, 897 F. Supp. 1170, 1172 (S.D. Ind. 1995)* (invoking comity between state and federal government but refusing to apply state law mediation privilege where information sought did not relate to confidentiality of settlement negotiations); *Carman v. McDonnell Douglas* **[*1175]** *Corp., 114 F.3d 790, 793-94 (8th Cir. 1997)* (applying Rule 501 and refusing to adopt "ombudsman's privilege" in part because employee perception of ombudsman as company investigator is more likely to prevent employee from

speaking openly than fact that information imparted is not privileged).

In Cook, the court denied a motion to compel production of material disclosed in settlement [**33] negotiations between a terminated employee and his employer where the plaintiffs claimed the terminated employee had sexually harassed them. *Cook, 132 F.R.D. at 550.* Although the Cook court did not specifically consider confidentiality in the context of mediation, in effect, that court suggested that the intensity of the need for confidentiality supports a broad, blanket privilege extending not only to all alternative dispute resolution proceedings but to all settlement negotiations regardless of their context.

Taking the foregoing authorities en masse, the majority of courts to consider the issue appear to have concluded that the need for confidentiality and trust between participants in a mediation proceeding is sufficiently imperative to necessitate the creation of some form of privilege. This conclusion takes on added significance when considered in conjunction with the fact that many federal district courts rely on the success of ADR proceedings to minimize the size of their dockets.

Many jurisdictions make settlement proceedings, including mediation, a mandatory step in the litigation process. For example, in the Central District of California, Local Rule 23 requires [**34] the parties in every civil case to participate in one of the approved settlement procedures. Local Rule 23.2. The Central District specifically permits parties to select a non-judicial dispute resolution proceeding as a settlement procedure and requires each party to submit to the settlement officer a confidential letter that includes a written statement of the case and the party's settlement position. Local Rule 23.5.3, 23.6.1. Most tellingly, the Central District's Local Rule provides:

all settlement proceedings shall be confidential. No part of a settlement proceeding shall be reported, or otherwise recorded, without the consent of the parties, except for any memorialization of a settlement and the Clerk's minutes of the proceedings.

Local Rule 23.9. In short, this Court's Local Rules inform parties that information disclosed in whichever settlement proceeding they select will remain confidential. In the absence of a federal mediation privilege, that assurance of confidentiality does little, in the face of third-party discovery, to protect those parties choosing mediation. n7

n7 Even if we interpret this Court's Local Rules expansively and read the confidentiality provision as providing protection from compelled disclosure in later federal court proceedings, in the absence of a common law mediation privilege, an anomalous situation arises in which mediation ordered by a federal court is confidential while the confidentiality of a mediation conducted at the direction of a state court or on the parties' own initiative may be invaded under the Federal Rules of Civil Procedure.

[**35]

Like this District's Local Rules, the proposed Alternative Dispute Resolution Act of 1998 (the "ADR Bill") n8 now pending in the United States Senate Committee on the Judiciary would mandate that each district court establish an ADR system requiring civil litigants to participate in an ADR process. H.R. 3528, 105th Cong. (1998). Mediation is specifically included as one of the acceptable ADR methods. Id. With respect to confidentiality, the ADR Bill would amend Title 28 as follows:

Until such time as rules are adopted under chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule adopted under section 2071(b), provide for the confidentiality of the alternative dispute resolution processes and to (sic) prohibit disclosure of confidential dispute resolution communications.

[*1176] Id. Whether or not the ADR Bill is passed into law, the proposal provides additional evidence of the important federal and public interest in protecting confidential communications in court-ordered mediation. n9

n8 The Alternative Dispute Resolution Act of 1998 passed in the House of Representatives on April 21, 1998 by a yea-nay vote of 405 to 2 and was received by the Senate and submitted to the Senate Committee on the Judiciary on April 22, 1998. [**36]

n9 The Ninth Circuit noted in Macaluso that because participation in FMCS mediation is voluntary, it is fair to charge the participants with acceptance of restrictions on use of information disclosed in mediation proceedings. *Macaluso, 618 F.2d at 56.* Where mediation is mandated, however, the argument for protecting confidential

> communications may be even stronger because participants are often assured that all discussions and documents related to the proceeding will be protected from forced disclosure.

Passage of the ADR Bill, however, would not establish a separate basis for protecting information revealed in mediation from compulsory disclosure. The federal common law is inapplicable when Congress enacts a law governing a particular privilege. FED. R. EVID. 501. Nonetheless, the ADR Act would provide only a general mandate to establish the confidentiality of court-ordered mediation proceedings. Without explicitly defining that confidentiality in terms of privilege, mediation participants will not be protected from third-party discovery of information disclosed to the opposing party **[**37]** in the course of mediation proceedings.

The proliferation of federal district court rules purporting to protect the confidentiality of mediation and the ADR Bill now pending before the United States Senate indicate a commitment to encouraging confidential mediation as an alternative means of resolving disputes that would otherwise result in protracted litigation. Academic authors differ on the necessity of creating a mediation privilege, but most federal courts considering the issue have protected confidential settlement negotiations and mediation proceedings, either by relying on state law or by applying the confidentiality provisions of federal court ADR programs. Having carefully reviewed the foregoing authority, the Court concludes that the proposed blanket mediation privilege is rooted in the imperative need for confidence and trust among participants.

b. Public Ends

A new privilege must serve a public good sufficiently important to justify creating an exception to the "general rule disfavoring testimonial privileges." *Jaffee, 518 U.S. at 9.* The attorney-client privilege encourages observance of the law and facilitates the maintenance of an effective adversarial system **[**38]** of justice; the spousal privilege protects the public interest in marital harmony; the doctor-patient and psychotherapist-patient privileges serve the public interest in providing appropriate physical and mental health care. *Id. at 11.* The proposed blanket mediation privilege would serve public ends by encouraging prompt, consensual resolution of disputes, minimizing the social and individual costs of litigation, and markedly reducing the size of state and federal court dockets.

Articulating a normative distinction between privilege rules that protect relationships and privilege rules that protect desirable activities, one academic has suggested that "what is truly at stake with a mediator's privilege is the promotion of the process of mediation rather than the protection of the relationship between mediator and party." Structural Il(logic), *105 HARV. L. REV. at 1356.* The author suggests that because the value of a mediation privilege is its ability to promote dispute resolution rather than its ability to foster ongoing interpersonal relationships, the need for confidentiality in mediation is of a lesser order. *Id. at 1357.* Consequently, the author contends that statements **[**39]** made in conjunction with a mediation, whether divulged exclusively to the mediator or to the opposing party, should be accorded, at most, only a limited "activity" privilege. Id.

The fallacy of this argument is in its formalistic adherence to a model that posits first and second-order public interests and then concludes that only first-order, relational interests provide a sufficiently imperative need for confidentiality to justify the creation of a privilege. Although the author suggests that privileges such as the attorney-client privilege provide a social good by promoting important relationships, the Supreme Court has indicated that the public interest served by the attorney-client privilege is the benefit **[*1177]** to the administration of justice. See *Jaffee, 518 U.S. at 11.* Furthermore, if the purpose of a mediation privilege is to foster forthright communication between parties to a dispute, rather than to protect only those communications made in private sessions with the mediator, a mediation privilege would fall squarely within the "relational" privileges the Harvard author would protect. Consequently, the level of protection afforded depends largely upon the way in which **[**40]** the relationship is characterized. For example, where disputants have ongoing relationships, consensual dispute resolution serves the public good by fostering conciliatory relationships between employees and employers and between contracting parties in the business world. Whether a blanket mediation privilege is characterized as a relational privilege or as an activity privilege under the author's rubric, it serves important public ends by encouraging open communication in mediation which ultimately leads to better relationships between the parties and to voluntary settlement of cases pending in state and federal courts.

In an early, broad-based critique of the ADR movement, Professor Owen Fiss argues against rules that promote settlement, contending that

> settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.... When the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone. The

settlement of a school [desegregation] suit might secure the peace, but not racial equality. Although the parties are prepared to live under the terms [**41] they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept something less than ideal.

Owen Fiss, "Against Settlement," *93 YALE L.J. 1073, 1075-76 (1984)*. Similarly, Aseem Mehta, writing on confidential mediation of environmental disputes, suggests that confidential settlement of such disputes sometimes masks the true cost to society, allowing polluters to settle without alerting non-parties who will be affected by the clean-up plan, shielding producers of harmful products from public scrutiny, and allowing repeat offenders to avoid the creation of adverse precedent. Note, "Resolving Environmental Disputes in the Hush-Hush World of Mediation: A Guideline for Confidentiality," *10 Geo. J. Legal Ethics 521, 522-23 (1997)* (arguing blanket privilege for mediation should not apply in context of environmental and public health disputes, particularly where government agencies are involved because just results require open governmental decision-making process).

While this critique has merit and, in an ideal world, we might prefer to [**42] allocate all necessary resources to public adjudication of civil disputes, we live in a world of ever-expanding court dockets and limited judicial resources. A privilege that promotes conciliatory dispute resolution and alleviates the press of cases on the formal judicial system also allows the courts to devote those limited resources to fairly adjudicating those cases that do result in protracted litigation. Rather than the hasty judgments born of overcrowded dockets, the courts are able to provide more carefully considered decisions in matters of sufficient public concern that the parties submit their disputes to a court of law, having found it too difficult to reach a mutually agreeable settlement.

Idealism aside, a mediation privilege would serve important public ends by promoting conciliatory relationships among parties to a dispute, by reducing litigation costs and by decreasing the size of state and federal court dockets, thereby increasing the quality of justice in those cases that do not settle voluntarily.

c. Evidentiary Detriment

In assessing the necessity of adopting a new privilege, the courts must consider whether "the likely evidentiary benefit that would result [**43] from the denial of the privilege is modest." *Jaffee, 518 U.S. at 11-12.* In Jaffee, the Supreme Court reasoned that in the absence of psychotherapist-patient privilege, "much of the desirable evidence to which litigants ... seek access -- [*1178] for example, admissions against interest by a party -- is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." *Id. at 12.* The same rationale applies with respect to party admissions in mediation proceedings.

Where, as here, an employer is sued by one employee claiming wrongful termination based on false allegations of sexual harassment and by another employee asserting a claim for sexual harassment perpetrated by the other employee, a blanket mediation privilege might permit an unscrupulous employer to garner the benefit of the two employees' opposing positions. In open mediation proceedings, the employer would be forced to strike a balance between the two parties positions rather than taking one employee's side in the first case and then shifting to the other side when defending against charges by the second employee. Despite the potential [**44] moral implications of fostering such duplicity, however, there is very little evidentiary benefit to be gained by refusing to recognize a mediation privilege.

First, evidence disclosed in mediation may be obtained directly from the parties to the mediation by using normal discovery channels. For example, a person's admission in mediation proceedings may, at least theoretically, be elicited in response to a request for admission or to questions in a deposition or in written interrogatories. In addition, to the extent a party takes advantage of the opportunity to use the cloak of confidentiality to take inconsistent positions in related litigation, evidence of that inconsistent position only comes into being as a result of the party's willingness to attend mediation. Absent a privilege protecting the confidentiality of mediation, the inconsistent position would presumably never come to light.

Although the Court need not, and indeed may not, address the outer limits of a federal mediation privilege, it seems appropriate to note one potential limitation here. A federal mediation privilege may be attenuated of necessity in criminal or quasi-criminal cases where the defendant's constitutional [**45] rights are at stake. In a recent decision, a California appellate court discussed the scope of acceptable evidentiary detriment created by the mediation privilege set forth in CAL. EVID. CODE § 1119. See *Rinaker v. Superior Court of San Joaquin County, 62 Cal. App. 4th 155 (3d Dist. 1998)*. In the context of a juvenile delinquency proceeding, the Rinaker court found that

> neither the witness nor the mediator had a reasonable expectation of privacy in inconsistent statements made

by the witness during confidential mediation because it has long been established that, when balanced against the competing goals of preventing perjury and preserving the integrity of the truth-seeking process of a juvenile delinquency proceeding, the interest in promoting settlements (in this case through confidential mediation of a civil harassment action against the minors) must yield to the minors' constitutional right to effective impeachment.

Id. at 161.

Despite the potential need to limit a federal mediation privilege in certain types of cases, the matter before the Court is directly in line with the Supreme Court's conclusion in Jaffee that a new federal privilege results **[**46]** in little evidentiary detriment where the evidence lost would simply never come into being if the privilege did not exist. In fact, this rationale applies even more strongly in the context of mediation proceedings than in a psychotherapeutic relationship because mediation is part of an overall litigation strategy while psychotherapy is a response to health care concerns. The decision to seek out a therapist is often made without considering the potential impact on pending litigation. By contrast, anyone who attends a mediation, or decides not to use mediation to attempt to resolve a dispute, will consider the effect of disclosures on the pending or potential litigation.

d. Mediation Privilege in the 50 States

In assessing a proposed privilege, a federal court should look to a consistent body of state legislative and judicial decisions adopting such a privilege as an important indicator of both reason **[*1179]** and experience. *Jaffee, 518 U.S. at 12-13.* Put simply, "the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." Id. Practically speaking, the confidential status accorded **[**47]** to mediation proceedings by the states will be of limited value if the federal courts decline to adopt a federal mediation privilege. See *id. at 13.*

Several years ago, one district court addressed the propriety of adopting a federal privilege protecting mediators from being compelled to testify. See *Smith v. Smith, 154 F.R.D. 661, 670-71 (N.D. Tex. 1994)* (affirming magistrate judge's decision quashing subpoena served on court-appointed mediator). Because the parties in Smith had assumed that state privilege laws applied, that court ultimately declined to resolve the issue. Id. Nonetheless, the Smith court -- considering the somewhat different question raised there of whether a mediator should have protected status -- commented at length on the importance of confidentiality to the mediation process. The court noted that "confidentiality appears to be widely accepted in state law as a desirable component of the mediation process[.]" *Id. at 671.* At the same time, however, the Smith court suggested that the lack of uniformity and uneven protection of mediation in the states indicates "the absence of consensus concerning the scope of the right of confidentiality." **[**48]** *Id. at 674* (quoting Young & Ross, § III(B) at 575).

At a time when state-law support for confidentiality in mediation is apparently increasing, the protections accorded are still characterized as uneven and lacking in uniformity.... The unsettled state of the law reflects disagreement among judges and legislators on the weight of competing interests[.]

Id. Although the Smith court reached no conclusion with respect to the propriety of adopting a mediator privilege, that court's reasoning suggests the federal courts should attempt to strike a balance or refrain from adopting a privilege when the states are in disagreement about the proper scope of the privilege.

At the forefront of the inquiry, however, is the fact that every state in the Union, with the exception of Delaware, has adopted a mediation privilege of one type or another. Pamela A. Kentra, "Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct," *1997 B.Y.U.L. REV. 715,* Appendix A (collecting statutes) [hereinafter Here No Evil]. The District of Columbia's **[**49]** court rules on dispute resolution also provide that the mediation process is confidential. *Id. at 761.* While some states provide only limited protection, a majority of the states go beyond protecting communications in private sessions with the mediator, requiring that the entire process be confidential. Id. A number of states provide explicitly that information disclosed in mediation proceedings is not subject to discovery. See, e.g., CAL. EVID. CODE § 1119 (admissions made pursuant to a mediation are not subject to discovery); N.Y. JUD. LAW ANN. § 849-b (communications in mediation not subject to disclosure in later judicial proceedings); TEX. CIV. PRAC. & REM CODE ANN. § 154.073 (ADR proceedings confidential and privileged from disclosure); WYO STAT. ANN. § 1-43-103 (party to mediation has privilege to prevent disclosure by other participants); WASH. REV. CODE. ANN. § 7.75.050 (all communications privileged).

The fact that the states have not settled on the scope of protection to provide should not prevent the federal courts from determining that in light of reason and experience we should adopt a federal mediation privilege. While the contours of such a federal **[**50]**

privilege need to be fleshed out over time, state legislatures and state courts have overwhelmingly chosen to protect confidential communications in mediation proceedings in order to facilitate settlement of disputes through alternative dispute resolution. "Denial of the federal privilege ... would frustrate the purposes of the state legislation that was enacted to foster these confidential communication." *Jaffee, 518 U.S. at 13.* Accordingly, this Court finds it is appropriate, in light of reason and experience, to adopt a federal mediation privilege applicable **[*1180]** to all communications made in conjunction with a formal mediation.

e. Contours of the Privilege

Where courts are required to balance a number of factors to determine whether a privilege should apply to the particular factual scenario presented, the purpose of the privilege is severely undermined.

If the purpose of the privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, **[**51]** is little better than no privilege at all.

Id. at 18 (internal marks omitted). Accordingly, in adopting any privilege under Rule 501, the federal courts must attempt to provide a clear rule of protection.

The mediation underlying the instant dispute was a formal mediation with a neutral mediator, not a private settlement discussion between the parties. Accordingly, the mediation privilege adopted today applies only to information disclosed in conjunction with mediation proceedings with a neutral. Any interpretation of Rule 501 must be consistent with Rule 408. To protect settlement communications not related to mediation would invade Rule 408's domain; only Congress is authorized to amend the scope of protection afforded by Rule 408. Consequently, any post-mediation communications are protected only by Rule 408's limitations on admissibility.

On the facts presented here, the Court concludes that communications to the mediator and communications between parties during the mediation are protected. In addition, communications in preparation for and during the course of a mediation with a neutral must be protected. Subsequent negotiations between the parties, however, are **[**52]** not protected even if they include information initially disclosed in the mediation. To protect additional communications, the parties are required to return to mediation. A contrary rule would permit a party to claim the privilege with respect to any settlement negotiations so long as the communications took place following an attempt to mediate the dispute. n10

n10 In light of the requirement that each privilege be adopted or rejected wholesale in order to ensure privileges are applied predictably, the Court found it necessary to consider the validity of adopting a federal mediation privilege in some depth. Nonetheless, this Court is presented with the relatively narrow question raised by the litigants. The Court has not attempted to fully elucidate the appropriate scope of a mediation privilege under the federal common law. For example, the Court does not consider questions of waiver beyond those briefly mentioned below, nor does the Court consider exceptions to the application of a mediation privilege. Whether traditional exceptions such as the crime-fraud exception to the attorney-client privilege are applicable in the context of a mediation privilege must be left for another day.

[53]**

Based on the foregoing analysis, although Magistrate Judge Woehrle erred as a matter of law by failing to strictly apply Rule 501, the ultimate decision to deny plaintiff's motion to compel is properly sustained. The Court also concludes that Magistrate Judge Woehrle neither erred as matter of law nor made a clearly erroneous factual determination when she concluded that Vasquez did not waive the mediation privilege when the Plans' attorneys disclosed the mediation brief to Saxe without Vasquez' consent. "Waiver is the intentional relinquishment of a known right." 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, EQUITY § 178 (9th ed 1990) (citations omitted). Vasquez neither expressly nor impliedly consented to the Plans' disclosure of the mediation brief to Saxe.

Because the Court has not had the benefit of in camera review of the documents at issue, certain documents at issue may fall outside the scope of the mediation privilege adopted today. Accordingly, as set forth in detail below, plaintiff may attempt to compel production of communications that took place between counsel privy to the mediation after the mediation was formally concluded.

III.

Conclusion [54]**

For the foregoing reasons, plaintiff's Objections to the Magistrate Judge's order are **[*1181] SUSTAINED**

with respect to the underlying legal reasoning and **OVERRULED** with respect to the magistrate judge's ultimate decision to deny plaintiff's motion to compel production of the mediation brief and communications between counsel privy to the mediation, at least to the extent that those communications were made in anticipation of or during the course of the mediation. Plaintiff may seek, by renewed motion before the Magistrate Judge within fifteen days of entry of this order, to compel production of any documents relating to communications between Vasquez and the Plans that were not made in conjunction with, or pursuant to, the formal mediation proceeding.

In short, the Court concludes that encouraging mediation by adopting a federal mediation privilege under FED. R. EVID. 501 will provide "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jaffee, 518 U.S. at 9.*

IT IS SO ORDERED

DATED: July 7, 1998

Richard A. Paez

United States District Judge

RECYCLED

PATSY B. SHELDONE, et al., Plaintiffs, v. PENNSYLVANIA TURNPIKE COMMISSION, Defendant.

Civil Action No. 99-1650

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

104 F. Supp. 2d 511; 2000 U.S. Dist. LEXIS 12681; 48 Fed. R. Serv. 3d (Callaghan) 943

July 17, 2000, Decided

DISPOSITION:
[1]** Defendants' motion for a protective order granted.

COUNSEL:
For PATSY B. SHELDONE, BRUCE M. BRINKOS, RAYMOND F. CECCHETTI, GARY L. CURFMAN, MICHAEL JOHN DYTKO, MARCEL GRAHAM, ROGER T. HAAS, THOMAS E. KELLY, THOMAS MARTUCCI, STAN NAMOLA, JR., CHARLES W. REED, GAETANO J. JEFFREY, plaintiffs: Ernest B. Orsatti, Jason Mettley, Jubelirer, Pass & Intrieri, Pittsburgh, PA.

For PENNSYLVANIA TURNPIKE COMMISSION, defendant: James B. Brown, W. Scott Hardy, Cohen & Grigsby, Pittsburgh, PA.

JUDGES:
FRANCIS X. CAIAZZA, U.S. Magistrate Judge. Judge Lancaster.

OPINIONBY:
FRANCIS X. CAIAZZA

OPINION:

[*511]

ORDER

For the reasons stated below, the Defendant Pennsylvania Turnpike Commission's ("the Commission's" or "the Defendant's") motion for a protective order (Doc. 23, hereinafter cited as "Def.'s Mot.") will be granted as consistent with this Order.

BACKGROUND

A. Procedural History

The Plaintiffs, members of International Brotherhood of Teamsters, Local 30 ("Local 30") who are employed by the Commission (hereinafter "the Plaintiffs"), filed this lawsuit on October 7, 1999 alleging that the Defendant violated the Fair Labor Standards Act, *29 U.S.C. § 201,* **[**2]** *et seq.* **[*512]** ("the FLSA"), by "imposing a fluctuating hours method of compensation on the Plaintiffs." *See* Pls.' Mem. in Opp'n to Mot. for Protective Order ("Pls.' Mem.") at 1. On approximately May 24, 2000, Plaintiffs' counsel noticed the deposition of an authorized agent of the Commission pursuant to Federal Rule of Civil Procedure 30(b)(6). *See* Notice of Dep., attached as Ex. A to Def.'s Mot ("Dep. Notice"). Among other things, the Plaintiffs seek to conduct an examination regarding "the mediation [of] the grievance filed by Roger Haas [("Mr. Haas")] and Michael Pandolfo heard on May 21, 1999, before Mediator Michael W. Krchnar, Jr." ("the Mediation"). *See* Dep. Notice at P 2.

The Defendant's motion seeks to preclude the discovery "through any method ..., including [the] Plaintiffs' noticed deposition," of " all mediation communications and mediation documents ...." *See* Def.'s Mot. at P 12 and Wherefore clause. As the basis for its request, the Commission urges this Court to recognize a federal "mediation privilege" precluding discovery of such communications and documents.

B. The Mediation

The Plaintiffs explain that the Mediation constituted [**3] the "third step of a grievance procedure under" a "Memorandum of Understanding" between the Commission and Local 30 that "applied to the terms and conditions of" the Plaintiffs' employment. *See* Pls.' Mem. at 4. Their opposition brief alleges Mr. Haas testified at his deposition that one of the Commission's attorneys stated that it "settled out of court" another lawsuit brought by many of the same Plaintiffs here because the Commission "found out it was illegal to pay [them] ... straight time for overtime." *See* Pls.' Mem. at 3 (purportedly *quoting* Dep. Tr. of R. Haas, not attached as exhibit to Pls.' Mem.).

The Plaintiffs argue that this purported admission is "extremely significant to [their] claims of retaliation" and to the Commission's affirmative defense that it acted with a good faith belief it was not violating the law. *See id.* They also assert the purported admission is highly relevant to their claim that the fluctuating hours method of compensation actually results in "less compensation for overtime hours than under the 'straight time' method" allegedly referenced during the Mediation. *See id.* at 3-4.

ANALYSIS

In asking this Court to recognize [**4] a federal mediation privilege, the Defendant correctly identifies Federal Rule of Evidence 501 as authority for the creation of evidentiary privileges under the federal common law. *See* Def.'s Mot. at PP 5-6. *See generally Pearson v. Miller, 211 F.3d 57, 65-66 (3d Cir. 2000)* (*citing* and *quoting* Fed. R. Evid. 501). Rule 501 provides:

The privilege of a witness, person, government, State, or political subdivision ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Id. n1

> n1 The second clause in Rule 501, which directs that privileges relevant to "element[s] of ... claim[s] or defense[s] as to which State law supplies the rule of decision" are determined by state law, is inapplicable here because the Plaintiffs' claims are asserted under a federal statute. *See* Fed. R. Evid. 501; *see also generally* discussion *supra* at 1-2 (Plaintiffs assert claims under the FLSA).

[**5]

The parties agree that the four factors annunciated by the Supreme Court in *Jaffee v. Redmond, 518 U.S. 1, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996)* provide the standards for determining whether a potential federal evidentiary privilege should be recognized, and this Court joins the other federal courts that have focused on these same standards. *See, e.g., In re Air Crash Near Cali, Colombia on Dec. 20, 1995, 959 F. Supp. 1529, 1533-34 (S.D. Fla. 1997)* (Jaffee factors provide "a useful [*513] framework" for analyzing claim of privilege); *Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1171 (C.D. Cal. 1998)* (same); *cf. generally Pearson, 211 F.3d at 66-67* (*quoting* and *citing* general principles annunciated in Jaffee).

The four relevant factors are:

(1) whether the asserted privilege is "rooted in the imperative need for confidence and trust";

(2) whether the privilege would serve public ends;

(3) whether the evidentiary detriment caused by an exercise of the privilege is modest; and

(4) whether denial of the federal privilege would frustrate a parallel [**6] privilege adopted by the states.

See Jaffee, 518 U.S. at 9-13.

Each of these factors weigh in favor of recognizing the mediation privilege in this case.

1. The Mediation Privilege Is Rooted in the Imperative Need for Confidence and Trust.

Mediation "is the process in which an independent, impartial, trained, neutral third party, or mediator, facilitates the resolution of a dispute by assisting parties in reaching a voluntary agreement." *See* Sally Ortner, *et al., Alternative Dispute Resolution Column*, 29-JUN Colo Law. 45, 49 (2000); *see also Willis v. Trenton Memorial Ass'n, 1998 U.S. App. LEXIS 23744, 1998 WL 812110,* *2 (4th Cir. Sept. 22, 1998) ("the stated goal of mediation ... is to facilitate and promote conciliation, compromise and the ultimate resolution of a civil action") (unpublished opinion, citation and internal quotations omitted). In a Local Rule addressing court-annexed mediation, this District Court has recognized that the mediation process "afford[s] to litigants an opportunity to articulate their position[s] and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the relative [**7] strengths of the opposing positions." *See* W. Dist. Local R. 16.3.5(A).

Both federal and state courts have recognized that confidentiality is essential to the mediation process. The federal circuit court in *Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928 (2d Cir. 1979)* succinctly articulated why confidentiality is necessary:

If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements ..., thereby expediting cases at a time when ... judicial resources ... are sorely taxed.

Id. at 930 (emphasis added), *cert. denied, 444 U.S. 1076, 62 L. Ed. 2d 758, 100 S. Ct. 1023 (1980).*

The need for confidence and trust in the mediation process is further evidenced **[**8]** by federal statute, the local rules of federal district courts in Pennsylvania and other states, and state statutes from across the country. The Alternative Dispute Resolution Act of 1998, which requires each federal district court to "provide litigants in all civil cases with at least one alternative dispute resolution process, including ... mediation," expressly directs the courts to adopt local rules "providing for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications." *See 28 U.S.C. § 652*(d).

As directed by Congress, the District Courts of Pennsylvania have adopted provisions addressing the confidentiality of mediation communications and documents. **[*514]** This District's Local Rule, for example, provides:

All counsel and parties shall treat as confidential all written and oral communications made in connection with or during any conference and no such communications may be disclosed to anyone not involved in the litigation. Nor may any such communication be used for any purpose (including impeachment) in the civil action or in any other proceedings. **[**9]** Except for a written settlement agreement or any written stipulations executed by the parties or their counsel, no party or counsel shall be bound by anything done or said at any [mediation] conference[].

See W. Dist. Local R. 16.3.5(E) n2 (emphasis added); *see also* M. Dist. Local R. 16.8.6(c) (mediation "proceeding shall not be used by any adverse party for any reason in the litigation at issue"); E. Dist. Local R. 53.2.1(5)(e) ("nothing communicated during the mediation process[,] including any oral or written statement made by an ... attorney or other participant ...[,] shall be placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission") (emphasis added).

n2 To be sure, this District's Local Rule does not govern the instant motion because the Rule addresses "court-annexed mediation," *i.e.*, mediation ordered by the Court. *See* W. Dist. Local R. 16.3.1, 16.3.3(B). Nevertheless, the District Court's adoption of the confidentiality provisions in Rule 16.3 reveals its recognition of "the imperative need for confidence and trust" in the mediation process. *See* discussion *supra* at 5.

[10]**

Finally, as noted by another district court that adopted the federal mediation privilege, forty-nine states and the District of Columbia have adopted "a mediation privilege of one type or another." *See Folb, 16 F. Supp. 2d at 1179* (*citing* Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: the Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, B.Y.U. L. Rev. 715 (1997)).

Based on the foregoing, it is beyond doubt that the mediation privilege is rooted in the imperative need for confidence and trust.

2. The Mediation Privilege Would Serve the Public Ends of Encouraging Settlement and Reducing Court Dockets.

As noted above, mediation is intended to facilitate and promote the voluntary conciliation, compromise and resolution of civil actions. *See* discussion supra at 6; *see also Folb, 16 F. Supp. 2d at 1176.* Absent the mediation privilege, parties and their counsel would be reluctant to lay their cards on the table so that a neutral assessment of the relative strengths and weaknesses of their opposing positions could be made. **[**11]** *See generally* W. Dist. Local R. 16.3.5(A). Assuming they would even agree to participate in the mediation process absent confidentiality, n3 participants would necessarily "feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil

dispute." *Lake Utopia, 608 F.2d at 930.* The effectiveness of mediation would be destroyed, thereby threatening the well established public needs of encouraging settlement and reducing court dockets. *See id.; see also generally Bank of Amer. Nat. Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc., 800 F.2d 339, 344 (3d Cir. 1986)* (acknowledging "the strong public interest in encouraging settlement of private litigation"); *University of Tenn. v. Elliott, 478 U.S. 788, 798, 92 L. Ed. 2d 635, 106 S. Ct. 3220 (1986)* (noting "the public's interest in conserving judicial resources").

n3 "Parties who fear that the results of an unsuccessful mediation attempt will come back to haunt them in a court of law will have little incentive to cooperate and compromise ...." *See Willis, 1998 WL 812110* at *2.

[12] [*515]**

3. The Evidentiary Detriment Caused by Exercise of the Mediation Privilege is Modest.

In Jaffee, the Supreme Court explained why the psychotherapist-patient privilege it recognized for the first time caused only a modest evidentiary detriment:

If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. without a privilege, much of the desirable evidence to which litigants such as petitioner seek access -- for example, admissions against interest by a party -- is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

Id., 518 U.S. at 11-12 (emphasis added).

This analysis presents the most compelling basis for adopting and applying the mediation privilege in this case. If the Commission had not participated in the Mediation, the admission against interest purportedly made by one of its attorneys would not likely have come into being. **[**13]** This Court sees no reasoned basis for allowing the Plaintiffs to enjoy the benefit of an alleged admission arising through the mediation process when it seems doubtful that such an admission would have otherwise come into existence. *See Jaffee, 518 U.S. at 11-12.*

The Court notes, though, that the rationale underlying the mediation privilege does not justify precluding the Plaintiffs' discovery of the alleged admission or the facts underlying it independent and outside the scope of the mediation process. *See* Fed. R. Evid. 408 ("This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."); *see also* Pamela A. Kentra, *Hear No Evil*, B.Y.U. L. Rev. at 735 (noting that certain states' mediation privilege statutes contain an "otherwise discoverable information" exception); *see also, e.g.*, 42 Pa. Cons. Stat. § 5949(b)(4) ("Any document which otherwise exists, or existed independent of the mediation and is not otherwise covered by this section, is not subject to this privilege.").

In any event, a discussion of the Plaintiffs' potential attempts to discover information **[**14]** outside the scope of the Mediation would be premature, as the Defendants have only requested protection of "all mediation communications and mediation documents ...." *See* Def.'s Mot. at P 12 and Wherefore clause.

In sum, the Supreme Court's analysis in Jaffee confirms that the evidentiary detriment caused by an exercise of the mediation privilege is modest.

4. Denial of the Federal Mediation Privilege Would Frustrate a Parallel Privilege Adopted by the States.

As noted above, nearly all of the states have adopted a mediation privilege. *See* discussion *supra* at 9; *see also* Ex. A to Def.'s Reply Br. (attaching Appendix in *Hear No Evil*, B.Y.U. L. Rev. at 757-75, which contains a chart summarizing mediation privilege statutes for the many states). The states' "promise[s] of confidentiality" regarding mediation "would have little value if the [participants] were aware that the privilege would not be honored in ... federal court." *See Jaffee, 518 U.S. at 13.* Thus, a "denial of the federal privilege ... would frustrate the purposes of the state legislation that was enacted to foster" confidentiality in the mediation process. **[**15]** *See id.*

Based on the foregoing analysis, this Court concludes that all of the factors in Jaffee counsel in favor of recognizing a federal mediation privilege here. Like the psychotherapy-patient privilege adopted in that case, the mediation privilege creates a "public good transcending the normally predominant principle of utilizing all rational **[*516]** means for ascertaining truth." See *Jaffee, 518 U.S. at 9* (citation and internal quotations omitted); *see also Folb, 16 F. Supp. 2d at 1171-79* (holding same).

Nothing in the Plaintiffs' opposition brief demonstrates the contrary. First, for reasons articulated above, their suggestion that "no private interest is furthered" by adopting the privilege is entirely without

merit. *See* discussion *supra* at 6-9 (addressing first prong of Jaffee regarding need for trust and confidence); *see* Pls.' Mem. at 6-8. Under the first prong in Jaffee, Plaintiffs' counsel apparently attempts to distinguish the Mediation from the "normal mediation process," stating that Local 30 "had no recourse" once mediation did not result in a settlement. Aside from the obvious fact that the Plaintiffs **[**16]** have enjoyed the recourse of filing a federal lawsuit, Counsel provides no legal authority for the proposition that Local 30's potential rights are in any way relevant to the privilege issue.

Nor can the Plaintiffs support their suggestion that the Mediation was "essentially meaningless" because the Commission was not bound by any findings of the mediator. *See* Pls.' Mem. at 7. By definition, mediation is a non-binding dispute resolution technique through which "a neutral third party ... facilitates the resolution of a dispute by assisting parties in reaching a voluntary agreement." *See* discussion *supra* at 6 (emphasis added). The very nature of this process mandates a need for confidence and trust so that the parties can honestly and openly discuss the strengths and weaknesses of their positions in an attempt to reach a voluntarily settlement. The Plaintiffs' "private interest" arguments are of no avail.

So too are their arguments regarding "public interest." *See* Pls.' Mem. at 8-9. Under this prong, the Plaintiffs merely reiterate their claim that the mediation process here was meaningless and they state that the privilege "would only give the [Commission] **[**17]** a license to lie and encourage disingenuity." *See id.* The Plaintiffs' sentiments notwithstanding, Congress, the legislatures of nearly every state, and this and other District Courts have recognized the valuable role that mediation plays in our judicial system. *See* discussion *supra* at 6-9. Additionally, this Court fails to see how an adoption of the mediation privilege creates a license for litigants to lie or to be disingenuous. To the contrary, the privilege fosters mediation participants' candor and honesty regarding the validity of their positions by alleviating their "fears that an unsuccessful mediation attempt will come back to haunt them in a court of law." *See* discussion *supra* at 10, n.3.

Regarding the third prong in Jaffee, the Plaintiffs suggest that the Commission's purported admission "would have been spoken with or without a privilege because" the Defendant agreed to participate in the Mediation. *See* Pls.' Mem. at 9. This argument turn's the reasoning in Jaffee on its head. The Jaffee Court concluded that, if the privilege at issue there "were rejected, confidential conversations ... would surely be chilled," thereby making it **[**18]** unlikely for "admissions against interest by a party" like the purported one here "to come into being." *See id., 518 U.S. at 11-12.* This is the appropriate analysis, and it demonstrates precisely why the Plaintiffs should not be afforded the benefit of the purported admission.

Regarding the fourth prong in Jaffee, the Plaintiffs' arguments simply cannot explain away the nearly unanimous voices of state legislatures from across the country adopting mediation privileges. *See* discussion *supra* at 13 (addressing frustration of parallel states' privilege).

The only other argument the Plaintiffs present in opposing an application of the mediation privilege is their contention that the Commission "waived the privilege by putting" mediation communications and documents "at issue" in this case. *See* **[*517]** Pl.'s Mem. at 10-11. A review of the record, however, reveals the contrary. The mediation issue arose only after Mr. Haas and an agent of Local 30 referenced it in their depositions. *See* Pls.' Mem. at 2-3 *quoting* Dep. Test. of R. Haas); *id. at 11* (*referencing* Dep. Test. of A. Lombardozzi, agent for Local 30). The Plaintiffs have not and **[**19]** cannot support their assertion that discussions in depositions of the Mediation by them or agents of Local 30 somehow effectuated a waiver of the privilege on behalf of the Commission. n4

n4 Nor have the Plaintiffs demonstrated that Defense counsel's following up on Mr. Haas' references to the Mediation in his deposition, without immediately asserting the mediation privilege, renders the instant motion untimely or otherwise inappropriate. *See id. at 11.* Finally, this magistrate judge fails to see how the Defendant's assertion of the affirmative defense that it acted on a good faith belief that its conduct was lawful constitutes a waiver of the mediation privilege. *Cf. generally United States v. Liebman, 742 F.2d 807, 811 n.4 (3d Cir. 1984)* (refusing to find waiver of privilege "on a speculative basis").

Having concluded that the federal mediation privilege will be adopted and applied in this case the Court must, to the extent possible, define the contours of the privilege. **[**20]** *Cf. generally Folb, 16 F. Supp. 2d at 1180* (noting same). Because this District's Local Rule 16.3 addresses standards regarding the appropriate scope of confidentiality in the mediation process (albeit, within the context of court-annexed mediation), the Court concludes that the Rule is an appropriate starting point for defining the privilege. Accordingly, the mediation privilege recognized herein shall comport with the following standards:

. The privilege protects from disclosure "all written and oral communications made in connection with or during" a mediation conducted before a "neutral" mediator. *See* W. Dist. Local R. 16.3.5(E), 16.3.1.

. No such written or oral communication may be "used for any purpose (including impeachment) in the civil action or in any other proceedings." *See id.*, R. 16.3.5(E).

. "Except for a written settlement agreement or any written stipulations executed by the parties or their counsel, no party or counsel shall be bound by anything done or said" during the mediation process. *See id.*

In addition, this Court has already concluded that the most compelling reason for recognizing the mediation privilege **[**21]** is the Plaintiffs' lack of entitlement to any admission of the Defendant that, but for the mediation process, would not have come into being. *See* discussion *supra* at 11-12 (*citing* and *quoting Jaffee, 518 U.S. at 11-12).* If the Plaintiff is able to elicit any admissions (or facts underlying them) outside the scope of the mediation process, however, the rationale for the privilege would no longer apply. Accordingly, this Court concludes and therefore holds that the mediation privilege does not protect from disclosure "any evidence otherwise" and independently "discoverable merely because it was presented in the course of" the Mediation. *See generally* Fed. R. Evid. 408; *see also* discussion *supra* at 12. Accordingly, the Plaintiffs remain free to conduct discovery independent of, and unrelated to, the mediation process. n5

n5 Should the Plaintiffs seek to engage in such discovery, the Defendant remains entitled to assert any other privilege that may independently protect from disclosure the information sought.

[22]**

Finally, the Court notes that the elements listed above are by no means intended to be an exhaustive recitation of the standards governing the mediation privilege. Numerous court and legislatures have recognized exceptions and/or limitations to the privilege not implicated in this case. *See, e.g.*, 42 Pa. Cons. Stat. § 5949(b)(1), (b)(2) (stating exceptions to mediation privilege with respect to legal, binding settlement agreements and evidence relevant to criminal matters). These issues must be saved for another **[*518]** day. *See generally Trammel v. United States, 445 U.S. 40, 47, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980)* (purpose of Federal Rule 501 "was to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis, ... and to leave the door open to change") (citations and internal quotations omitted).

CONCLUSION

For the foregoing reasons, the Defendants' motion for a protective order is granted consistent with the reasoning in this Order.

July 17, 2000

FRANCIS X. CAIAZZA

U.S. Magistrate Judge

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In Aftermath of the *Carman* Decision, Ombuds 'Privilege' Still Has Validity

by Charles L. Howard and George R. Wratney

A shudder raced through the organizational ombuds community in the summer of 1997 following the Eighth Circuit Court of Appeals' decision in *Carman v. McDonnell Douglas* (114 F3d 790 [8th Circuit 1997]). After years of favorable decisions by federal district courts recognizing a confidentiality privilege for organizational ombuds, *Carman* presented the first federal appellate review of the privilege, and the court flatly refused to recognize the privilege.

Because the confidentiality privilege plays such an important role for organizational ombuds, the central question in the aftermath of *Carman* has been whether the privilege has any continuing validity. Based on our experiences over the last two years, we believe the answer is yes: While *Carman* was correctly decided on its facts, an ombuds confidentiality privilege can still be recognized under Federal Rule of Evidence 501 if the lessons of *Carman* are heeded.

The essential lesson of Carman is that in every case facts need to be presented to the court to prove entitlement to the privilege.

The *Carman* case

Carman was an age discrimination employment case. In the course of discovery, the plaintiff sought disclosure of information from the ombuds, which the company resisted on grounds of an ombuds privilege under Federal Rule of Evidence 501. The district court precluded the plaintiff from obtaining the ombuds' records, but when this issue was raised on appeal, the appellate court reversed the decision of the trial court, finding that the record did not support such a claim. This decision came as a surprise, since one of the first reported cases involving an ombuds confidentiality privilege was *Kientzy v. McDonnell Douglas Corporation,* 133 FRD 570 (E.D. Mo. 1991), also involving the ombuds program at McDonnell Douglas. There are, however, two critical points to a proper understanding of *Carman*.

First, by the time suit was filed in *Carman*, McDonnell Douglas had abolished its ombuds program (see *ethikos* September/October 1997). Thus, the ombuds program no longer had a separate voice inside the company, much less separate counsel. Moreover, counsel for McDonnell Douglas was not fully versed on the history and nuances of the ombuds privilege.

Second, the way in which the privilege was asserted by McDonnell Douglas is important. While not fully apparent from the decision, the appellate record reveals that in response to the plaintiff's request to produce documents, McDonnell Douglas objected to the production of documents from the ombuds on the grounds that they were "immune

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United Technologies Corp. has consistently taken an aggressive approach in asserting ombuds privilege, an approach vindicated by a recent favorable ruling in the Leslie *case.*

from discovery" because the ombuds' activities were considered confidential. This objection was overruled. In a subsequent motion for reconsideration filed by McDonnell Douglas, the company cited two unreported orders from the same federal district court involving the McDonnell Douglas ombuds program in which the privilege had been recognized. The district court reconsidered its prior ruling and, without any analysis on the issue, ordered that McDonnell Douglas did not have to produce the ombuds' documents.

Thus, the record before the appeals court in *Carman* reveals no facts (by testimony, affidavit, or otherwise) concerning the ombuds office, how it operated, or why confidentiality was important. Likewise, the record contained no analysis by the district court. Yet it is a fundamental principle of law that full disclosure of relevant evidence is required, and that any person claiming an exception to this rule, as in the ombuds privilege, bears the burden of proving why he is entitled to an exception. 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.

Aftermath of *Carman*

In contrast to the approach taken by McDonnell Douglas in *Carman*, United Technologies Corporation and its operating units (including Pratt & Whitney and Sikorsky Aircraft) have consistently taken an aggressive approach to providing the trial court with the facts necessary to demonstrate entitlement to a confidentiality privilege.

This began with the evidentiary record presented to the court in *Roy v. United Technologies*, Civil No. H-89-680 (JAC) (D. Conn., May 29, 1990), the first case in which an organizational ombuds privilege was recognized under Federal Rule of Evidence 501. The decision in *Carman* has not changed this approach; rather, it has confirmed our belief that this approach can prevail despite the ruling in *Carman*. Moreover, this approach was vindicated by the recent favorable ruling in *Leslie v. United Technologies Corporation d/b/a Pratt & Whitney*, Case No. 97-8212-CIV (RYSKAMP), Southern District of Florida, West Palm Beach Division. Thus, the essential lesson of *Carman* is that, in every case, facts need to be presented to the court to prove entitlement to the privilege.

Practice Pointers

To meet this burden, we offer the following suggestions:

1. *Know what the standard is.* While different federal circuits may have slightly different tests, the legal analysis of whether a communication privilege exists generally involves the four Wigmore factors (8 John Henry Wigmore, Evidence § 2285 [McNaughton rev. 1961]):

a) the communication must be one made in the belief that it will not be disclosed;

b) confidentiality must be essential to the relationship between the parties;

c) the relationship should be one that society considers worthy of being fostered;

d) the injury to the relationship incurred by the disclosure must be greater than the benefit gained in the correct disposal of the litigation.

2. *The ombuds must present facts to the trial court.* This can be done through affidavits, testimony, and documents in order to give the court the facts necessary to determine that each element in the Wigmore test is satisfied. Since the issue usually arises as a result of a plaintiff's attempt to depose an ombuds or to obtain the ombuds' documents, the privilege typically is asserted in a motion for protective order. In addition to a brief analyzing the facts and legal issues, we usually file an extensive affidavit from the ombuds, together with documents, in which we establish the following:

- *How the company came to create the ombuds program.* For defense industry companies such as United Technologies Corp., we begin with references to the Packard Commission, appointed by President Reagan, and the Defense Industry Initiative, both of which emphasized greater corporate self-governance and reporting. Creation of an ombuds program was one suggestion that arose from these major national policy

Continued on page 13

Role playing and case studies were used extensively. One afternoon, students grilled a sales representative in an effort to learn how to audit for potential breaches of anti-trust law.

strategies.

(2) Each student was required to reflect upon, justify and evaluate his or her solution to a regulatory or compliance program in the second part of the essay.

This form of assessment was different from the traditional assessment in law courses, and closer to the style of work required in management classes. It was chosen to reflect more accurately the nature of compliance practice which revolves around integrating management and ethical concerns with legal and regulatory responsibilities. Some law graduates found it difficult to master the complexities required of compliance practice, but all came away positive about what they had learnt.

Among the projects: a proposal for a code of practice and compliance systems in the bookmaking industry; a paper aimed at convincing a company's board of directors of the need to commit to an occupational health and safety policy; and an analysis of what was required for environmental compliance for a particular construction site—and how the law could be changed to improve environmental outcomes at the site and others like it.

Most students drew on their work experience to write their papers, and many used their assessment directly as an aid in their daily jobs. In one case, a teacher's suggestion regarding a practitioner's essay led to discovery of a looming compliance problem at the individual's company. (It was swiftly rectified.)

Although the course remains a work in progress, student evaluations at the end were positive. Students were especially pleased about its practical relevance to their individual work. The course will be offered for the second time in the second half of 1999.

For additional information or comments, contact Christine Parker by e-mail at: C.Parker@unsw.edu.au. ❑

Ombuds 'Privilege' . . . *Continued from page 10*

initiatives.

- *How the program was established at the company.* The court needs to know how and why a company decided to create an ombuds office and how it differs from other communication channels in the company. We also describe or attach the ombuds' job description.

- *Why confidentiality is critical to the ombuds from the company's perspective.* Frequently this involves citations to corporate compliance or other policies and references to the Sentencing Guidelines for Organizations of the United States Sentencing Commission.

- *How the program operates within the company.* Included here are the facts describing how the program actually operates, the physical security measures used to protect confidentiality, and operating and record-keeping procedures used to preserve the confidentiality of communications. It is also important to present examples of publicity within the company in which confidentiality was emphasized.

The court needs to know how and why a company decided to create an ombuds office and how it differs from other communication channels in the company.

- *Qualifications, experience, and standards adhered to by the ombuds.* Invariably, this involves reference to The Ombudsman Association's Code of Ethics and Standards of Practice, as well as other relevant experience and qualifications of the ombuds.

- *Specific facts concerning the use of the ombuds program.* We try to inform the court how extensively the ombuds program is used (often by reference to the number of inquiries) and any aggregate statistics by

Continued on page 16

The anti-slavery amendment became 'the chief legal instrument for protecting the corporation.'

wage, and even refrains from the practice of bribing officials in both this country and abroad.

Also, labor, the group charged with the heaviest obligations in the projected campaign, had, after it reached its own heights of power, transformed its operations into an imitation of life on the corporate executive's level. There were perquisites, conferences, expensive headquarters, and consultants and legal staffs to manage pension plans and write legislation. There was even a fair amount of corruption, and a number craft unions were as lily-white as any corporate board room. If the unions had never been able to fund a competitive labor lobby until long after the corporations had entrenched themselves in Washington, they had some successes: the *New York Times* reported on July 25, 1944, that "The President told the chairman" (of the Democratic convention) to 'clear everything with Sidney.'" Sidney Hillman at the time was Chairman of the Political Action Committee of the CIO, and president of the Amalgamated Clothing Workers.

In his epilogue, Mr. Derber has set out eighteen positive steps toward the formation of a populist movement to "lay the foundation of a new struggle for democracy." They range from quite subjective efforts like practicing self-awareness and the education of oneself and others to the wise use of buying power, and the determination to stand up for one's rights in the workplace, to becoming an activist in opposing any corporation that is making your community "a less civil place to live," joining and voting with a populist group, or investing with a socially conscious approach.

There is nothing strident or emotional about the program, and no evangelical harangue—simply rational ways to apply 'countervailing forces' in order to control the overwhelming power of the corporation. Whether this will inspire millions of couch potatoes to build and man the barricades is doubtful at this time. It may not be simply indifference on the part of the citizenry when joblessness is at a new low, and inflation supposedly well under control. Perhaps it is some lingering belief on the part of the people that Americans are not so many suppliants to be manipulated, but a force to be reckoned with if their well-being or their nation is threatened. Minute Men. ❑

Ombuds 'Privilege' . . . *Continued from page 13*

which the effectiveness of the program is measured. Not to be forgotten is the point that the ombuds has never been compelled to break confidence.

3. *In support of each of the factual allegations in an affidavit, we attach as many documents as we can find.* Among the types of documents are board resolutions, company policies, publications from outside the company, internal memoranda, informational brochures, other publicity (including posters), and statistical reporting summaries.

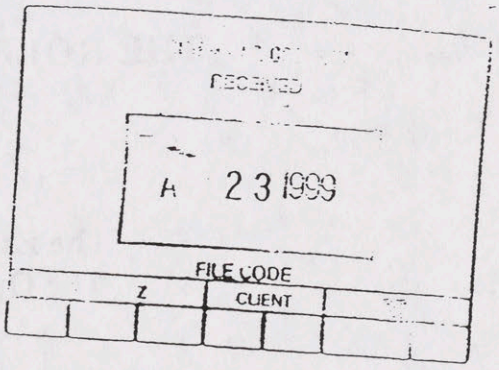
4. *Prepare in advance.* Since the preparation of these affidavits and the collection of the documents can be time consuming, we suggest that some effort be made to pull together this information in advance so that an effective motion for protective order can be prepared on short notice. Likewise, we suggest that the ombuds retain separate counsel to represent the ombuds in such a motion, since joint representation of the company and the office of the ombuds under these circumstances undermines the principles of confidentiality and independence on which the ombuds programs are established.

Conclusion

The ombuds confidentiality privilege, like any privilege, can be established on the basis of a proper showing of facts supporting it. These facts must be presented to the trial court at the time a motion for protective order is filed, and the trial court must be provided with an analysis of these facts and the established legal principles. While the assertion of a confidentiality privilege is still very much a case-by-case analysis, we believe with a properly designed program, the facts will justify recognition of such a privilege. The challenge for the ombuds and the lawyer is to marshal those facts in an effective manner. ❑

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The Ombudsman
ASSOCIATION
5521 Greenville Avenue, Suite 104-265, Dallas, Texas 75206
(214) 553-0043



Date: August 16, 1999

To: TOA 15th Annual Conference Participants

From: Linda Wilcox

Re: Shared Responsibility - The Role of Ombuds and Counsel

As we had promised you at the TOA conference in Phoenix this May, enclosed is the revised grid presented at the title session, Shared Responsibility ....

Charles Howard the moderator, and the panelists: Dale E. Skivington; Beatriz Dale, and myself, greatly appreciated your input.

I trust you will find it useful.

LINDA WILCOX
PRESIDENT - TOA

Enc.

SHARED RESPONSIBILITY:

THE ROLE OF OMBUDS AND COUNSEL

In

The Establishment Of Ombuds Office, The Operation Of Ombuds Office, Or In Litigation

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May, 1999

(Materials presented at The Ombudsman Association 15th Annual Meeting, Phoenix, Arizona)

The suggested roles and functions of inside counsel, ombuds, and independent counsel for the ombuds on the following pages represent the "best practices" views of the panel participants, as supplemented by comments from the audience at The Ombudsman Association annual conference in Phoenix, AZ, in May 1999. These guidelines were prepared for consideration and use by ombuds and inside and outside counsel and have not been formally adopted by the Board of Directors of The Ombudsman Association.

SHARED RESPONSIBILITY: THE ROLE OF OMBUDS AND COUNSEL
In The Establishment Of An Ombuds Office

Inside Counsel	Ombuds	Independent Outside Counsel for Ombuds
1. Advice regarding recommended structure for office	1. Review establishment documents to ensure neutrality (impartiality), independence, confidentiality, and informality	1. If organization does not have inside counsel, assist in establishment tasks identified for inside counsel
2. Draft board resolutions or directives from CEO	2. Confirm reporting obligations to insure adequate access to senior management	2. To extent involved at creation stage, coordinate activities with inside counsel and ombuds
3. Document structural neutrality, independence, and confidentiality from organization's perspective	3. Create linkages with HR, legal, corporate security, corporate auditing, compliance and senior management	3. Independent review of employment agreement or job description and organization documentation
4. Revise ethics code and compliance procedures to refer to ombuds office	4. Create physical security aspects to office: • 1-800-numbers • unobserved access to offices • separate computer system • secure files, etc.	4. Advise on establishing and documenting office procedures to make sure they are consistent with confidentiality (i.e., document handling practices, procedures if subpoena is received, etc.)
5. Draft employment contract or job description of ombuds regarding independence, neutrality, confidentiality, and compliance with organization's and TOA's Code of Ethics and Standards of Practice	5. Make sure employment contract or job description permits practice in accordance with TOA Code of Ethics and Standards of Practice	5. Review draft communications to organization to ensure confidentiality privilege can be defended
6. Advise organization on issues in connection with when notice to ombuds office may constitute notice to organization, contract issues and arbitration programs	6. Publicize creation of office and its independence, neutrality, confidentiality, and informality	
7. Benchmarking with other in-house counsel	7. Establish working relationship with inside and outside counsel	
8. Help coordinate relationship among ombuds office, legal department and outside counsel for organization and for ombuds		
9. Advise organization on any legal issues arising from international operations		

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The Operation Of An Ombuds Office

Inside Counsel	Ombuds	Independent Outside Counsel for Ombuds
1. Advise ombuds regarding organization actions and litigation that may affect ombuds	1. Develop policies and procedures that are consistent with ombuds principles	1. Review procedures to make sure consistent with neutrality, independence, confidentiality, and informality
2. Review ombuds publications and reports to organization	2. Develop statistical, trend and other reports for organization and constituency base	2. Review annual reports and publicity regarding office
3. Coordinate with ombuds and outside counsel for organization on litigation that could involve the ombuds (possibly include ombuds on distribution list of pending actions)	3. Develop measures of effectiveness	3. Advise ombuds concerning dealings with organization on issues involving confidentiality and independence
4. Monitor operations regarding issues relating to "notice" of claims against organization	4. Continue to publicize confidentiality aspects of office, including the requirement under the TOA Code of Ethics, that the only exception, at the sole discretion of the ombuds, is where there appears to be imminent threat of serious harm	4. Coordinate with ombuds and inside counsel on potential discovery in litigation involving ombuds
5. Respond to ombud's request for information (i.e., on applicability of a law or on steps in a company procedure/process)	5. Make sure that office's records handling systems are consistent with policies of ombuds office	5. Respond to ombud's request for legal advice on specific ombuds inquiries
6. Discuss trends identified by ombuds to address legal concerns	6. Maintain collection of ombuds documentation for use in event motion for protective order is sought (provide copies to outside counsel--i.e., originals of dated publicity materials, affidavits)	6. Update ombuds on continuing development of law on confidentiality privilege and other legal issues affecting ombuds
7. Be mindful of organization's responses to discovery in litigation that may have impact on ombuds		
8. Provide government affairs support		
9. Use professional networks to discuss legal issues involving ombuds and share solutions		

The suggested roles and functions of inside counsel, ombuds, and independent counsel for the ombuds on the following pages represent the "best practices" views of the panel participants, as supplemented by comments from the audience at The Ombudsman Association annual conference in Phoenix, AZ, in May 1999. These guidelines were prepared for consideration and use by ombuds and inside and outside counsel and have not been formally adopted by the Board of Directors of The Ombudsman Association.

In Litigation

Inside Counsel	Ombuds	Independent Outside Counsel for Ombuds
1. Monitor litigation and advise ombuds and outside counsel when issue may arise involving efforts to obtain discovery from ombuds or concerning confidential communications or any other issues involving ombuds independence, neutrality, confidentiality, or informality	1. Give prompt notice of any subpoena to both inside counsel and outside counsel	1. Coordinate appearance in litigation and time requirements with inside counsel and outside counsel representing the organization
2. Try to resolve informally discovery against ombuds	2. DO NOT disclose confidential communications at issue to inside counsel or outside counsel for the organization	2. Try to resolve informally discovery against ombuds
3. Make sure outside counsel for organization is aware of ombuds issues. In depositions or in other discovery or pleadings, counsel for the organization should not seek to obtain confidential information from the ombuds and may need to object to disclosures of confidential information volunteered by nonombuds witnesses	3. Retain outside counsel to represent office independently	3. Prepare motion for protective order with complete affidavits and memorandum of law
4. DO NOT ask or permit outside counsel for organization to ask ombuds to disclose confidential communications	4. Make documentation regarding operation of office available to outside counsel for the ombuds	4. Prepare ombuds for deposition or discovery of nonconfidential materials
5. Coordinate with ombuds and outside counsel to file motion for protective order	5. Testify, if necessary, concerning nonconfidential aspects of ombuds office	5. Provide litigation advice on issue affecting ombud's confidentiality, neutrality, independence, or informality
		6. Consider special issues in connection with arbitration of disputes
		7. Defend deposition and represent ombuds at hearing where necessary

The suggested roles and functions of inside counsel, ombuds, and independent counsel for the ombuds on the following pages represent the "best practices" views of the panel participants, as supplemented by comments from the audience at The Ombudsman Association annual conference in Phoenix, AZ, in May 1999. These guidelines were prepared for consideration and use by ombuds and inside and outside counsel and have not been formally adopted by the Board of Directors of The Ombudsman Association.

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ARTICLE: University Officials as Administrators & Mediators:
The Dual Role Conflict & Confidentiality Problems

Jeffrey C. Sun *

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SUMMARY:
... "Mediation is a voluntary process in which a neutral third party with no authority to impose a solution helps parties reach a personalized agreement for resolving their differences." ... Understanding that statements made at a mediation session will remain confidential provides further support that mediation is the best approach to dispute resolution. ... To avoid conflicts and confidentiality dilemmas in university-sponsored mediations, the educational institution must provide an impartial neutral. ... This concept of building a Chinese wall could also be implemented where a school official plays the dual role of a university administrator and mediator. ... Because mediation confidentiality laws are unsettled, courts may unexpectedly intervene and require disclosure of what at first seemed to qualify as a confidential statement. ... The act of seeking a protective order may be enough to keep the other disputant and the neutral-administrator mindful of the possible consequences of improper disclosure. ... Because university mediators should be charged with confidentiality applicable to all mediation communications, this article proposes a university administrator-neutral code of professional conduct that reads as follows: ... A university mediator shall keep any mediation communication confidential, except when otherwise prohibited by law. ... As used in this proposed university administrator-neutral code of professional conduct, ""mediation communication' means a communication made in the course of and relating to the subject matter of a mediation" and "university" includes all post-secondary educational institutions. ...

TEXT:
[*19]

I. Introduction

"Mediation is a voluntary process in which a neutral third party with no authority to impose a solution helps parties reach a personalized agreement for resolving their differences." n1 The process of mediation is not a new approach to problem solving. The conciliatory scheme has been recognized as an "ancient concept." n2 In fact, alternative dispute resolutions have been referred to in writings dating back to biblical times. n3 Although the concept of mediations has developed in conjunction with adversarial proceedings in other cultures, n4 that has not been **[*20]** the case for this nation. n5 As a result, this particular medium of dispute resolution is still an evolving concept in the United States. Indeed, mediation programs in the United States are only in their infancy. n6

Because mediation is only recently gaining widespread acceptance, many organizations need guidelines for implementing such a program. In constructing an effective mediation program, the planners of an alternative dispute resolution system must identify and evaluate their desired outcomes along with the potential barriers to such outcomes. n7 Generally, these desired outcomes of mediation have been identified by various phrases such as "party satisfaction,

empowerment, and ownership;" n8 prevention of improper conduct; n9 and development of a "healing approach." n10 Whichever terms are employed, the common element is the conciliatory nature of the desired result. This characterization, however, does not adequately reflect the multitude of barriers that exist and must be addressed in the mediation process.

For instance, in mediated dispute resolution systems, a key component to success is the confidentiality of the proceedings. By the very nature of their role, mediators are in a position to hear confidences such as trade secrets; n11 embarrassing, n12 un **[*21]** comfortable, or sensitive disclosures; n13 and privileged information that allows them to evaluate the strengths and weaknesses of a disputant's case. n14 Another reason for confidentiality is to "preserve the appearance of the mediator's impartiality and neutrality." n15 Many parties who have participated in mediations would probably have opted not to follow the alternative approach to dispute resolution if their discussions did not remain confidential. n16 Consequently, a confidentiality provision serves to promote mediation as a "preferable alternative to judicial proceedings." Simply stated, the absence of confidentiality assurances could deter the use of mediations. Thus, these assurances are necessary to overcome one of the barriers to effective mediation. n17

As more intraorganizational mediation programs begin to form, the confidentiality element of mediation has become a crucial element to the success of a dispute resolution system. In particular, many institutions of higher education have created conflict management centers or have further developed their existing programs. n18 Their goal is to resolve disputes using a neutral n19 in order to minimize future conflicts. These disputes **[*22]** may exist among roommates, classmates, faculty, staff, or between members of the university and its neighbors. n20 Because the benefits of alternative dispute resolution are so advantageous to the parties involved, mediation has been an attractive forum for dispute resolution at college campuses. n21 Understanding that statements made at a mediation session will remain confidential provides further support that mediation is the best approach to dispute resolution. With the growing prevalence of mediation at universities, the confidentiality issues raised by such programs warrant careful attention.

In order to effectuate a truly confidential process, colleges and universities must carefully select a mediator who will not be influenced by the institution's authority, particularly when the mediator is also a university administrator. n22 Moreover, the institution must provide mechanisms to avoid "mediator taint," because the neutral will have gained confidential information. Finally, a mechanism to deter breaches of confidentiality should be included that would address the problem of the dual role of the university official serving as both administrator and mediator.

To explore these issues under the context of student-to-student mediations in higher education, Part II looks at the purposes of mediations within the higher education context. Part III addresses legislative mandates and judicial determinations with which universities may be required to comply in order to conduct legally prescribed, confidential mediation sessions. To illustrate these barriers, the Family Education Rights and Privacy Act will be applied to mediation confidences. Part IV recommends four measures to promote confidentiality and to encourage student participation. Part V concludes by summarizing the confidentiality issues in university mediations, particularly when the mediator is a university administrator.

[*23]

II. Mediation in Higher Education

Alternative dispute resolution mechanisms have existed as part of the higher education environment for some time. Indeed, many colleges and universities have participated in systematic conflict resolution sessions in the form of collective bargaining proceedings. n23 One study has recognized the potential benefits of collective bargaining as a means to resolving disputes in the higher education context. n24 Similarly, the use of mediation in the higher education context may serve as a valuable means to resolving disputes. Moreover, evidence exists that conflict resolution training and implementation in the schools can serve to reduce future disputes among the students. n25

Certainly, "the "business' of a university is education." n26 Courts have viewed this duty to educate in broad terms. In fact, courts have charged colleges and universities with the duty to protect their students under the doctrine of in loco parentis. n27 Consequently, university administrators have gradually become aware that their responsibilities naturally extend beyond the classroom. n28

In addition to the duties prescribed by the courts, university administrators recognize and understand the need to maintain a peaceful educational environment. n29 Because of the day-to-day **[*24]** interaction of students who may have disputes with each other, resolution of differences through mediation can be an attractive means of keeping order. n30 Furthermore, mediation may serve as a preventative measure for future confrontations, whereas conflicts addressed through a

court-summoned or university-sponsored judicial proceeding may not yield the same result. n31

It has been stated that "mediation is the least intrusive method of alternative dispute resolution where a neutral third party assists in negotiations between the parties to resolve their conduct." n32 Mediations have naturally become an attractive alternative to formal university disciplinary hearings, counseling meetings, or judicial proceedings, because the process allows for greater flexibility. Furthermore, unlike court proceedings, a mediation session is not bound by formalities of a structured judicial process, and collateral issues may be raised and resolved in a more comprehensive fashion. n33 Specifically, a mediation's informal manner provides opportunities for broader discussions than traditional adjudicative proceedings would otherwise allow; traditionally, the issues raised or evidence introduced would be classified as "irrelevant" to the case at hand. In reality, it is precisely this type of interaction or discussion that might be instrumental in finding an agreeable or workable resolution between two students mired in conflict.

III. The Mediator - Administrator

A. Who is the Mediator?

"A mediator works with the parties together and separately to identify important issues, to minimize the retrospective plac **[*25]** ing of blame, to stress potential areas of agreement, and to build a desire to reach a settlement acceptable to both parties." n34 An intimate knowledge of student concerns coupled with the ability to draw out unstated, underlying issues from the disputants is crucial for successful university mediations. n35 Without these skills, the final agreement may only serve as a temporary remedy, and the disputants may soon return with another conflict. n36 Additionally, the mediator must successfully dispel the student-disputants' fears of backlash from incriminating or embarrassing disclosures made during the mediation process. Students may fear the possibility of university sanctions, fraternity/sorority alienation, peer humiliation, or scrutiny by university officials if discussions from their mediation are revealed to others. Therefore, to administer a more open and effective student-to-student mediation, each party should be given complete information about the process, with an emphasis on the confidentiality and neutrality of the mediator. n37

Generally, mediated conflicts between students have been funded through the Student Affairs Division of the college. n38 Traditionally, the mediators have been university staff members with some formal training in conflict resolution. n39 However, with financial constraints on many colleges and the limited number of mediated disputes, these mediators rarely function exclusively as a mediating neutral. Consequently, information obtained from the mediation may be valuable to the university official in another capacity, such as the Residence Life Director, Dean of Students, Director of Public Safety, Greek Advi **[*26]** sor, Counseling and Guidance Personnel, or Academic Programs Officer.

B. Dual Roles of University Mediators: Neutral and Administrator

Problems typically addressed in university conflict resolution sessions have included roommate problems, vandalism, harassment, noise control, school violence, use of drugs and alcohol, work arrangements, and ethnic and lifestyle tensions. n40 Not surprisingly, the information disclosed in these dispute resolution meetings tends to revolve around issues that are sensitive for the students involved. n41 Furthermore, a mediation study comprised of college students also supported the basic assertion that disputants are "sensitive to the procedures which govern their interaction and decision making." n42 Thus, in order for the mediator to foster participation and promote active listening by the disputants, a relationship of trust should be formed during the process. n43

Unfortunately, in a situation where the neutral is also a college administrator, the trust factor becomes a major concern **[*27]** for the student-disputant. n44 In fact, it has the potential of becoming a deterrent to conflict resolution. A student may view the neutral as a university administrator and not as a neutral. In other words, the student would label the administrator as one who is incapable of being impartial as a third-party mediator because of ties and allegiance to the university as employer. Therefore, the mediator who plays this dual role must overcome any possible impartiality concerns. n45 In addition, fears of disclosure to another college administrator or even the possibility of penalties from the mediator acting in her non-neutral role should be dispelled from the outset. n46

Whether or not the mediation program is university sponsored, its success is predicated on the existence of confidential proceedings. n47 Accordingly, courts have also identified the necessity of maintaining the confidentiality of mediation sessions. n48 As a matter of sound public policy,

[*28]

it is essential for the parties to feel confident that anything they reveal privately to the mediator or in open mediation sessions cannot be used against them should

the mediation fail. Otherwise, parties would be reluctant to make the kinds of concessions and admissions that pave the way to settlement. n49

IV. Laws Relating to Confidentiality

In the higher education context, there are times when a mediation session cannot remain confidential. n50 For example, disclosure laws applicable to public institutions may trump university policies of mediation confidentiality. n51

A. Family Education Rights and Privacy Act of 1974: "Educational Records"

The laws pertaining to disclosure of a student's record have undergone several challenges because the language of the statutes and their corresponding applications have been unclear to school administrators. n52 The courts' interpretations of these laws weigh heavily on the possible legitimacy of various mediation procedures. For example, the Family Education Rights and Privacy Act of 1974 ("FERPA") has traditionally been viewed as a protective measure for students. FERPA prohibits an educational institution from carelessly disclosing students' records to **[*29]** the public. n53 Specifically, FERPA's coverage is confined to improper disclosures of "education records" or "personally identifiable information." n54

Educational records are defined as "records, files, documents, and other materials which... (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." n55 Traditionally, courts have narrowly interpreted what constitutes "educational records" by focusing merely on "records related to academic performance, financial aid, or scholastic probation." n56 Similarly, "personally identifiable information" has been held to represent data contained in a student's records, such as a student's Social Security number. n57 Besides prohibiting an educational institution from revealing a student's Social Security number, the language has been found to bar disclosure to the media of a non-criminal incident where the student can be identified as a result of the school's disclosure. n58 Considering the possibility of improper disclosures of "educational records" and "personally identifiable information," institutions of higher education that conduct mediations must concern themselves with proper maintenance of a student's record. n59

At the same time, institutions of higher education should be aware of two state supreme court cases. In State v. Miami University and Red & Black Publishing Company, Inc. v. Board of Regents, two state supreme courts found university disciplinary **[*30]** records were outside the scope of educational records. n60 Because both of these states also had an open records act, the disciplinary units of those universities were required to disclose all the files not pertaining to "academic performance, financial aid, and/or scholastic probation." n61 Applying this FERPA analysis, information gathered from university-sponsored mediations that does not pertain to academic performance, financial aid, and/or scholastic probation would be considered accessible under a state's open records act. n62

Fortunately, many states with an open records act also have included a provision that precludes the act's application when otherwise prohibited by state or federal law. n63 To overcome the potential damaging application of an open records act, a university should carefully examine the confidentiality protections for mediations under its state's statutes. n64 A state statute requiring the confidentiality of mediations would supercede the open records act. As a result, a student who participates in a university-sponsored mediation in such a state could openly discuss underlying issues with respect to the dispute and not fear public disclosure. To illustrate, mediation communications in Ohio are generally confidential. n65 Because section 2317.023 of the Ohio Code holds mediation communications confidential, the language would be sufficient to override the Ohio Public Records Act. n66

On the other hand, confidentiality provisions that prohibit general public disclosure do not effectively bar a college administrator from reviewing a student's file, which may contain a mediation agreement. Despite the FERPA provisions and the state confidentiality statutes, there are insufficient restraints **[*31]** placed on other school administrators to keep them from accessing a student's file. n67 Furthermore, confidentiality protections currently in place for students are primarily geared toward nondisclosure to the general public; thus, they are ineffective in preventing another school administrator from retrieving mediation session notes that are contained in a student's file. n68 Likewise, the provisions do not effectively deter the administrator-neutral from using the information learned in a mediation against the student-disputant, another student, or in attempting to draft school policies. Because the mediation session itself is not defined as a disciplinary proceeding, the best solution to mediation-inhibiting disclosure under the Open Records Act is to minimize the paperwork produced during a mediation session. n69

B. Family Education Rights and Privacy Act of 1974: "Legitimate Educational Interest"

FERPA was designed to suspend federal funding to educational institutions that ignore the statute's mandates. n70 The language of the Act pertinent to mediation confidentiality states:

(a)(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school ...the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be in [*32] formed of the specific information contained in such part of such material.... n71

(b)(1)No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following - n72

(b)(1)(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required. n73

From the language in the last quoted provision, *20 U.S.C. 1232g*(b)(1)(A), school officials within the educational institution may access a student's records after determination that the school official has a "legitimate educational interest." n74 This potential access does not encourage students to pursue a university-sponsored mediation if the student's hesitancy to proceed is based on the reaction of university officials. Of course, if the dispute is not recorded with the university police or security n75 and the student does not care that the university [*33] will obtain information concerning the substance and nature of the dispute, a university-sponsored mediation would be a viable alternative to resolve the dispute.

Generally speaking, FERPA does not provide students sufficient protection to satisfy all possible confidentiality concerns. In particular, even with the protections provided by FERPA, students may still fear the repercussions of their actions or statements to a university official disclosed in the mediation session. For example, in the course of a mediation, a student may reveal information regarding a third-party student's plagiarized paper, substance abuse problems in a dormitory, excessive cheating on exams with a particular professor, or knowledge of an on-campus sexual assault. The mediator-administrator who learns this type of information may feel compelled to disclose the existence of the uncontrolled environments to another school official.

Furthermore, in the event the school improperly discloses a student's records, whether it be to the public or an official within the institution with no legitimate educational interests, the student has no private right of action against the school under FERPA. n76 Consequently, under the current legislative [*34] scheme, a student may hesitate to put forward candid comments that would otherwise aid in resolving the conflict. Therefore, to rectify these problems, higher education institutions must adopt appropriate policies and procedures if they wish to conduct an effective mediation program. n77

C. Criminal Violations

Commonly referred to as the Crime Awareness and Campus Security Act of 1990 ("Campus Security Act"), colleges and universities are required to develop policies that encourage prompt reporting of crimes to police and college officials. n78 In addition, this Act, which is within the Higher Education Amendments of 1998, n79 places a mandate that colleges compile and report statistics on crimes specifically listed in the statute. n80 Under the Campus Security Act, disputes that are brought to mediation have the potential for disclosure. n81 In addition, several courts have held that educational records under FERPA exclude disciplinary proceedings. n82 In the absence of some other protective [*35] measures, disputants who are aware of the relevant case law and reporting statutes will be less inclined to be forthright with sensitive, embarrassing, or incriminating information.

Similarly, if the university requires the mediator to file all documents and notes created from the mediation, the mediator may be cautious with the information gathered from the dispute resolution session in an effort to protect the students. The mediator may not record the entire content of the proceeding for fear any notes may unfairly taint one of the disputants. The uncomfortable tension between unfettered mediations and the laws requiring or permitting disclosure may adversely impact a potentially effective mediation program in colleges and

universities. Moreover, this tension may cause administrators to be less inclined to serve the dual role of administrator and neutral or even support the existence of a mediation program.

Another concern for the dual role neutral is the potential legal liability for the university. In Tarasoff v. Regents of the University of California, n83 the California Supreme Court found a special relationship to exist between the defendant-psychotherapist and a third party individual who was killed by the psychotherapist's patient. n84 Following the Tarasoff analysis, a neutral school administrator may attach liability to the university for failing to warn a third party of a discussion that transpired during the mediation involving threats of violent acts.

The problem in Tarasoff arose when the patient informed the psychotherapist that he intended to kill an individual. In the session, the intended victim was specifically named. Bothered by the comments, the psychotherapist contacted the campus police. The police detained the patient, but they released him shortly thereafter because he seemed rational. Two months later, the intended victim was killed. Prior to the killing, no one informed the intended victim of the potential harm.

[*36] "Once foreseeable danger to a party with whom the professional had a special relationship has been established, the issue becomes whether reasonable care was exercised to protect the threatened victim." n85 In Tarasoff, the California Supreme Court held that the psychotherapist had a duty to take reasonable steps to protect the intended victim. n86 Under the Tarasoff doctrine, it has been stated that "where... the potential victim threatened by disputants in a mediation program is foreseeable, the mediator would have an affirmative duty to disclose this information." n87 In essence, there may be times that the intended victim is not a party to the mediation, yet the individual could still be subject to a violent act. Thus, despite the victim's lack of involvement in the proceedings, the mediator must inform the victim of the threats in order to avoid liability in jurisdictions that follow the Tarasoff doctrine. n88

Indeed, a neutral who also serves as a college administrator would probably be more likely to take proper measures and disclose confidences of a disputant to prevent the school from later being found negligent for its nondisclosure. In the alternative, an administrator-neutral may discuss the matter with another school official for advice. She may decide to consult the other administrator so that a third-party individual may evaluate the circumstances of the dispute and the potential harm at issue. Moreover, absent any express policies prohibiting such conduct, the administrator-neutral may feel obligated to inform another administrator of impending or suspecting problems.

Looking at the conflict from a risk management perspective, precautions taken to protect the university would be the most economical and beneficial for the school, not to mention the benefits to the person threatened. n89 Unfortunately, revealing the danger could severely hamper future mediations under a university-sponsored program. Progress in future mediations **[*37]** could be hindered by student fears of disclosure to other school officials, rendering the university's mediation program ineffective.

V. Satisfying the Disputants' Concerns: Conflicts and Confidentiality Resolved

A. The Chinese Wall

To avoid conflicts and confidentiality dilemmas in university-sponsored mediations, the educational institution must provide an impartial neutral. Student disputants would not necessarily view a person who serves the dual role of administrator and neutral as impartial. Instead, students may perceive that the neutral will display a marked allegiance to the university should a conflict arise between the disputants' confidentiality concerns and the best interest of the educational institution. Therefore, disputants would be more apt to participate in a university-sponsored mediation if there were mechanisms in place to insulate the neutral from conflicts of split loyalties. n90

Under the Model Rules of Professional Conduct ("Model Rules"), an attorney who has represented one client cannot later represent a client who is opposing the original client in a substantially similar case. n91 In such an instance, the attorney must either decline the work with the latter client or be disqualified from the case. Furthermore, when an attorney represents a client, that representation and associated conflicts of interest are generally imputed to other members of the law firm. n92 The problem becomes much more complex when the attorney leaves the firm for a government lawyer post or another law firm. Because these conflicts could potentially eliminate a vast majority of practicing attorneys in an area, the Model Rules established an approach that erects a "Chinese **[*38]** wall" around attorneys who have gone to another law firm or have chosen to work in a government agency's legal division. n93

A Chinese wall is a procedure that insulates the attorney who represented a former client and that former client now becomes an adversary of a client of the firm or agency for whom the attorney currently works. n94 Thus, the attorney with the conflict is "walled off" from

any potentially improper conflicts, and disqualification of an entire firm is not necessary. A Chinese wall balances the need for exclusion of attorneys from inside or incriminating information and avoids the blanket elimination of law firms or government agencies after an attorney joins the new organization. This concept of building a Chinese wall could also be implemented where a school official plays the dual role of a university administrator and mediator.

Unfortunately, it is inevitable that there will be "continuing danger that a [school official] may unintentionally transmit confidential information" to the administrator who serves as a neutral for a case substantially related to the information passed. n95 Therefore, the goal of the Chinese wall "is to minimize the potential for the transmission of confidential information" between other school administrators and the neutral. n96

To properly implement an effective Chinese wall, universities may employ several possible methods of insulating the administrator-neutral. First, the mechanism should prohibit the neutral from participating in disciplinary proceedings with students who sought mediation. n97 Without this barrier, students would likely distrust the mediator and fear the reprisals from the former neutral who might later become a disciplinary officer. n98 Second, the neutral should not be provided with previ **[*39]** ously filed information regarding the student. Therefore, despite any "legitimate educational interest" that would normally permit a university official to examine a student's records without her consent, the neutral should be prohibited from accessing a student's file, since it may unfairly taint the outcome of the mediation. Third, distributions of inter-departmental and intra-departmental memoranda, letters, e-mails, and faxes should be carefully screened before issuing them to one who is both neutral and a university administrator. A coding system could alert the neutral of an inadvertently delivered correspondence that should not be read. For instance, the system may operate by placing a mediation code or a number that indicates the subject matter pertains to a student dispute. Once such a code is seen, the neutral would return the correspondence to the sender. Likewise, an e-mail may be "filtered" by subject matter. Thus, once an e-mail subject matter has been labeled with specific codes, the e-mail would be rejected and returned to the sender.

In addition, the files of a neutral-administrator should be securely maintained and should not be intermingled with the files of other departments. Likewise, the neutral's files should not be placed with files dealing with the neutral's other role as an administrator. Only the neutral-administrator would have access to the mediation records, thereby eliminating possible access by other administrators or even work study students from gaining any information from the mediation session.

Many of the potential problems mentioned above may be alleviated to some degree if the university creates an ombudsperson to handle all mediations. An ombudsperson is generally a neutral official of the university who handles complaints and disputes within the university. n99 At Columbia University, the ombudsperson is charged with the responsibility of maintaining the neutrality and confidentiality of all disputes filed. n100 To ensure insulation, this individual reports directly to the president of the university rather than to a particular ad **[*40]** ministrative office. Moreover, confidentiality is maintained because the ombudsperson does not report the names of any office visitors without consent, except in cases of serious threats to individual safety. Therefore, the use of an ombudsperson would satisfy the disputants' concerns of confidentiality and neutrality.

Alternatives to hiring one person dedicated to conflicts within the university include the use of individuals not related to an administrative position. n101 For instance, the university may consider the use of peer mediators, administrators from other schools, students from other schools, n102 or administrators with little day-to-day interaction with students.

Once a Chinese wall has been erected, notification to the students of the various confidentiality mechanisms would enhance the program and attract student participation. n103 Furthermore, students who feel compelled to resolve their disputes through mediation would feel more free to discuss their conflicts without withholding information than they would have felt in the absence of the Chinese wall.

B. Contract and Tort Liability

Disclosure of confidential information, whether required by law or not, brings an uneasy feeling for mediators and the dis **[*41]** putants. n104 Mediators are constantly in fear of the possibility that a former disputant may bring suit for "libel, slander, defamation, invasion of privacy, and breach of an express or implied confidentiality contract" when information is disclosed, even when required by law. n105 Similarly, the disputants are never provided absolute guarantees that their statements will remain within the walls of the mediation room. n106 As a result, they do not feel completely free to tell the mediator their account of the dispute. Instead, they are preoccupied that their statements will later be used against them. n107

In the event that statutes governing confidentiality do not exist in a particular state or are not applicable to a specific situation, the university may opt to implement a contractual promise of confidentiality. n108 The agreement should clearly indicate that matters addressed in mediation would remain confidential unless prohibited by law. In addition, a clause may state that the mediator's role may not be imputed to the university or any other individual, department, or office within the university. Such a provision would eliminate any ambiguities of confidentiality disclosures and file accessibility to other university officials. It would also further the mediator's insulation and identify another expressly stated protective measure for the students.

"While mediation communications are confidential, confidentiality does not prevent a party from bringing suit for breach of a mediation agreement." n109 In general, confidentiality **[*42]** agreements are enforceable among the signatories in the absence of a subpoena. n110 Such agreements are important to the process because they add to the likelihood that the parties involved in the mediation will keep their conferences confidential. Furthermore, the agreements provide an avenue for bringing legal action against individuals who breach the confidentiality of the mediations. n111 Therefore, if a mediator who also serves as a university administrator discloses information when not required by law, the mediator will have breached the contract. In such an instance, the educational institution through the law of agency, may be held liable for the administrator-mediator's actions. n112

Contracts maintaining the confidentiality of a mediation proceeding may be attractive to the participants. The parties may draft a confidentiality agreement tailored to their specific needs before the proceedings begin. Although it may seem awkward to negotiate terms for a mediation, the parties' control over their dispute may provide more opportunities for an eventual settlement. Moreover, the confidentiality agreement may have more strength then a state statute mandating confidentiality. n113 Because mediation confidentiality laws are unsettled, courts may unexpectedly intervene and require disclosure of what at first seemed to qualify as a confidential statement. n114 By contracting, the parties may also address their choice of laws to be applied. n115 This would be particularly helpful if a suit is filed in federal court and a party asserts that another party **[*43]** violated the confidences of the mediation proceedings. n116 Likewise, one state law may have stronger language to protect a mediation session than another state. n117 Thus, the choice of laws provision could determine the outcome of later challenges.

A confidentiality agreement places the needed emphasis on the sensitivity of mediations. By contracting confidentiality, disputants may clearly express preventative measures to mediation disclosure. The agreement can include the understanding of the parties that any mediation communication shall not be revealed to any other school employee without the express authorization of the disputants. In addition, the neutral-administrator shall not knowingly use any information revealed through the mediation process against any student, staff, or faculty member of the university, whether in specific proceedings for any of the named individuals or groups, or while proposing or drafting policy matters for the educational institution. n118 A liquidated damages clause, holding the administrator-neutral personally liable for non-negligent disclosures, may also serve as a deterrence to mediators who contemplate revealing confidential information.

Another avenue that a disputant may take is tort liability. For instance, if a neutral discloses information that may be harmful to one of the party's academic research, the party may seek damages by claiming actions such as misappropriation of information n119 or improper disclosure of trade secrets. n120 In ad **[*44]** dition, disputes between other students outside the academic context may include libel, slander, defamation, and invasion of privacy. n121

In sum, improper disclosures of confidential information by a neutral may bring about claims under contract and tort liability. Unfortunately to assert these claims, the damage will have already taken place, and such disclosure may be so harmful to a student-disputant that money damages will never fully compensate the disputant for her injury. On the other hand, a student-disputant who truly fears the chance of improper disclosure may seek a court injunction against the neutral-administrator from revealing the potentially harmful information. To succeed, the student will have the burden of establishing the necessary relationship, the confidentiality agreement, and the irreparable harm that would result from improper disclosure. n122 Similar to injunctions, protective orders may be available to student-disputants to prevent disclosure at an earlier time and to assure that confidences will not be revealed. The act of seeking a protective order may be enough to keep the other disputant and the neutral-administrator mindful of the possible consequences of improper disclosure. n123

C. Confidentiality Statutes

In the past several decades, the number of state statutes that govern mediations has increased in reaction to the growth of alternative dispute resolution programs.

Consequently, legislators have promulgated laws to promote mediation proceed [*45] ings. Specifically, many states and federal regulations have been issued to maintain the confidentiality aspect of mediations. n124 Although "many states have confidentiality statutes governing mediation and ADR processes, ... these statutes vary considerably in both coverage, exceptions and scope." n125

For instance, a federal statute that governs the Department of Commerce's Community Relations Service Mediation Program states in part:

(b) The activities of all officers and employees of the Service in providing conciliation assistance shall be conducted in confidence and without publicity, and the Service shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held. No officer or employee of the Service shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service. Any officer or other employee of the Service, who shall make public in any manner whatever any information in violation of this subsection, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $ 1,000 or imprisoned not more than one year. n126

From the language of this statute, the mediator is charged with the responsibility of maintaining confidentiality of the information obtained in the "regular performance of its duties." n127 In addition, the language of the statute indicates a mutual "understanding" that a level of trust may be imputed to the mediator. n128 Furthermore, a deterrent factor has been encompassed in the statute. A mediator who violates the confidentiality requirement will face criminal penalties that may include a monetary sanction. n129

[*46] A statute modeled after the federal Community Relations Service Mediation Program would provide greater incentive for students to participate openly in university-sponsored mediations and remind neutrals within the educational institutions of their confidentiality obligations. In the event that a state statute fails to provide an appropriate confidentiality deterrence, the college or university may wish to adopt its own sanction for further support of confidential mediation proceedings. This may allow for specific consideration and appropriate language to address the complexities of maintaining a dual role as a university administrator and neutral. Whatever the imposed sanction becomes, the students should be made aware of the institution's attempts to promote candid discussions with the university-sponsored mediator.

D. Professional Standards for Confidentiality

Confidentiality is a major concern, which may be remedied through the implementation of professional standards. Although statutory schemes are an alternative, n130 a code of professional standards may contribute to a uniform system and a general understanding. Likewise, students would become acquainted with the standards and would know what to expect from mediation sessions.

Several suggested uniform standards have been published in the last two decades. n131 In 1987, the Symposium Rule, which was a spin-off of the ABA's Draft Model Rules, was created. n132 After critiquing the Draft Model Rules, the Symposium members formulated a new confidentiality standard for mediators that states:

All mediation documents and mediation communications are privileged and confidential and shall not be disclosed where the parties and mediator have agreed that they shall be confi [*47] dential pursuant to this statute/rule. If confidential pursuant to this statute/rule, they are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding. n133

Similarly, the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution worked together to craft a mediator's code of professional conduct in 1992. n134 Of course, confidentiality and impartiality were relevant issues and they were specifically examined. The code addresses these two areas in the following manner:

2. Impartiality: a mediator shall conduct the mediation in an impartial manner.

A mediator should only mediate those matters in which he or she can remain impartial and should withdraw if unable to meet such a standard. The comments further state that a mediator should avoid the appearance of partiality toward one of the parties, including partiality based on the parties' personal characteristics, background, or performance at the mediation. An unstated premise is that the quality of the process is enhanced only to the extent the parties have confidence in the mediator's impartiality. When a mediator is appointed by a court or institution, the comments provide that it is the responsibility of the appointing authority to make reasonable efforts to ensure impartiality.

... [*48] 5. Confidentiality: a mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.

Since the parties' expectations regarding confidentiality are critical, the mediator should ascertain and discuss these expectations with them. The parties' expectations may be shaped by the circumstances of the mediation and any prior confidentiality agreements. A mediator must not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy. The comments further state that a mediator should avoid communicating outside the mediation any information about how the parties acted, the merits of the dispute or any settlement offers. n135

Although these model rules assert confidentiality provisions, specific language for university mediations would eliminate ambiguous policies. In particular, it would clarify any misconceptions of disclosure to other university administrators and the prohibited use of communications in subsequent proceedings. Because university mediators should be charged with confidentiality applicable to all mediation communications, this article proposes a university administrator-neutral code of professional conduct that reads as follows:

A university mediator shall keep any mediation communication confidential, except when otherwise prohibited by law. The mediator shall not reveal any information acquired through the mediation to any person not a party to the mediation, including other school employees, without the express authorization of the disputants. In addition, the university mediator shall not knowingly use any information revealed through the mediation process in other university or judicial proceedings. Furthermore, the university mediator may not use information acquired from mediation communications to propose or draft policy matters for the university which would directly and adversely affect a student, faculty, or staff member mentioned in the mediation. The provisions stated in this paragraph are not applicable if otherwise required by law.

[*49] Any university mediator who shall make public in any manner information obtained through mediation communication shall be in violation of this section. Violators shall be subject to university disciplinary proceedings which may include discontinuance from mediating any future disputes in the university and dismissal from the university.

As used in this proposed university administrator-neutral code of professional conduct, ""mediation communication' means a communication made in the course of and relating to the subject matter of a mediation" n136 and "university" includes all post-secondary educational institutions. Finally, the university's adoption of a rule, similar to the one stated above, would alleviate the apprehension that many students may have toward university-sponsored mediations. Specifically, a university may adopt a policy where non-negligent disclosures of mediation confidences would subject the neutral-administrator to university disciplinary proceedings. From these hearings, a neutral-administrator may be subject to termination.

Once this separation of confidential information from administrative decision-makers is in place, the students will be open to developing a trust relationship with the mediators. Mediation will become a viable option for students to resolve their conflicts in a nonajudicatory manner.

VI. Conclusion

Justice Felix Frankfurter once stated that "it is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." n137 Today, mediations in higher education institutions represent one of the significant areas for program development. In an effort to create an environment where students have respect for one another, universities have implemented mediation programs with [*50] the intent to promote a peace-making approach for student-to-student disputes. n138

Currently, records laws and confidentiality provisions are insufficient to consistently hold university administrators accountable for confidentiality of mediation sessions. Therefore, this article recommends that universities examine confidentiality mechanisms such as the Chinese wall, contract and tort liability, proposed confidentiality provisions, and the establishment of a code of professional standards.

"Mediation can serve as a model on which to establish other creative forums in which members of the college community may express their concerns...." n139 However, without a code of conduct for university administrators-mediators, the policy regarding confidentiality with other university officials may be unclear. Consequently, students may hesitate to use this alternative forum for dispute resolution or may refrain from disclosing confidences for fear of adverse repercussions.

FOOTNOTES:

n1. Stephen S. Cook, Mediation as an Alternative to Probation Revocation Proceedings, *59 Fed. Probation 48, 48 (1995)* (quoting Matthew J. Sauter, Comment, Post-Conviction Mediation of Rape Cases: Working within the Criminal Justice System to Achieve Well-Rounded Justice, *1993 J. Disp. Resol. 175, 186).*

n2. See Loretta W. Moore, Lawyer Mediators: Meeting the Ethical Challenges, *30 Fam. L.Q. 679, 680 (1996).*

n3. See, e.g., Jacqueline M. Nolan-Haley, Court Mediation and the Search for Justice through the Law, *74 Wash. U. L.Q. 47, 100 n.2 (1996)* ("Biblical references to mediative conflict resolution are found in St. Paul's admonition to the people of Corinth. 1 Corinthians 6:1-4."); Andrew W. McThenia & Thomas L. Shaffer, For Reconciliation, *94 Yale L.J. 1660, 1666 & n.36 (1985)* (explaining that Judeo-Christians have been advised to first discuss their problems and alternatively mediate their disputes).

n4. See Stephen G. Bullock & Linda Rose Gallagher, Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana, *57 La. L. Rev. 885, 890 (1997)* ("Mediation is, and traditionally has been, a dominant method of resolving disputes in Asian, European, African, and Native American cultures.").

n5. See Pamela A. Kentra, Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct, *1997 BYU L. Rev. 715, 719.*

n6. See Matthew W. Daus, Mediating Disability Employment Discrimination Claims, 52 Disp. Resol. J. 16, 19 (1997).

n7. See generally Jeffrey Krivis, Alternative Dispute Resolution: How to Use It to Your Advantage! - 10 Steps in Preparing for a Mediation, SC55 ALI-ABA 307 (1998).

n8. Kimberlee K. Kovach, Mediation for Mediators? If You Talk the Talk, You'd Better Walk the Walk: An Examination of How Dispute Resolvers Resolve Disputes, 11 Ohio St. J. on Disp. Resol. 403, 422 (1996).

n9. See, e.g., Brian Koy Harper, Comment, Peer Mediation Programs: Teaching Students Alternatives to Violence, *1993 J. Disp. Resol. 323 (1993).*

n10. See, e.g., Cynthia A. Savage, Culture and Mediation: A Red Herring, *5 Am. U. J. Gender & L. 269, 281-82 (1996);* Gerald R. Williams, Negotiation as a Healing Process, *1996 J. Disp. Resol. 1;* Ann J. Kellett, Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients, *1987 J. Disp. Resol. 111.*

n11. See, e.g., *American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 n.14 (2d Cir. 1978)* (stating that the legislative history supports the proposition that "commercial information," i.e. trade secrets, is exempted from Freedom of Information Act disclosure).

n12. See, e.g., Julie Barker, International Mediation - A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans, *19 Loy. L.A. Int'l & Comp. L.J. 1, 58 n.68 (1996).*

n13. See, e.g., Carrie A. Bond, Note, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace, *65 Fordham L. Rev. 2489 (1997).*

n14. See, e.g., *Poly Software Intern., Inc. v. Su, 880 F. Supp. 1487, 1494 (D. Utah 1995)* ("Where a mediator received confidential information in the course of mediation, that mediator should not thereafter represent anyone in connection with the same or substantially factually related matter unless all parties to the mediation proceeding consent after disclosure.").

n15. *Smith v. Smith, 154 F.R.D. 661, 674 (N.D. Tex. 1994)* (citing *National Labor Rel. Bd. v. Joseph Macaluso, Inc., 618 F.2d 51, 54 (9th Cir. 1980))* (additional citations omitted).

n16. Cf. S. Rep. No. 1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051 (Senate Report discussion of *rule 408 of the Federal Rules of Evidence* stated: "The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.").

n17. See generally, Jaime Alison Lee & Carl Giesler, Comment, Confidentiality in Mediation, *3 Harv. Negotiation L. Rev. 285, 297 (1998).*

n18. See William C. Warters, Conflict Management in Higher Education: A Review of Current Approaches, 92 New Directions for Higher Educ. 71, 71, 77 (1995).

n19. "Neutral" is a term of art used throughout this article meaning "mediator."

n20. See, e.g., Wallace Warfield, Town and Gown: Forums for Conflict and Consensus Between Universities and Communities, 92 New Directions for Higher Educ. 63 (1995).

n21. See generally Jacqueline Gibson, "Can't We Settle This?": Student Conflicts in Higher Education and Options for Resolution, 92 New Directions for Higher

Educ. 27 (1995); Donna Bialik et al., Higher Education: Fertile Ground for ADR, 49 Disp. Resol. J. 61 (1994).

n22. See, e.g., Robert Zemsky, Shared Purposes, 6 Pol'y Persp. 1 (1996) (discussing distrust with institutional leaders of higher education).

n23. See Bialik, supra note 21, at 61.

n24. See Frank R. Annunziato, From Conflict to Accord: Collective Bargaining at the Academy, 92 New Directions for Higher Educ. 51 (1995).

n25. See Kathryn L. Girard & Susan J. Koch, Preparing Teachers for Conflict Resolution in the Schools, ERIC Clearinghouse on Teaching and Teacher Education: Washington D.C. (Sept. 1995) (ERIC Document Reproduction Service No. ED 387 456).

n26. *National Labor Rel. Bd. v. Yeshiva Univ., 444 U.S. 672, 688 (1980).* This notion of education as a business is best illustrated in an article written by Arthur Levine. See generally Arthur Levine, Daedalus: How the Academic Profession is Changing, 126 J. Am. Academy Arts & Sciences 1 (1997).

n27. See *Furek v. University of Delaware, 594 A.2d 506 (Del. 1991);* see also Philip M. Hirshberg, The College's Emerging Duty to Supervise Students: In Loco Parentis in the 1990s, *46 Wash. U. J. Urb. & Contemp. L. 189 (1994);* Brian Jackson, The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform, *44 Vand. L. Rev. 1135 (1991).*

n28. See generally Derek Bok, Beyond the Ivory Tower: Social Responsibilities of the Modern University 97 (1982).

n29. See also William S. Haft & Elaine R. Weiss, Note, Peer Mediation in Schools: Expectations and Evaluations, *3 Harv. Negotiation L. Rev. 213, 221 (1998);* Thomas J. Scheff, Community Conferences: Shame and Anger in Therapeutic Jurisprudence, 67 Revista Juridica Universidad de Puerto Rico 97, 124-28 (1998).

n30. See generally, Kimberlee K. Kovach, ADR Education: The Promise of Our Future, 51 Disp. Resol. J. 56, 151 (1997).

n31. See infra note 35 and accompanying text.

n32. Bialik, supra note 21, at 62.

n33. See Bullock & Gallagher, supra note 4, at 957 (citing John R. Murphy, III, Comment, In the Wake of Tarasoff: Mediation and the Duty to Disclose, *35 Cath. U. L. Rev. 209, 216 (1985)).*

n34. Cook, supra note 1, at 48.

n35. For instance, the mediator should be one who can appreciate the continual interaction of students in a campus environment and simultaneously recognize the negative implications in her ability to influence the disputants by virtue of her role as a mediator and university administrator.

n36. See Kay O. Wilburn & Mary Lynn Bates, Conflict Resolution in America's Schools: Defusing an Approaching Crisis, 52 Disp. Resol. J. 67, 69 (1997).

n37. But see *Watson v. Watson, No. 25-60-96, 1992 WL 175102,* at *1 (Conn. Super. Ct. July 21, 1992).

n38. See generally Susan A. Holton & William C. Warters, Appendix: Conflict Management Programs in the United States and Canada, 92 New Directions for Higher Educ. 97 (1995).

n39. See generally Susan A. Holton, Conflict Management Programs in Institutions of Higher Education (visited April 2, 1999) <http://www.ombuds.org/holton.html>.

n40. See Gibson, supra note 22; see also Bill Warters, Campus Mediation Resources: Campus Mediation Program Planning Guide (visited April 2, 1999) <http://www.mtds.wayne.edu/guide.htm>.

n41. See generally Merrily S. Dunn, Mediation: One Alternative to Traditional Judicial Proceedings, 15 C. Student Aff. J. 40 (1996).

n42. Claudia L. Hale, Communication within a Dispute Mediation: Interactants' Perceptions of the Process, 2 Int'l J. Conflict Mgmt. 139, 139 (1991).

n43. See *In re Florida Rules of Civil Procedure, Florida Rules for Certified and Court-Appointed Mediators, and Proposed Florida Rules for Court-Appointed Arbitrators, 641 So.2d 343, 349 (Fla. 1994)* ("A mediator occupies a position of trust with respect to the parties and the courts.").

Under the language of "impartiality," the Committee notes state, "mediators establish personal relationships with many representatives, attorneys, mediators, and other members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances, but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality." Id.

For purposes of mediations conducted in higher education institutions by school administrators, the language here indicates disclosure of possible biases would occur after application of the objective test of impaired impartiality. This objective standard seems to utilize the reasonableness of a mediator not a disputant in

determining where "a particular relationship might reasonably appear to impair impartiality." Id.

n44. Cf. *R.A. v. Grover, No. 85-1774, 1986 WL 217182,* at *4 (Wis. Ct. App. Aug. 21, 1986) (explaining that disabled child had distrusted the local school officials in their providing of services); see also Jon Marcus, Ripped off! Inside the Higher Ed Racket (visited Apr. 2, 1999) <http://www.bostonmagazine.com/articles/college.shtml >; Official: College Not "For Sale," Omaha World-Herald, Oct. 11, 1997, at 67, available in *1997 WL 6316108* (discussing an audience's noticeable distrust of the college leadership and widespread concern about perceived "behind-the-scenes deals" with the college).

n45. See also William H. Champlin, III, ADR in the Federal Courts, in Litigation 1993, at 573 (PLI Litig. & Admin. Practice Course Handbook Series No. 481, 1993).

n46. See, e.g., *Marchal v. Craig, 681 N.E.2d 1160, 1163 (Ind. Ct. App. 1997)* ("The mediator should be perceived as impartial and willing to protect the confidentiality of the process."); but see *Pyne v. Procacci Brothers Sales Corp., No. CIV.A.96-7314, 1997 WL 634370,* at *1 (E.D. Pa. Oct. 8, 1997) (discussing a plaintiff who alleged that the mediator represented herself as an impartial mediator when in fact she was at the time representing defendants).

n47. See *Paranzino v. Barnett Bank of South Florida, N.A., 690 So. 2d 725, 728 (Fla. Dist. Ct. App. 1997)* ("This court finds that, in the instant case, all parties were aware of the precedent condition of absolute confidentiality regarding the mediation proceedings." In addition, the parties explicitly provided for a confidentiality provision in the mediation agreement.).

n48. See, e.g., *Illinois Educ. Labor Relations Bd. v. Homer Community Consol. Dist. No. 208, 547 N.E.2d 182, 187 (Ill. 1989)* (stating the need for confidentiality to preserve the mediation process); see also *Pipefitters, Local Union No. 208 v. Mechanical Contractors Ass'n of Colorado, No. CIV.A.79-C-1382, 1980 WL 2169,* at *1 (D. Colo. June 26, 1980) ("A key element of the mediation process... is a process essentially private, rather than public in its structure." (quoting *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. National Mediation Bd., 425 F.2d 527, 538 (D.C. Cir. 1970))).*

n49. *Ryan v. Garcia, 33 Cal. Rptr. 2d 158 (Cal. Ct. App. 1994)* (quoting H. Warren Knight et. al., California Practice Guide: Alternative Dispute Resolution 3:25, at 3-5 (1993)).

n50. Accord *Andrew Corp. v. Rossi, 180 F.R.D. 338, 342 (N.D. Ill. 1998)* (In considering a broad sweeping court order, the court stated: "Anything interfering with the sunlight's power as a "disinfectant' must be carefully restricted."); see also Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, *105 Harv. L. Rev. 427, 442-45, 479 (1991).*

n51. See *DTH Pub. Corp. v. University of North Carolina at Chapel Hill, 496 S.E.2d 8 (N.C. Ct. App. 1998)* (holding that the information disclosed in an undergraduate court proceeding was not considered privileged or confidential under FERPA because it was subject to the North Carolina Open Meetings Law).

n52. See, e.g., *Lewin v. Medical College of Hampton Roads, 931 F. Supp. 443 (C.D. Va. 1996)* (finding no valid claim under FERPA when the student requested to review the challenged exam which he failed).

n53. See *Red & Black Pub. Co., Inc. v. Board of Regents, 427 S.E.2d 257, 261 (Ga. 1993).*

In recognizing the purposes of FERPA, also referred to as the Buckley Amendment, the court pointed out that FERPA "was not to grant individual students the right of privacy or access to educational records, but to control the careless release of educational information on the part of many institutions." Id. (citing *Bauer v. Kincaid, 759 F. Supp. 575, 590 (W.D. Mo. 1991);* see also *Smith v. Duquesne Univ., 612 F. Supp. 72 (W.D. Pa. 1985)).*

n54. *20 U.S.C. 1232g*(b)(1) (1998).

n55. *20 U.S.C. 1232g*(a)(4)(A)(i) and (ii) (1998).

n56. *Gannett River States Pub. Corp. v. Mississippi State Univ., 945 F. Supp. 128, 131 (S.D. Miss. 1996).*

n57. *Krebs v. Rutgers, 797 F. Supp. 1246, 1258 (D.N.J. 1992).*

n58. See *Doe v. Knox County Bd. of Educ., 918 F. Supp. 181 (E.D. Ky. 1996).*

n59. The parents of the minor may also retrieve a student's records from the university; thus, parents may potentially represent another class of persons whom the student fears will receive mediation information.

n60. *State v. Miami Univ., 680 N.E.2d 956, 959 (Ohio 1997); Red & Black Publishing Co., Inc. v. Board of Regents, 427 S.E.2d 257 (Ga. 1993).*

n61. *680 N.E.2d at 959; 427 S.E.2d at 261.*

n62. See *Gannett River States Pub. Corp. v. Mississippi State Univ., 945 F. Supp. 128, 131 (S.D. Miss. 1996).*

n63. See, e.g., *Cal. Gov't Code 6254(k)* (West Supp. 1999); *Kan. Stat. Ann. 45-221(a)(1)* (Supp. 1996); *Ohio Rev. Code Ann 149.43(A)(1)(p)* (Anderson Supp. 1997); *Wash. Rev. Code 42.17.310(1)(ee)* (Supp. 1999).

n64. See generally Nancy H. Rogers & Craig A. McEwen, Mediation: Law, Policy, Practice 243-72 (1989 & 1992 Supp.).

n65. "A mediation communication is confidential... [therefore] no person shall disclose a mediation communication in a civil proceeding or in an administrative proceeding." *Ohio Rev. Code Ann. 2317.023* (Anderson Supp. 1997).

n66. See *Ohio Rev. Code Ann. 149.43(A)(1)(p)* (Anderson Supp. 1997).

n67. See *20 U.S.C. 1232g*(b)(1)(A) (1998) (illustrating provisions of FERPA's Need-to-Know requirements for internal disclosure).

n68. See infra Part III.C.

n69. See id.

n70. See *Red & Black Publishing Co., Inc. v. Board of Regents, 427 S.E.2d 257, 261 (Ga. 1993).*

n71. *20 U.S.C. 1232g*(a)(1)(A) (1998).

n72. *20 U.S.C. 1232g*(b)(1) (1998).

n73. *20 U.S.C. 1232g*(b)(1)(A) (1998).

n74. See *Eastern Connecticut State Univ. v. Freedom of Information Comm'n, No. CV 960556097, 1996 WL 580966,* at *1 (Conn. Super. Ct. Sept. 30, 1996). Adjunct professor sought to retain a copy of the audiotapes from a hearing that he participated in. The hearing proceedings disclosed a student's behavior records. The court found the professor's legitimate educational interest in the student's behavior. Thus, his obtaining the tapes did not require the consent of the student, and consequently, the passing of the tapes did not violate any FERPA provision. Id. at *3; but see *Krebs v. Rutgers, 797 F. Supp. 1246, 1259 (D. N.J. 1992)* (finding no legitimate educational interest to provide the post office personnel with students' social security numbers).

n75. The term "educational records' is not all-inclusive.

The term "education records' does not include - (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute; (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement; (iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or (iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

20 U.S.C. 1232g(a)(4)(B)(i) through (iv) (1998) (emphasis added).

n76. See *Hartfield v. East Grand Rapids Public Schs., 960 F. Supp. 1259 (W.D. Mich. 1997);* see also *Odom v. Columbia Univ., 906 F. Supp. 188 (S.D.N.Y. 1995).* But see *Belanger v. Nashua, New Hamsphire Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994)* (holding that a FERPA created interest could result in a 1983 action for the individual).

n77. See infra Part IV. A-D.

n78. *20 U.S.C. 1092*(f)(1)-(6) (1998).

n79. *20 U.S.C. 1092*(f)(1)(F), (f)(7) (1998).

n80. The following crimes must be compiled and reported: murder, sex offenses (forcible or nonforcible), robbery, aggravated assault, burglary, and motor vehicle theft. *20 U.S.C. 1092* (f)(1)(F)(i) - (vi) (1994) In addition, statistics must be reported concerning the number of arrests for the following crimes occurring on campus: liquor law violations, drug abuse violations, and weapons possessions. *20 U.S.C. 1092* (f)(1)(H)(i) - (iii) (1998).

n81. Easily traceable information, such as residence hall room number, date and time of the incident, etc., which is filed to campus security, reduces the probability of keeping the information confidential. See, e.g., *State v. Miami Univ., 680 N.E.2d 956, 962 (Ohio 1997)* (Lundberg-Stratton, J., dissenting).

n82. Several courts have been asked to determine the relationship between FERPA confidentiality and First Amendment rights to general public access of records. There is a conflict between the two District Courts on this issue. Compare *Student Press Law Center v. Alexander, 778 F. Supp. 1227 (D.D.C. 1991)* ("The right to receive information and ideas "is an inherent corollary of the rights of free speech and press that are explicitly

guaranteed by the Constitution.' Therefore, plaintiffs' claim that the FERPA interferes with their ability to gather information regarding campus crimes implicates the First Amendment." *778 F. Supp. at 1233* (citing *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982)))*, and *Bauer v. Kincaid, 759 F. Supp. 575, 593-95 (W.D. Mo. 1991)* (holding that FERPA does not act to bar public access to criminal investigations and incident reports conducted by university police), with *Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark. 1991)* (In declining to follow Bauer, the court stated: "because the press may have a right to print accurate information, for example, regarding the identities of crime victims and gory details of the crime, [it] does not, by any stretch of the imagination, compel the conclusion that members of the general public have a right to acquire that information from any governmental employee, or body which might possess the same.").

n83. *Tarasoff v. Regents of the Univ. of California, 551 P.2d 334 (Cal. 1976).*

n84. Accord *Fraser v. United States, 674 A.2d 811, 813-14 (Conn. 1996);* but see *Boynton v. Burglass, 590 So.2d 446 (Fla. Dist. Ct. App. 1991).*

n85. John R. Murphy, III, Comment, In the Wake of Tarasoff: Mediation and the Duty to Disclose, *35 Cath. U. L. Rev. 209, 216 (1985).*

n86. See id. at 340 (The psychotherapist "did not confine [the patient] and did not warn [the victim] or others likely to apprise her of the danger."); Accord *Schuster v. Altenberg, 424 N.W.2d 159 (Wis. 1988).*

n87. Murphy, supra note 85, at 216.

n88. See id.

n89. For public policy reasons, disclosure may be warranted to avoid risk of serious bodily harm upon a third party.

n90. See Joseph Z. Fleming, Grievances and Arbitration for the Organized Employer, A.L.I. - A.B.A. Continuing Legal Educ. (July 7, 1997).

n91. Model Rules of Professional Conduct 1.10(b)(1) (1997).

n92. See, e.g., *State v. Lentz, 639 N.E.2d 784 (Ohio 1994).*

n93. See Steve E. Couch, Ethics: Identifying Conflicts of Interest under Texas' Disciplinary Rules: Don't Forget about Contract Attorneys, Hous. Law., 35-Feb. 1998, at 34.

n94. See *Steel v. General Motors Corp., 912 F. Supp. 724 (D.N.J. 1995).*

n95. *In re Grand Jury 91-1, 790 F. Supp. 109, 111 (E.D. Va. 1992).*

n96. *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1289 (Pa. 1992).*

n97. Cf. *State v. Tolias, 954 P.2d 907 (Wash. 1998)* (describing where the defendant waived his rights to challenge the possible improper dual role of the prosecutor who also arguably served as a mediator to the case).

n98. Cf. *Dobuzinsky v. Middlesex Mutual Assurance Co., No. 37-62-43, 1995 WL 574769,* at *2 (Conn. Super. Ct. Sept. 22, 1995) ("After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.").

n99. See *Garstang v. Superior Court, 46 Cal. Rptr. 2d 84, 88-90 (Cal. Ct. App. 1995)* (recognizing a qualified privilege for discussions made to the ombudsperson at the California Institute of Technology).

n100. See Facets 1998-1999: Student Recources-Ombuds Office (visited April 2, 1999) <http://www.columbia.edu/cu/facets/30.html>.

n101. Budgetary constraints may eliminate the use of an ombudsperson. Therefore, the university should examine the use of other resources.

n102. The use of students from other schools has many implications attached with its use. In particular, the creation of a coop-type program could possibly avoid university liability. For instance, a neutral-administrator who mediates a case where she learns of a discrimination claim or a sexual harassment charge may create the appropriate scienter to meet the requisite elements of knowledge or awareness by the university. On the other hand, using a mediator who has no administrative capacity in that particular university may not be sufficient to place the school on notice of the problem.

n103. At the beginning of the mediation, the mediator would qualify herself as a neutral person in the process. For instance, she may state that she has no affiliation with the university because she is in fact a law student at another university. She would then inform the disputants of the confidentiality requirements and wait for their acknowledgment of this policy. In addition, she would specify that she will shred her notes at the end of the mediation and no paper trails will exist except for the possible signed mediation agreement which the disputants will keep for themselves. Finally, before beginning discussions, the mediator must clearly disclose her duty to reveal criminal activity including of potential harm to another.

n104. See generally, Michael A. Perino, Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act, *26 Seton Hall L. Rev. 1 (1995).*

n105. Murphy, supra note 87, at 224.

n106. See Samuel J. Imperati, Mediator Practice Models: the Interaction of Ethics and Stylistic Practices in Mediation, *33 Willamette L. Rev. 703, 734-35 (1997);* but see Peter N. Thompson, Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota, *18 Hamline J. Pub. L. & Pol'y 329, 360-62 (1997)* and Jerrold J. Ganzfried, Bringing Business Judgment to Business Litigation: Mediation and Settlement in the Federal Courts of Appeals, *65 Geo. Wash. L. Rev. 531, 538-40 (1997).*

n107. See generally John G. Mebane, III, Comment, An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts, *71 N.C. L. Rev. 1857, 1871-74 (1993).*

n108. See, e.g., *Doe v. Nebraska, 971 F. Supp. 1305, 1307-08 (D. Neb. 1997).*

n109. Randle v. Mid Gulf, Inc., No. 14-95-01292-*CV, 1996 WL 447954,* *1 (Tex. Ct. App. Aug. 8, 1996) (citing *Hur v. City of Mesquite, 893 S.W.2d 227, 234 (Tex. Ct. App. 1995)).*

n110. See *Hutton v. Gen. Motors Corp., 775 F. Supp. 1373, 1377 (D. Nev. 1991).*

n111. See, e.g., Randle v. Mid Gulf, Inc., No. 14-95-01292- *CV, 1996 WL 447954,* *1 (Tex. Ct. App. Aug. 8, 1996) (citing *Hur v. City of Mesquite, 893 S.W.2d 227, 234 (Tex. Ct. App. 1995)* ("While mediation communications are confidential, confidentiality does not prevent a party from bringing suit for a breach of a mediation agreement."); cf. *Bernard v. Galen Group, Inc., 901 F. Supp. 778 (S.D.N.Y. 1995)* (describing where mediating parties requested sanctions against attorney for violating confidentiality provisions).

n112. See *Restatement (Second) of Agency 1*, 140 (1958).

n113. See generally Jay E. Grenig, Alternative Dispute Resolution With Forms 7.13 to 7.16, at 122-25 (2d ed. 1997); but cf. Bullock & Gallagher, supra note 4, at 961.

n114. See Catherine Cronin-Harris, What the Business Lawyer Needs to Know About ADR: A Primer on ADR Statutes and Cases, in Litigation 1998, at 542 (PLI Litig. & Admin. Practice Course Handbook Series No. H0-001S, 1998).

n115. Cf. *Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)* (explaining that a franchise agreement that included a provision of a "choice of law" was valid).

n116. See Cronin-Harris, supra note 114, at 542.

n117. Compare *Mass. Gen. Laws ch. 233, 23C* (stating in part: "Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.") (emphasis added), with *Tex. Rev. Civ. Stat. Ann. 154.073* (West 1997) (stating in part: "An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.").

n118. Columbia University allows the information to be used in a "constructive format." Similar to the Campus Safety statutes, "the Ombuds Officer keeps aggregate statistics of the types of complaints received by the office." In addition, the Ombuds Officer "may periodically report problem areas to senior administrators and make recommendations for institutional improvements as appropriate." See Facets 1998-1999: Student Recources-Ombuds Office (visited April 2, 1999) <http://www.columbia.edu/cu/facets/30.html>.

n119. See *Den-Tal-Ez, Inc. v. Siemens Capital Corp., 566 A.2d 1214, 1224 (Pa. Super. Ct. 1989).*

n120. See *Burten v. Milton Bradley Co., 763 F.2d 461, 463, 465 (5th Cir. 1985).*

n121. See Murphy, supra note 87, at 224; see also *City of Middletown v. Von Mahland, 643 A.2d 888, 891 (Conn. Ct. App. 1994).*

n122. See *International Paper Co. v. Suwyn, 966 F. Supp. 246, 258 (S.D.N.Y. 1997)* (describing where former employer was trying to enforce a noncompete clause, but failed to establish likelihood of irreparable injury).

n123. A protective order does not guarantee Full Faith and Credit by all sister states. See *Baker v. General Motors Corp., 118 S. Ct. 657, 664-65 (1998)* ("Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law.").

n124. See generally Rogers, supra note 66, at 243-72.

n125. Cronin-Harris, supra note 114, at 453.

n126. *42 U.S.C.S. 2000g-2*(b) (Law. Co-op. 1996) (entitled: Cooperation with appropriate agencies; activities confidential).

n127. Id.

n128. See id.

n129. See id.

n130. See supra Part IV.C.

n131. See John D. Feerick, Standards of Conduct for Mediators, 79 Judicature 314, 315 (1996).

n132. See Mori Irvine Sub, Serving Two Masters: The Obligation under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation, *26 Rutgers L.J. 155 (1994).*

n133. *Id. at 167 & nn.60, 63-64.* The Symposium Rule gives eight bases for the parties to disclose information: by agreement of the parties; if a legal claim against the mediator is made; if there is evidence of ongoing or future criminal activity; to prevent a manifest injustice; to resolve disputes about the agreement that resulted from the mediation; if disclosure is required by statute; to enforce the agreement to mediate; or "if parties to mediation are together engaged in litigation with third parties and a court determines fairness to third parties requires disclosure." By contrast, the mediator may disclose information: if required by statute, as evidence of ongoing or future criminal activity, or if it is necessary to prevent manifest injustice. Disclosure of attorney misconduct may fall under the exception for prevention of manifest injustice. The mediator must get permission from the court before breaching the confidentiality of the mediation under this exception. See *id. at 167-68.*

n134. See Feerick, supra note 131, at 314.

n135. Id. at 316-17; see also, John D. Feerick, The Lawyers' Duties and Responsibilities in Dispute Resolution: Toward Uniform Standards of Conduct for Mediators, *38 S. Tex. L. Rev. 455, 481-82 (1997).*

n136. The definition of "Mediation Communication" originated from the Ohio Mediation Statute. *Ohio Rev. Code Ann. 2317.023(A)(2)* (Anderson Supp. 1997).

n137. *Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)* (Franfurter, J., concurring).

n138. See generally Warfield, supra note 20, at 71-75; Tamara L. Baker, Appreciating Others: A Program on Diversity and Tolerance, Annual Meeting of the American College Personnel Association: Baltimore, MD (Mar. 1996) (ERIC Document Reproduction Service No. ED 406 628).

n139. Maria R. Volpe & Roger Witherspoon, Mediation and Cultural Diversity on College Campuses, 9 Mediation Q. 341, 351 (1992).

RECYCLED

LEGAL CORNER

WHAT TO DO WHEN THE SUBPOENA IS SERVED?



Charles L. Howard
Associate of TOA

Many ombuds have never been served with a subpoena and, therefore, have never experienced a certain sinking feeling that usually accompanies the event. Inevitably the next thought is "What do I do now?" While I am compelled to say that this article is not intended to provide blanket legal advice, and the facts and circumstances of each situation need to be considered, I would like to offer some general guidelines that should be of assistance to you when first faced with this situation.

Let's start with the subpoena. It is a legal paper, usually signed by a lawyer, that compels the recipient to appear at a specified time and place to testify (either in court or at a deposition, an examination under oath frequently held at a lawyer's office) in connection with a lawsuit. Administrative agencies can sometimes issue subpoenas., but usually the case is in either the federal or the state court. In addition, the subpoena often requires that documents be produced at the time of testimony. Since the rules governing subpoenas, and especially those relating to the time frames for action, vary depending on the jurisdiction and the court, one of the first things for an ombuds to notice is the court in which the lawsuit is pending and the date he or she is required to appear or produce documents.

As a general rule, a subpoena must be complied with unless a court grants a motion that excuses compliance. This means that usually there is a need for speed. In federal court, for example, a written objection to a subpoena compelling the production of documents must be made within 14 days of the service of the subpoena, or before the date of compliance if that date is less than 14 days from the date of service. Thus, an ombuds needs to decide quickly how to respond.

After being served with the subpoena, the ombuds should notify the organization as soon as possible and seek legal assistance. Since not all ombuds have access to independent outside legal counsel, the next steps can vary, depending on whether one does or does not have access to independent counsel. In some cases, the lawyers representing the organization in the lawsuit have filed motions for a protective order on behalf of their client's ombuds office, but having the organization's lawyers file such a motion also has been challenged as demonstrating that the office is not really independent. Regardless of whether independent counsel is retained, however, the ombuds needs to decide almost immediately whether to comply with the subpoena or to file a motion with the court for a protective order to excuse compliance with it.

In making this decision, ombuds will need to consult with a lawyer. Since most ombuds consider their conversations and documents to be confidential, they will need to discuss with counsel whether the courts in the jurisdiction involved recognize or might recognize an ombuds privilege or grant a protective order on some other ground (such as implied contract). While the Eighth Circuit (federal) Court of Appeals refused to recognize a privilege in ***Carman v. Mc Donnell Douglas***, federal district courts have granted protective orders since that decision upon a proper showing. But, a few points must be emphasized.

First, if the ombuds wants to assert a claim of privilege on the grounds that the ombuds office is confidential, neutral and independent, the ombuds must be careful what information is revealed to the management of his or her organization and their lawyers (including both the inside lawyers as well as the law firm that represents the organization in the case). These lawyers will naturally want to know what was said and what documents there are, but the claim of privilege and confidentiality may well be lost if the ombuds reveals this information. How can the ombuds assert that its communications must be kept confidential if this information is disclosed to the managers or lawyers for one side of the lawsuit? Remember that these lawyers represent the organization, and the organization's interests may not be the same as those of the ombuds office. A better approach - but one that requires the commitment of the organization - is one in which the company's lawyers don't ask and the ombuds doesn't tell what discussions occurred or what documents exist. This is especially important if independent outside counsel is not available to represent the ombuds. **Second**, it may be possible to resolve the subpoena informally. If the lawyer acting for the ombuds explains the nature of the ombuds office to the lawyer issuing the subpoena, the lawyer issuing the subpoena may decide not to insist on compliance. Although the chances are not great that the lawyer will just back off, it is still almost always worth trying. At the very least, it will provide the lawyer with a better understanding of the basis for the motion for a protective order once it is ruled.

If a motion for a protective order is going to be filed, the ombuds and his or her lawyers must remember that they must provide the court with facts to show entitlement to the protective order. The burden of

Continued on page 12

COMING SOON — A NEW FEATURE OF THE OMBUDSMAN NEWS!

Ask An Ombudsman... one of the many fine suggestions to come out of the Fall '99 newsletter survey was to create a panel of experienced ombuds from various sectors to answer questions of ombudsman interest and publish the Q&A in the Ombudsman News. We have gleaned such a panel from the TOA communications committee representative of corporate, academic, and government ombudsmanry. If necessary, the panel may call upon other experienced ombuds to assist. Questions of general interest to all ombuds will be printed in the Ombudsman News.

"Ask An Ombudsman" Panel members will include:



Nancy Franzen
UCLA Medical Enterprises

Nancy Franzen
After a 20 year creer as a healthcare provider, Nancy became an ombudsperson, bringing her healthcare background to her position as ombuds at UCLA Medical Enterprises.



Michael Turpenoff
Federal Deposit Insurance Corporation

Michael Turpenoff
Mike began working for the federal government in 1980 and has served as ombudsman specialist for over four years providing dispute resolution services to FDIC employees, bankers and the public.



Tanya Walter
GE Capital Solutions

Tanya Walter
Tanya currently serves as the U. S. ombudsperson and Global Network Coordinator for GE Capital IT solutions with more than two years ombuds experience.

Send your questions to:
Ask An Ombudsman
c/o The Ombudsman Association
PMB 265
5521 Greenville Avenue #104
Dallas, TX 75206

Note: The opinions expressed by this panel are not the opinions of TOA or any other organization, nor should the opinions be considered legal advice or rulings.

Subpeona (cont'd from page 11)

proof is on the ombuds, not on the party issuing the subpoena. To provide these facts, it will almost always be necessary to provide sworn statements (affidavits) and documents about the general operations of the office to prove that it is, in fact, confidential, neutral, and independent. This is why it is always helpful for ombuds to keep a current file of all brochures, newsletters, articles, posters, etc. about the office and to make sure that the themes of confidentiality, neutrality and independence are always emphasized in these documents. In addition, it is a good idea to try to provide the court with information, while not revealing confidential communications, to demonstrate that the office is successful in resolving disputes.

And finally, the ombuds and all of the lawyers (whether inside counsel, outside counsel for the organization, or outside counsel for the ombuds) need to work cooperatively to make sure that the positions taken on the motion for a protective order are consistent with how the rest of the case is handled. It can be disastrous for a claim of ombuds privilege for the organization's lawyer to cross examine other witnesses in the case to compel them to disclose communications that the ombuds is claiming are privileged. While this principle is simple, it is often difficult to implement. It is thus a good idea for the ombuds or his or her lawyer to discuss these issues with the outside counsel representing the organization to iron out any questions or misunderstandings before the damage is done.

Once the motion is filed, it is, of course up to the court. Yet, armed with these guidelines, an ombuds should be able to develop an action plan to deal with that sinking feeling that is served with the subpoena.

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Documents:

Suggestions on their Creation, Maintenance, and Destruction

BY CHARLES L. HOWARD, ATTORNEY, PARTNER, SHIPMAN & GOODWIN, LLP



When I describe to clients or witnesses how lawyers prosecute or defend a case, I often use a construction analogy. I say that lawyers build cases with documents and testimony. Documents are the basic building blocks, with their often contemporaneous reflection of events; and testimony from witnesses, like mortar, is what connects the documents to each other and helps them form a structure—a successful claim or defense. Documents are thus an important part of any lawsuit because they are frequently the foundation upon which a case is built. When an ombuds office becomes implicated in a lawsuit, however, documents assume an even greater role. Lawyers for at least the plaintiff will closely examine all nonconfidential documents concerning the ombuds office and will often seek to obtain all confidential documents. Meanwhile, ombuds generally try not to create many documents, and they assert a privilege for any remaining confidential documents that might exist.

Because of the inevitable conflict between the plaintiff's lawyer who wants disclosure of all information and the ombuds who wants to prevent disclosure of confidential information, ombuds should thoroughly review all documents that relate to their office, including (1) documents that create or establish the program; (2) documents that describe it to the various constituencies of the office; (3) documents that are kept by the office; and (4) documents created or kept by others outside the ombuds office that relate to the ombuds' role or confidential communications. Ideally, this review should take place before the office becomes involved in a lawsuit. Not only may an ombuds office avoid the negative impact any such documents may have, an ombuds may create documents that have a positive impact in proving entitlement to the ombuds privilege.

By offering these suggestions, I am only trying to highlight areas for further evaluation. Specific legal advice, of course, always depends on an analysis of the specific facts of a matter and the relevant law. I am, however, indebted to Randy Williams, Ombudsperson of American Express Company, for giving me permission to share in this forum some of the principles that the American Express Ombudspersons and I developed a couple of years ago for their practice.

Finally, I want to point out that these comments are prepared from the perspective of a corporate ombuds program, with which I have experience, and may or may not apply to governmental or other ombuds programs.

DOCUMENTS CREATING AN OMBUDS PROGRAM

One might at first blush assume that if an ombuds program is already established, it is too late to do anything about the documents in this category. But it is never too late. Documents creating an ombuds program can often be amended or revised or additional documents created. For example, even if the original job description or employment agreement did not emphasize confidentiality, neutrality or independence, a new one with provisions on these topics can be prepared. Since these documents are often the "charter" for the ombuds program, they are especially important. These documents, therefore, should emphasize the following:

- Why the program was created and why this is important to the organization;
- What the scope of the ombuds office is and how it is expected to operate;
- To whom an ombuds reports and how this enables an ombuds to have access to senior management without compromising independence;
- That the program is independent, neutral, confidential, and not an official channel for placing the organization on notice;
- What the specific program features are that promote independence, confidentiality, and neutrality;
- Whether there are additional bases for a claim of confidentiality, such as a contractual basis or applicable statutes relating to the confidentiality of alternate dispute resolution or mediation proceedings;
- If there are exceptions to absolute confidentiality, what the exceptions are and who decides when they are applicable; and
- That the ombuds program helps employees report matters without fear of retaliation and thus helps the organization have a reporting system that complies with the U.S. Sentencing Commission Guidelines. ▸▸

▸▸ If all the documents establishing the ombuds office are reviewed and are found not to address any of the topics or issues noted above, an ombuds should consider creating additional documentation to make sure that all of these points are addressed.

PUBLICITY CONCERNING AN OMBUDS PROGRAM

Publicity about an ombuds program, especially in large, multi-site corporations is critically important. This publicity may include posters, letters, speeches, newsletter items, brochures, videotapes, intranet bulletin boards, business cards or many other ways to communicate to employees. If an ombuds office does not communicate its existence and role in all of these ways, it should consider doing so. Moreover, each of these media must present a consistent message—as if it were a mantra—on the core elements of the ombuds role: that it is neutral, confidential, independent, informal and not a channel for placing the organization on notice or for the organization to take disciplinary or remedial action. While some forms of publicity *(such as a speech or a newsletter item)* may present the opportunity to expand on these concepts, virtually every publicity document should address these core elements. If it does not do so now, it should be replaced with ones that do.

DOCUMENTS MUST PRESENT A CLEAR AND CONSISTENT MESSAGE OF THE CORE ELEMENTS OF WHAT AN OMBUDS OFFICE IS AND HOW IT OPERATES.

A couple of recent experiences illustrate these points. In one instance, an ombuds was deposed about a brochure which referred to the ombuds office, among other things, but neglected to mention confidentiality. This was the only brochure identified by the plaintiff, and the fact that the organization had emphasized the office's confidentiality in a multitude of other places and in other documents appeared irrelevant. After all, an employee may only read one document; we cannot assume that he or she will read them all. In another instance, a brochure described the types of matters that could be brought to the ombuds attention and specifically referred to discrimination and harassment claims. While other brochures clearly indicated that the ombuds office was not an official reporting channel, this brochure did not make that distinction, thus arguably creating the impression that the ombuds was an official reporting channel.

A similar concern relates to how ombuds offices are referred to in an organization's code of ethics or business code. The ones that make no references to an ombuds program are missing a valuable opportunity to emphasize the value of the office. However, the ones that say that violations of the code may be reported to an ombuds—without also mentioning that the ombuds office is not a channel of official notice to the organization—are running the risk that a court might consider a communication with an ombuds to be notice to the organization.

With these considerations in mind, a good exercise for ombuds is to gather all of the documents about the office and to review them, one by one, to make sure that each publicity piece—assuming that is all a particular individual may have had—adequately describes the core function of the office.

OMBUDS DOCUMENTS

Let's now turn to what goes on inside the ombuds office. Most ombuds accept it as an article of faith that they should create as few records as possible and then routinely destroy all records that might reveal individual confidential communications. Yet, this approach still leaves many unanswered questions on when documents or correspondence should be kept, returned or destroyed. While the "charter" of a particular ombuds office may suggest or require a different approach, here are some guiding principles to help answer these questions:

Correspondence from a lawyer or source that clearly reveals a matter being raised outside the jurisdiction of the office should be returned to the sender. This can be done with a simple form enclosure or a telephone call stating that the matter is not within the jurisdiction of the office. A similar approach should be taken with correspondence or documents asserting claims against the organization by someone who misperceives the function of the office.

Correspondence or documents sent to others but which indicate that a copy is sent to the ombuds office *(or vice versa)* should be destroyed routinely since such communications may not be privileged. An ombuds may wish to contact the writer to indicate that the office is unable to deal with inquiries when copies of written documents are sent elsewhere or copied to the ombuds.

Ombuds should avoid, if possible, being the conduit for giving notice to the organization of harassment, discrimination or similar claims. Accordingly, great care should be exercised in what is said to a manager on these issues and documents from an inquirer should not be forwarded to these channels by the ombuds.

E-mails containing substantive information from an ombuds should be avoided. Efforts should be made to discourage inquirers from using e-mails to convey substantive information to an ombuds. Often, it may be appropriate to send a form reply e-mail advising the inquirer not to use this means of communication.

Documents created by the ombuds *(case notes, for instance)* should be labeled "CONFIDENTIAL AND PRIVILEGED." A preprinted form is often useful for this purpose. Presum- ▸▸

ably these documents are routinely destroyed soon after a matter is closed. Ombuds should not accept original documents from inquirers *(personnel evaluations, correspondence with others, etc.)*. An ombud should accept only a copy *(and preferably not even that)*.

Anonymous information sent to an ombuds presents additional considerations. Documents or correspondence outside the ombuds' jurisdiction or that are clearly inappropriate should be destroyed. If the documents or correspondence raise issues appropriately addressed by other offices of the company, they may be reformatted to remove references to the ombuds office and anonymously forwarded to the appropriate office.

Anything in writing leaving an ombuds office must be assumed to have a life of its own and cannot be considered confidential, since courts have not articulated how far the confidentiality privilege extends. While the best practice is to avoid putting anything in writing on a confidential topic that leaves the ombuds office, any such documents should be labeled, where appropriate, "PRIVILEGED AND CONFIDENTIAL."

Where an ombuds is aware of litigation that involves the ombuds office or that refers to contact with the ombuds, the ombuds should also be alert to the possibility that routine practices may need to be altered or specific legal advice sought. For example, what should an ombuds do with information—perhaps even anonymous information—relating to a lawsuit against the organization? If someone is seeking to obtain information from the ombuds office and a court has not yet ruled on a motion for a protective order, should the routine document destruction in the office be suspended until the court rules? The answers to these questions are not simple and depend on the specific facts involved, but an ombuds should think to raise these issues if they do not otherwise present themselves.

DOCUMENTS CREATED OR KEPT OUTSIDE THE OMBUDS OFFICE THAT RELATE TO THE OMBUDS OFFICE OR CONFIDENTIAL COMMUNICATION.

My greatest area of concern with documents is not with the documents created by ombuds. Ombuds generally have a keen appreciation of the confidentiality issues involved and are trained in how they should handle documents. But, because ombuds frequently communicate with others in an organization—with the permission of an inquirer—there is always the possibility that the people outside the ombuds office with whom the ombuds speak are creating documents that relate to their confidential communications. This is my nightmare. To illustrate the point, consider what happens when someone with whom an ombuds talks *(the inquirer or an authorized follow-up source)* makes notes of all of the communications. While there may be little one can do if that person is an inquirer *(other than the general admonition that this not be done)*, documents such as telephone notes of a conversation with the ombuds by someone working for the organization outside the ombuds office can be a disaster. They may be collected by the organization's lawyers and produced in discovery in administrative proceedings *(such as EEOC responses)* or in a lawsuit before anyone in the ombuds office even knows there is a dispute or a lawsuit. Since the notes in my example look like any other notes, there is very little to alert an organization's counsel that these documents should be confidential and privileged. Further, inadvertent disclosure even to the organization's counsel creates a risk of a waiver of the confidentiality privilege or establishing a bad precedent for placing an organization on notice. Accordingly, ombuds should carefully consider to how to avoid having records of confidential communications created outside of their office. Some suggestions include: (1) Consistently advising those individuals with whom an ombuds is authorized to speak that the conversation is confidential and privileged and that it is best if no notes are made. If it becomes necessary to make notes, request that they be labeled "CONFIDENTIAL AND PRIVILEGED" and later forwarded to the ombuds. Even if the documents are not sent to the ombuds, marking them as confidential may warn the organization's counsel to contact the ombuds office if these notes or records become relevant to a suit or claim. (2) Working with the lawyers for the organization to advise them of this concern so that the ombuds office can be informed as early as possible if it appears that confidential documents from outside the ombuds office become an issue. At the very least, this may help avoid the inadvertent disclosure of documents relating to confidential communications. (3) Assuming that anything outside the ombuds office risks being disclosed and operating with this assumption always in mind.

CONCLUSION

Although the concept of an ombuds has existed for over a century, the role of an ombuds in a corporation in the US is still in its infancy. This is even more true in other countries. Courts have not uniformly recognized the principle of a confidentiality privilege on which so much of the work depends, and even those that have recognized the privilege have not articulated how far the privilege extends. As a result, an ombuds must use documents affirmatively to show that the office is entitled to the privilege. This means that the documents must present a clear and consistent message of the core elements of what an ombuds office is and how it operates. Ombuds must also avoid having documents used against them to destroy the privilege. Confidential communications should be handled with appropriate safeguards within the ombuds office. Both the ombuds and the organization should guard against documents that may be created or exist outside the ombuds office that compromise or destroy the office's confidentiality. ✖

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PRACTICAL TIPS

ASSERTING THE OMBUDS TESTIMONIAL PRIVILEGE, AND SAFEGUARDING YOUR OMBUDS PROGRAM'S CONFIDENTIALITY

BY BRUCE MACALLISTER, ESQ., LABORATORY OMBUDSMAN, LOS ALAMOS NATIONAL LABORATORY

Recently, I had the mixed good fortune to be called to testify in a legal action involving an employee of my organization. I say "mixed good fortune" because even though the situation involved some stressful interactions, in the end our Ombuds Program came away with valuable lessons-learned. Naturally, many of us might list being called to testify in court in our role as Ombudsman among our worst nightmares. Of course, testimony in any legal action is stressful, and spending time professionally with lawyers is rarely something any of us look forward to. In our role as an ombudsman, compelled testimony is perhaps our worst fear. I came away from my recent experience with some interesting lessons about managing our own information practices and visitor protocols to better ensure our claim of confidentiality.

The situation that I was involved in as the Ombudsman concerned a protected class individual who had sought help from the Ombuds Office in resolving problems stemming from being passed over for a leadership role after reorganization. Our office assisted the visitor in securing a new position in another unit of the organization. Because of the specialized background of this professional-level individual, finding another relevant and challenging job fit took significant time and effort. Ultimately, the visitor initiated litigation against our organization, stemming from unresolved issues surrounding the original job selection process.

Litigation rarely sneaks up on anyone. There is typically an extensive discovery phase, pre-trial motions, and invariably protracted negotiations. Our Office has a policy that we do not serve as a negotiation venue for people represented by legal counsel. These negotiations occur attorney-to-attorney. But it's never so simple. An employee may have one issue in the legal area, but wish to resolve on-going workplace issues, such as job assignments, informally and with the assistance of the Ombuds Program. This was the case in our case study. We knew there was litigation pending. We drew scrupulous boundaries between our role and the issues we could help with, and those that were to be left resolved through litigation. We did not wish to avoid assisting the person on issues unrelated to the litigation because it could create the appearance that because of the litigation, this employee was denied access to the Ombuds Office on other issues.

With the knowledge that our visitor had issues that were pending legal review, we devoted extensive effort to ensuring that the visitor knew and fully understood our confidentiality policy and our practice to refuse to become involved in formal reviews. The visitor also echoed our office's desire that we never become entangled in the litigation. We agreed that our work would be limited to providing ombuds services relevant to issues not under legal review. We gave the visitor hard copies and had several express discussions about our confidentiality, and we secured from the visitor verbal agreement and express understanding about our confidentiality and privilege. Thus, we approached the impending litigation with confidence that there was little potential that we would be involved. This is where the lesson began.

Several days into our visitor's trial, our office received a frantic phone call from one of my organization's contract trial attorneys seeking information about conversations that I may have had with this visitor. Consistent with our standards of practice and code of ethics, we refused to confirm or deny that we had seen this person. The attorneys were convinced that we had in fact seen the person, because they indicated that the visitor had made assertions that they had spoken with the Ombudsman and the Ombudsman had said that "the reason it took so long to find the person a job was because ... [the visitor ...] was involved in litigation with our employer." The trial attorneys stated that they were convinced that no one in the Ombuds Office would ever say such a thing, and that it was important that we testify as to what was said. Our office naturally refused, and negotiations ensued around what the ombudsman could or could not testify to. Even in the press of the trial, I found that our in-house counsel and trial counsel were reasonable, and wanted to accommodate our limitations. However, the attorneys also felt strongly that it was irresponsible to leave a misconception hanging

before a jury. In the final analysis, I learned a number of important lessons. Some of the most significant follow:

1. Attorneys can misunderstand the concept of ombuds privilege. Attorneys are familiar with the attorney-client privilege, which is owned by and can be waived by the client. This is true of most of the established and recognized testimonial privileges. Thus, in this situation, the good news was that the court readily accepted the concept of ombuds confidentiality, but once the visitor asserted that he was disclosing the contents of confidential conversations, the court, misunderstanding the concept of who owns the privilege, deemed that the visitor had "waived" confidentiality. The court determined to "allow" rebuttal testimony regarding the visitor's assertions.

LESSON LEARNED: Visitors should be counseled that it is extremely important that they treat conversations with the Ombudsman as confidential, and that they do not share them outside of the Ombuds context. Otherwise, they run the risk that a court may decide that they have waived confidentiality.

2. While Attorneys may accept the ombud's confidentiality, they may have a difficult time accepting the absolute nature of this confidentiality, and may be very skeptical about asserting a testimonial privilege. Attorneys typically approach information management on two levels: confidentiality and testimonial privilege. Basically, information is accepted as confidential if there is an established, recognized basis, such proprietary business information, public employee personnel records, and the like. On the other hand, courts and attorneys recognize very few testimonial privileges. These are generally created by statute or high level judicial decisions. The ombuds testimonial privilege has been accepted and recognized officially in relatively few jurisdictions. Confidential information is typically readily accessible to courts and attorneys involved in litigation through the discovery process, whereas privileged information is generally accessible only if the privilege is somehow waived or expressly limited by law.

LESSON LEARNED: Be prepared to approach the court with the understanding that the court may be unlikely to accept a testimonial privilege, and that even though the court may accept the Ombuds perogative to hold information as confidential, it may nonetheless expect disclosure. Manage your records accordingly, and do not maintain long-term case records that might be ordered released. Remember that there are very few laws that mandate records!

3. Be wary. Attorneys may accept the ombudsman's assertion of confidentiality and request that you merely provide general information. While this is perfectly acceptable and can be a civic service, the attorneys may have another end in mind. There is little difference between testimony that specifically discloses a conversation between the ombudsman and a visitor, and testimony that responds to a question which, in fact, essentially discloses information about a conversation with a visitor. Generic questions such as "would you ever tell any visitor something along the lines of..." are often thinly-veiled efforts to seek disclosure.

LESSON LEARNED: Negotiate exactly what questions are acceptable to you before you take the stand.

4. Have your house in order. Most attorneys love documentation and are comfortable in the world that documents and records create. The Ombuds approach to scant case documentation represents a very different paradigm than many attorneys are used to. A powerful way to help you sway attorneys that you may be working with to accept the ombuds confidentiality and privilege is to have a widely and consistently publicized set of statements, informational brochures, policies, memos from officials, web sites, etc., that all consistently state the confidentiality policies of the office. Links to the TOA standards of practice and code of ethics can be very useful as well.

LESSON LEARNED: We found our practice of consistently delivering our brochures and a detailed page about our confidentiality policies and practices was extremely useful in approaching our trial and in-house attorneys, who were much more willing to accept the ombuds practice because it was linked to national standards, and because the confidentiality practices had been so widely and consistently publicized.

As a parting note, I often reflect on the sage advice of many of our most experienced ombuds, who have consistently offered support, reassurance, and understanding to those confronted with the challenge of a threatened compelled disclosure. In the final analysis, we must remember that we do not work in isolation. We work within a social and civic web where all processes and approaches have valid application. Attorneys are tasked with the job of zealous representation. Ombudsmen hold dear their role as a neutral, independent, and confidential resource. Sometimes these roles appear to be in conflict, but my experience as both an attorney and an ombudsman tells me that there is room for mutual success. ●



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THE ETHICS OF AUTHORSHIP: AN OMBUDSPERSON'S PERSPECTIVE

BY LINDA WILCOX, OMBUDSPERSON, HARVARD MEDICAL SCHOOL

What is an "ombudsperson"? Simply put, an ombudsperson is an unbiased institutional resource you can go to if you have a problem. Indeed, a good ombudsperson doesn't take sides in a dispute, doesn't keep records or notes, will not comment about whether anyone has or has not been in contact with the office, and is independent — responsible only to the dean or president. Institutions hire ombudspeople to help with informal dispute resolution. An ombudsperson needs to be a nonjudgmental listener who can help visitors organize, generate and analyze options for dealing with their problems. Ombudspeople do not seek only one set of solutions for each type of problem that comes their way. Rather, they work with individuals to develop options that are appropriate to the needs and interests of the individual in that particular case. The final decision lies with the visitor — an ombudsperson does not tell people what to do.

With that in mind, I'll address the case study:

This case is not just about ethics, but about achieving a solution to conflicting interests. Ideally, the graduate student would speak directly to the adviser, but often this is a frightening task. The adviser may take offense at his or her judgment being questioned. Going to someone organizationally above the adviser, who is in a position to evaluate and promote the adviser may upset that person even more. If the graduate student is not comfortable going directly to the adviser or to those above the adviser, a visit to the ombudsperson ("Ombuds") may be an appropriate first step to sort out what do to. However, people often come to the Ombuds after bringing the matter to their adviser's attention but not getting the response for which they had hoped.

At the Ombuds office, the graduate student is able to relay thoughts and feelings in a confidential manner. The Ombuds asks the graduate student what he or she would like the outcome to be and why. By doing this, the Ombuds wants to learn the motivation behind the graduate student's desire to be first author — is it a sense of legitimate entitlement, or a pragmatic desire for a good job in industry? The Ombuds might help the graduate student explore what criteria are used in industry for hiring students who leave before attaining a degree. The two might also explore what criteria are used to determine authorship order.

Here are some questions the graduate student should consider: How important is it to be first author on a paper when trying to attain an industry job at this point in your career? Is your adviser pivotal in getting a great job through what he or she writes in a recommendation letter? Is the recommendation likely to be the same if you bring up the authorship matter? Would the manner in which you brought it up make a difference? What criteria does the school have for assigning authorship? Were they followed? Was the order decided purely by this lab's standard practice, as was suggested by other students? If yes, was this method of assigning authorship discussed before you joined the lab? What part did the senior student have, if any, in the development of the project? Did this senior student contribute the idea for the project and/or the development of the protocols before going on to concentrate on a thesis? Should this information make a difference in who should be first author?

The question posed at the end of the case is this: "Is it ethical of me *(the graduate student)* to jump my place in the line and ask to be first author on this paper?" Only the graduate student can answer this question. Once the student has determined whether or not first authorship is deserved or whether trying to get it is desirable, the student is in a better position to make an informed decision. The next step for the graduate student might be any of the following: do nothing, speak to the adviser, contact the department head, ask the Ombuds *(in the role of a neutral party)* to speak to the adviser, ask for mediation, or file a formal complaint.

If the graduate student decides that the authorship order is unfair and feels that being first author is required to get a good job, he or she may request that the adviser reconsider the order. If the student wants to speak directly to the adviser, the Ombuds can help the graduate student consider how to bring the matter up in a manner that is least likely to offend. Then, a discussion about level of contribution and proper credit on a paper can take place between the student and the adviser, especially if written criteria exist.

Alternatively, the graduate student may request that the Ombuds act as a mediator. If all the parties agree, this can often prove to be a useful alternative. If an expert in the field is needed, the parties may be asked to agree on who can join the group to neutrally fulfill that role. In the case before us, let's suppose that the adviser, graduate student, and senior student agree to mediation. At the mediation, the materials gathered about authorship can be shared. Even when guidelines exist, most people are unaware of them. Further, most people want to appear reasonable when a third party is present. They are then more willing to evaluate the issues using objective criteria, if such criteria exist.

What are some possible outcomes of the mediation process? The senior student may feel embarrassed to take credit for someone else's work. This may be especially true if the guidelines suggest that all authors need to agree to a written ▸▸

The Ombudsman Association in Action:

TOA BOARD NOTES

BY MIKE TURPENOFF, SENIOR OMBUDSMAN SPECIALIST, FDIC

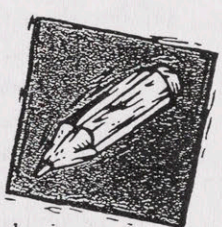
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The discussion was a tough one. Patti Lynch, TOA President, asked early in the meeting "How should TOA react or respond to the terrible events of September 11?" All agreed that the Board should discuss what might be done. Several members offered personal stories or experiences. Others talked about possibly collecting donations from members and matching those donations dollar for dollar with TOA funds. While all board members reacted positively to this idea, the association simply doesn't maintain a budget line for charitable relief. After much discussion, the board decided that a special sub-committee would be formed to review possibilities for TOA response to the New York, Washington, D.C. and Pennsylvania tragedies. That sub-committee will soon offer some options for consideration. There was also a lengthy discussion and much concern expressed about harassment of Arab-Americans, Muslims and people of color in general. Board members agreed that a special request for insights from our membership through the TOA listserve might be helpful. Members and associates can aid in identifying effective organization-wide policies or procedures to help prevent harassment and fear in the workplace, as well as case-work strategies for when harassment problems and complaints arise. By now, if you are part of the listserve, you have seen some of this discussion. Please offer any suggestions you may have for ombuds to handle these very difficult and hurtful situations. We will offer feedback to you on this important effort through the listserve and the holiday issue of the **Ombudsman News.**

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Wilbur Hicks has assembled a 2002 conference committee composed of TOA and UCOA members and planning is well underway on the joint TOA/UCOA Conference that will be held in Washington, D.C. in May, 2002. The committee is working hard to identify a conference theme, structure the conference program, and determine pre-conference training, speakers, and break-out and general sessions that will most benefit TOA and UCOA members. Conference feedback from the May 2001 conference in Houston has been very helpful in this regard.

Sharan Levine, TOA associate and attorney, provided an update on the American Bar Association's ratification of Ombudsman Standards and the associated report. While there was some difficult coordination and communication along the way to ratification, there is no doubt that the standards represent a significant milestone for the ombuds profession and a stepping stone towards statutory protection for ombudspeople. Please read Sharan's article in this issue of **Ombudsman News** and retain the copy of the approved standards for your future reference. In addition, I urge you to visit the TOA website at **www.ombuds-toa.org** and read the full ABA standards report. ●



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This essay appeared in ***Science Next Wave*** *on March 30, 2001. It can be found and viewed in its entirety by subscribers at http://nextwave.sciencemag.org/*

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WELCOME NEW MEMBERS

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Sony Electronics, Inc.
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Dadizi Baker-Cummings
Ombudsman Assistant
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Massachusetts State Police
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Maggie Sloane
Efland, NC

Passage of the Uniform Mediation Act

BY WENDELL JONES, OMBUDSMAN, SANDIA LABORATORIES

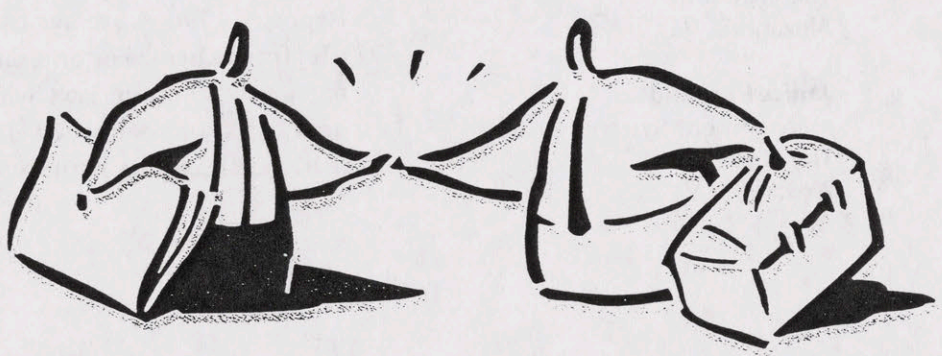
The draft Uniform Mediation Act **(UMA)** is the product of several year's work by the National Conference of Commissioners of Uniform State Laws **(NCCUSL)** and the American Bar Association **(ABA)**.

There are numerous legislative matters that the US Constitution dictates are the prerogative of the states (and not the federal government). On these matters, if there is to be uniformity across the nation, then someone must draft a proposed statute for consideration in all 50 states. Some of these issues have been taken up by NCCUSL. The process is that an act is drafted and hopefully approved by all parties in the drafting process. In the case of the UMA, NCCUSL and the ABA jointly participated in the drafting. NCCUSL approved the draft UMA last year; the ABA approved it on Monday, February 4, 2002.

Interested parties (i.e. state bar associations) can now take the draft UMA to state legislatures for consideration as proposed legislation. A Uniform Arbitration Act was drafted and approved several years ago and is now well along in this process of being adopted into law by individual states. Should you support the UMA? I'd encourage you to look at the act **(http://www.pon.harvard.edu/guests/uma/)** and review the debate that preceded the vote at several sites **(http://www.ronkelly.com/RonKellyMedAct.html http://www.mediate.com** [and then do a search for UMA]).

Many forces pulled this drafting effort in many directions. Most agree that the draft moves in the right direction on confidentiality. Many feel that the confidentiality portions still fall short of being strong enough for endorsing the draft. Several large associations have declined to endorse this draft (ACR [formerly SPIDR] and the International Academy of Mediators [IAM]). Both of these associations compliment the drafters in the spirit of the UMA but conclude that the provisions fall short of necessary protections that would allow them to endorse the UMA.

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The act itself makes no mention of "ombuds" or "ombudsmen." TOA negotiated a paragraph in the "Reporter's Notes." If you get the PDF electronic version of the act from the URL I've listed earlier, you will fi. that note on page 11. It says: "Mediations can be conducted by ombuds practitioners. See Standards for the Establishment and Operation of Ombuds Offices (August 2001). If such a mediation is conducted pursua to one of these triggering mechanisms, such as a written agreement unde Section 3(a)(2), it will be protected under the terms of the Act. There is no intent by the Drafters to exclude or include mediations conducted by an ombuds a priori. The terms of the Act determine applicability, not a mediator's formal title."

The Uniform Mediation Act: Key Points *

UNIFORM MEDIATION ACT NOW IN STATE LEGISLATURES

The Uniform Mediation Act is now being introduced in state legislatures. In every state there are Uniform Law Commissioners, whose rol is to work to replace their state's existing laws with the UMA. The goal i to get your legislature to adopt the UMA as the main body of law defining and governing mediation in your state. The Act was officially adopte by the full National Conference of Commissioners on Uniform State Laws at its August, 2001, meeting in West Virginia. The American Bar Association House of Delegates then voted to endorse the Act at its February, 2002, meeting, with only a handful of opposing votes. Introduction into each state's legislature will proceed on a schedule coordinated at least partially through the UMA's Enactment Coordinator, **Stan Fisher**.

DETAILED STATE-BY-STATE ANALYSIS NEEDED

A detailed reading and analysis of the Act is now needed in every state to decide whether to support its adoption. As the UMA is introduced in each state, careful analysis will also be needed to decide exactly which sections of existing state law should be repealed and which kept (per UMA Section 15). The Reporter's Notes contain important Legislative Notes intended to guide legislators on certain important issues. For instance, one states "Legislative Note: The Act does not supersede existing state statutes that make mediators incompetent to testify, or that provide for costs and attorney fees to mediators who are wrongfully subpoenaed. See, e.g., Cal. Evid. Code Section 703.5, West 1994)." The Reporter's Notes are available at **http://www.law.upenn.edu/bll/ulc/ulc_frame.htm**. For an example of a side-by-side analysis chart comparing a state's current laws with the UMA's provisions, the final UMA draft, a list of your state's uniform law commissioners, and related information, please see **http://www.ronkelly.com**.

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Kathy Phelan
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Hall Medical Center
San Antonio, TX

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Ombudsperson
TLW Associates
Montrose, MN

SUMMARY OF MOST RECENT CHANGES

The conference made several significant improvements from the previous draft. Participants are now entitled to receive actual notice if the confidentiality protections are waived before any session, the exception for judicial officers was narrowed to except only judges, and the requirement for disclosure of conflicts of interest was made a regular requirement of the Act (previously optional). Other changes include significantly revising the scope of which mediations the Act covers, revising the way the Act deals with the many mediators from backgrounds other than law, eliminating the section guiding courts on how the Act should be construed, and changing the way the Act deals with general confidentiality (as opposed to court privilege).

ACT INTENDED TO STRENGTHEN CONFIDENTIALITY

The desirability of this Act has been hotly debated in a large number of states, especially those already having what they consider stronger protections. To clarify the intent of the Act, the ABA Section of Dispute Resolution sent out a description containing the statement that "The Act is crafted as a minimum level of protection in those states that have none and is not meant to replace stronger confidentiality protections already on the books." The Official Reporters for both the NCCUSL and ABA Drafting Committees, **Nancy Rogers** and **Richard Reuben**, confirmed that this statement accurately reflected their understandings as well. •

* *Permission granted to reprint in OmbudsmanNEWS by Ron Kelly, Berkeley, Official UMA Observer*

FROM THE MEMBERSHIP COMMITTEE

BY CHANDRA HEILMAN, OMBUDSMAN, THE SMITHSONIAN INSTITUTES

Before I joined the Membership Committee about one and a half years ago, I was unaware of the many factors involved in maintaining the membership of an organization. Determining categories of members, defining those categories, reaching and attracting potential members, retaining existing members and facilitating the election of board members are just some of the issues the Membership Committee faced this past year. As described on the TOA website, the Membership Committee is "...responsible for defining criteria for membership in the Association, and overseeing the design and use of the application. The membership review panel, a sub-committee of this committee, may be called upon to review applications to verify eligibility for member or associate status.... The nominating sub-committee is responsible for implementing the nomination process and election of Board members."

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THE ETHICS OF AUTHORSHIP: AN OMBUDSPERSON'S PERSPECTIVE

BY LINDA WILCOX, OMBUDSPERSON, HARVARD MEDICAL SCHOOL

What is an "ombudsperson"? Simply put, an ombudsperson is an unbiased institutional resource you can go to if you have a problem. Indeed, a good ombudsperson doesn't take sides in a dispute, doesn't keep records or notes, will not comment about whether anyone has or has not been in contact with the office, and is independent — responsible only to the dean or president. Institutions hire ombudspeople to help with informal dispute resolution. An ombudsperson needs to be a nonjudgmental listener who can help visitors organize, generate and analyze options for dealing with their problems. Ombudspeople do not seek only one set of solutions for each type of problem that comes their way. Rather, they work with individuals to develop options that are appropriate to the needs and interests of the individual in that particular case. The final decision lies with the visitor — an ombudsperson does not tell people what to do.

With that in mind, I'll address the case study:

This case is not just about ethics, but about achieving a solution to conflicting interests. Ideally, the graduate student would speak directly to the adviser, but often this is a frightening task. The adviser may take offense at his or her judgment being questioned. Going to someone organizationally above the adviser, who is in a position to evaluate and promote the adviser may upset that person even more. If the graduate student is not comfortable going directly to the adviser or to those above the adviser, a visit to the ombudsperson ("Ombuds") may be an appropriate first step to sort out what do to. However, people often come to the Ombuds after bringing the matter to their adviser's attention but not getting the response for which they had hoped.

At the Ombuds office, the graduate student is able to relay thoughts and feelings in a confidential manner. The Ombuds asks the graduate student what he or she would like the outcome to be and why. By doing this, the Ombuds wants to learn the motivation behind the graduate student's desire to be first author — is it a sense of legitimate entitlement, or a pragmatic desire for a good job in industry? The Ombuds might help the graduate student explore what criteria are used in industry for hiring students who leave before attaining a degree. The two might also explore what criteria are used to determine authorship order.

Here are some questions the graduate student should consider: How important is it to be first author on a paper when trying to attain an industry job at this point in your career? Is your adviser pivotal in getting a great job through what he or she writes in a recommendation letter? Is the recommendation likely to be the same if you bring up the authorship matter? Would the manner in which you brought it up make a difference? What criteria does the school have for assigning authorship? Were they followed? Was the order decided purely by this lab's standard practice, as was suggested by other students? If yes, was this method of assigning authorship discussed before you joined the lab? What part did the senior student have, if any, in the development of the project? Did this senior student contribute the idea for the project and/or the development of the protocols before going on to concentrate on a thesis? Should this information make a difference in who should be first author?

The question posed at the end of the case is this: "Is it ethical of me *(the graduate student)* to jump my place in the line and ask to be first author on this paper?" Only the graduate student can answer this question. Once the student has determined whether or not first authorship is deserved or whether trying to get it is desirable, the student is in a better position to make an informed decision. The next step for the graduate student might be any of the following: do nothing, speak to the adviser, contact the department head, ask the Ombuds *(in the role of a neutral party)* to speak to the adviser, ask for mediation, or file a formal complaint.

If the graduate student decides that the authorship order is unfair and feels that being first author is required to get a good job, he or she may request that the adviser reconsider the order. If the student wants to speak directly to the adviser, the Ombuds can help the graduate student consider how to bring the matter up in a manner that is least likely to offend. Then, a discussion about level of contribution and proper credit on a paper can take place between the student and the adviser, especially if written criteria exist.

Alternatively, the graduate student may request that the Ombuds act as a mediator. If all the parties agree, this can often prove to be a useful alternative. If an expert in the field is needed, the parties may be asked to agree on who can join the group to neutrally fulfill that role. In the case before us, let's suppose that the adviser, graduate student, and senior student agree to mediation. At the mediation, the materials gathered about authorship can be shared. Even when guidelines exist, most people are unaware of them. Further, most people want to appear reasonable when a third party is present. They are then more willing to evaluate the issues using objective criteria, if such criteria exist.

What are some possible outcomes of the mediation process? The senior student may feel embarrassed to take credit for someone else's work. This may be especially true if the guidelines suggest that all authors need to agree to a written ▸▸

The Ombudsman Association in Action:

TOA BOARD NOTES

BY MIKE TURPENOFF, SENIOR OMBUDSMAN SPECIALIST, FDIC

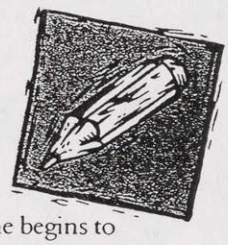
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SARBANES-OXLEY ACT OF 2002 – ANOTHER OPPORTUNITY FOR ORGANIZATIONAL OMBUDS

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In the fall 2000 issue of Ombudsman News, I made several suggestions about how to document the creation and operations of an organizational ombuds office so that the ombuds' ability to assert a confidentiality privilege would be strengthened. The recent passage of the Sarbanes-Oxley Act of 2002 presents yet another opportunity to document the organizational ombuds' role and enhance the argument for confidentiality.

To understand why the Sarbanes-Oxley Act is helpful, however, we need to briefly review the grounds on which ombuds claim confidentiality. With the exception of some classical or governmental ombuds, there is no legislation that expressly creates a confidentiality privilege for organizational ombuds programs. Accordingly, recognition of a confidentiality privilege for these offices has often relied on two different arguments.

The first is that of implied contract. Organizational ombuds offices miss a valuable opportunity if they do not articulate in their brochures and other literature that they were created with the understanding or on the condition that communications with the ombuds are confidential. This contract argument can be very helpful in disputes over confidentiality outside of the United

States or in jurisdictions in which courts are not permitted to recognize privileges other than those that have been created legislatively.

The second basis for asserting a confidentiality privilege, and the one most relevant to the Sarbanes-Oxley Act, is Federal Rule of Evidence 501, which allows federal courts in the United States to recognize privileges as developed on a case-by-case basis under common law. Most federal courts use the Wigmore test to determine whether a privilege is appropriate. Under this test, a privilege is recognized if it meets the following four criteria:

1. the communication must be 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 is one that society considers worthy of being fostered; and
4. the injury to the relationship incurred by the disclosure must be greater than the benefit gained in the correct disposal of the litigation.

Thus, in asserting a confidentiality privilege, lawyers representing organizational ombuds present *evidence* to demonstrate that these criteria have been met. (Remember the lesson of *Carman v. McDonnell Douglas*, 114 F.3d 790 (8th Cir. 1997), that a party invoking a privilege must present evidence to demonstrate entitlement to it.) It is particularly important to have evidence on the third criterion of the Wigmore test ("the relationship is one society considers worthy of being fostered"). Accordingly, I have urged organizational ombuds programs to document their benefit to the organization as an alternate means of resolving disputes and as an adjunct to the organization's efforts to comply with the United States Sentencing Guidelines by permitting employees to raise concerns without fear of retribution. This issue is addressed at

length in a booklet that Tom Furtado and I wrote for TOA: "The United States Sentencing Guidelines, What an Organizational Ombuds Might Want to Know and Share with Management". The adoption last year by the American Bar Association of the resolution on standards for ombuds likewise strengthens the argument that ombuds programs serve a purpose that society believes is important.

The Sarbanes-Oxley Act was the legislative response to corporate corruption scandals of the past year. Among its many features, it creates a Public Accounting Oversight Board and requires enhanced financial disclosures by both large companies and senior management. One of its provisions, however, presents an opportunity for organizational ombuds programs at publicly held companies both to solidify their reporting relationship and to bolster the claim that the ombuds office serves an important public purpose.[1]

In particular, Section 301 of the Act amends Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78(f)) by adding a new subsection "m" to impose additional responsibilities on the audit committees of the board of directors of publicly held companies. Subsection m(4)(b) requires each such audit committee to establish procedures for: *"the confidential, anonymous*

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[1] While outside the scope of this article, another opportunity to bolster the role of the organizational ombuds and the ombuds' claim to a confidential privilege is also presented by the Report issued on June 6, 2002 by the New York Stock Exchange Corporate Accountability and Listing Standards Committee. The Report recommended that the NYSE Board of Directors "[r]equire listed companies to adopt and disclose a code of business conduct and ethics for directors, officers, and employees ... ." The Report also recommends that NYSE listed companies adopt policies that encourage "the reporting of any illegal and unethical behavior." In particular, the Report states: "The company should proactively promote ethical behavior. The company should encourage employees to talk to supervisors, managers, or other appropriate personnel when in doubt about the best course of action in a particular situation. Additionally, employees should report violations of laws, rules, regulations, or code of business conduct to appropriate personnel. To encourage employees to report such violations, the company must ensure that employees know the company will not allow retaliation for reports made in good faith." The recommendations in this article may also be applied to the recommendations in the NYSE Report or subsequent regulations promulgated by the NYSE for companies listed on that stock exchange.

submissions by employees of the [company] of concerns regarding questionable accounting or auditing matters."[2]

At first blush, this provision may seem inconsistent with the independence and neutrality of the organizational ombuds office -- it is not part of management and should not be regarded as a reporting channel that creates an obligation on them to report to management, except in the narrow exceptions recognized under the TOA Code of Ethics. Yet, both the need for employee reporting and employee fear of reporting is real. The 2000 National Business Ethics Survey (Vol. I) by the Ethics Resource Center reveals that employees still perceive misconduct in the work place at alarming levels and are afraid to report it:

- 31% of employees reported observing workplace misconduct within the previous year (p. 12)
- 37% of employees at organizations with fewer than 500 employees observed workplace misconduct within the previous year (p. 13)
- While lower than reported in a previous survey, 13% of employees at for-profit companies still reported a perception of pressure to compromise on their company's ethics standards (p.17)
- For the employees who felt pressured, the sources of pressure were identified as co-workers (28%), supervisors (39%), and top management (36%) (p. 19)
- While also lower than in a previous survey, 43% of employees at for-profit

[2] Other provisions of the Sarbanes-Oxley Act may also be relevant and helpful. Section 806 prohibits adverse employment actions or discrimination against employees of publicly traded companies who assist in investigations or provide information relating to fraud against shareholders. Section 1107 makes it a federal criminal offense to retaliate against or interfere with the employment of a person who provides truthful information relating to possible federal crimes.

companies did NOT report their observation of misconduct to management or another appropriate person (p. 22)

- 31% of employees either strongly agree (7%) or agree (24%) that if they report ethics concerns, they will be seen as "troublemakers" by management (p. 24)
- Even among senior and middle managers, 19% fear being labeled as a troublemaker if they report ethics concerns (p. 24)

These statistics are consistent with the observation of Mary Rowe, Ombudsperson of MIT, that the more formidable the formal efforts are by an organization to achieve compliance with the law (and hence punishment for wrongdoers), the greater the barriers to reporting wrongdoing. These barriers include not only fear of punishment or organizational retribution, but loss of friendships, reputation, and other relationships.[3]

On the other hand, simply relying on a compliance officer or existing management as the only reporting channels is inadequate. The survey statistics demonstrate that more is needed. Presumably all of the employees in the 2000 National Business Ethics Survey could have reported misconduct to compliance officers or management, but many employees did not and many were afraid to do so. Moreover, designating a compliance officer as a "confidential" reporting channel is inconsistent with his or her role in management and the legal obligations to investigate

[3] M. Rowe and C. Bendersky, "Workplace Justice, Zero Tolerance and Zero Barriers," unpublished monograph, 2002, pp. 13-20.

complaints and to take appropriate corrective action. While a "hot line" may allow anonymous comments to be made, such an approach is too passive to be truly effective. It does not allow the interactive discussion or coaching on options or approaches that organizational ombuds, who presumably are intimately knowledgeable about the formal and informal systems of their organizations, can provide to employees who want to report wrongdoing but who need more information or reassurance in order to do so. Thus, given the other obligations of compliance officers and the limitations inherent in hot line numbers, some other approach is preferable.

One solution is for the ombuds office to be designated by the board or audit committee of the board as *part* of its efforts to comply with the Sarbanes-Oxley Act. While recognizing that the ombuds office can never be *the* official reporting channel for employees with concerns about questionable accounting or auditing matters, issues can be brought to the ombuds anonymously or on a confidential basis. Even though the organizational ombuds would not be required to break confidence or report such matters to the audit committee, these ombuds, working with an employee, almost always find a way to surface an issue even if the identity of the particular employee raising the issue is not revealed. An organizational ombuds program can be created with a promise of confidentiality and anonymity, whereas a compliance office cannot promise confidentiality or anonymity without compromising its essential legal obligations. Thus, from the perspective of the audit committee and the board, an organizational ombuds can serve a valuable role in assisting the company to comply with the Sarbanes-Oxley Act without compromising either the integrity, confidentiality, or neutrality of the ombuds office or the proper functioning and legal obligations of the compliance office. In addition, even where no confidential communications are

revealed, an ombuds can give the audit committee information on trends among the issues raised, which can also be of valuable assistance to the audit committee and the company.

The benefits to the organizational ombuds program of being identified as part of the company's efforts to comply with these new requirements are no less significant. By being designated by the audit committee as a means for employees to discuss concerns confidentially or anonymously and by being given reporting access to the audit committee, ombuds increase the options available to them and strengthen their role in the organization. Moreover, any reference to the ombuds program as part of the company's efforts to comply with the Sarbanes-Oxley Act becomes extremely powerful evidence that can be used by the organizational ombuds program to assert a confidentiality privilege. Even if an organizational ombuds office is not in a publicly held corporation to which the Sarbanes-Oxley Act applies directly, the organization and the ombuds office can choose to adopt policies that are consistent with the higher standards articulated in this legislation. Not only is the Sarbanes-Oxley Act the embodiment of significant national policy to deal with concerns over corporate corruption (and therefore evidence relevant to the third prong of the Wigmore test), it expressly requires that there be a means for *confidential* and *anonymous* communications. What better platform could there be for asserting a need for a confidentiality privilege?

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September 2002

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HELPING AN ORGANIZATION'S ATTORNEYS UNDERSTAND - AND DEFEND - THE OMBUDS CONFIDENTIALITY PRIVILEGE

Tom Sebok

University of Colorado at Boulder

I have, at times, likened my experience in the Ombuds Office to working on a bomb squad. Although it usually isn't, one never knows when the work may become explosive! One obvious way a situation can "explode" is when informal attempts to resolve issues are unsuccessful and complainants file lawsuits. This outcome dramatically increases the likelihood of a threat to the Ombuds' commitment to confidentiality.

On a few occasions, former complainants and others have attempted to obtain my testimony or records. In the absence of a "Shield Law" protecting the ombuds confidentiality, I decided to speak with a number of attorneys in an attempt to better understand the kinds of criteria on which courts rely in evaluating our assertion that we should be protected from testifying and/or providing our records. It is from these discussions that I drew the conclusions which are detailed in this article. I hope that the following information will be helpful to the ombudspeople and the attorneys who might face the task of defending "The Ombuds Confidentiality Privilege."

Institutional/Organizational Agreements

When administrators establish an Ombuds Office, they do so with the hope that the benefits to the organization of having such a function will outweigh the costs. One of those "costs" is that ombudspeople do not testify in formal proceedings, even when that testimony might help the organization win -- or avoid losing -- cases. The logic is, of course, that while the testimony of an ombudsperson may, indeed, "help" in some cases, it might be damaging in others. So, in order to prevent our having to give the testimony deemed by our employers to be damaging, we do not give the testimony our employers might find beneficial.

Ombuds Offices, almost without exception, are delegated no authority within their organizations. This means we cannot make official decisions for our organizations, sanction those accused of wrong-doing, or bind users of the office in any way. Also, our offices are designated to be independent of -- but not a replacement for -- the formal administrative grievances or complaint procedures. Finally, use of the Ombuds Office is

always voluntary and in no way prevents individuals from using other options within the organization to address conflicts, complaints, or disputes. This combination of factors may have relevance for attorneys to whom we turn for help when we attempt to avoid testifying in court.

To enhance the possibility of these factors being helpful in our avoiding testimony, I believe office brochures, promotional materials, and web sites should detail the Ombuds Office's lack of authority for making official decisions. Also, it can strengthen our legal position if all the official organizational publications which mention the Ombuds Office indicate that the office functions in a confidential, neutral, informal, and independent manner while attempting to assist individuals in resolving conflicts, complaints, and disputes.

Legal Challenges and Strategies

I believe attorneys representing our organizations are likely to face two primary kinds of challenges with respect to Ombuds Offices. In the absence of a "Shield Law," there may be attempts by the plaintiff's attorney to compel our testimony. Furthermore, because we will not testify, attorneys for our organizations might, on occasion, perceive the need to "neutralize" the potentially damaging effects of the testimonies given by the plaintiffs or witnesses which contain statements that can be attributed to an ombudsperson.

Attorneys may be able to meet the challenge of the plaintiff's attorney who seeks to compel our testimony by citing precedents related to confidentiality in case law. It can be argued that these precedents establish a common law testimonial privilege. According to Howard and Gulluni (1996), the following are the four tests which are traditionally understood to be necessary for establishing a common law testimonial privilege:

1. The communication must be 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 is one that society considers worthy of being fostered; and,

4. The injury to the relationship incurred by the disclosure must be greater than the benefit gained in the correct disposal of the litigation.

Ombudspeople who practice according to the ethical principles of a professional ombuds association -- and who publicize this fact -- are likely to meet the "expectation of confidentiality" test (#1 above) because the ethical obligation to maintain confidentiality is one of the key ethical principles of all ombuds professional organizations. I also

believe that it is in the interest of the ombudspeople to give copies of these Ethical Principles to their organization's attorneys which can be kept in their files for ready reference.

Additionally, to assist attorneys in demonstrating how the Ombuds Office meets the other three tests required to establish a common law testimonial privilege, I believe it may be helpful to give them the following information to present to the court:

1. The Ombuds Office offers independent, confidential, and neutral alternative dispute resolution services to various constituents within an organization.

2. The primary purpose of the Ombuds Office is to provide an opportunity for individuals to resolve disputes confidentially and informally. This confidential assistance is, in fact, the reason many people choose to use the Ombuds Office, rather than less confidential alternatives.

3. Because of reasons 1 and 2, the Ombuds Office promotes individual, organizational, and societal interests by providing an alternative to expensive and time-consuming litigation.

4. If its confidentiality were eliminated (or even threatened), these individual, organizational, and societal benefits would be severely diminished, and, perhaps lost completely.

Attorneys may also find it useful to liken the protection needed by Ombuds Offices to that currently enjoyed by mediators in a number of states. These statutes prevent mediators from having to testify except in limited circumstances. In Colorado, for example, the testimony of mediators requires their consent. This is in marked contrast to the client-attorney privilege in which a client may "waive" the privilege and, in essence, obligate an attorney to testify.

As mentioned previously, attorneys representing our organizations may also encounter the need to "neutralize" the effects of any testimony offered by plaintiffs or their witnesses about statements (whether true or false) attributed to an ombudsperson. Normally, they would achieve this goal by asking the individual to whom the statements were attributed to testify in an attempt to rebut any testimony thought to be harmful to the organization's case.
However, because ombudspeople do not testify, there is no way to rebut anything that is alleged.

Therefore, what can an attorney do? The attorney can remind the court that the Ombuds Office operates under the following parameters: it has no authority to make official determinations or decisions for the organization; it functions independently of those within the organization who do have authority; it is optional for all users; and, its use does not preclude individuals from using other grievance resolution alternatives within

the organization. This rationale should provide a sufficient contrast between our circumstances and those in our organizations who do have the authority to make official determinations for the organization; who do not function independently; and, whose involvement is not optional.

In essence, an attorney might argue that actions and statements by these individuals are far more relevant than anything an ombudsperson is alleged to have said. In fact, given these factors, it might even be argued that any statements attributed to an ombudsperson are, for the purposes of adjudicating a case, absolutely meaningless. This argument applies in cases where complainants say they spoke about their complaints with both an ombudsperson and with formal investigators or administrators. In cases where complainants say they only spoke with the ombudsperson, the arguments can still be made that the ombudsperson's alleged statement is legally meaningless because no formal or administrative investigation occurred, and that the ombudsperson lacks the authority to make an official determinations for the organization.

Confidentiality and Neutrality

In addition to focusing on our lack of authority, our independence, and the ways in which our work meets the four-part test for establishing a common law testimonial privilege, I believe it is important for the attorneys who are representing our organizations to understand how "the ombuds confidentiality and neutrality tenets" function. Ombudspeople are asserting a confidentiality privilege which is significantly different from other privileges with which most attorneys are familiar. As mentioned previously, "The Ombuds Confidentiality Privilege" is most similar to that of mediators in some states. Specifically, what makes it different from other kinds of privileges is that "The Ombuds Confidentiality Privilege" cannot be waived by the individuals who use the services of the Ombuds Office.

Furthermore, it is important that attorneys understand and assert that Ombuds Offices are specifically designated to operate in a neutral manner. As a result, Ombuds Office staff members cannot take sides or participate in adversarial proceedings because the attorneys who represent the opposing litigants must use any information available to advocate for their clients. The oppositing attorney's use of any information provided by the Ombuds Office staff members would violate this promised neutrality. This need to avoid our being inappropriately required to participate in an adversarial process, of course, is a major rationale for the assertion that "The Ombuds Confidentiality Privilege" cannot be waived by the individuals who use theOmbuds Office.

The result of functioning with this kind of confidentiality and neutrality is that, other than in situations not addressed here, e.g., cases involving the "duty to warn," ombudspeople who operate according to the ethical principles of a professional ombuds association cannot testify in court about "who" used the Ombuds Office or "what" was said.

Conclusion

I believe it is important that we operate in all the ways that give us the greatest likelihood of gaining a confidentiality privilege. I believe the principles and strategies identified in this article represent our best chance of defending "The Ombuds Confidentiality Privilege" until such time as we obtain "Shield Laws" to accomplish the same thing. In the meantime, despite my non-adversarial bias, I have learned that attorneys can be helpful. I hope that my colleagues who read this article will seriously consider sharing and discussing it with the attorneys who represent their organizations.

For ombudspeople and attorneys who seek more in-depth understanding about legal strategies for defending "The Ombuds Confidentiality Privilege," I highly recommend Charles Howard and Maria Gulluni's booklet, "The Ombuds Confidentiality Privilege, Theory and Mechanics." [published by TOA, 1996]

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UNIVERSITY AND COLLEGE OMBUDS ASSOCIATION

Standards of Practice

INTRODUCTION

The University and College Ombuds Association has developed the following standards of practice to provide a model for individual practice and for the establishment of office policies and procedures. These standards were developed in accordance with commonly understood principles within the Ombuds profession and reflect the core values of the University and College Ombuds Association. Standards of Practice help guide members in making responsible choices and further, they are intended to promote constituents' understanding of and confidence in Ombuds Offices and their services.

DEFINITION

A college or university ombudsman* is authorized by an institution of higher education to confidentially receive complaints, concerns or inquiries about alleged acts, omissions, improprieties, and/or broader systemic problems within the ombudsman's defined jurisdiction and to listen, offer options, facilitate resolutions, informally investigate or otherwise examine these issues independently and impartially.

* The term Ombudsman is used in this definition in order to communicate with the widest possible community and is not intended to discourage others from using more gender neutral terms. In accordance with UCOA practice adopted in 1991, the document uses the term Ombuds throughout. UCOA acknowledges, with respect, that many practitioners
use alternative forms of this word, such as ombudsperson, ombuds officer and the like.

Members of the University and College Ombuds Association strive to practice according to the following standards:

1. Independence

The Ombuds Office must be independent in its structure, function and appearance.

1.1 The Ombuds institutional reporting relationship to her/his supervisor is for administrative and budgetary purposes only.

1.2 The Ombuds should be placed at the highest possible level.

1.3 The Ombuds should have no assignment of duties that would present a conflict of interest to her/his duties as ombuds.

1.4 The Ombuds is independent of the units which the office informally investigates or examines.

1.5 The Ombuds has the sole power to appoint and remove Ombuds Office staff and is directly involved in staff supervision.

1.6 The Ombuds acts on issues, concerns, inquiries, complaints, or on her or his own initiative.

1.7 The Ombuds should issue periodic reports summarizing the ombuds' activities.

1.8 The Ombuds should have a set and renewable term or should be removable only for cause.

1.9 The Ombuds should have a specific allocated budget and sufficient resources to perform the function.

1.10 The Ombuds Office should be established through an act of the organization's official governing body, or in written policies, such as terms of reference or resolution.

1.11 The Ombuds has access to all relevant sources of information.

2. Impartiality/Neutrality
The Ombuds is neutral, impartial, unaligned and objective.

2.1 The Ombuds has no personal interest or stake in and incurs no personal gain or loss from the outcome of an issue.

2.2 The Ombuds avoids situations which may cause or result in conflicts of interest for the Ombuds.

2.3 The Ombuds is an advocate for good and fair process, not an advocate on behalf of individuals or the institution.

2.4 The Ombuds acts in consideration of and with respect for the legitimate interests and concerns of all affected parties.

2.5 The Ombuds should recommend and advocate for responsible and appropriate systems change.

2.6 The Ombuds should bring to the attention of appropriate parties policies, programs, personnel matters, or institutional practices or decisions which affect persons' health, safety or rights.

3. Confidentiality

The Ombuds must not disclose and must not be required to disclose any information provided in confidence, except to address an imminent risk of serious harm where there is no other responsible option.

3.1 The Ombuds safeguards the identity of individuals and their issues and does not disclose having met or talked with a party or parties, without permission of the party or parties.

3.2 The Ombuds does not disclose without permission communications received from any or all parties in the course of performing her/his duties.

3.3 The privilege of confidentiality of communications and records belongs to the Ombuds and the Ombuds Office, rather than to any party to an issue.

3.4 The Ombuds does not comply with requests for information about individual cases.

3.5 The Ombuds takes specific action related to an individual's issues only with the individual's permission and only to the extent permitted.

3.6 If the Ombuds pursues an issue systemically, the Ombuds does so without revealing the identity of a complainant or a singular situation that could be associated with a particular individual(s).

3.7 The Ombuds does not violate institutional standards of privacy or confidentiality in the pursuit or provision of information.

3.8 The Ombuds maintains information (e.g., notes, phone messages, appointment calendars) in a secure location and manner.

3.9 The Ombuds carefully prepares data and/or reports in anonymous and aggregate form to preserve confidentiality and prohibit identification of individuals.

3.10 Communication with the Ombuds is not notice to the organization.

3.11 The Ombuds publicizes the confidential nature of Ombuds work.

4. Informality

The Ombuds functions on an informal basis by such means as: listening, providing and receiving information, reframing issues, developing options, referral, third party intervention, shuttle diplomacy, mediation, and systems change.

4.1 The Ombuds does not take an active role in any formal institutional investigative or adjudicative procedures. The Ombuds may informally investigate or otherwise examine

alleged procedural irregularities of a formal process and allegations about alleged acts, omissions, improprieties and/or broader systemic problems.

4.2 The Ombuds supplements, but does not replace, any steps required in formal internal or external procedures. Use of the Ombuds office is not a required step in any grievance process or organizational policy.

4.3 The Ombuds hears, considers, and as appropriate, pursues resolution of the concerns, issues, perceptions, interpretations, facts, and/or allegations of inappropriate acts, omissions, or improprieties presented by individuals.

4.4 The Ombuds may conduct informal fact finding when appropriate.

4.5 When a formal investigation is requested, the Ombuds refers individuals to the appropriate offices or persons.

5. Access to Services
All members of the specified community may voluntarily seek services and will be treated with respect and dignity.

5.1 The Ombuds exercises discretion in response to requests for service.

6. Professional Competence
The Ombuds acts in accordance with professional standards of practice and pursues and provides opportunities for staff to pursue continuing education and training.

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The Ombudsman
ASSOCIATION

CODE OF ETHICS

The ombudsman, as a designated neutral, has the responsibility of maintaining strict confidentiality concerning matters that are brought to his/her attention unless given permission to do otherwise. The only exceptions, at the sole discretion of the ombudsman, are where there appears to be imminent threat of serious harm.

The ombudsman must take all reasonable steps to protect any records and files pertaining to confidential discussions from inspection by all other persons, including management.

The ombudsman should not testify in any formal judicial or administrative hearing about concerns brought to his/her attention.

When making recommendations, the ombudsman has the responsibility to suggest actions or policies that will be equitable to all parties.

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The Ombudsman ASSOCIATION

STANDARDS OF PRACTICE

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.

While serving in this role:

1. We adhere to The Ombudsman Association Code of Ethics.

2. We base our practice on confidentiality.

2.1 An ombudsman should not use the names of individuals or mention their employers without express permission.

2.2 During the problem-solving process an ombudsman may make known information as long as the identity of the individual contacting the office is not compromised.

2.3 Any data that we prepare should be scrutinized carefully to safeguard the identity of each individual whose concerns are represented.

2.4 Publicity about our office conveys the confidential nature of our work.

3. We assert that there is a privilege with respect to communications with the ombudsman and we resist testifying in any formal process inside or outside the organization.

3.1 Communications between an ombudsman and others (made while the ombudsman is serving in that capacity) are considered privileged. Others cannot waive this privilege.

3.2 We do not serve in any additional function in the organization which would undermine the privileged nature of our work (such as compliance of officer, arbitrator, etc.)

3.3 An ombudsman keeps no case records on behalf of the organization. If an ombudsman finds case notes necessary to manage the work, the ombudsman should establish and follow a consistent and standard practice for the destruction of any such written notes.

3.4 When necessary, the ombudsman's office will seek judicial protection for staff and records of the office. It may be necessary to seek representation by separate legal counsel to protect the privilege of the office.

4. We exercise discretion whether to act upon a concern of an individual contacting the office. An ombudsman may initiate action on a problem he or she perceives directly.

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5. We are designated neutrals and remain independent of ordinary line and staff structures. We serve no additional role (within an organization where we serve as ombudsman) which would compromise this neutrality.

5.1 An ombudsman strives for objectivity and impartiality.

5.2 The ombudsman has a responsibility to consider the concerns of all parties known to be involved in a dispute.

5.3 We do not serve as advocates for any person in a dispute within an organization; however, we do advocate for fair processes and their fair administration.

5.4 We help develop a range of responsible options to resolve problems and facilitate discussion to identify the best options. When possible, we help people develop new ways to solve problems themselves.

5.5 An ombudsman should exercise discretion before entering into any additional affiliations, roles or actions that may impact the neutrality of the function within the organization.

5.6 We do not make binding decisions, mandate policies or adjudicate issues for the organization.

6. We remain an informal and off-the-record resource. Formal investigations - for the purpose of adjudication - should be done by others. In the event that an ombudsman accepts a request to conduct a formal investigation, a memo should be written to file noting this action as an exception to the ombudsman role. Such investigations should not be considered privileged.

6.1 We do not act as agent for the organization and we do not accept notice on behalf of the organization We do always refer individuals to the appropriate place where formal notice can be made.

6.2 Individuals should not be required to meet with an ombudsman. All interactions with the ombudsman should be voluntary.

7. We foster communication about the philosophy and function of the ombudsman's office with the people we serve.

8. We provide feedback on trends, issues, policies and practices without breaching confidentiality or anonymity. We identify new problems and we provide support for responsible systems change.

9. We keep professionally current and competent by pursuing continuing education and training relevant to the ombudsman profession.

10. We will endeavor to be worthy of the trust placed in us.

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GLOSSARY

Confidential

Confidential describes communications, or a source of communications, which are intended to be held in secret. In an ombudsman's work confidentiality is often accomplished by providing anonymity to the source of communications. When the source of a communication is kept secret or private, this is known as an anonymous communication.

Independent

An ombudsman functions independent of line management. The ombudsman reporting relationship is with highest authority in an organization.

Neutrality

We do not serve as advocates for any person in a dispute within an organization; however, we do advocate for fair processes and their fair administration.

When making recommendations, the ombudsman has the responsibility to suggest actions or policies that will be equitable to all parties.

Privilege

Privilege is a legal term which describes a relationship which the law protects from forced disclosure. Traditional privileges are client/lawyer, doctor/patient, priest/penitent, husband/wife. An ombudsman privilege differs from these other forms of privilege because the office holds the privilege and it cannot be waived by others. The privilege is necessary to preserve the process that allows people to come forward to resolve their concerns in a confidential setting without the risk of reprisal.

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Standards for the Establishment and Operation of Ombuds Offices

ABA Policy Adopted August 2001



Section of Administative Law
and Regulatory Practice



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January 2002

Re: Recommendation, Standards and Report For The Establishment and Operation of Ombuds Offices

Dear Colleague:

Government, academia, and the private sector are answering demands for fairness and responsiveness by establishing ombuds. Ombuds confidentially receive complaints or questions about alleged acts, omissions, improprieties, and broader, systemic problems within the ombuds's jurisdiction and address, investigate, or otherwise examine these issues independently and impartially. There are three basic types of ombuds: a "classical" ombuds receives complaints or inquiries from citizens about the functioning of the government, investigates the matter, and publishes a report making recommendations to resolve the issue. An "organizational" ombuds strives to resolve the multitude of issues that arise in the workplace. An "advocate" ombuds serves a designated vulnerable population and when justified by the facts of a particular case becomes an advocate on behalf of an individual member of that group.

While the basic authorities of these persons called ombuds and the independence, impartiality and confidentiality with which they operate vary markedly, they share essential characteristics which these standards address. To be credible and effective, the office of the ombuds must be independent in structure, form and appearance. The ombuds's structural independence is the foundation upon which the ombuds's impartiality is built. The ombuds must conduct investigations and inquiries in an impartial manner, free from initial bias and conflicts of interest. Confidentiality is a widely accepted characteristic of ombuds,

which helps ombuds perform the functions of the office. In addition, these Standards address establishment and operations of ombuds, their qualifications, limitations on their authority, and removal from office.

The Standards for the Establishment and Operation of Ombuds Offices were initially prepared by a joint committee of the Sections of Administrative Law and Regulatory Practice and of Dispute Resolution. The committee consulted with numerous ombuds from Federal, state, and local agencies, academic institutions, companies, and non-profit organizations. Further, it solicited, received and considered comments from the international community of ombuds. The Standards were jointly sponsored by the Section of Administrative Law and Regulatory Practice, the Section of Dispute Resolution, the Commission on Legal Problems of the Elderly, the Section of Business Law, the Senior Lawyer Division, and the Government and Public Sector Lawyers Division. In August, 2001, the American Bar Association's House of Delegates adopted these Standards as Association Policy.

If an ombuds does not adhere to these Standards, individuals may be reluctant to seek the ombuds's assistance because of fear of personal, professional or economic retaliation, loss of privacy, and loss of relationships. The Standards for the Establishment and Operation of Ombuds Offices are appropriate to ensure that ombuds can help protect individual rights and interests against the excesses of public and private bureaucracies.

Ellen Waxman,
Immediate Past Chair
Ombuds Committee
Section of Dispute Resolution

Sharan Lee Levine, Chair
The Ombuds Committee
Section of Administrative
Law and Regulatory Practice

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW
AND REGULATORY PRACTICE
SECTION OF BUSINESS LAW
SECTION OF DISPUTE RESOLUTION
SECTION OF STATE AND LOCAL GOVERNMENT LAW
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OF THE ELDERLY
NATIONAL CONFERENCE OF ADMINISTRATIVE
LAW JUDGES
STANDING COMMITTEE ON ENVIRONMENTAL LAW

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

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

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

STANDARDS[1] FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES

PREAMBLE

Ombuds[2] receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations.

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

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombuds office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. These standards were developed to provide advice and guidance on the structure and operation of ombuds

offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

The essential characteristics of an ombuds are:

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

ESTABLISHMENT AND OPERATIONS

A. An entity undertaking to establish an ombuds should do so pursuant to a legislative enactment or a publicly available written policy (the "charter") which clearly sets forth the role and jurisdiction of the ombuds and which authorizes the ombuds to:

(1) receive complaints and questions about alleged acts, omissions, improprieties, and systemic problems within the ombuds jurisdiction as defined in the charter establishing the office

(2) exercise discretion to accept or decline to act on a complaint or question

(3) act on the ombuds own initiative to address issues within the ombuds prescribed jurisdiction

(4) operate by fair and timely procedures to aid in the just resolution of a complaint or problem

(5) gather relevant information

(6) resolve issues at the most appropriate level of the entity

(7) function by such means as:

(a) conducting an inquiry

(b) investigating and reporting findings

(c) developing, evaluating, and discussing options available to affected individuals

(d) facilitating, negotiating, and mediating

(e) making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have the authority to act upon them

(f) identifying complaint patterns and trends

(g) educating

(h) issuing periodic reports, and

(i) advocating on behalf of affected individuals or groups when specifically authorized by the charter

(8) initiate litigation to enforce or protect the authority of the office as defined by the charter, as otherwise provided by these standards, or as required by law.

QUALIFICATIONS

B. An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity

should provide the ombuds with relevant education and the periodic updating of the ombuds qualifications.

INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY

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

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

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

(2) Impartiality in Conducting Inquiries and Investigations. The ombuds conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the ombuds from developing an interest in securing changes that are deemed necessary as

a result of the process, nor from otherwise being an advocate on behalf of a designated constituency. The ombuds may become an advocate within the entity for change where the process demonstrates a need for it.

(3) Confidentiality. An ombuds does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm. Records pertaining to a complaint, inquiry, or investigation are confidential and not subject to disclosure outside the ombuds office. An ombuds does not reveal the identity of a complainant without that person's express consent. An ombuds may, however, at the ombuds discretion disclose non-confidential information and may disclose confidential information so long as doing so does not reveal its source. An ombuds should discuss any exceptions to the ombuds maintaining confidentiality with the source of the information.[3]

LIMITATIONS ON THE OMBUDS AUTHORITY

D. An ombuds should not, nor should an entity expect or authorize an ombuds to:

(1) make, change or set aside a law, policy, or administrative decision

(2) make binding decisions or determine rights

(3) directly compel an entity or any person to implement the ombuds recommendations

(4) conduct an investigation that substitutes for administrative or judicial proceedings

(5) accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent

(6) address any issue arising under a collective bargaining agreement or which falls within the purview of any existing federal, state, or local labor or employment law, rule, or regulation, unless the ombuds is authorized to do so by the collective bargaining agreement or unless the collective bargaining representative and the employing entity jointly agree to allow the ombuds to do so, or if there is no collective bargaining representative, the employer specifically authorizes the ombuds to do so, or

(7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.

REMOVAL FROM OFFICE

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

NOTICE

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

CLASSICAL OMBUDS

G. A classical ombuds is a public sector ombuds who receives complaints from the general public or internally and addresses actions and failures to act of a government agency, official, or public employee. In addition to and in clarification of the standards contained in Paragraphs A-F, a classical ombuds:

(1) should be authorized to conduct independent and impartial investigations into matters within the prescribed jurisdiction of the office

(2) should have the power to issue subpoenas for testimony and evidence with respect to investigating allegations within the jurisdiction of the office

(3) should be authorized to issue public reports

(4) should be authorized to advocate for change both within the entity and publicly

(5) should, if the ombuds has general jurisdiction over two or more agencies, be established by legislation[4] and be viewed as a part of and report to the legislative branch of government.

ORGANIZATIONAL OMBUDS

H. An organizational ombuds facilitates fair and equitable resolutions of concerns that arise within the entity. In addition to and in clarification of the standards contained in Paragraphs A-F, an organizational ombuds should:

(1) be authorized to undertake inquiries and function by informal processes as specified by the charter

(2) be authorized to conduct independent and impartial

inquiries into matters within the prescribed jurisdiction of the office

(3) be authorized to issue reports

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

ADVOCATE OMBUDS

I. An advocate ombuds serves as an advocate on behalf of a population that is designated in the charter. In addition to and in clarification of the standards described in Paragraphs A-F, an advocate ombuds should:

(1) have a basic understanding of the nature and role of advocacy

(2) provide information, advice, and assistance to members of the constituency

(3) evaluate the complainant's claim objectively and advocate for change relief when the facts support the claim

(4) be authorized to represent the interests of the designated population with respect to policies implemented or adopted by the establishing entity, government agencies, or other organizations as defined by the charter, and

(5) be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant.

REPORT

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

Over the past three decades, and particularly recently, an extraordinary growth in the number and type of ombuds[5] has taken place. Congress has established several ombuds in various programs. In addition to specific legislation concerning ombuds, the Administrative Dispute Resolution Act authorizes Federal agencies to use "ombuds."

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

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

The ABA's Board of Governors establishes legislative and governmental priorities annually. Based on its importance to society, to the practice of law, and in the administration of justice, one of the year 2001 priorities is alternative dispute resolution. The ABA supports the greater use of alternative dispute resolution by private parties, government agencies, and the courts "as a necessary and welcome component of America's civil justice system, so long as all parties' legal rights and remedies are protected." As a protector of individual rights against the excesses of public and private bureaucracies, an ombuds receives complaints and questions from individuals concerning the functioning of an entity, works for the resolution of particular issues, and where necessary, makes recommendations for the improvement of the general administration of the entity. As an independent, impartial, and confidential complaint handler, an ombuds serves as an alternative means of dispute resolution — a means by which issues may be raised, considered, and resolved.

Consistent with ABA priorities, the Sections of Administrative Law and Regulatory Practice and of Dispute Resolution have worked together and appointed a steering committee consisting of representatives from the Coalition of Federal Ombudsmen, the National Association of State Ombudsman Programs, the International Ombudsman Institute (IOI subsequently withdrew), The Ombudsman

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

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

For Federal, state, and local governments that want to create a Classical ombuds who would be authorized to address, investigate or inquire into administrative action and to criticize agencies, officials, and public employees, the ABA's 1969 policy continue to serve as a model.[6] This Resolution and the Standards clarify that independence, impartiality in conducting inquiries and investigations, and confidentiality are essential characteristics of all ombuds. Ombuds must operate consistently with these essential characteristics to discharge the duties of the office effectively. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

THE RESOLUTION

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

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

STANDARDS

Section A. Establishment and Operations

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

Importantly, the ombuds jurisdiction — who complains and who or what are complained about — needs to be defined in advance, setting out the scope of the duties and authority. The ombuds jurisdiction must be defined in an official act that establishes the office, which is appropriately called the "charter" in the standards. The charter may be a legislative enactment[7] or a publicly available written policy. The jurisdiction may be limited to a defined constituency or population. For example, a state ombuds may receive complaints or questions from any person, while a university student ombuds may receive complaints or questions only from students at that university, and a long-term care ombuds has jurisdiction only to resolve complaints initiated by or on behalf of residents receiving long-term care.

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

Appropriate subjects for an ombuds to review include allegations of unfairness, maladministration, abuse of power, abuse of discretion, discourteous behavior or incivility, inappropri-

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

An ombuds may make a formal or informal report of results and recommendations stemming from a review or investigation. If such a report is issued, the ombuds should generally consult with an individual or group prior to issuing a report critical of that individual or group, and include their comments with the report. Moreover, the ombuds should communicate the outcome, conclusion or resolution of a complaint or an inquiry to the complainant and may also communicate with other concerned entities or individuals.

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

In receiving complaints or questions and examining problems, the ombuds may use a variety of dispute resolution and other techniques. These processes include: conducting an inquiry; investigating and reporting findings; developing, evaluating, and discussing the options which may be available for remedies or redress; facilitating, negotiating, and mediating; making recommendations for the resolution of an

individual complaint or a systemic problem to those persons who have authority to act on them; identifying complaint patterns and trends; and educating.

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

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

Section B. Qualifications

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

Section C. The Essential Characteristics

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

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

1. Independence in structure, function, and appearance

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

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

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

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

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

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

2. Impartiality in conducting inquiries and investigations

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

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

The ombuds conducts inquiries and investigations in an impartial manner. An ombuds may determine that a complaint is without merit and close the inquiry or investigation without further action. If the ombuds finds that the complaint has merit, the ombuds makes recommendations to the entity and/or seeks resolution for a fair outcome. Impartiality does not, however, preclude the ombuds from developing an interest in securing the changes that are deemed necessary where the process demonstrates a need for change nor from otherwise being an advocate on behalf of a designated constituency. The ombuds therefore has the authority to become an advocate for change where the results of the inquiry or investigation demonstrate the need for such change. For example, when an ombuds identifies a systemic problem, it would be appropriate for the ombuds to advocate for changes to correct the problem. An advocate ombuds may initiate action and therefore serve as an advocate on behalf of a designated population with respect to a broad range of issues and on specific matters when the individual or group is found to be aggrieved. But, when determining the facts, the ombuds must act impartially.

3. Confidentiality

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

Confidentiality extends to all communications with the ombuds[9] and to all notes and records maintained by the ombuds in the performance of assigned duties. It begins when a communication is initiated with the ombuds to schedule an appointment or make a complaint or inquiry. Confidentiality may apply to the source of the communications and to the content of the communications. Individuals may not want the ombuds to disclose their identity but may want the ombuds to act on the information presented. Therefore, an ombuds does not reveal the identity of a complainant without that person's consent. The ombuds may, however, disclose confidential information so long as doing so does not compromise the identity of the person who supplied it. It should be emphasized that the decision whether or not to disclose this information belongs to the ombuds, and it would not be appropriate for anyone to demand that the ombuds disclose such information, except as required by statute. To the extent that an ombuds may not maintain confidentiality, the ombuds should discuss those exceptions with individuals who communicate with the office.

The authorizing entity should allow the ombuds to provide confidentiality of the identity of persons who communicate with the ombuds and of information provided in confidence. The authorizing entity should not seek information relating to the identity of complainants nor seek access to the ombuds notes and records.

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

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

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

Section D. Limitations on the ombuds authority

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

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

It is essential that an ombuds operate by fair procedures which means that the actions taken will likely vary with the nature of the concern, and that care must be taken to protect the rights of those who may be affected by the actions of an ombuds. Furthermore, since due process rights could well be implicated, it would not be appropriate for the ombuds review to serve as the final determination for any disciplinary activity or civil action, nor as a determination of a violation of law or policy. An ombuds inquiry or investigation does not substitute for an administrative or judicial proceeding. In an administrative or judicial proceeding, the deciding official should not consider the ombuds review or recommendations to be controlling. Rather, the deciding official must conduct a de novo examination of the matter.

Moreover, it would not be appropriate for the ombuds to act as an appellate forum when a complainant is dissatisfied with the results in a formal adjudicatory or administrative proceeding. Thus, an ombuds should not take up a specific issue that is pending in a legal forum without the concurrence of the parties and

the presiding officer. It may, however, be fully appropriate for an ombuds to inquire into matters that are related to a controversy that is in litigation so long as they are not the subject of the suit.

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

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

recitals. Rather, it should be read as simply a particularized application of the generalized expectation in Section A of the Standards that the jurisdiction of an ombuds office should be identified in its charter.

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

Section E. Removal from office

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

Section F. Notice

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

Communications must be protected if people are to be willing to visit and speak candidly with the ombuds. As noted above, some ombuds have confidentiality protected by law. Under these Standards, entities that establish an ombuds should authorize the ombuds to operate with confidentiality and independence. If an ombuds functions in accordance with these Standards by operating with confidentiality and independence, it can be strongly argued that management lacks the control over day to day operations that is essential for someone to be deemed an agent. Likewise, there would be a strong argument that any

communication to the ombuds should not be imputed to any other person, including the entity. Rather, the ombuds would be deemed independent of the entity itself for these purposes. Thus, it would not be appropriate for the ombuds to accept notice on the entity's behalf with respect to any alleged grievance.

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

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

Section G. Classical Ombuds

A Classical Ombuds operates in the public sector addressing issues raised by the general public or internally, usually concerning the actions or policies of government entities or individuals. A Classical Ombuds may conduct inquiries or investigations and suggest modifications in policies or proce-

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

Section H. Organizational Ombuds

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

Section I. Advocate Ombuds

The Advocate Ombuds may be located in either the public or private sectors, and like the Classical and Organizational

Ombuds, also evaluates claims objectively. However, unlike other ombuds, the Advocate Ombuds is authorized or required to advocate on behalf of individuals or groups found to be aggrieved. Because of the unique role, the Advocate Ombuds must have a basic understanding of the nature and role of advocacy. In addition, the Advocate Ombuds should provide information, advice, and assistance to members of the population identified in the law or publicly available written policy. Further, the Advocate Ombuds represents the interests of a designated population with respect to policies implemented or adopted by the establishing entity and government agencies.

CONCLUSION

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

FOOTNOTES

Standards

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

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

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

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

Report

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

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

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

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

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

RECYCLED

GENERIC COLLEGE/UNIVERSITY OMBUDSPERSON JOB DESCRIPTION

POSITION SUMMARY

A college or university ombudsperson is a designated neutral or impartial dispute resolution practitioner whose major function is to provide confidential and informal assistance to constituents of the university or college community (this may include students, staff, faculty and/or administrators).

The ombudsperson role has a long and honorable tradition as a means of protecting against abuse, bias and other improper treatment or unfairness. Serving as a designated neutral, the ombudsperson is neither an advocate for any individual nor the organization, but rather, an advocate for fairness who acts as a source of information and referral, and aids in answering individual's questions, and assists in the resolution of concerns and critical situations. In considering any given instance or concern, the rights of all parties that might be involved are taken into account. This office supplements, but does not replace, the university's existing resources for conflict resolution.

REPORTING

The ombudsperson function is independent of existing administrative structures and reports directly to the president or other senior leader in the administration. The ombudsperson does not accept notice on behalf of the university.

While maintaining confidentiality of communications, the ombudsperson may prepare a periodic report to the university community. Based on anonymous aggregate data, this report discusses trends in the reporting of grievances and concerns, identifies patterns or problem areas in university/college policies and practices, may recommend revisions and improvements, and may assess the climate of the campus.

CRITICAL SKILLS AND CHARACTERISTICS

Communication and Problem-Solving Skills

An ombudsperson must have outstanding communication skills and be able to communicate effectively with individuals at all levels of the organization as well as with people of all cultures. It is imperative that the ombudsperson have excellent problem-solving skills and be able to gather information, analyze it and as necessary, help the inquirer develop appropriate options and actions.

Decision Making/Strategic Thinking Skills

An ombudsperson must be aware of how all decisions might impact the inquirer, as well as other stakeholders and the institution. An ombudsperson must know how to proceed with issues, and help the inquirer assess who should be involved and at what stage. Anombudsperson endeavors first of all to do no harm.

Conflict Resolution Skills

An essential element of theombudsperson's role is that of facilitating the resolution of conflict between parties. It is important that the ombudsperson have a thorough understanding of what leads to conflict, the nature of conflict, and methods for resolution. The skills used to assist inquirers resolve their conflicts include: helping people learn how to deal with the matter directly if they wish to do this, serving asa communication conduit between the parties (shuttle diplomacy), informally bringing the parties together, bringing them together through an informal mediation process, approaching the conflict generically (especially when the inquirer is afraid of retaliation), and influencing systems change which could obviate the individual problem. The ombudsperson must also have the ability to help the inquirer determine which conflict resolution method would be appropriate for the specific situation.

Organizational Knowledge and Networking Skills

An ombudsperson must be knowledgeable about the college or university - its structure, culture, policies and practices. The ombudsperson must have excellent networking skills, understand and participate in collaboration with others and be able to establish and maintain broad contacts throughout the organization.

Sensitivity to Diversity Issues

The university's expectation is to create an environment that values human differences. The ombudsperson must be sensitive to dealing with individuals from a wide variety of backgrounds and cultures. The ombudsperson must be open, objective, and must seek to understand issues from different perspectives. Theombudsperson should be innovative in developing options that are responsive to differing needs.

Composure and Presentation Skills

An ombudsperson should maintain a professional demeanor, should have strong presentation skills, and should be able to organize and communicate information to a variety of groups of people.

Integrity

An ombudsperson should have a reputation for integrity and for dealing fairly, effectively and in a timely fashion with all constituents. Theombudsperson is sensitive to cultural issues within the university.

An ombuds office is based on the offer of near absolute confidentiality. Therefore, the ombudsperson must keep information confidential and must use good judgement about when and how such information can be shared, while being mindful of maintaining professional standards that are consistent with the *Code of Ethics* and *Standards of Practice* of The Ombudsman Association, and the *Ethical Principles of the University and College Ombuds Association* (see Addendum).

An ombudsman should not be risk-averse and should understand that this position may, on occasion, challenge even the highest levels of the administration in an effort to foster fair and just practices.

ACCOUNTABILITIES

Dispute Resolution/Consultation and Referral

- Provide impartial and confidential consultation to members of the college/university community who are aggrieved or concerned about an issue
- Remain independent, neutral and impartial, and exercise good judgement
- Assist inquirers in interpreting college/university policies and procedures
- Provide assistance to inquirers by clarifying issues and generating options for resolution
- Facilitate the inquirer's assessment of the pros and cons of possible options
- If direct action by the ombudsperson may be an appropriate option, obtain the inquirer's agreement and permission before proceeding
- If necessary, and while maintaining confidentiality, conduct appropriate informal fact-finding in order to better understand an issue from all perspectives
- Consult with managers/faculty to develop cooperative strategies for complaint resolution
- With the inquirer's permission, consult with all parties to clarify and analyze problems, focus discussions, and develop a mutually-satisfactory process for resolution

- When appropriate, facilitate group meetings, use shuttle diplomacy, or negotiation skills to facilitate communication among parties in conflict

- Encourage flexible administrative practices to maximize the institution's ability to meet the needs of all members of the campus community equitably

- Whenever possible and appropriate, provide referrals to other resources

Policy Analysis and Feedback

- Serve as a campus resource for officials in formulating or modifying policy and procedures, raising issues that may surface as a result of a gap between the stated goals of the institution and actual practice

- Review periodically the patterns of grievances. Make appropriate recommendations for policies or practices that would reduce or eliminate recurring grievances

- Act as a liaison between individuals or groups and the campus administrative structure, serving as a communicator or informal facilitator, as appropriate

- Function as a sensor within the campus community to identify problems or trends that affect the entire campus or significant parts of the community; if appropriate, recommend creative ways to address these concerns

- Provide early warning of new areas of organizational concern, upward feedback, critical analysis of systemic need for improvement, and make systems change recommendations

Community Outreach and Education

- The ombudsperson is responsible for on-going education and communication about the office's role to all potential inquirers as well as to university/college leadership

- Design and conduct training programs for the campus community in dispute/conflict resolution, negotiation skills and theory, civility, and related topics

Establish/Maintain Office of the Ombudsperson

- Supervise office staff, as necessary. Formulate, manage and monitor the overall goals, direction, programs, and budget of the office

- Ensure that the integrity of the office is maintained by allombuds offic staff through independence, fair process, neutrality, impartiality, confidentiality and timely attention to the

resolution of issues while treating people with dignity and respect

EDUCATION/WORK EXPERIENCE

The ombudsperson should have a Bachelor's Degree. An advanced degree and/or relevant is desired. An understanding of diverse cultures and backgrounds is also desired.
The incumbent must either be, or be willing to be, an active member of professional associations, in particular, The Ombudsman Association, the University and College Ombuds Association, the Society of Professionals in Dispute Resolution, etc., in order to stay on the leading edge of critical ombud's issues such as confidentiality and privilege. Additionally, an ombudsman's skills should be continually enhanced through training courses offered by these professional associations.

NOTE: The information contained in this document represents the views of the collective experience of The Ombudsman Association. The contents are intended for general informational purposes only. A competent professional should be consulted for advice on any specific application of the information contained herein.

ADDENDUM

ETHICAL CODES/STANDARDS OF PRACTICE

An ombudsperson practices to the Code of Ethics and the Standards of Practice of The Ombudsman Association (TOA), the University and College Ombuds Association (UCOA) or to the similar precepts of another ombuds association. The codes and standards of TOA and UCOA are provided below.

The Ombudsman Association Code of Ethics

The ombudsman, as a designated neutral, has the responsibility of maintaining strict confidentiality concerning matters that are brought to his/her attention unless given permission to do otherwise. The only exceptions, at the sole discretion of the ombudsman, are where there appears to be imminent threat of serious harm.

The ombudsman must take all reasonable steps to protect any records and files pertaining to confidential discussions from inspection by all other persons, including management. The ombudsman should not testify in any formal judicial or administrative hearing about concerns brought to his/her attention.

When making recommendations, the ombudsman has the responsibility to suggest actions or policies that will be equitable to all parties.

UCOA Ethical Principles

An ombudsperson is guided by the following principles: objectivity, independence, accessibility, confidentiality and justice; justice is preeminent.

An ombudsperson hears and investigates complaints objectively. Objectivity includes impartial attention to all available perspectives on an issue and may or may not entail support of any particular perspective.

An ombudsperson acts as independently as possible of all other offices and avoids conflict of interest, external control and either the reality or appearance of being compromised.

An ombudsperson is readily accessible to all members of the constituent community, promotes timely solutions to problems and avoids either the reality or appearance of bias toward any individual or group.

An ombudsperson treats with confidentiality all matters brought to him or her. No action is taken on a complaint without the complainant's permission. Information retained by the ombudsperson is kept secure. However, with the verbal or written permission of the complainant, such information may be carried forward by the ombudsperson.

If a complainant reports a serious problem but is unwilling to be part of any steps taken to address it, an ombudsperson tries to find a way to address the problem that is acceptable to the complainant, or that does not compromise the identity of the complainant.

However, if an individual speaks about intending serious harm tohimself or herself or others, or if the complainant confesses to serious misconduct or a crime, an ombudsperson must use personal discretion in determining whether or not this information is carried forward. Discretion is likewise required in regard to matters governed by state and federal law.

An Ombudsperson considers that confidentiality may preclude complying with requests for information in the context of formal proceedings on or off campus or required by law.

An ombudsperson is guided by a concern for and commitment to justice. Justice requires that individual interests be carefully balanced with the consideration of the good of the larger academic community. An ombudsperson's commitment to justice includes the understanding of power, identification of the use and misuse of power and authority, and recognitionof the need for access to power by the members of the institution.

Other concerns also govern an ombudsperson's conduct. While it is the parties who are responsible for choosing a particular resolution, the ombudsperson attempts to guide them toward options that are fair, conform with institutional policy, and give clear indication of being in their best interest. An ombudsperson remembers, and at all times protects, the right to privacy of all parties, including the alleged offenders. An ombudsperson generally does not act on third-party complaints.

An ombudsperson has a responsibility to maintain and improve professional skills, to assist in the development of new practitioners, and to promote impartial dispute resolution in the institution.

The Ombudsman Association Standards of Practice

We adhere to The Ombudsman Association Code of Ethics. We base our practice on confidentiality. We assert that there is a privilege with respect to communications with the ombudsman and we resist testifying in any formal process inside or outside the organization.

We exercise discretion whether to act upon a concern of an individual contacting the office. An ombudsman may initiate action on a problem he or she perceives directly. We are designated neutrals and remain independent of ordinary line and staff structures. We serve no additional role

(within an organization where we serve as ombudsman) which would compromise this neutrality.

We remain an informal and off-the-record resource. Formal investigations - for the purpose of adjudication - should be done by others. In the event that an ombudsman accepts a request to conduct a formal investigation, a memo should be written to file noting this action as an exception to the ombudsman's role. Such investigations should be considered privileged.

We foster communication about the philosophy and function of the ombudsman's office with people we serve. We provide feedback on trends, issues, policies and practices without breaching confidentiality or anonymity. We identify new problems and we provide support for responsible systems change.

We keep professionally current and competent by pursuing continuing education and training relevant to the ombudsman profession. We will endeavor to be worthy of the trust placed in us.

RECYCLED

Mediation Act

Summary

This act, drafted in collaboration with the ABA's Section on Dispute Resolution, establishes a privilege of confidentiality for mediators and participants.

Draft Tracking

Final Act

Final Act

Related Documents

Agenda--February 10-12, 2001 Meeting
Appendix Presenting Alternative Draft Provisions
Memo (Rogers & Reuben)--Re: Interim Draft
Memo (Rogers & Reuben)--Re: November 2000 Draft
Draft (12/1999)
Appendix, 1999
Agenda--May 1, 1998
Summary
Legislative Fact Sheet

Show Drafts

Bill Tracking

Illinois : Introduced as SB 278/HB 2146 in 2002-2003 - Passed Senate
Nebraska : Introduced as LB 255 in 2002-2003 - General File
New Hampshire : Introduced as HB 303 in 2002-2003 - Died in Committee
Massachusetts : Introduced as HB 96 in 2002-2003 - House Judiciary
New York : Introduced as SB 1340 in 2002-2003 - Senate Codes
Vermont : Introduced as SB 227/SB 97 in 2002-2003 - House Judiciary
Indiana : Introduced as SB 500 in 2002-2003 - Senate Judiciary
Maine : Introduced as LD 1295 in 2002-2003 - Senate Judiciary

Related Links

Guide to the Uniform Mediation Act

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Uniform Mediation Act

Executive Summary

The Uniform Mediation Act (UMA) promotes the increasingly important use of mediation as an appropriate means of dispute resolution, while also protecting the rights of participants in the mediation processes.

It will strengthen existing state laws and court rules by providing a strong mediation privilege that permits the parties, mediator, and non-party participants to prevent the use of mediation communications in legal proceedings that take place after the mediation. This privilege is consistent with the current trend of state law protections for mediation, and if adopted uniformly, will assure that mediation communications in one state will not be subject to admissibility in another state

Scope: The protections of the Act will be available to mediation participants in almost all mediations in which the parties agreed to mediation or are directed into mediation by a court or other governmental entity. The only mediations that the Act will not apply to are those involving labor unions, student peer mediations, and judicial settlement conferences. (Section 3)

The Mediation Privilege: As a general matter, anyone who participates in a mediation will be able to prevent the statements they make from being used against them in later legal proceedings. (Sections 4-6). Under the UMA, statements made in mediation are treated as inadmissible in much the same way that the law in most states bars the use of statements made to attorneys, doctors, and priests.

The UMA mediation privilege applies to bar the use of mediation communications in a wide range of proceedings that take place after the mediation, including civil and criminal trials, arbitrations, administrative hearings, and legislative "proceedings." (Section 2(7))

There are only limited exceptions to this general rule, for example to permit disclosures of threats of bodily harm, reports of abuse and neglect, and to establish that a mediation was used as a pretext to further a crime. (Section 6(a)) To ensure the integrity of the mediation process, there are also limited exceptions that would permit a judge to admit mediation communications into evidence to establish that a mediated settlement agreement was induced by fraud or duress, or that the mediator engaged in professional malpractice or misconduct. (Section 6(b))

Relatedly, the Act further bars mediator disclosures to courts, administrative agencies, and other government entities. (Section 7)

Party Accompaniment: The Act provides parties with the ability to be accompanied by a friend, family member, or lawyer, which is particularly important when a party is compelled into a mediation by a court or other governmental entity. (Section 10)

Disclosure of Conflicts of Interest: To further the integrity of the process, the UMA also requires the disclosure of conflicts of interest by a mediator, and requires a mediator to disclose his or her qualifications when asked. (Section 9).

UNIFORM MEDIATION ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TENTH YEAR
WHITE SULPHUR SPRINGS, WEST VIRGINIA
AUGUST 10–17, 2001

WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM MEDIATION ACT

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UNIFORM MEDIATION ACT

PREFATORY NOTE

During the last thirty years the use of mediation has expanded beyond its century-long home in collective bargaining to become an integral and growing part of the processes of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict.

Public policy strongly supports this development. Mediation fosters the early resolution of disputes. The mediator assists the parties in negotiating a settlement that is specifically tailored to their needs and interests. The parties' participation in the process and control over the result contributes to greater satisfaction on their part. *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 Ohio St. J. on Disp. Resol. 885 (1998). Increased use of mediation also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. For this reason, hundreds of state statutes establish mediation programs in a wide variety of contexts and encourage their use. *See* Sarah R. Cole, Craig A. McEwen & Nancy H. Rogers, Mediation: Law, Policy, Practice App. B (2001 2d ed. and 2001 Supp.)(hereinafter, Cole et al.). Many States have also created state offices to encourage greater use of mediation. *See, e.g.*, Ark. Code Ann. Section 16-7-101, *et seq.* (1995); Haw. Rev. Stat. Section 613-1, *et seq.* (1989); Kan. Stat. Ann. Section 5-501, *et seq.* (1996); Mass. Gen. Laws ch. 7, Section 51 (1998); Neb. Rev. Stat. Section 25-2902, *et seq.* (1991); N.J. Stat. Ann. Section 52:27E-73 (1994); Ohio Rev. Code Ann. Section 179.01, *et seq.* (West 1995); Okla. Stat. tit. 12, Section 1801, *et seq.* (1983); Or. Rev. Stat. Section 36.105, *et seq.* (1997); W. Va. Code Section 55-15-1, *et seq.* (1990).

These laws play a limited but important role in encouraging the effective use of mediation and maintaining its integrity, as well as the appropriate relationship of mediation with the justice system. In particular, the law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated. For this reason, a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings (*see* Sections 4-6). Because the privilege makes it more difficult to offer evidence to challenge the settlement agreement, the Drafters viewed the issue of confidentiality as tied to provisions that will help increase the likelihood that the mediation process will be fair. Fairness is enhanced if it will be conducted with integrity and the parties' knowing consent will be preserved. *See* Joseph B. Stulberg, *Fairness and Mediation*, 13 Ohio St. J. on Disp. Resol. 909 (1998); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Neg. L. Rev. 1 (2001). The Act protects integrity and knowing consent through provisions that provide exceptions to the privilege (Section 6),

limit disclosures by the mediator to judges and others who may rule on the case (Section 7), require mediators to disclose conflicts of interest (Section 9), and assure that parties may bring a lawyer or other support person to the mediation session (Section 10). In some limited ways, the law can also encourage the use of mediation as part of the policy to promote the private resolution of disputes through informed self-determination. *See* discussion in Section 2; *see also* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 Ohio St. J. on Disp. Resol. 831 (1998); *Denburg v. Paker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 1000 (N.Y. 1993) (societal benefit in recognizing the autonomy of parties to shape their own solution rather than having one judicially imposed). A uniform act that promotes predictability and simplicity may encourage greater use of mediation, as discussed in part 3, below.

At the same time, it is important to avoid laws that diminish the creative and diverse use of mediation. The Act promotes the autonomy of the parties by leaving to them those matters that can be set by agreement and need not be set inflexibly by statute. In addition, some provisions in the Act may be varied by party agreement, as specified in the comments to the sections. This may be viewed as a core Act which can be amended with type specific provisions not in conflict with the Uniform Mediation Act.

The provisions in this Act reflect the intent of the Drafters to further these public policies. The Drafters intend for the Act to be applied and construed in a way to promote uniformity, as stated in Section, and also in such manner as to:

- promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests (*see* part 1, below);
- encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties (*see* part 2, below); and
- advance the policy that the decision-making authority in the mediation process rests with the parties (*see* part 2, below).

Although the Conference does not recommend "purpose" clauses, States that permit these clauses may consider adapting these principles to serve that function. Each is discussed in turn.

1. Promoting candor

Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications. *See* Sections 4-6. Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality to encourage the effective use of mediation to resolve disputes. Indeed, state legislatures have enacted more than 250 mediation privilege statutes. *See* Cole et al., *supra*, at apps. A and B. Approximately half of the States have enacted

privilege statutes that apply generally to mediations in the State, while the other half include privileges within the provisions of statutes establishing mediation programs for specific substantive legal issues, such as employment or human rights. *Id.*

The Drafters recognize that mediators typically promote a candid and informal exchange regarding events in the past, as well as the parties' perceptions of and attitudes toward these events, and that mediators encourage parties to think constructively and creatively about ways in which their differences might be resolved. This frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. *See, e.g.*, Lawrence R. Freedman and Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 Ohio St. J. Disp. Resol. 37, 43-44 (1986); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 Admin. L. Rev. 315, 323-324 (1989); Alan Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest,* 1995 J. Disp. Resol. 1, 17; Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?,* 85 Marquette L. Rev. 79 (2001). For a critical perspective, *see generally* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. on Disp. Resol. 1 (1986); Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 Marquette L. Rev. 9 (2001). Such party-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as the attorney-client privilege, the doctor-patient privilege, and various other counseling privileges. *See, e.g.*, Unif. R. Evid. R. 501-509 (1986); *see generally* Jack B. Weinstein, et. al, Evidence: Cases and Materials 1314-1315 (9th ed.1997); *Developments in the Law – Privileged Communications*, 98 Harv. L. Rev. 1450 (1985); Paul R. Rice, Attorney-Client Privilege in the United States, Section 2/1-2.3 (2d ed. 1999). This rationale has sometimes been extended to mediators to encourage mediators to be candid with the parties by allowing them to block evidence of their notes and other statements by mediators. *See, e.g.*, Ohio Rev. Code Ann. Section 2317.023 (West 1996).

Similarly, public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements, particularly in the context of other investigations or judicial processes. The public confidence rationale has been extended to permit the mediator to object to testifying, so that the mediator will not be viewed as biased in future mediation sessions that involve comparable parties. *See, e.g., NLRB v. Macaluso*, 618 F.2d 51 (9th Cir. 1980) (public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator's testimony). To maintain public confidence in the fairness of mediation, a number of States prohibit a mediator from disclosing mediation communications to a judge or other officials in a position to affect the decision in a case. Del. Code Ann. tit. 19, Section 712(c) (1998) (employment discrimination); Fla. Stat. Ann. Section 760.34(1) (1997) (housing discrimination); Ga. Code Ann. Section 8-3-208(a) (1990) (housing discrimination); Neb. Rev. Stat. Section 20-140 (1973) (public accommodations); Neb. Rev. Stat.

Section 48-1118 (1993) (employment discrimination); Cal. Evid. Code Section 703.5 (West 1994). This justification also is reflected in standards against the use of a threat of disclosure or recommendation to pressure the parties to accept a particular settlement. *See, e.g.*, Center for Dispute Settlement, National Standards for Court-Connected Mediation Programs (1994); Society for Professionals in Dispute Resolution, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (1991); *see also* Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 Ohio St. J. on Disp. Resol. 831, 874 (1998).

A statute is required only to assure that aspect of confidentiality that relates to evidence compelled in a judicial and other legal proceeding. The parties can rely on the mediator's assurance of confidentiality in terms of mediator disclosures outside the proceedings, as the mediator would be liable for a breach of such an assurance. *See, e.g.*, *Cohen v. Cowles Media Co*, 501 U.S. 663 (1991) (First Amendment does not bar recovery against a newspaper's breach of promise of confidentiality); *Horne v. Patton*, 291 Ala. 701, 287 So.2d 824 (1973) (physician disclosure may be invasion of privacy, breach of fiduciary duty, breach of contract). Also, the parties can expect enforcement of their agreement to keep things confidential through contract damages and sometimes specific enforcement. The courts have also enforced court orders or rules regarding nondisclosure through orders striking pleadings and fining lawyers. *See* Section 8; *see also Parazino v. Barnett Bank of South Florida*, 690 So.2d 725 (Fla. Dist. Ct. App. 1997); *Bernard v. Galen Group, Inc.*, 901 F. Supp. 778 (S.D.N.Y. 1995). Promises, contracts, and court rules or orders are unavailing, however, with respect to discovery, trial, and otherwise compelled or subpoenaed evidence. Assurance with respect to this aspect of confidentiality has rarely been accorded by common law. Thus, the major contribution of the Act is to provide a privilege in legal proceedings, where it would otherwise either not be available or would not be available in a uniform way across the States.

As with other privileges, the mediation privilege must have limits, and nearly all existing state mediation statutes provide them. Definitions and exceptions primarily are necessary to give appropriate weight to other valid justice system values, in addition to those already discussed in this Section. They often apply to situations that arise only rarely, but might produce grave injustice in that unusual case if not excepted from the privilege.

In this regard, the Drafters recognize that the credibility and integrity of the mediation process is almost always dependent upon the neutrality and the impartiality of the mediator. The provisions of this Act are not intended to provide the parties with an unwarranted means to bring mediators into the discovery or trial process to testify about matters that occurred during a court ordered or agreed mediation. There are of course exceptions and they are specifically provided for in Section 5(a)(1), (express waiver by the mediator) or pursuant to Section 6's narrow exceptions such as 6(b)(1), (felony). Contrary use of the provisions of this Act to involve mediators in the discovery or trial process would have a destructive effect on the mediation process and would not be in keeping with the intent and purpose of the Act.

Finally, these exceptions need not significantly hamper candor. Once the parties and mediators know the protections and limits, they can adjust their conduct accordingly. For example, if the parties understand that they will not be able to establish in court an oral agreement reached in mediation, they can reduce the agreement to a record or writing before relying on it. Although it is important to note that mediation is not essentially a truth-seeking process in our justice system such as discovery, if the parties realize that they will be unable to show that another party lied during mediation, they can ask for corroboration of the statement made in mediation prior to relying on the accuracy of it. A uniform and generic privilege makes it easier for the parties and mediators to understand what law will apply and therefore to understand the coverage and limits of the Act, so that they can conduct themselves in a mediation accordingly.

2. Encouraging resolution in accordance with other principles

Mediation is a consensual process in which the disputing parties decide the resolution of their dispute themselves with the help of a mediator, rather than having a ruling imposed upon them. The parties' participation in mediation, often accompanied by counsel, allows them to reach results that are tailored to their interests and needs, and leads to their greater satisfaction in the process and results. Moreover, disputing parties often reach settlement earlier through mediation, because of the expression of emotions and exchanges of information that occur as part of the mediation process.

Society at large benefits as well when conflicts are resolved earlier and with greater participant satisfaction. Earlier settlements can reduce the disruption that a dispute can cause in the lives of others affected by the dispute, such as the children of a divorcing couple or the customers, clients and employees of businesses engaged in conflict. *See* generally, Jeffrey Rubin, Dean Pruitt and Sung Hee Kim, Social Conflict: Escalation, Stalemate and Settlement 68-116 (2d ed. 1994) (discussing reasons for, and manner and consequences of conflict escalation). When settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways. The public justice system gains when those using it feel satisfied with the resolution of their disputes because of their positive experience in a court-related mediation. Finally, mediation can also produce important ancillary effects by promoting an approach to the resolution of conflict that is direct and focused on the interests of those involved in the conflict, thereby fostering a more civil society and a richer discussion of issues basic to policy. *See* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 Ohio St. J. on Disp. Resol. 831 (1998); *see also* Frances McGovern, *Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)*, 3 Disp. Resol. Mag. 12-13 (1997); Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 Ohio St. J. on Disp. Resol. 715 (1999); Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community (2000) (discussion the causes for the decline of civic engagement and ways of ameliorating the situation).

State courts and legislatures have perceived these benefits, as well as the popularity of mediation, and have publicly supported mediation through funding and statutory provisions that have expanded dramatically over the last twenty years. *See*, Cole et al., *supra* 5:1-5:19; Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54 (Aug. 1996). The legislative embodiment of this public support is more than 2500 state and federal statutes and many more administrative and court rules related to mediation. *See* Cole et al, *supra* apps. A and B.

The primary guarantees of fairness within mediation are the integrity of the process and informed self-determination. Self-determination also contributes to party satisfaction. Consensual dispute resolution allows parties to tailor not only the result but also the process to their needs, with minimal intervention by the State. For example, parties can agree with the mediator on the general approach to mediation, including whether the mediator will be evaluative or facilitative. This party agreement is a flexible means to deal with expectations regarding the desired style of mediation, and so increases party empowerment. Indeed, some scholars have theorized that individual empowerment is a central benefit of mediation. *See*, *e.g.*, Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation (1994).

Self-determination is encouraged by provisions that limit the potential for coercion of the parties to accept settlements, *see* Section 9(a), and that allow parties to have counsel or other support persons present during the mediation session. *See* Section 10. The Act promotes the integrity of the mediation process by requiring the mediator to disclose conflicts of interest, and to be candid about qualifications. *See* Section 9.

3. Importance of uniformity.

This Act is designed to simplify a complex area of the law. Currently, legal rules affecting mediation can be found in more than 2500 statutes. Many of these statutes can be replaced by the Act, which applies a generic approach to topics that are covered in varying ways by a number of specific statutes currently scattered within substantive provisions.

Existing statutory provisions frequently vary not only within a State but also by State in several different and meaningful respects. The privilege provides an important example. Virtually all States have adopted some form of privilege, reflecting a strong public policy favoring confidentiality in mediation. However, this policy is effected through more than 250 different state statutes. Common differences among these statutes include the definition of mediation, subject matter of the dispute, scope of protection, exceptions, and the context of the mediation that comes within the statute (such as whether the mediation takes place in a court or community program or a private setting).

Uniformity of the law helps bring order and understanding across state lines, and encourages effective use of mediation in a number of ways. First, uniformity is a necessary predicate to predictability if there is any potential that a statement made in

viewpoints about how mediation is to be conducted, including, for example, strong proponents of both the evaluative and facilitative models of mediation, as well as supporters and opponents of mandatory mediation.

Finally, with the assistance of a grant from the William and Flora Hewlett Foundation, both Drafting Committees had substantial academic support for their work by many of mediation's most distinguished scholars, who volunteered their time and energies out of their belief in the utility and timeliness of a uniform mediation law. These included members of the faculties of Harvard Law School, the University of Missouri-Columbia School of Law, the Ohio State University College of Law, and Bowdoin College, including Professors Frank E.A. Sander (Harvard Law School); Chris Guthrie, John Lande, James Levin, Richard C. Reuben, Leonard L. Riskin, Jean R. Sternlight (University of Missouri-Columbia School of Law); James Brudney, Sarah R. Cole, L. Camille Hébert, Nancy H. Rogers, Joseph B. Stulberg, Laura Williams, and Charles Wilson (Ohio State University College of Law); Jeanne Clement (Ohio State University College of Nursing); and Craig A. McEwen (Bowdoin College). The Hewlett support also made it possible for the Drafting Committees to bring noted scholars and practitioners from throughout the nation to advise the Committees on particular issues. These are too numerous to mention but the Committees especially thank those who came to meetings at the advisory group's request, including Peter Adler, Christine Carlson, Jack Hanna, Eileen Pruett, and Professors Ellen Deason, Alan Kirtley, Kimberlee K. Kovach, Thomas J. Stipanowich, and Nancy Welsh.

Their scholarly work for the project examined the current legal structure and effectiveness of existing mediation legislation, questions of quality and fairness in mediation, as well as the political environment in which uniform or model legislation operates. *See* Frank E.A. Sander, *Introduction to Symposium on Drafting a Uniform/Model Mediation Act*, 13 Ohio St. J. on Disp. Resol. 791 (1998). Much of this work was published as a law review symposium issue. *See Symposium on Drafting a Uniform/Model Mediation Act*, 13 Ohio St. J. Disp. Resol. 787 (1998).

Finally, observers from a vast array of mediation professional and provider organizations also provided extensive suggestions to the Drafting Committees, including: the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution, Academy of Family Mediators and CRE/Net), National Council of Dispute Resolution Organizations, American Arbitration Association, Federal Mediation and Conciliation Service, Judicial Arbitration and Mediation Services, Inc. (JAMS), CPR Institute for Dispute Resolution, International Academy of Mediators, National Association for Community Mediation, and the California Dispute Resolution Council. Other official observers to the Drafting Committees included: the American Bar Association Section of Administrative Law and Regulatory Practice, American Bar Association Section of Litigation, American Bar Association Senior Lawyers Division, American Bar Association Section of Torts and Insurance Practice, American Trial Lawyers Association, Equal Employment Advisory Council, National Association of District Attorneys, and the Society of Professional Joumalists.

Similarly, the Act also received substantive comments from several state and local Bar Associations, generally working through their ADR committees, including: the Alameda County Bar Association, the Beverly Hills Bar Association, the State Bar of California, the Chicago Bar Association, the Louisiana State Bar Association, the Minnesota State Bar Association, and the Mississippi Bar. In addition, the Committees' work was supplemented by other individual mediators and mediation professional organizations too numerous to mention.

6. Drafting philosophy.

Mediation often involves both parties and mediators from a variety of professions and backgrounds, many of who are not attorneys or represented by counsel. With this in mind, the Drafters sought to make the provisions accessible and understandable to readers from a variety of backgrounds, sometimes keeping the Act shorter by leaving some discretion in the courts to apply the provisions in accordance with the general purposes of the Act, delineated and expanded upon in Section 1 of this Prefatory Note. These policies include fostering prompt, economical, and amicable resolution, integrity in the process, self-determination by parties, candor in negotiations, societal needs for information, and uniformity of law.

The Drafters sought to avoid including in the Act those types of provisions that should vary by type of program or legal context and that were therefore more appropriately left to program-specific statutes or rules. Mediator qualifications, for example, are not prescribed by this Act. The Drafters also recognized that some general standards are often better applied through those who administer ethical standards or local rules, where an advisory opinion might be sought to guide persons faced with immediate uncertainty. Where individual choice or notice was important to allow for self-determination or avoid a trap for the unwary, such as for nondisclosure by the parties outside the context of proceedings, the Drafters left the matter largely to local rule or contract among the participants. As the result, the Act largely governs those narrow circumstances in which the mediation process comes into contact with formal legal processes.

Finally, the Drafters operated with respect for local customs and practices by using the Act to establish a floor rather than a ceiling for some protections. It is not the intent of the Act to preempt state and local court rules that are consistent with the Act, such as those well-established rules in Florida. *See*, for example, Fla.R.Civ.P. Rule 1.720; *see also* Sections 12 and 15.

Consistent with existing approaches in law, and to avoid unnecessary disruption, the Act adopts the structure used by the overwhelming majority of these general application States: the evidentiary privilege. However, many state and local laws do not conflict with the Act and would not be preempted by it. For example, statutes and court rules providing standards for mediators, setting limits of compulsory participation in mediation, and providing mediator qualifications would remain in force.

The matter may be less clear if the existing provisions relate to the mediation privilege. Legislative notes provide guidance on some key issues. Nevertheless, in order to achieve the simplicity and clarity sought by the Act, it will be important in each State to review existing privilege statutes and specify in Section 15 which will be repealed and which will remain in force.

UNIFORM MEDIATION ACT

SECTION 1. TITLE. This [Act] may be cited as the Uniform Mediation Act.

SECTION 2. DEFINITIONS. In this [Act]:

(1) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(2) "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(3) "Mediator" means an individual who conducts a mediation.

(4) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

(5) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(7) "Proceeding" means:

(A) a judicial, administrative, arbitral, or other adjudicative process,

situations in which mediation parties are either required to mediate or referred to mediation by governmental institutions or by an arbitrator. Administrative agencies include those public agencies with the authority to prescribe rules and regulations to administer a statute, as well as the authority to adjudicate matters arising under such a statute. They include agricultural departments, child protective services, civil rights commissions and worker's compensation boards, to name only a few. Through this triggering mechanism, the formal court-referred mediation that many people associate with mediation is clearly covered by the Act.

Where Section 3(a)(1) focuses on publicly referred mediations, the second triggering mechanism, Section 3(a)(2), furthers party autonomy by allowing mediation parties and the mediator to trigger the Act by agreeing to mediate in a record that is signed by the parties and by the mediator. A later note by one party that they agreed to mediate would not constitute a record of an agreement to mediate. In addition, the record must demonstrate the expectation of the mediation parties and the mediator that the mediation communications will have a privilege against disclosure.

Yet significantly, these individuals are not required to use any magic words to obtain the protection of the Act. *See Haghighi v. Russian-American Broadcasting Co.*, 577 N.W.2d 927 (Minn.1998). The lack of a requirement for magic words tracks the intent to be inclusive and to embrace the many different approaches to mediation. Moreover, were magic words required, party and mediator expectations of confidentiality under the Act might be frustrated, since a mediation would only be covered by the Act if the institution remembered to include them in any agreement.

The phrase "privileged against disclosure" clarifies the type of expectations that the record must demonstrate tin order to show an expectation of confidentiality in a subsequent legal setting. Mere generalized expectations of confidentiality in a non-legal setting are not enough to trigger the Act if the case does not fit under Sections 3(a)(1) or 3(a)(3). Take for example a dispute in a university between the heads of the Spanish and Latin departments that is mediated or "worked out informally" with the assistance of the head of the French department, at the suggestion of the university provost. Such a mediation would not reasonably carry with it party or mediator expectations that the mediation would be conducted pursuant to an evidentiary privilege, rights of disclosure and accompaniment and the other protections and obligations of the Act. Indeed, some of the parties and the mediator may more reasonably expect that the mediation results, and even the underlying discussions, would be disclosed to the university provost, and perhaps communicated throughout the parties' respective departments and elsewhere on campus. By contrast, however, if the university has a written policy regarding the mediation of disputes that embraces the Act, and the mediation is specifically conducted pursuant to that policy, and the parties agree to participate in mediation in a record signed by the parties, then the parties would reasonably expect that the Act would apply and conduct themselves accordingly, both in the mediation and beyond.

The third triggering mechanism, Section 3(a)(3), focuses on individuals and organizations that provide mediation services and provides that the Act applies when the mediation is conducted by one who is held out as a mediator. For example, disputing neighbors who mediate with a volunteer at a community mediation center would be covered by the Act, since the center holds itself out as providing mediation services. Similarly, mediations conducted by a private mediator who advertises his or her services as a mediator would also be covered, since the private mediator holds himself or herself out to the public as a mediator. Because the mediator is publicly held out as a mediator, the parties may reasonably expect mediations they conduct to be conducted pursuant to relevant law, specifically the Act. By including those mediations conducted by private mediators who hold themselves out as mediators, the Act tracks similar doctrines regarding other professions. In other contexts, "holding out" has included making a representation in a public manner of being in the business or having another person make that representation. *See* 18A Am. Jur.2d Corporations Section 271 (1985).

Mediations can be conducted by ombuds practitioners. *See* Standards for the Establishment and Operation of Ombuds Offices (August 2001). If such a mediation is conducted pursuant to one of these triggering mechanisms, such as a written agreement under Section 3(a)(2), it will be protected under the terms of the Act. There is no intent by the Drafters to exclude or include mediations conducted by an ombuds a priori. The terms of the Act determine applicability, not a mediator's formal title.

Finally, on the issue of Section 3(a) inclusions into the Act, the Drafting Committees discussed whether it should cover the many cultural and religious practices that are similar to mediation and that use a person similar to the mediator, as defined in this Act. On the one hand, many of these cultural and religious practices, like more traditional mediation, streamline and resolve conflicts, while solving problems and restoring relationships. Some examples of these practices are Ho'oponopono, circle ceremonies, family conferencing, and pastoral or marital counseling. These cultural and religious practices bring richness to the quality of life and contribute to traditional mediation. On the other hand, there are instances in which the application of the Act to these practices would be disruptive of the practices and therefore undesirable. On balance, furthering the principle of self-determination, the Drafting Committees decided that those involved should make the choice to be covered by the Act in those instances in which other definitional requirements of Section 2 are met by entering into an agreement to mediate reflected by a record or securing a court or agency referral pursuant to Section 3(a)(1). At the same time, these persons could opt out the Act's coverage by not using this triggering mechanism. This leaves a great deal of leeway, appropriately, with those involved in the practices.

3. Section 3(b)(1) and (2). Exclusion of collective bargaining disputes.

Collective bargaining disputes are excluded because of the longstanding, solidified, and substantially uniform mediation systems that already are in place in the collective bargaining context. *See* Memorandum from ABA Section of Labor and

Employment Law of the American Bar Association to Uniform Mediation Act Reporters 2 (Jan. 23, 2000) (on file with UMA Drafting Committees); Letter from New York State Bar Association Labor and Employment Law Section to Reporters, Uniform Mediation Act 2-4 (Jan. 21, 2000) (on file with UMA Drafting Committees). This exclusion includes the mediation of disputes arising under the terms of a collective bargaining agreement, as well as mediations relating to the formation of a collective bargaining agreement. By contrast, the exclusion does not include employment discrimination disputes not arising under the collective bargaining agreement as well as employment disputes arising after the expiration of the collective bargaining agreement. Mediations of disputes in these contexts remain within the protections and responsibilities of the Act.

4. Section 3(b)(3). Exclusion of certain judicial conferences.

Difficult issues arise in mediations that are conducted by judges during the course of settlement conferences related to pending litigation, and this Section excludes certain judicially conducted mediations from the Act. Some have the concern that party autonomy in mediation may be constrained either by the direct coercion of a judicial officer who may make a subsequent ruling on the matter, or by the indirect coercive effect that inherently inures from the parties' knowledge of the ultimate presence of that judge. *See*, *e.g.*, James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them For Trial*, 6 Disp. Resol. Mag. 11 (Fall 1999), and Frank E.A. Sander, *A Friendly Amendment*, 6 Disp. Resol. Mag. 11 (Fall 1999).

This concern is further complicated by the variegated nature of judicial settlement conferences. As a general matter, judicial settlement conferences are typically conducted under court or procedural rules that are similar to Rule 16 of the Federal Rules of Civil Procedure, and have come to include a wide variety of functions, from simple case management to a venue for court-ordered mediations. *See* Mont. R. Civ. P., Rule 16(a). In situations in which a part of the function of judicial conferences is case management, the parties hardly have an expectation of confidentiality in the proceedings, even though there may be settlement discussions initiated or facilitated by the judge or judicial officer. In fact, such hearings frequently lead to court orders on discovery and issues limitations that are entered into the public record. In such circumstances, the policy rationales supporting the confidentiality privilege and other provisions of the Act are not furthered.

On the other hand, there are judicially-hosted settlement conferences that for all practical purposes are mediation sessions for which the Act's policies of promoting full and frank discussions between the parties would be furthered. *See* generally Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role,* 3 OHIO ST. J. ON DISP. RESOL. 1 (1987); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

The Act recognizes the tension created by this wide variety of settlement functions by drawing a line with regard to those conferences that are covered by the Act and those that are not covered by the Act. The Act excludes those settlement conferences

in which information from the mediation is communicated to a judge with responsibility for the case. This is consistent with the prohibition on mediator reports to courts in Section 7. The term "judge" in Section 3(b)(3) includes magistrates, special masters, referees, and any other persons responsible for making rulings or recommendations on the case. However, the Act does not apply to a court mediator, or a mediator who contracts or volunteers to mediate cases for a court because they may not make later rulings on the case. Similarly mediations conducted by judges specifically and exclusively are assigned to mediate cases, so-called "buddy judges," and retired judges who return to mediate cases do not fall within the Section 3(b)(3) exemption because such mediators do not make later rulings on the case.

Local rules are usually not recognized beyond the court's jurisdiction, and may not provide assurance of confidentiality if the mediation communications are sought in another jurisdiction, and if the jurisdiction does not permit recognize privilege by local rule.

5. Section 3(b)(4)(A). Exclusion of peer mediation.

The Act also exempts mediations between students conducted under the auspices of school programs because the supervisory needs of schools toward students, particularly in peer mediation, may not be consistent with the confidentiality provisions of the Act. For example, school administrators need to be able to respond to, and in a proceeding verify, legitimate threats to student safety or domestic violence that may surface during a mediation between students. *See* Memorandum from ABA Section of Dispute Resolution to Uniform Mediation Act Reporters (Nov. 15, 1999) (on file with UMA Drafting Committees). The law has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969), *citing Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) and *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

This exemption does not include mediations involving a teacher, parent, or other non-student as such an exemption might preclude coverage of truancy mediation and other mediation sessions for which the privilege is pertinent

6. Section 3(b)(4)(B). Exclusion of correctional institutions for youth.

The Act also exempts programs involving youths at correctional institutions if the mediation parties are all residents of the institution. This is to facilitate and encourage mediation and conflict prevention and resolution techniques among those juveniles who have well-documented and profound needs in those areas. Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails,* 66 IND. L.J. 999, 1021 (1991). Exempting these programs serves the same policies as are served by the peer mediation exclusion for non-incarcerated youths. The Drafters do not intend to

exclude cases where at least one party is not a resident, such as a class action suit against a non-resident in which the parties mediate or attempt to mediate the case.

7. Section 3(c). Alternative of non-privileged mediation.

This Section allows the parties to opt for a non-privileged mediation or mediation session by mutual agreement, and furthers the Act's policy of party self-determination. If the parties so agree, the privilege sections of the Act do not apply, thus fulfilling the parties reasonable expectations regarding the confidentiality of that mediation or session. For example, parties in a sophisticated commercial mediation, who are represented by counsel, may see no need for a privilege to attach to a mediation or session, and may by express written agreement "opt out" of the Act's privilege provisions. Similarly, parties may also use this option if they wish to rely on, and therefore use in evidence, statements made during the mediation. It is the parties rather than the mediator who make this choice, although a mediator could presumably refuse to mediate a mediation or session that is not covered by this Act. Even if the parties do not agree in advance, the parties, mediator, and all nonparty participants can waive the privilege pursuant to Section 5. In this instance, however, the mediator and other participants can block the waiver in some respects.

If the parties want to opt out, they should inform the mediators or nonparty participants of this agreement, because without actual notice, the privileges of the Act still apply to the mediation communications of the persons who have not been so informed until such notice is actually received. Thus, for example, if a nonparty participant has not received notice that the opt-out has been invoked, and speaks during a mediation, that mediation communication is privileged under the Act. If, however, one of the parties or the mediator tells the nonparty participant that the opt-out has been invoked, the privilege no longer attaches to statements made after the actual notice has been provided, even though the earlier statements remain privileged because of the lack of notice.

8. Other scope issues.

The Act would apply to all mediations that fit the definitions of mediation by a mediator unless specifically excluded by the State adopting the Act. For example, a State may want to exclude international commercial conciliation, which is covered by specific statute in some States. *See, e.g.*, N.C. Gen. Stat. Section 1-567.60 (1991); Cal. Civ. Pro. Section 1297.401 (West 1988); Fla. Stat. Ann. Section 684.10 (1986).

SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.

(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

Legislative Note: The Act does not supersede existing state statutes that make mediators incompetent to testify, or that provide for costs and attorney fees to mediators who are wrongfully subpoenaed. See, e.g., Cal. Evid. Code Section 703.5 (West 1994).

Reporter's Notes

1. In general.

Sections 4 through 6 set forth the Uniform Mediation Act's general structure for protecting the confidentiality of mediation communications against disclosure in later

b. Communications to which the privilege attaches

The privilege applies to a broad array of "mediation communications" including some communications that are not made during the course of a formal mediation session, such as those made for purposes of convening or continuing a mediation. *See* Reporter's Notes to Section 2(2) for further discussion.

c. Proceedings at which the privilege may be asserted.

The privilege under Section 4 applies in most legal "proceedings" that occur during or after a mediation covered by the Act. *See* Section 2(7). If the privilege is raised in a criminal felony proceeding, it is subject to a specialized treatment under Section 6(b)(1), and the Reporter's Notes to that Section should be consulted for further clarification.

3. Section 4(a). Description of effect of privilege.

The words "is not subject to discovery or admissible in evidence" in Section 4(a) make explicit that a court or other tribunal must exclude privileged communications that are protected under these sections, and may not compel discovery of them. Because the privilege is unfamiliar to many using mediation, this Section provides a description of the effect of the privilege provided in Sections 4(b), 5, and 6. It does not change the reach of the remainder of the Section.

4. Section 4(b). Operation of privilege.

As with other privileges, a mediation privilege operates to allow a person to refuse to disclose and to prevent another from disclosing particular communications. *See generally* Strong, *supra*, at Section 72; *Developments in the Law – Privileged Communications*, 98 Harv. L. Rev. 1450 (1985).

This blocking function is critical to the operation of the privilege. As discussed in more detail below, parties have the greatest blocking power and may block provision of testimony about or other evidence of mediation communications made by anyone in the mediation, including persons other than the mediator and parties. The evidence may be blocked whether the testimony is by another party, a mediator, or any other participant. However, if all parties agree that a party should testify about a party's mediation communications, no one else may block them from doing so, including a mediator or nonparty participant.

Mediators may block their own provision of evidence, including their own testimony and evidence provided by anyone else of the mediator's mediation communications, even if the parties consent. Nonetheless, the parties' consent is

required to admit the mediator's provision of evidence, as well as evidence provided by another regarding the mediator's mediation communications.

Finally, a nonparty participant may block evidence of that individual's mediation communication regardless of who provides the evidence and whether the parties or mediator consent. Once again, nonetheless, the nonparty participant may not provide such evidence if the parties do not consent. This is consistent with fixing the limits of the privilege to protect the expectations of those persons whose candor is most important to the success of the mediation process.

a. The holders of the privilege.

1. In general.

A critical component of the Act's general rule is its designation of the holder – i.e., the person who is eligible to raise and waive the privilege.

This designation brings both clarity and uniformity to the law. Statutory mediation privileges are somewhat unusual among evidentiary privileges in that they often do not specify who may hold and/or waive the privilege, leaving that to judicial interpretation. *See, e.g.*, 710 Ill. Comp. Stat. Section 20/6 (1987) (community dispute resolution centers); Ind. Code Section 20-7.5-1-13 (1987) (university employee unions); Iowa Code Section 679.12 (1985) (general); Ky. Rev. Stat. Ann. Section 336.153 (1988) (labor disputes); 26 Me. Rev. Stat. Ann. Section 1026 (1999) (university employee unions); Mass. Gen. Laws ch. 150, Section 10A (1985) (labor disputes).

Those statutes that designate a holder tend to be split between those that make the parties the only holders of the privilege, and those that also make the mediator a holder. *Compare* Ark. Code Ann. Section 11-2-204 (1979) (labor disputes); Fla. Stat. Ann. Section 61.183 (1996) (divorce); Kan. Stat. Ann. Section 23-605 (1999) (domestic disputes); N.C. Gen. Stat. Section 41A-7(d) (1998) (fair housing); Or. Rev. Stat. Ann. Section 107.785 (1995) (divorce) (providing that the parties are the sole holders) *with* Ohio Rev. Code Ann. Section 2317.023 (West 1996) (general); Wash. Rev. Code Ann. Section 7.75.050 (1984) (dispute resolution centers (making the mediator an additional holder in some respects).

The Act adopts an approach that provides that both the parties and the mediators may assert the privilege regarding certain matters, thus giving weight to the primary concern of each rationale. *See* Ohio Rev. Code Ann. Section 2317.023 (West 1996) (general); Wash. Rev. Code Section 5.60.070 (1993) (general). In addition, the Act provides a limited privilege for nonparty participants, as discussed in Section (c) below.

a2. Parties as holders.

The mediation privilege of the parties draws upon the purpose, rationale, and traditions of the attorney-client privilege, in that its paramount justification is to

encourage candor by the mediation parties, just as encouraging the client's candor is the central justification for the attorney-client privilege. *See* Paul R. Rice, Attorney Client Privilege in the United States 2.1-2.3 (2d ed. 1999).

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because mediations involve parties whose interests appear to be adverse. However, the law of attorney-client privilege has considerable experience with situations in which multiple-client interests may conflict, and those experiences support the analogy of the mediation privilege to the attorney-client privilege. For example, the attorney-client privilege has been recognized in the context of a joint defense in which interests of the clients may conflict in part and yet one may prevent later disclosure by another. *See Raytheon Co. v. Superior Court*, 208 Cal. App.3d 683, 256 Cal. Rptr. 425 (1989); *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979), *cert denied*, 444 U.S. 898 (1979); *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So.2d 437 (Fla. App. 1987); *but see Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769 (Tex. App. 1985) (refusing to apply the joint defense doctrine to parties who were not directly adverse); *see generally* Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. Miami L. Rev. 321 (1981). Similarly, the attorney-client privilege applies in the insurance context, in which an insurer generally has the right to control the defense of an action brought against the insured, when the insurer may be liable for some or all of the liability associated with an adverse verdict. *Desriusseaux v. Val-Roc Truck Corp.*, 230 A.D.2d 704 (N.Y. Supreme Ct. 1996); Paul R. Rice, Attorney-Client Privilege in the United States, 4:30-4:38 (2d ed. 1999).

It should be noted that even if the mediator loses the privilege to block or assert a privilege, the parties may still come forward and assert their privilege, thus blocking the mediator who has lost the privilege from providing testimony about the affected mediation. This Section should be read in conjunction with 9(d) below.

a3. Mediator as holders.

Mediators are made holders with respect to their own mediation communications, so that they may participate candidly, and with respect to their own testimony, so that they will not be viewed as biased in future mediations, as discussed further in the Reporter's Prefatory Note. As noted above in Section 4(a)(2) above and in commentary to Section 9(d) below, even if the mediator loses the privilege to block or assert a privilege, the parties may still come forward and assert their privilege.

a4. Nonparty participants as holders.

In addition, the Act adds a privilege for the nonparty participant, though limited to the communications by that individual in the mediation. *See* 5 U.S.C. Section 574(a)(1). The purpose is to encourage the candid participation of experts and others who may have information that would facilitate resolution of the case. This would also cover statements prepared by such persons for the mediation and submitted as part

of it, such as experts' reports. Any party who expects to use such an expert report prepared to submit in mediation later in a legal proceeding would have to secure permission of all parties and the expert in order to do so. This is consistent with the treatment of reports prepared for mediation as mediation communications. *See* Section 2(2).

a5. Contractual notice of intent to invoke the mediation privilege.

As a practical matter, a person who holds a mediation privilege can only assert the privilege if that person knows that evidence of a mediation communication will be sought or offered at a proceeding. This presents no problem in the usual case in which the subsequent proceeding arises because of the failure of the mediation to resolve the dispute because the mediation party would be one of the parties to the proceeding in which the mediation communications are being sought. To guard against the unusual situation in which a party or mediator may wish to assert the privilege, but is unaware of the necessity, the parties and mediator may wish to contract for notification of the possible use of mediation information, as is a practice under the attorney-client privilege for joint defense consultation. *See* Paul R. Rice, et. al., *Attorney-Client Privilege in the United States* Section 18-25 (2d ed. 1999) (attorney client privilege in context of joint representation).

5. Section 4(c). Otherwise discoverable evidence.

This provision acknowledges the importance of the availability of relevant evidence to the truth-seeking function of courts and administrative agencies, and makes clear that relevant evidence may not be shielded from discovery or admission at trial merely because it is communicated in a mediation. For purposes of the mediation privilege, it is the communication that is made in a mediation that is protected by the privilege, not the underlying evidence giving rise to the communication. Evidence that is communicated in a mediation is subject to discovery, just as it would be if the mediation had not taken place.

There is no "fruit of the poisonous tree" doctrine in the mediation privilege. For example, a party who learns about a witness during a mediation is not precluded by the privilege from subpoenaing that witness. This is a common exemption in mediation privilege statutes, and is also found in Uniform Rule of Evidence 408. *See, e.g.*, Fla. Stat. Ann. Section 44.102 (1999) (general); Minn. Stat. Ann. Section 595.02 (1996) (general); Ohio Rev. Code Ann. Section 2317.023 (West 1996) (general); Wash. Rev. Code Section 5.60.070 (1993) (general).

SECTION 5. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 4.

Reporter's Notes

1. Section 5(a) and (b). Waiver and preclusion.

Section 5 provides for waiver of privilege, and for a party, mediator, or nonparty participant to be precluded from asserting the privilege in situations in which mediation communications have been disclosed before the privilege has been asserted. Waiver must be express and either recorded through a writing or electronic record or made orally during specified types of proceedings. These rules further the principle of party autonomy in that mediation participants may generally prefer not to waive their mediation privilege rights. However, there may be situations in which one or more parties may wish to be freed from the burden of privilege, and the waiver provision permits that possibility. *See, e.g., Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110, 1131-33 (N.D. Cal. 1999).

Significantly, these provisions differ from the attorney-client privilege in that the mediation privilege does not permit waiver to be implied by conduct. *See* Michael H. Graham, Handbook of Federal Evidence Section 511.1 (4th ed. 1996). The rationale for

requiring explicit waiver is to safeguard against the possibility of inadvertent waiver, such as through the often salutary practice of parties discussing their dispute and mediation with friends and relatives. In contrast to these settings, there is a sense of formality and awareness of legal rights in all of the proceedings to which the privilege may be waived if the waiver is oral. They generally are conducted on the record, easing the difficulties of establishing what was said.

Read together with Section 4, the waiver operates as follows:

> For testimony about mediation communications made by a party, all parties are the holders and therefore all parties must waive the privilege before a party or nonparty participant may testify or provide evidence; if that testimony is to be provided by a mediator, all parties and the mediator must waive the privilege.
>
> For testimony about mediation communications that are made by the mediator, both the parties and the mediator are holders of the privilege, and therefore both the parties and the mediator must waive the privilege before a party, mediator, or nonparty participant may testify or provide evidence of a mediator's mediation communications.
>
> For testimony about mediation communications that are made by a nonparty participant, both the parties and the nonparty participants are holders of the privilege and therefore both the parties and the nonparty participant must waive before a party or nonparty participant may testify; if that testimony is to be offered through the mediator, the mediator must also waive.

Earlier drafts included provisions that permitted waiver by conduct, which is common among communications privileges. However, the Drafting Committees deleted those provisions because of concerns that mediators and parties unfamiliar with the statutory environment might waive their privilege rights inadvertently. That created the anomalous situation of permitting the opportunity for one party to blurt out potentially damaging information in the midst of a trial and then use the privilege to block the other party from contesting the truth.

To address this anomaly, the Drafters added Section 5(b), a preclusion provision to cover situations in which the parties do not expressly waive the privilege but engage in conduct inconsistent with the assertions of the privilege, and that cause prejudice. As under existing interpretations for other communications privileges, waiver through preclusion would not typically constitute a waiver with respect to all mediation communications, only those related in subject matter. *See generally* Unif. R. Evid. R. 510 and 511 (1986).

Critically, the preclusion provision applies only if the disclosure prejudices another in a proceeding. It is not intended to encompass the casual recounting of the mediation session to a neighbor that is not admissible in court, but would include

disclosure that would, absent the exception, allow one party to take unfair advantage of the privilege. For example, if one party's attorney states in court that the other party admitted destroying evidence during mediation, that party should not be able to block the use of testimony to refute that statement later in that proceeding. Such advantage-taking or opportunism would be inconsistent with the policy rationales that support continued recognition of the privilege, while the casual conversation would not. Thus, if Andy and Betty were the parties in a mediation, and Andy affirmatively stated in court that Betty admitted destroying evidence during the mediation, Andy is precluded from asserting that A did not waive the privilege. If Betty decides to waive as well, evidence of Andy's and Betty's statements during mediation may be admitted.

Analogous doctrines have developed regarding constitutional privileges, *Harris v. New York*, 401 U.S. 222, 224 (1971) (shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances), and the rule of completeness in Rule 106 of the Uniform Rules of Evidence, which states that if one party introduces part of a record, an adverse party may introduce other parts when to do otherwise would be unfair.

Finally, it is worth noting that in arbitration, which is sometimes conducted without an ongoing record, it will be important for waiving parties to ask the arbitrator to note the waiver. Any individual who wants notice that another has received a subpoena for mediation communications or has waived the privilege can provide for notification as a clause in the agreement to mediate or the mediated agreement.

2. Section 5(c). Preclusion for use of mediation to plan or commit crime.

This preclusion reflects a common practice in the States of exempting from confidentiality protection those mediation communications that relate to the ongoing or future commission of a crime, as discussed in the Reporter's Notes to Section 6(a)(4). However, it narrows the preclusion, thus retaining broader confidentiality, and removes the privilege protection only when an actor uses or attempts to use the mediation itself to further the commission of a crime, rather than lifting the confidentiality protection more broadly to any discussion of crimes. For example, it would preclude gang members from claiming that a meeting to plan a drug deal was really a mediation that would privilege those communications in a later criminal or civil case.

This Section should be read together with Section 6(a)(4), which applies to particular communications within a mediation which are used for the same purposes. The two differ on the purpose of the mediation: Section 5(c) applies when the mediation itself is used to further a crime, while Section 6(a)(4) applies to matters that are being mediated for other purposes but which include discussion of acts or statements that may be deemed criminal in nature. Under Section 5(c), the preclusion applies to all mediation communications because the purpose of the mediation frustrates public policy. Under Section 6(a)(4), the preclusion only applies to those mediation communications that have

a criminal character; the privilege may still be asserted to block the introduction of other communications made during the mediation. This rationale is discussed more fully in the Comments to Section 6(a)(4).

SECTION 6. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the

[Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]

[Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Legislative Note: If the enacting state does not have an open records act, the following language in paragraph (2) of subsection (a) needs to be deleted: "available to the public under [insert statutory reference to open records act] or".

Reporter's Notes

1. In general.

This Section articulates specific and exclusive exceptions to the broad grant of privilege provided to mediation communications in Section 4. As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the Act contemplates that a court will hold an in camera proceeding at which the claim for exemption from the privilege can be confidentially asserted and defended. *See, e.g.*, Rinaker v. Superior Court, 74 Cal. Rptr.2d 464, 466 (Ct. App. 1998); *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110, 1131-33 (N.D. Cal. 1999) (discussing whether an in camera hearing is necessary).

The exceptions in Section 6(a) apply regardless of the need for the evidence because society's interest in the information contained in the mediation communications may be said to categorically outweigh its interest in the confidentiality of mediation communications. In contrast, the exceptions under Section 6(b) would apply only in situations where the relative strengths of society's interest in a mediation communication and mediation participant interest in confidentiality can only be measured under the facts and circumstances of the particular case. In these situations, the Act establishes what is in effect a presumption of privilege, which may be rebutted in an off-the-record hearing in which the proponent of the evidence must meet a high standard of need by demonstrating that the evidence is otherwise unavailable and that the need for it in the case at bar substantially outweighs the state's interest in protecting the confidentiality of mediation. In other words, the exceptions listed in 6(b) include situations that should remain confidential but for overriding concerns for justice.

2. Section 6(a)(1). Record of an agreement.

This exception would permit evidence of a signed agreement, such as an agreement to mediate, an agreement regarding how the mediation should be conducted -- including whether the parties and mediator may disclose outside of proceedings, or, more commonly, written agreements memorializing the parties' resolution of the dispute. The exception permits such an agreement to be introduced in a subsequent court proceeding convened to determine whether the terms of that settlement agreement had been breached.

The words "agreement evidenced by a record" and "signed" refer to written and executed agreements, those recorded by tape recorded and ascribed to by the parties on the tape, and other electronic means to record and sign, as defined in Sections 2(9) and 2(10). In other words, a participant's notes about an oral agreement would not be a signed agreement. On the other hand, the following situations would be considered a signed agreement: a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement.

Written agreements are commonly excepted from mediation confidentiality protections, permitting the Act to embrace current practices in a majority of States. *See* Ariz. Rev. Stat. Ann. Section 12-2238 (1993); Cal. Evid. Code Section 1120(1) (West 1997) (general); Cal. Evid. Code Section 1123 (West 1997) (general); Cal. Gov't. Code Section 12980(i) (West 1998) (housing discrimination); Colo. Rev. Stat. Section 24-34-506.5 (1993) (housing discrimination); Ga. Code Ann. Section 45-19-36(e) (1989) (fair employment); 775 Ill. Comp. Stat. Section 5/7B-102(E)(3) (1989) (human rights); Ind. Code Section 679.2 (1998) (general); Iowa. Code Ann. Section 216.15(B) (1999) (civil rights); Ky. Rev. Stat. Ann. Section 344.200(4) (1996) (civil rights); La. Rev. Stat. Ann. Section 9:4112(B)(1)(c) (1997) (general); La. Rev. Stat. Ann. Section 51:2257(D) (1998) (human rights); 5 Me. Rev. Stat. Ann. Section 4612(1)(A) (1995) (human rights); Md. Code 1957 Ann. Art. 49(B) Section 28 (1991) (human rights); Mass. Gen. Laws. ch. 151B, Section 5 (1991) (job discrimination); Mo. Rev. Stat. Section 213.077 (1992) (human rights); Neb. Rev. Stat. Section 43-2908 (1993) (parenting act); N.J. Stat. Ann. Section 10:5-14 (1992) (civil rights); Or. Rev. Stat. Ann. Section 36.220(2)(a) (1997) (general); Or. Rev. Stat. Ann. 36.262 (1989) (agricultural foreclosure); 42 Pa. Consol. Stat. Section 5949(b)(1) (1996) (general); Tenn. Code Ann. Section 4-21-303(d) (1996) (human rights); Tex. Gov't. Code Ann. Section 2008.057 (1999) (Administrative Procedure Act); Vt. R. Civ. P., Rule 16.3 (1998) (general civil); Va. Code Ann. Section 8.01-576.10 (1994) (general); Va. Code Ann. Section 8.01-581.22 (1988) (general); Wash. Rev. Code Section 5.60.070 (1)(e) and (f) (1993) (1993) (general); Wash. Rev. Code Section 26.09.015(3) (1991) (divorce); Wash. Rev. Code Section 49.60.240 (1995) (human rights); W.Va. Code Section 5-11A-11(b)(4) (1992) (fair housing); W.Va. Code Section 6B-2-4(r) (1990) (public employees); Wis. Stat. Section 767.11(12) (1993) (family court); Wis. Stat. Section 904.085(4)(a) (1997) (general).

This exception is noteworthy only for what is not included: oral agreements. The disadvantage of exempting oral settlements is that nearly everything said during a mediation session could bear on either whether the parties came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule of privilege. As a result, mediation participants might be less candid, not knowing whether a controversy later would erupt over an oral agreement. Unfortunately, excluding evidence of oral settlements reached during a mediation session would operate to the disadvantage of a less legally sophisticated party who is accustomed to the enforcement of oral settlements reached in negotiations. Such a person might also mistakenly assume the admissibility of evidence of oral settlements reached in mediation as well. However, because the majority of courts and statutes limit the confidentiality exception to signed written agreements, one would expect that mediators and others will soon incorporate knowledge of a writing requirement into their practices. *See Vernon v. Acton*, 732 N.E.2d 805 (Ind., 2000) (citing draft Uniform Mediation Act); *Ryan v. Garcia*, 27 Cal. App.4th 1006, 1012 (1994) (privilege statute precluded evidence of oral agreement); *Hudson v. Hudson*, 600 So.2d 7,9 (Fla. App. 1992) (privilege statute precluded evidence of oral settlement); Ohio Rev. Code Ann. Section 2317.023 (West 1996). For an example of a state statute permitting the enforcement of oral agreements

under certain narrow circumstances, *see* Cal. Evid. Code Section 1118, 1124 (West 1997) (providing that oral agreement must be memorialized in writing within 72 hours).

Despite the limitation on oral agreements, the Act leaves parties other means to preserve the agreement quickly. For example, parties can agree that the mediation has ended, state their oral agreement into the tape recorder and record their assent. *See Regents of the University of California v. Sumner*, 42 Cal. App. 4th 1209, 1212 (1996). This approach was codified in Cal. Evid. Code Section 1118, 1124 (West 1997).

The parties may still provide that particular settlements agreements are confidential with regard to disclosure to the general public, and provide for sanctions for the party who discloses voluntarily. *See* Stephen A. Hochman, *Confidentiality in Mediation: A Trap for the Unwary,* SB41 ALI-ABA 605 (1995). However, confidentiality agreements reached in mediation, like those in other settlement situations, are subject to the need for evidence and public policy considerations. *See* Cole et al., *supra*, Section 9.23, 9.25.

3. Section 6(a)(2). Mediations open to the public; meetings and records made open by law.

Section 6(a)(2) makes clear that the privileges in Section 4 do not preempt state open meetings and open records laws, thus deferring to the policies of the individual States regarding the types of meetings that will be subject to these laws. In addition, it provides an exception when the mediation is opened to the public, such as a televised mediation.

This exception recognizes that there should be no after-the-fact confidentiality for communications that were made in a meeting that was either voluntarily open to the public – such as a workgroup meeting in a federal negotiated rule making that was made open to the general public, even though not required by Federal Advisory Committee Act (FACA) to be open – or was required to be open to the public pursuant to an open meeting law. For example, the Act would provide no privilege if an agency holds a closed meeting but FACA would require that it be open. This exception also applies if a meeting was properly closed but an open record law requires that the meeting summaries or other documents – perhaps even a transcript – be made available under certain circumstances, e.g. the Federal Sunshine Act (5 U.S.C. 552b (1995). In this situation, only the records would be excepted from the privilege, however.

4. Section 6(a)(3). Threats of bodily injury or to commit a crime of violence.

The policy rationales supporting the privilege do not support mediation communications that threaten bodily injury or crimes of violence. To the contrary, in cases in which a credible threat has been made disclosure would serve the public interest in safety and the protection of others. Because such statements are sometimes made in anger with no intention to commit the act, the exception is a narrow one that applies only

to the threatening statements; the remainder of the mediation communication remains protected against disclosure.

State mediation confidentiality statutes frequently recognize a similar exception. *See* Alaska Stat. Section 47.12.450(e) (1998) (community dispute resolution centers) (admissible to extent relevant to a criminal matter); Colo. Rev. Stat. Section 13-22-307 (1998) (general) (bodily injury); Kan. Stat. Ann. Section 23-605(b)(5) (1999) (domestic relations) (mediator may report threats of violence to court); Or. Rev. Stat. Section 36.220(6) (1997) (general) (substantial bodily injury to specific person); 42 Pa. Cons. St. Ann. Section 5949(2)(I) (1996) (general) (threats of bodily injury); Wash. Rev. Code Section 7.75.050 (1984) (community dispute resolution centers) (threats of bodily injury); Wyo. Stat. Section 1-43-103 (c)(ii) (1991) (general) (future crime or harmful act).

5. Section 6(a)(4). Communications used to plan or commit a crime.

The policies underlying this provision mirror those underlying Section 5(c), and are discussed there. This exception applies to particular communications used to plan or commit a crime, whereas Section 5(c) applies when the mediation is used for these purposes. It includes communication intentionally used to conceal an ongoing crime or criminal activity.

Almost a dozen States currently have mediation confidentiality protections that contain exceptions related to a commission of a crime. Colo. Rev Stat. Section 13-22-307 (1991) (general) (future felony); Fla. Stat. Ann. Section 723.038 (mobile home parks) (ongoing or future crime or fraud); Iowa Code Section 216.15B (1999) (civil rights); Iowa Code Section 654A.13 (1990) (farmer-lender); Iowa Code Section 679C.2 (1998) (general) (ongoing or future crimes); Kan. Stat. Ann. Section 23-605(b)(3) (1989) (ongoing and future crime or fraud); Kan. Stat. Ann. Section 44-817(c)(3) (1996) (labor) (ongoing and future crime or fraud); Kan. Stat. Ann. Section 75-4332(d)(3) (1996) (public employment) (ongoing and future crime or fraud); 24 Me. Rev. Stat. Ann. Section 2857(2) (1999) (health care) (to prove fraud during mediation); Minn. Stat. Section 595.02(1)(a) (1996) (general); Neb. Rev. Stat. Section 25-2914 (1994) (general) (crime or fraud); N.H. Rev. Stat. Ann. Section 328-C:9(III) (1998) (domestic relations) (perjury in mediation); N.J. Stat Ann. Section 34:13A-16(h) (1997) (workers' compensation) (any crime); N.Y. Lab. Laws Section 702-a(5) (McKinney 1991) (past crimes) (labor mediation); Or. Rev. Stat. Ann. Section 36.220(6) (1997) (general) (future bodily harm to a specific person); S.D. Codified Laws Section 19-13-32 (1998) (general) (crime or fraud); Wyo. Stat. Ann. Section 1-43-103(c)(ii) (1991) (future crime).

While ready to exempt attempts to commit or the commission of crimes from confidentiality protection, the Drafting Committees declined to cover "fraud" that would not also constitute a crime because civil cases frequently include allegations of fraud, with varying degrees of merit, and the mediation would appropriately focus on discussion of fraud claims. Some state statutes do exempt fraud, although less frequently than they

do crime. *See, e.g.*, Fla. Stat. Ann. Section 723.038(8) (1994) (mobile home parks) (communications made in furtherance of commission of crime or fraud); Kan. Stat. Ann. Section 23-605(b)(3) (1999) (domestic relations) (ongoing crime or fraud); Kan. Stat. Ann. Section 44-817(c)(3) (1996) (labor) (ongoing crime or fraud); Kan. Stat. Ann. Section 60-452(b)(3) (1964) (general) (ongoing or future crime or fraud); Kan. Stat. Ann. Section 75-4332(d)(3) (1996) (public employment) (ongoing or future crime or fraud); Neb. Rev. Stat. Section 25-2914 (1994) (general) (crime or fraud); S.D. Codified Laws Section 19-13-32 (1998) (general) (crime or fraud).

Significantly, this exception does not cover mediation communications constituting admissions of past crimes, or past potential crimes, which remain privileged. Thus, for example, discussions of past aggressive positions with regard to taxation or other matters of regulatory compliance in commercial mediations remain privileged against possible use in subsequent or simultaneous civil proceedings. The Drafting Committees discussed the possibility of creating an exception for the related circumstance in which a party makes an admission of past conduct that portends future bad conduct. However, they decided against such an expansion of this exception because such past conduct can already be disclosed in other important ways. The other parties can warn others, because parties are not prohibited from disclosing by the Act. The Act permits the mediator to disclose if required by law to disclose felonies or if public policy requires.

It is important to emphasize that the Act's limited focus as an evidentiary and discovery privilege, rather than a broader rule of confidentiality means that this privilege provision would not prevent a party from calling the police, or warning someone in danger.

Finally, it should be noted that this exception is intended to prevent the abuse of the privilege as a shield to evidence that might be necessary to prosecute or defend a crime. The Drafters recognize that it is possible that the exception itself could be abused. Such unethical or bad faith conduct would continue to be subject to traditional sanction standards.

6. Section 6(a)(5). Evidence of professional misconduct or malpractice by the mediator.

The rationale behind the exception is that disclosures may be necessary to promote accountability of mediators by allowing for grievances to be brought against mediators, and as a matter of fundamental fairness, to permit the mediator to defend against such a claim. Moreover, permitting complaints against the mediator furthers the central rationale that States have used to reject the traditional basis of licensure and credentialing for assuring quality in professional practice: that private actions will serve an adequate regulatory function and sift out incompetent or unethical providers through liability and the rejection of service. *See, e.g.*, W. Lee Dobbins, *The Debate Over*

Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?, U. Fla. J. L. & Pub. Pol'y 95, 96-98 (1995).

7. Section 6(a)(6). Evidence of professional misconduct or malpractice by a party or representative of a party.

Sometimes the issue arises whether anyone may provide evidence of professional misconduct or malpractice occurring during the mediation. *See In re Waller*, 573 A.2d 780 (D.C. App. 1990); *see generally* Pamela Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U.L. Rev. 715, 740-751. The failure to provide an exception for such evidence would mean that lawyers and fiduciaries could act unethically or in violation of standards without concern that evidence of the misconduct would later be admissible in a proceeding brought for recourse. This exception makes it possible to use testimony of anyone except the mediator in proceedings at which such a claim is made or defended. Because of the potential adverse impact on a mediator's appearance of impartiality, the use of mediator testimony is more guarded, and therefore protected by Section 6(c). It is important to note that evidence fitting this exception would still be protected in other types of proceedings, such as those related to the dispute being mediated.

Reporting requirements operate independently of the privilege and this exception. Mediators and other are not precluded by the Act from reporting misconduct to an agency or tribunal other than one that might make a ruling on the dispute being mediated, which is precluded by Section 8(a) and (b).

8. Section 6(a)(7). Evidence of abuse or neglect.

An exception for child abuse and neglect is common in domestic mediation confidentiality statutes, and the Act reaffirms these important policy choices States have made to protect their citizens. *See, e.g.*, Iowa. Code Ann. Section 679c.3(4) (1998) (general); Kan. Stat. Ann. Section 23-605(b)(2) (1999) (domestic relations); Kan. Stat. Ann. Section 38-1522(a) (1997) (general); Kan. Stat. Ann. Section 44-817©)(2) (1996) (labor); Kan. Stat. Ann. Section 72-5427(e)(2) (1996) (teachers); Kan. Stat. Ann. Section 75-4332(d)(1) (1996) (public employment); Minn. Stat. Ann. Section 595.02(2)(a)(5) (1996) (general); Mont. Code Ann. Section 41-3-404 (1999) (child abuse investigations) (mediator may not be compelled to testify); Neb. Rev. Stat. Section 43-2908 (1993) (parenting act) (in camera); N.H. Rev. Stat. Ann. Section 328-C:9(III)(c) (1998) (marital); N.C. Gen. Stat. Section 7A-38.1(L) (1999) (superior court); N.C. Gen. Stat. Section 7A-38.4(K) (1999) (district courts); Ohio Rev. Code Ann. Section 3109.052(c) (West 1990) (child custody); Ohio Rev. Code Ann. Section 5123.601 (West 1988) (mental retardation); Ohio Rev. Code Ann. Section 2317.02 (1998) (general); Or. Rev. Stat. Section 36.220(5) (1997) (general); Tenn. Code Ann. Section 36-4-130(b)(5) (1993) (divorce); Utah Code Ann. Section 30-3-38(4) (2000) (divorce) (mediator shall report); Va. Code Ann. Section 63.1-248.3(A)(10)

(2000) (welfare); Wis. Stat. Section 48.981(2) (1997) (social services): Wis. Stat. Section 904.085(4)(d) (1997) (general); Wyo. Stat. Section 1-43-103(c)(iii) (1991) (general). *But see* Ariz. Rev. Stat. Ann. Section 8-807(B) (West 1998) (child abuse investigations) (rejecting rule of disclosure).

By referring to "child and adult protective services agency," the exception broadens the coverage to include the elderly and disabled if that State has protected them by statute and has created an agency enforcement process. It should be stressed that this exception applies only to permit disclosures in public agency proceedings in which the agency is a party or nonparty participant. The exception does not apply in private actions, such as divorce, because the need for the evidence is not as great as in proceedings brought to protect against abuse and neglect so that the harm can be stopped, and is outweighed by the policy of promoting candor during mediation. For example, in a mediation between Husband and Wife who are seeking a divorce, Husband admits to sexually abusing a child. Husband's admission would not be privileged in an action brought by the public agency to protect the child, but would be privileged in the divorce hearings.

The last bracketed phrases make an exception to the exception to privilege of mediation communications in certain mediations involving such public agencies. Child protection agencies in many States have created mediation programs to resolve issues that arise because of allegations of abuse. Those advocating the use of mediation in these contexts point to the need for privilege to promote the use of the process, and these alternatives provide it. National Council of Juvenile and Family Court Judges, *Resource Guidelines: Improving the Child Abuse and Neglect Court Process*, 1995. These alternatives are bracketed and offered to the states as recommended model provisions because of concerns raised by some mediators of such cases that mediator testimony sometimes can be necessary and appropriate to secure the safety of a vulnerable party in a situation of abuse. *See* Letter from American Bar Association Commission on Mental and Physical Disability Law, November 15, 2000 (on file with Drafting Committees).

The words "child or adult protection" are bracketed so that States using a different term or encouraging mediation of disputes arising from abuse of other protected classes can add appropriate language.

Each state may chose to enact either Alternative A or Alternative B. The Alternative A exception only applies to cases referred by the court or public agency. In this situation, allegations already have been made in an official context and a court has made the determination that settlement of that case is in the public interest by referring it to mediation. In Alternative B exception, no court referral is required. A state enacting Alternative B would be adopting a policy that it is sufficient that the public agency favors settlement of a particular case by its participation in the mediation.

The term "public agency" may have to be modified in a State in which a private agency is charged by law to assume the duties to protect children in these contexts.

9. Section 6(b). Exceptions requiring demonstration of need.

The exceptions under this Section constitute less common fact patterns that may sometimes justify carving an exception, but only when the unique facts and circumstances of the case demonstrate that the evidence is otherwise unavailable, and the need for the evidence outweighs the policies underlying the privilege. Thus, Section 6(b) effectively places the burden on the proponent to persuade the court on these points. The evidence will not be disclosed absent a finding on these points after an in camera hearing. Further, under Section 6(d) the evidence will be admitted only for that limited purpose.

10. Section 6(b)(1). Felony [and misdemeanors].

As noted in the commentary to Section 6, point 5, the Act affords more specialized treatment for the use of mediation communications in subsequent felony proceedings, which reflects the unique character, considerations, and concerns that attend the need for evidence in the criminal process. States may also wish to extend this specialized treatment to misdemeanors, and the Drafters offer appropriate model language for states in that event.

Existing privilege statutes are silent or split as to whether they apply only to civil proceedings, apply also to some juvenile or misdemeanor proceedings, or apply as well to all criminal proceedings. The split among the States reflects clashing policy interests. One the one hand, mediation participants operating under the benefit of a privilege might reasonably expect that statements made in mediation would not be available for use in a later felony prosecution. The candor this expectation promotes is precisely that which the mediation privilege seeks to protect. It is also the basis upon which many criminal courts throughout the country have established victim-offender mediation programs, which have enjoyed great success in misdemeanor, and, increasingly, felony cases. *See* generally Nancy Hirshman, *Mediating Misdemeanors: Big Successes in Smaller Cases*, 7 DISP. RESOL MAG. 12 (Fall 2000); Mark S. Umbreit, The Handbook of Victim Offender Mediation (2001). Public policy, for example, specifically supports the mediation of gang disputes, for example, and these programs may be less successful if the parties cannot discuss the criminal acts underlying the disputes. Cal. Penal Code Section 13826.6 (West 1996) (mediation of gang-related disputes); Colo. Rev. Stat. Section 22-25-104.5 (1994) (mediation of gang-related disputes).

On the other hand, society's need for evidence to avoid an inaccurate decision is greatest in the criminal context – both for evidence that might convict the guilty and exonerate the innocent -- because the stakes of human liberty and public safety are at their zenith. For this reason, even without this exception, the courts can be

expected to weigh heavily the need for the evidence in a particular case, and sometimes will rule that the defendant's constitutional rights require disclosure. *See Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 466 (Ct. App. 1998) (juvenile's constitutional right to confrontation in civil juvenile delinquency trumps mediator's statutory right not to be called as a witness); *State v. Castellano*, 460 So.2d 480 (Fla. App. 1984) (statute excluding evidence of an offer of compromise presented to prove liability or absence of liability for a claim or its value does not preclude mediator from testifying in a criminal proceeding regarding alleged threat made by one party to another in mediation). *See also Davis v. Alaska*, 415 U.S. 308 (1974).

After great consideration and public comment, the Drafting Committees decided to leave the critical balancing of these competing interests to the sound discretion of the courts to determine under the facts and circumstances of each case. Critically, it is drafted in a manner to ensure that the same right to evidence introduced by the prosecution, thus assuring a level playing field. In addition, it puts the parties on notice of this limitation on confidentiality.

11. Section 6(b)(2). Validity and enforceability of settlement agreement.

This exception is designed to preserve traditional contract defenses to the enforcement of the mediated settlement agreement that relate to the integrity of the mediation process, which otherwise would be unavailable if based on mediation communications. A recent Texas case provides an example. An action was brought to enforce a mediated settlement. The defendant raised the defense of duress and sought to introduce evidence that he had asked the mediator to permit him to leave because of chest pains and a history of heart trouble, and that the mediator had refused to let him leave the mediation session. *See Randle v. Mid Gulf, Inc.*, No. 14-95-01292, 1996 WL 447954 (Tex App. 1996) (unpublished). The exception might also allow party testimony in a personal injury case that the driver denied having insurance, causing the plaintiff to rely and settle on that basis, where such a misstatement would be a basis for reforming or avoiding liability under the settlement. Under this exception the evidence will not be privileged if the weighing requirements are met. This exception differs from the exception for a record of an agreement in Section 6(a)(1) in that Section 6(a)(1) only exempts the admissibility of the record of the agreement itself, while the exception in Section 6(b)(2) is broader in that it would permit the admissibility of other mediation communications that are necessary to establish or refute a defense to the validity of a mediated settlement agreement.

12. Section 6(c). Mediator not compelled.

Section 6(c) allows the mediator to decline to testify or otherwise provide evidence in a professional misconduct and mediated settlement enforcement cases to protect against frequent attempts to use the mediator as a tie-breaking witness, which would undermine the integrity of the mediation process and the impartiality of the

individual mediator. Nonetheless, the parties and others may testify or provide evidence in such cases.

This Section is discussed in the comments to Sections 6(a)(7) and 6(b)(2). The mediator may still testify voluntarily if the exceptions apply, or the parties waive their privilege, but the mediator may not be compelled to do so.

13. Section 6(d). Limitations on exceptions.

This Section makes clear the limited use that may be made of mediation communications that are admitted under the exceptions delineated in Sections 6(a) and 6(b). For example, if a statement evidencing child abuse is admitted at a proceeding to protect the child, the rest of the mediation communications remain privileged for that proceeding, and the statement of abuse itself remains privileged for the pending divorce or other proceedings.

SECTION 7. PROHIBITED MEDIATOR REPORTS.

(a) Except as required in subsection (b), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(b) A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under Section 6; or

(3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(c) A communication made in violation of subsection (a) may not be considered by a court, administrative agency, or arbitrator.

Reporter's Notes

1. Section 7. Disclosures by the mediator to an authority that may make a ruling on the dispute being mediated.

Section 7(a) prohibits communications by the mediator in prescribed circumstances. In contrast to the privilege, which gives a right to refuse to provide evidence in a subsequent legal proceeding, this Section creates a prohibition against disclosure.

Some states have already adopted similar prohibitions. *See, e.g.*, Cal. Evid. Code Section 1121 (West 1997); Fla. Stat. Ann. Section 373.71 (1999) (water resources); Tex. Civ. Prac. & Rem. Code Section 154.053 (c) (West 1999) (general). Disclosures of mediation communications to a judge also could run afoul of prohibitions against ex parte communications with judges. *See* Code of Conduct for Federal Judges, Canon 3(A)(3), 175 F.R.D. 364, 367 (1998); American Bar Association Model Code of Conduct of Judicial Conduct at 9. The purpose of this Section is consistent with the conclusions of seminal reports in the mediation field condemn the use of such reports as permitting coercion by the mediator and destroying confidence in the neutrality of the mediator and in the mediation process. *See* Society for Professionals in Dispute Resolution, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (1991); Center for Dispute Settlement, National Standards for Court-Connected Mediation Programs (D.C. 1992).

Importantly, the prohibition is limited to reports or other listed communications to those who may rule on the dispute being mediated. While the mediators are thus constrained in terms of reports to courts and others that may make rulings on the case, they are not prohibited from reporting threatened harm to appropriate authorities, for example, if learned during a mediation to settle a civil dispute. In this regard, Section 7(b)(3) responds to public concerns about clarity and makes explicit what is otherwise implied in the Act, that mediators are not constrained by this Section in their ability to disclose threats to the safety and well being of vulnerable parties to appropriate public authorities, and is consistent with the exception for disclosure in proceedings in Section 6(a)(7). Similarly, while the provision prohibits mediators from making these reports, it does not constrain the parties.

The communications by the mediator to the court or other authority are broadly defined. The provisions would not permit a mediator to communicate, for example, on whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement. Section 7(b)(1), however, does permit disclosure of particular facts, including attendance and whether a settlement was reached. For example, a mediator may report that one party did not attend and another attended only for the first five minutes. States with "good faith" mediation laws or court rules may want to consider the interplay between such laws and this Section of the Act.

SECTION 8. CONFIDENTIALITY. Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

Reporter's Notes

This Section restates the general rule in the states regarding the confidentiality of mediation communications outside the context of proceedings.

Typically, confidentiality agreements are enforceable against a signatory under state contract law, through damages and sometimes specific enforcement. *See, e.g., Doe v. Roe*, 93 Misc.2d 201, 400 N.Y.S.2d 668 (1977). This furthers the Act's underlying policy of party self-determination by permitting the parties to determine whether, when, and how statements made in mediation may be disclosed to friends, family members, business associates, the media and other third parties -- outside the context of proceedings that are covered by the privilege. It also draws a clear line to better guide the parties.

Section 8 was the culmination of efforts in several drafts to understand and manage the reasonable expectations of mediation participants regarding disclosures outside of proceedings. Early drafts were criticized by some in the mediation community for failing to impose an affirmative duty on mediation participants not to disclose mediation communications to third persons outside of the context of the proceedings at which the Section 4 privilege applies. In several subsequent drafts, the Drafters attempted to establish a rule that would prohibit such disclosures, but found it impracticable to do so without imposing a severe risk of civil liability on the many unknowing mediation participants who might discuss their mediations with friends and family members, for example, for any number of salutary reasons. In addition, the Drafters were deeply concerned about their capacity to develop a truly comprehensive list of legitimate and appropriate exceptions -- such as for the education and training of mediators, for the monitoring evaluation and improvement of court-related mediation programs, and for the reporting of threats to police and abuse to public agencies – as each draft drew forth more calls for legitimate and appropriate exceptions. Similarly, efforts to create a simpler rule with fewer exceptions but with greater judicial discretion to act as appropriate on a case-by-case basis to prevent "manifest injustice" also met severe resistance from many different sectors of the mediation community, as well as a number of state Bar ADR committees. Finally, recognizing the important role of non-lawyer

mediators and the many people who participate in mediations without counsel or knowledge of the law, the Drafters were concerned about the intelligibility and accessibility of the provisions.

In the end, the Drafters ultimately chose to draw a clear line, and to follow the general practice in the states of leaving the disclosure of mediation communications outside of proceedings to the good judgment of the parties to determine in light of the unique characteristics and circumstances of their dispute.

Finally, special note should be made of the language "or provided by other law or rule of this State." This language has two critical effects. First, it makes clear that the Act does not preempt current court rules or statutes that may impose a duty of confidentiality outside of proceedings. *See* Texas Civ. Prac. & Rem. Section 154.073 (a) (arguably imposing a duty of non-disclosure outside the context of proceedings). Second, the language "or provided by other law or rule of this State" also puts parties on notice that the parties' capacity to contract for this aspect of confidentiality, while broad, is subject to the limitations of existing State law. This recognizes the important policy choices that the State already has made through its various mechanisms of law.

For example, such a contract would be subject to the rule in some states that would permit or require a mediator to reveal information if there is a present and substantial threat that a person will suffer death or substantial bodily harm if the mediator fails to take action necessary to eliminate the treat. *See, e.g., Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976) (en banc) (permitting action against psychotherapist who knows of a patient's dangerousness and fails to warn the potential victim). The mediator in such a case may first wish to secure a determination by a court, in camera, that the facts of the particular case justify or indeed dictate divulging the information to prevent reasonably certain death or substantial bodily harm. *See*, for example, ABA Rule 1.6(b)(1) and accompanying commentary; 5 U.S.C. Section 574(a)(4)(C). This result is consistent with the ABA/AAA/SPIDR Model Standards of Conduct for Mediators, and the American Bar Association's revised the Standards of Conduct for Attorneys.

In addition, under contract law the courts may make exceptions to enforcement for public policy reasons. *See, e.g., Equal Employment Opportunity Commission v. Astra USA*, 94 F.3d 738 (1st Cir. 1996). Such agreements are typically not enforceable by non-signatories. They are also not enforceable if they conflict with public records requirements. *See, e.g. Anchorage School Dist. v. Anchorage Daily News*, 779 P.2d 1191 (Alaska 1989); *Pierce v. St. Vrain Valley School District*, 1997 WL 94120 (Colo. Ct. App. Div. 1 1997). The use of mediation communications as evidence in proceedings is governed by Section 4-7, and the signatories of a confidential agreement cannot expand the scope of the privilege.

SECTION 9. MEDIATOR'S DISCLOSURE OF CONFLICTS OF INTEREST; BACKGROUND.

(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(d) A person that violates subsection [(a) or (b)][(a), (b), or (g)] is precluded by the violation from asserting a privilege under Section 4.

(e) Subsections (a), (b), [and] (c), [and] [(g)] do not apply to an individual acting as a judge.

(f) This [Act] does not require that a mediator have a special qualification by background or profession.

[(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.]

Reporter's Notes

1. Sections 9(a) and 9(b). Disclosure of mediator's conflicts of interest.

a. In general.

This Section provides legislative support for the professional standards requiring mediators to disclose their conflicts of interest. *See, e.g,* American Arbitration Association, American Bar Association & Society of Professionals in Dispute Resolution, Model Standards of Conduct for Mediators, Standard III (1995); Model Standards of Practice for Family and Divorce Mediation, Standard IV (2001); National Standards for Court-Connected Mediation Programs, Standard 8.1(b) (1992). It is consistent with the ethical obligations imposed on other ADR neutrals. *See* Revised Uniform Arbitration Act (2000) Section 12; Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, Section 2(B) (1985) (required disclosures).

Sections 7(a)(2) and 7(b) make clear that the duty to disclose is a continuing one.

b. Reasonable duty of inquiry

The phrase in Section 9(b)(1) "make an inquiry that is reasonable under the circumstances" makes clear that the mediator's burden of inquiry into possible conflicts is not absolute, but rather is one that is consistent with the purpose of the Section: to make the parties aware of any conflict of interest that could lead the parties to believe that the mediator has an interest in the outcome of the dispute. Such disclosure fulfills the reasonable expectations of the parties, and furthers the Act's core principles of party self-determination and informed consent by assuring the parties that they will have sufficient information about the mediator's potential conflicts of interests to make the determination about whether that mediator is acceptable for the dispute at hand.

One may reasonably anticipate many situations in which parties are willing to waive a conflict of interest; indeed, depending upon the dispute, the very fact that a mediator is familiar to both parties may best qualify the mediator to mediate that dispute. That choice, however, properly belongs to the parties after informed consent, and in preserving this autonomy, this provision not only confirms the integrity of the individual mediator, but also supports the integrity of the mediation process by providing a visible, fundamental, and familiar safeguard of public protection.

Critically, the reasonable inquiry language is also intended to convey the Drafters' intent to exclude inadvertent failures to disclose that would result in the loss of the mediator privilege. The duty of reasonable inquiry is specific to each mediation, and such an inquiry always would discover those conflicts that are sufficiently material as to call for disclosure. For example, stock ownership in a company that is a party to an employment discrimination matter that is being mediated would likely be identified under a reasonable inquiry, and should be disclosed to both parties under Section 9(a).

On the other hand, less substantial or merely arguable conflicts of interest may not be discoverable upon reasonable inquiry and that may therefore result in inadvertent nondisclosure. In the foregoing hypothetical, for example, the mediator may not be aware, or have any reason to be aware, that he or she has membership in the same country club as an officer or board member of the company. The failure to disclose this arguable conflict would be inadvertent, not a violation of Section 9(a) or (b), and therefore not subject to the loss of privilege sanction in Section 9(d).

The reasonable inquiry also depends on the circumstances. For example, if a small claims court refers parties to a mediator who has a volunteer attorney standing in court, the parties would not expect that mediator to check on conflicts with all lawyers in the mediator's firm in the five minutes between referral and mediation. Presumably, only conflicts known by the mediator would affect that mediation in any event.

c. Conflicts that must be disclosed

Section 9(b)(1) expressly states that mediators should disclose financial or personal interests, and personal relationships, that a "reasonable person would consider likely to affect the impartiality of the mediator." However, the Drafters chose the word "including" to convey their intent that these types of conflicts not be viewed as an exclusive list of that which must be disclosed. Again, the standard is one of reasonableness under the circumstances, given the Section's purpose in furthering informed consent and the integrity of the mediation process.

It should be stressed that the Drafters recognize that it is sometimes difficult for the practitioner to know precisely what must be disclosed under a reasonableness standard. Prudence, professional reputation, and indeed common practice would compel the practitioner to err on the side of caution in close cases. Moreover, mediators with full-time or otherwise extensive mediation practices may wish to avail themselves of the common technologies used by law firms to identify conflicts of interest. Finally in this regard, it is worth underscoring that this duty to disclose conflicts of interest is intended to further party self-determination and the integrity of the mediation process, and is not intended to provide a cover or vehicle for bad faith litigation tactics, such as fishing expeditions into a mediator's professional or personal background. Such conduct would continue to be subject to traditional sanction standards.

2. Section 9(c) and (f). Disclosure of mediator's qualifications

Sections 9(c) and (f) address the issue of mediator qualifications, and, like the conflicts of interest provision, are intended to further principles of party autonomy and informed consent. In particular, these Sections do not require mediators to have certain qualifications, specifically including a law degree; nor, unlike the conflicts of interest provision, do they impose an affirmative duty on the mediator to disclose qualifications. Rather, the mediator's obligation is responsive: if a party asks for the mediator's

qualifications to mediate a particular dispute, the mediator must provide those qualifications.

In some situations, the parties may make clear that they care about the mediator's substantive knowledge of the context of the dispute, or that they want to know whether the mediator in the past has used a purely facilitative mediation process or instead an evaluative approach. *Compare* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negotiation L. Rev. 7 (1996) *with* Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing The "Grid" Lock*, 24 Fla. State Univ. L. Rev. 985 (1997); *see generally Symposium*, Fla. State Univ. L. Rev. (1997). Experience mediating would seem important to some parties, and indeed this is one aspect of the mediator's background that has been shown to correlate with effectiveness in reaching settlement. *See, e.g.*, Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results, in Divorce Mediation: Theory and Practice*, 429, 436 (Folberg & Milne, eds., 1988); Roselle L. Wissler, *A Closer Look at Settlement Week*, 4 Disp. Resol. Mag. 28 (Summer 1998).

It must be stressed that the Act does not establish mediator qualifications. No consensus has emerged in the law, research, or commentary as to those mediator qualifications that will best produce effectiveness or fairness. As clarified by Section 9(f), mediators need not be lawyers. In fact, the American Bar Association Section on Dispute Resolution has issued a statement that "dispute resolution programs should permit all individuals who have appropriate training and qualifications to serve as neutrals, regardless of whether they are lawyers." ABA Section of Dispute Resolution Council Res., April 28, 1999.

At the same time, the law and commentary recognize that the quality of the mediator is important and that the courts and public agencies referring cases to mediation have a heightened responsibility to assure it. *See generally* Cole et al., *supra*, Section 11.02 (discussing laws regarding mediator qualifications); Center for Dispute Settlement, National Standards for Court-Connected Mediation Programs (1992); Society for Professionals in Dispute Resolution Commission on Qualifications, Qualifying Neutrals: The Basic Principles (1989); Society for Professionals in Dispute Resolution Commission on Qualifications, Ensuring Competence and Quality in Dispute Resolution Practice (1995); Society for Professionals in Dispute Resolution, Qualifying Dispute Resolution Practitioners: Guidelines for Court-Connected Programs (1997).

The decision of the Drafting Committees against prescribing qualifications should not be interpreted as a disregard for the importance of qualifications. Rather, respecting the unique characteristics that may qualify a particular mediator for a particular mediation, the silence of the Act reflects the difficulty of addressing the topic in a uniform statute that applies to mediation in a variety of contexts. Qualifications may be important, but they need not be uniform. It is not the intent of the Act to preclude a statute, court or administrative agency rule, arbitrator or contract between the parties

from requiring that a mediator have a particular background or profession; those decisions are best made by individual states, courts, governmental entities, and parties.

3. Section 9(d). Violation of disclosure [and impartiality] requirements.

a. In general

This provision makes clear that the mediator who violates the disclosure requirements of Sections 9(a) or (b) may not refuse to disclose a mediation communication or prevent another person from disclosing a mediation communication of the mediator, pursuant to Section 4(b)(2). If a state adopts the impartiality provision of Section 9(f), a violation of that provision triggers the same denial of the privilege. Only those states adopting the impartiality provision should adopt the second bracket [(a), (b), or (g)]; all other states should adopt the first bracket [(a) or (b)].

b. Only mediator privilege lost; party, nonparty participant privileges remain intact

Crucially, while the mediator who fails to comply with the Act's conflicts of interest and impartiality requirements loses the privilege for purpose of that mediation, the parties and the non-party participants retain their privilege for that mediation. Thus, in a situation in which the mediator has lost the privilege, for example, the parties may still come forward and assert their privilege, thus blocking the mediator who has lost the privilege from providing testimony about the affected mediation. Similarly, to the extent the mediator's purported testimony would be about the mediation communications of a nonparty participant, the nonparty participant may block the testimony if the mediator has lost the privilege.

The only person prejudiced by the violation is the mediator who failed to disclose a conflict [or who had a bias in the dispute], and as such the loss of privilege provides an important but narrowly tailored measure of accountability. Section 9(d) makes clear that mediators cannot avoid testifying in such situations.

The Drafters considered other sanctions for mediators who failed to disclose conflicts [or who were partial], such as criminal and civil sanctions. However, it rejected specifically providing for those options because of the possibility of discouraging people from becoming mediators, and because the loss of privilege sanction was deemed to be tailored to the precise harm caused by the violation.

c. Practical operation

The loss of privilege in this narrow context raises important practical questions with regard to how a party or a nonparty participant would know that the mediator may lose, or has lost, the privilege with respect to a particular mediation. This is significant because they should have the opportunity to decide whether they wish to assert their own privilege and block the mediator's testimony to the extent permitted by the privilege, or

to permit the testimony, consistent with the Act's underlying premises of party autonomy and informed consent.

As a practical matter, notice is not likely to be a concern in the typical case in which the mediation communications evidence is being sought in an action to set aside the mediated settlement agreement, or in a professional misconduct proceeding or action, arising out of the conflict of interest. The parties would be aware of the loss of privilege, and indeed, the loss of the privilege is consistent with the exceptions permitting such testimony in cases to establish the validity of the settlement agreement or professional misconduct. *See* Sections 6(a)(6) and 6(b)(2).

However, in the more remote situation in which these exceptions would not be applicable, and the mediator's testimony is sought under a claim that the privilege has been lost by virtue of the mediator's failure to disclose a conflict of interest, the notice issue becomes more problematic. It may be expected that the mediator would give notice to the other mediation participants who may be affected by such a request. It may also be expected under usual customs and practices that the party seeking the privileged testimony would move the matter before a court and provide notice to all interested persons who would have the right to assert the privilege. For a challenge to the mediation privilege, those interested parties would be the mediator, parties, and nonparty participants. In any event, mediation participants are advised to consider including notice provisions in their agreements to mediate that call for participants who receive subpoenas for privileged testimony to provide notice to the other participants of such a request.

As with the exceptions recognized under this Act, the Act anticipates that the question of whether a privilege has been lost would typically be decided by courts in an in camera proceeding that would preserve the confidentiality of the mediation communications that may be necessary to establish the validity of the loss of privilege claim. The materiality of the failure to disclose is not likely to be in issue in the more common situations in which the mediator's testimony is being sought in a case other than to establish the invalidity of a mediated settlement agreement or professional misconduct arising from the failure to disclose. However, in those rare other situations in which the mediator's testimony is being sought, the proponent of the evidence may also need to establish the materiality of the failure to disclose.

4. Section 9(e). Individual acting as a judge.

This Section averts a legislative prohibition on certain judicial actions, and defers to other more appropriate regulation of the judiciary. It extends the principles embodied in Section 3(b)(3), which places mediations conducted by judges who might make a ruling on the case outside the scope of the Act. The rationales described therein apply with equal force in this context.

5. [Section 9(g). Mediator impartiality.]

This provision is a bracketed to signal that it is suggested as a model provision and need not be part of a Uniform Act. "Impartiality" has been equated with "evenhandedness" in the Model Standards of Practice approved by the American Bar Association, American Association of Arbitrators, and the Society of Professionals in Dispute Resolution (now Association for Conflict Resolution). The mediator's employment situation may present difficult issues regarding impartiality. A mediator who is employed by one of the parties is not typically viewed as impartial, especially if the person who mediates also represents a party. In the representation situation, the mediator's overriding responsibility is toward a single party. For example, the parties' legal counsel would not be an impartial mediator. Ombuds often are obligated by ethical standards to be impartial, although they are employed by one of the parties.

While few would argue that it is almost always best for mediators to be impartial as a matter of practice, including such a requirement into a uniform law drew considerable controversy. Some mediators, reflecting a deeply and sincerely felt value within the mediation community that a mediator not be predisposed to favor or disfavor parties in dispute, persistently urged the Drafters to enshrine this value in the Act; for these, the failure to include the notion of impartiality in the Act would be a distortion of the mediation process. Other mediators, service providers, judges, mediation scholars, however, urged the Drafters not to include the term "impartiality" for a variety of reasons.

At least three are worth stressing. One pressing concern was that including such a statutory requirement would subject mediators to an unwarranted exposure to civil lawsuits by disgruntled parties. In this regard, mediators with a more evaluative style expressed concerns that the common practice of so-called "reality checking" would be used as a basis for such actions against the mediator. A second major concern was over the workability of such a statutory requirement. Scholarly research in cognitive psychology has confirmed many hidden but common biases that affect judgment, such as attributional distortions of judgment and inclinations that are the product of social learning and professional culturation. *See generally*, Daniel Kahneman and Amos Tversky, Choices, Values, and Frames (2000); Scott Plous, The Psychology of Judgment and Decision Making (1993). Similarly, mediators in certain contexts sometimes have an ethical or felt duty to advocate on behalf of a party, such as long-term care ombuds in the health care context. Third, some parties seek to use a mediator who has a duty to be partial in some respects—such as a domestic mediator who is charged by law to protect the interests of the children. It has been argued that such mediations should still be privileged.

For these and other reasons, the Drafting Committees determined that impartiality, like qualifications, was an issue that was important but that did not need to be included in a uniform law. Rather, out of regard for the gravity of the issue, the

Drafting Committees determined that it was enough to flag the issue for states to consider at a more local level, and to provide model language that may be helpful to states wishing to pursue the issue.

If this Section is adopted, the state should also chose the bracketed option with this Section in Section (d), so that a mediator who is not impartial is precluded from asserting the privilege. Section (e) makes this inapplicable to an individual acting as a judge, whose impartiality is governed by judicial cannons.

SECTION 10. PARTICIPATION IN MEDIATION. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

Reporter's Notes

The fairness of mediation is premised upon the informed consent of the parties to any agreement reached. *See Wright v. Brockett*, 150 Misc.2d 1031 (1991) (setting aside mediation agreement where conduct of landlord/tenant mediation made informed consent unlikely); *see generally*, Joseph B. Stulberg, *Fairness and Mediation*, 13 Ohio St. J. on Disp. Resol. 909, 936-944 (1998); Craig A. McEwen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317 (1995). Some statutes permit the mediator to exclude lawyers from mediation, resting fairness guarantees on the lawyer's later review of the draft settlement agreement. *See, e.g.*, Cal. Fam. Code Section 3182 (West 1993); McEwen, et al., 79 Minn. L. Rev., *supra*, at 1345-1346. At least one bar authority has expressed doubts about the ability of a lawyer to review an agreement effectively when that lawyer did not participate in the give and take of negotiation. Boston Bar Ass'n, Op. 78-1 (1979). Similarly, concern has been raised that the right to bring counsel might be a requirement of constitutional due process in mediation programs operated by courts or administrative agencies. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1095 (April 2000).

Some parties may prefer not to bring counsel. However, because of the capacity of attorneys to help mitigate power imbalances, and in the absence of other procedural protections for less powerful parties, the Drafting Committees elected to let the parties, not the mediator, decide. Also, their agreement to exclude counsel should be made after the dispute arises, so that they can weigh the importance in the context of the stakes involved.

The Act does not preclude the possibility of parties bringing multiple lawyers or translators, as often is common in international commercial and other complex mediations. The Act also makes clear that parties may be accompanied by a designated person, and does not require that person to be a lawyer. This provision is consistent with good practices that permit the *pro se* party to bring someone for support who is not a lawyer if the party cannot afford a lawyer.

Most statutes are either silent on whether the parties' lawyers can be excluded or, alternatively, provide that the parties can bring lawyers to the sessions. *See, e.g.*, Neb. Rev. Stat. Section 42-810 (1997) (domestic relations) (counsel may attend mediation); N.D. Cent. Code Section 14-09.1-05 (1987) (domestic relations) (mediator may not exclude counsel); Okla. Stat. tit. 12, Section 1824(5) (1998) (representative authorized to attend); Or. Rev. Stat. Section 107.600(1) (1981) (marriage dissolution) (attorney may not be excluded); Or. Rev. Stat. Section 107.785 (1995) (marriage dissolution) (attorney may not be excluded); Wis. Stat. Section 655.58(5) (1990) (health care) (authorizes counsel to attend mediation). Several States, in contrast, have enacted statutes permitting the exclusion of counsel from domestic mediation. *See* Cal. Fam. Code Section 3182 (West 1993); Mont. Code Ann. Section 40-4-302(3) (1997) (family); S.D. Codified Laws Section 25-4-59 (1996) (family); Wis. Stat. Section 767.11(10)(a) (1993) (family).

As a practical matter, this provision has application only when the parties are compelled to participate in the mediation by contract, law, or order from a court or agency. In other instances, any party or mediator unhappy with the decision of a party to be accompanied by an individual can simply leave the mediation. In some instances, a party may seek to bring an individual whose presence will interfere with effective discussion. In divorce mediation, for example, a new friend of one of the parties may spark new arguments. In these instances, the mediator can make that observation to the parties and, if the mediation flounders because of the presence of the nonparty, the parties or the mediator can terminate the mediation. The pre-mediation waiver of this right of accompaniment can be rescinded, because the party may not have understood the implication at that point in the process. However, this provision can be waived once the mediation begins. Limitations on counsel in small claims proceedings may be interpreted to apply to the small claims mandatory mediation program. If so, the States may wish to consider whether to provide an exception for mediation conducted within these programs.

The right to accompaniment does not operate to excuse any participation requirements for the parties themselves.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [Act] modifies, limits, or supersedes the

federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but this [Act] does not modify, limit, or supersede Section 101(c) of that Act or authorize electronic delivery of any of the notices described in Section 103(b) of that Act.

Reporter's Notes

This Section adopts standard language approved by the Uniform Law Conference that is intended to conform Uniform Acts with the Uniform Electronic Transactions Act (UETA) and its federal counterpart, Electronic Signatures in Global and National Commerce Act (E-Sign) (15 U.S.C 7001, etc seq. (2000).

Both UETA and E-Sign were written in response to broad recognition of the commercial and other use of electronic technologies for communications and contracting, and the consensus that the choice of medium should not control the enforceability of transactions. These Sections are consistent with both UETA and E-Sign. UETA has been adopted by the Conference and received the approval of the American Bar Association House of Delegates. As of December 2001, it had been enacted in more than 35 states.

The effect of this provision is to reaffirm state authority over matters of contract by making clear that UETA is the controlling law if there is a conflict between this Act and the federal E-sign law, except for E-sign's consumer consent provisions (Section 101(c) and its notice provisions (Section 103(b) (which have no substantive impact on this Act). Among other things, such clarification assures that agreements related to mediation – such as the agreement to mediate and the subsequently mediated settlement agreement – may not be challenged on the basis of a conflict between this Act and the federal E-sign law. Such challenges should be dismissed summarily by the courts.

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Act], consideration should be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

Reporter's Notes

One of the goals of the Uniform Mediation Act is to simplify the law regarding mediation. Another is to make the law uniform among the States. In most instances, the

Act will render unnecessary the other hundreds of different privilege statutes among the States, and these can be repealed. In fact, to do otherwise would interfere with the uniformity of the law.

However, the Drafters contemplate the Act as a floor in many aspects, rather than a ceiling, one that provides a uniform starting point for mediation but which respects the diversity in contexts, cultures, and community traditions by permitting states to retain specific features that have been tried and that work well in that state, but which need not necessarily be uniform. For example, as noted after Section 4, those States that provide specially that mediators cannot testify and impose damages from wrongful subpoena may elect to retain such provisions. Similarly, as discussed in the comments to Section 8, States with court rules that have confidentiality provisions barring the disclosure of mediation communications outside the context of proceedings may wish to retain those provisions because they are not inconsistent with the Act.

As discussed in the preface, point 5, the constructive role of certain laws regarding mediation can be performed effectively only if the provisions are uniform across the States. *See generally* James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 Ohio St. J. on Disp. Resol. 795 (1998). In this regard, the law may serve to provide not only uniformity of treatment of mediation in certain legal contexts, but can serve to help define what reasonable expectations may be with regard to mediation. The certainty that flows from uniformity of interpretation can serve to promote local, state, and national interests in the expansive use of mediation as an important means of dispute resolution.

While the Drafters recognize that some such variations of the mediation law are inevitable given the diverse nature of mediation, the specific benefits of uniformity should also be emphasized. As discussed in the Prefatory Notes, uniform adoption of the UMA will make the law of mediation more accessible and certain in these key areas. Practitioners and participants will know where to find the law, and they and courts can reasonably anticipate how the statute will be interpreted. Moreover, uniformity of the law will provide greater protection of mediation than any one state has the capacity to provide. No matter how much protection one state affords confidentiality protection, for example, the communication will not be protected against compelled disclosure in another state if that state does not have the same level of protection. Finally, uniformity has the capacity to simplify and clarify the law, and this is particularly true with respect to mediation confidentiality. Where many states have several different confidentiality provisions, most of them could be replaced with an integrated Uniform Mediation Act. Similarly, to the extent that there may be confusion between states over which state's law would apply to a mediation with an interstate character, uniformity simplifies the task of those involved in the mediation by requiring them to look at only one law rather than the laws of all affected states.

SECTION 13. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 14. EFFECTIVE DATE. This [Act] takes effect ..... .

SECTION 15. REPEALS. The following acts and parts of acts are hereby repealed:

(1)

(2)

(3)

Reporter's Notes

The Uniform Mediation Act was drafted such that it can be integrated into the fabric of most state legal regimes with minimal disruption of current law or practices. In particular, it is not the intent of the UMA to disrupt existing law in those few states that have well-established mediation processes by statute, court rules, or court decisions. For example, its privilege structure, exceptions, etc., is consistent with most of the hundreds of privilege statutes currently in the states.

Many of these can simply be repealed, and this Section provides the vehicle for so doing. However, states should take care not to repeal additional provisions that may be embedded within their state laws that may be desirable and which are not inconsistent with the provisions of the Act. An Act is still uniform if it provides for mediator incompetency or provides for costs and attorneys fees to mediators who are wrongfully subpoenaed. For example, in Ohio the Act would seem to replace the need for the generic privilege statute, O.R.C. 2317.023, and that part of the domestic mediation statute O.R.C. 3109.052 relating to privilege, but not the public records exception, O.R.C. 149.43 or failure to report a crime, O.R.C. 3109.052.

In contrast, Alabama has fewer statutes that would be subsumed by the Act. For example, the Act would seem to replace the need for the confidentiality provision in Ala. Code 24-4-12 (communications during conciliation sessions of complaints brought under Fair Housing Law are confidential unless parties waive in writing). The Act would also subsume certain sections of Ala.. Code 6-6-20, such as the definition of mediation and the provision permitting attorneys or support persons to accompany parties, but would not replace the provisions authorizing courts to refer cases to mediation under certain conditions and defining sanctions.

Many of the existing statutes deal with matters not covered by the Act and need not be repealed in order to provide uniformity because they would not be superceded by the Act. Common examples include authorization of mandatory mediation, standards for mediators, and funding for mediation programs. Similarly, the Act would not supercede statutes relating to mediator qualifications, such as O.R.C. 3109.052(A)(permitting local courts to establish mediator qualifications) and O.R.C. 4117.02(E)(authorizing state employment relations board to appoint mediators according to training, practical experience, education, and character). In such situations, an abundance of caution may counsel in favor of noting specifically in this Section which provisions of current state laws are not being repealed, as well as which ones are being repealed.

On the other hand, in those relatively few instances where the Act directly conflicts, or may directly conflict, with existing state law, states will want to consider the relationship between their current law and the Act. The most prominent examples include those states that have provisions barring attorneys from attending and participating in mediation sessions, and those states that current permit or require mediators to make reports to judges who may make rulings on the case.

SECTION 16. APPLICATION TO EXISTING AGREEMENTS OR REFERRALS.

(a) This [Act] governs a mediation pursuant to a referral or an agreement to mediate made on or after [the effective date of this [Act]].

(b) On or after [a delayed date], this [Act] govems an agreement to mediate whenever made.

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TX CIV PRAC & REM s 154.073
V.T.C.A., Civil Practice & Remedies Code § 154.073

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL PRACTICE AND REMEDIES CODE
TITLE 7. ALTERNATE METHODS OF DISPUTE RESOLUTION
CHAPTER 154. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES
SUBCHAPTER D. MISCELLANEOUS PROVISIONS

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§ 154.073. Confidentiality of Communications in Dispute Resolution Procedures

(a) Except as provided by Subsections (c) and (d), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

WEST'S CONNECTICUT GENERAL STATUTES UNANNOTATED
TITLE 52. CIVIL ACTIONS
CHAPTER 900. COURT PRACTICE AND PROCEDURE

Current through 2002 February Regular and May 9 Special Sessions

§ 52-235d. Mediation. Disclosure

(a) As used in this section, "mediation" means a process, or any part of a process, which is not court-ordered, in which a person not affiliated with either party to a lawsuit facilitates communication between such parties and, without deciding the legal issues in dispute or imposing a resolution to the legal issues, which assists the parties in understanding and resolving the legal dispute of the parties.

(b) Except as provided in this section, by agreement of the parties or in furtherance of settlement discussions, a person not affiliated with either party to a lawsuit, an attorney for one of the parties or any other participant in a mediation shall not voluntarily disclose or, through discovery or compulsory process, be required to disclose any oral or written communication received or obtained during the course of a mediation, unless (1) each of the parties agrees in writing to such disclosure, (2) the disclosure is necessary to enforce a written agreement that came out of the mediation, (3) the disclosure is required by statute or regulation, or by any court, after notice to all parties to the mediation, or (4) the disclosure is required as a result of circumstances in which a court finds that the interest of justice outweighs the need for confidentiality, consistent with the principles of law.

(c) Any disclosure made in violation of any provision of this section shall not be admissible in any proceeding.

(d) Nothing in this section shall prevent (1) the discovery or admissibility of any evidence that is otherwise discoverable merely because such evidence was presented during the course of the mediation, or (2) the disclosure of information for research or educational purposes done in cooperation with dispute resolution programs provided the parties and specific issues in controversy are not identifiable.

CREDIT(S)

2002 Electronic Update

(1998, P.A. 98-59, § 1.)

12 Okl. St. § 1805

OKLAHOMA STATUTES

*** CURRENT THROUGH THE 2003 SUPPLEMENT, 2002 SECOND REGULAR SESSION ***

TITLE 12. CIVIL PROCEDURE
CHAPTER 37. DISPUTE RESOLUTION ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

12 Okl. St. § 1805 (2003)

§ 1805. Confidentiality of proceedings--Disclosure--Civil liability--Waiver of privilege

A. Any information received by a mediator or a person employed to assist a mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential.

B. No part of the proceeding shall be considered a matter of public record.

C. No mediator, initiating party, or responding party in a mediation proceeding shall be subject to administrative or judicial process requiring disclosure of any matters discussed or shall disclose any information obtained during any part of the mediation proceedings.

D. Each mediation session shall be informal. No adjudication sanction or penalty may be made or imposed by the mediator or the program.

E. No mediator, employee, or agent of a mediator shall be held liable for civil damages for any statement or decision made in the process of mediating or settling a dispute unless the action of such person was a result of gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety, or property of any party to the mediation.

F. If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation, for purposes of that action the privilege provided for in subsection A of this section shall be deemed to be waived as to the party bringing the action.

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TOC: Oklahoma Statutes > TITLE 12. CIVIL PROCEDURE > CHAPTER 37. DISPUTE RESOLUTION ACT > **§ 1805. Confidentiality of proceedings--Disclosure--Civil liability--Waiver of privilege**
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MODEL SHIELD LAW FOR OMBUDSMAN
(Drafted by Model Shield Law Committee Representing
Various Ombudsman Organization - 2/18/97)

An Act to Establish an Ombudsman Privilege

Be it enacted by the Legislature of the State of _____:

Section 1. Definition. For the purposes of this Act, an Ombudsman is defined as:

a. a person appointed under a federal or state statute or local ordinance creating an ombudsman's office to investigate complaints regarding governmental agencies, officials, or employees, and who practices according to the law establishing the office; or

b. a person formally designated by a government body or for profit or not for profit corporation as an impartial dispute resolution practitioner or complaint handler; who functions independently of the administrative officials or employees who are the subjects of complaints or disputes; who maintains confidentiality; who provides assistance in resolving complaints or disputes; and who practices according to the code of ethics or standards of practice of a professional ombudsman association.

Section 2. Neither the Ombudsman nor his/her staff shall be compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties. All related memoranda, work product, notes, or case files of an Ombudsman are confidential and are not subject to discovery, subpoena, or other means of legal compulsion, and are not admissible in evidence in a judicial or administrative proceeding.

Section 3. This Act shall become effective_____.

ACCEPTABLE EXCEPTIONS TO THE MODEL ACT:

Section 3. Exceptions. The privilege described in this Act does not apply when:
a. the Ombudsman or his/her staff is personally witness to a felony; or
b. imminent risk of serious harm is communicated directly to the Ombudsman or his/her staff; or
c. where the Ombudsman has been asked to provide general information regarding the general operation of the Ombudsman's office and the general processes employed.

The Drafting Committee for the Model Shield Law included the efforts of Mary Simon (TOA) and Marie Ferguson (USOA), Convenor/Chairs; Ruth Cooperrider and Marshall Lux (USOA); Mary Rowe and Elizabeth Clark (TOA); Kerry Burke and Suzanne Belson (ACCUO); Lillian Santa-Maria (UCOA); Mary Lou Fenili (Cal Caucus); Nancy Green (NSPR); Harley Johnson and Roberta Jamieson (Canadian Public Sector); and Dean Gottehrer

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MODEL 2 - NEUTRAL OFFICES CONFIDENTIALITY ACT

Overview:

Model 2 both expands and contracts upon Model 1. Model 2, like Model 3, would afford a wrongdoer some protection against having his or her identity disclosed, but only if the reporting source made the report to a designated "neutral office" within the organization. One of the hallmarks of this neutral office would be that it would receive information, but conduct no investigations. Both the organization and the reporting source would have to mutually consent in order to waive this privilege. Model 2 also differs from Model 1 by proposing to protect both the identity of the reporting source and the substance of conversations with the designated neutral office.

Draft Legislation:

§1. Purpose.

The adoption of voluntary ethics and compliance programs by organizations promotes compliance with laws and fosters the use of ethical business practices in the United States, to the benefit of all citizens. The purpose of this Act is to encourage such programs and to implement provisions to make them more effective.

A neutral office, as defined herein, supports and enhances the operation of voluntary ethics and compliance programs, often resulting in the elimination or reform of illegal or unethical practices, by encouraging employees and other persons dealing with an organization to report concerns of misconduct without fear of retribution. Neutral offices, such as an ombuds office, also serve an important public policy in that they provide a means for employees to resolve concerns or disputes informally and without resorting to costly and burdensome litigation. Since the effective operation of such a neutral office is dependent on all levels of employees and other persons being able to communicate concerns in confidence and without unreasonable risk of subsequent disclosure, it is hereby determined that the identity of such individuals and their communications should be protected from disclosure as provided herein.

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§2. Definitions.

For the purposes of this Act, the term–

¶a Employees - An employee is a person within any level of the organization including management, directors and officers.

¶b Neutral office - A neutral office is an office created by an organization to permit employees and other persons dealing with the organization to have confidential communications on issues of concern to such employees or other persons, including matters alleging organizational misconduct. To qualify as a "neutral office" under this section, such an office must, at a minimum, meet the following criteria:

(1) must be independent and neutral. By being neutral, this office does not take sides and does not have the authority to make managerial decisions with respect to issues brought to its attention. Persons employed by the organization may staff the neutral office, but the office must be created and operate in such a manner that it is neither part of the management of the organization nor responsible for essential business functions of the organization (i.e., operations, compliance, human resources, equal opportunity). Persons appointed to the neutral office may not be officers of the organization;

(2) shall not have authority to conduct formal investigations on behalf of the organization;

(3) must have adequate physical measures to permit confidential access to the neutral office and to preserve confidential communications;

(4) must have direct access to senior management of the organization;

(5) must adhere to practices and procedures designed to preserve the confidentiality of communications; and

(6) the organization and the neutral office must adequately publicize the existence of the neutral office within the organization and inform employees that communications with the office are confidential.

¶c Confidential communications - Communications, oral or written, which occur:

(1) between or among employees of a neutral office acting within the scope of their employment and employees or other persons consulting with the neutral office;

(2) between or among employees of the neutral office and other employees in the organization concerning matters brought to the attention of the neutral office; and

(3) among employees of the neutral office.

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§3. Protection of Confidential Communications from Disclosure.

Employees of a neutral office shall neither voluntarily disclose nor be compelled to disclose confidential communications, except as may be necessary to prevent an imminent threat of serious physical harm.

§4 Inadmissibility of Improper Disclosures.

Any disclosure made in violation of any provision of this act shall not be admissible evidence in any proceeding or for any purpose.

§5. Other Protections and Privileges Preserved.

The protections provided in this Act are in addition to, and not in derogation of, any other privileges and protections that may be applicable, including, but not limited to, the attorney-client privilege and work product protection.

§6. Admissibility of Other Evidence.

Nothing in §§1-5 of this Act shall prevent:

¶a The discovery or admissibility of any evidence that is otherwise discoverable merely because such evidence was included in a confidential communication,

¶b The disclosure of information for research or educational purposes in connection with training or educational programs by a neutral office, provided the identity of the parties and the specific issues of a confidential communication are not identifiable, or

¶c The preparation and disclosure of statistical summary reports by general issue category, provided that any such statistical summary be based on a sufficiently large number of matters that the identity of the parties and the specific issues of any confidential communication are not identifiable.

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RECYCLED

U.S.S.G. §8A-1.2 Commentary §3(k)

(k) An "effective program to prevent and detect violations of law" means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:

(1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.

(2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.

(3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.

(4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.

(5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.

(6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

(7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses--including any necessary modifications to its program to prevent and detect violations of law.

The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are:

(i) Size of the organization--The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.

(ii) Likelihood that certain offenses may occur because of the nature of its business--If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud.

(iii) Prior history of the organization--An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct.

An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law.

(Effective November 1, 1991)