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[Corporate Ombudsman Association shield law papers]

1988

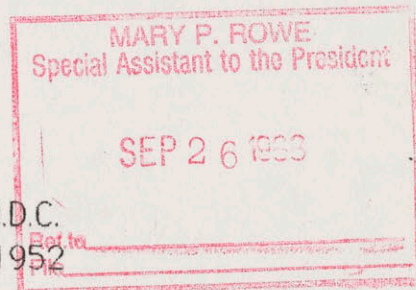
# Corporate Ombudsman

A S S O C I A T I O N

14 Wynkoop Court  
Bethesda, MD 20817  
September 16, 1988

The Hon. Brendan Ryan  
Circuit Court Judge  
Civil Courts Building  
Division 1, Fourth Floor  
10 North Tucker  
St. Louis, MO 63101

Ref. Adreon vs. M.D.C.  
Cause No. 872-01952



Sir:

It is my understanding that the confidentiality of an Ombudsman's records has been called into question in the case referred to above. I am writing to you at this time as an officer and Board member of the Corporate Ombudsman Association. The Association is composed of ombudsmen from a large number of the major corporations in the U.S. and Canada, as well as from public sector organizations, educational institutions and health care facilities. I enclose a brochure which outlines the purpose and goals of the Association and includes its Code of Ethics. My purpose in writing is to express the gravity with which the Board of Directors and members of the Association view any breach in the confidentiality which is assured persons seeking the counsel and assistance of an ombudsman. There are several reasons for this position:

(a) One definition of an "ombudsman," as cited in the Ombudsman Handbook prepared and issued by the Association to its members, is "... a neutral member of the corporation who provides *confidential* and *informal* assistance to employees in resolving work-related concerns and is *outside* the normal management control structure."

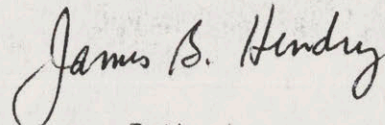
(b) Clients come to an ombudsman in large part because they are assured anything discussed will be held in strict confidence. This guarantee is the first article of the Code of Ethics which has been adopted by the Association, and is subscribed to by the membership (please see the enclosed brochure).

(c) In recent years many corporations have come to realize the value of an ombudsman office as an informal communication channel, but if clients come to believe their confidences will not be respected they will not seek the help of an ombudsman, and the value of an ombudsman's office will be lost.

(d) An ombudsman can offer clients protection against reprisals and thereby elicit full and frank discussion of problems, but this works only if the matters discussed are kept confidential. The recent Packard Commission, which investigated waste, fraud and abuse in governmental dealings with contractors, noted that ombudsmen are an important means by which people are encouraged to report such instances, primarily because they could do so without revealing their identities to supervisors.

In conclusion, therefore, and on behalf of the Corporate Ombudsman Association, I respectfully urge that access to ombudsman records in the referenced case be denied, and their contents be not disclosed.

Sincerely yours,

A handwritten signature in cursive script that reads "James B. Hendry". The signature is written in dark ink and is positioned above the typed name.

James B. Hendry  
Executive Officer

CORPORATE OMBUDSMAN ASSOCIATION

CORPORATE OMBUDSMAN'S PRIVILEGE

1. Proposed privilege statute:

Any communication relating to a matter which has been made as part of a process conducted under the auspices of an ombudsman, whether by a participant, ombudsman or any other person, shall be a confidential communication and shall not be subject to disclosure in any judicial or administrative proceeding. All related memoranda, work product, notes, or case files of an ombudsman are confidential and not subject to disclosure in any judicial or administrative proceeding.

Drafted by Jim Simon  
May 25, 1988

AN OMBUDSMAN IS...

A person designated as a neutral or impartial dispute resolution practitioner within a corporation or other business entity, hospital, nursing home or other provider of health care whose major function is to provide confidential and informal assistance in resolving concerns.

Suggested by Lou Garcia

; provided however, that such privilege shall not <sup>obtain</sup> apply  
in the following instances: a) where there is evidence the  
ombudsman observes the commission of a crime; b) where  
threats of bodily harm to a third person are communicated to  
the ombudsman; c) where threats of extensive property damage  
are communicated to the ombudsman; and d) where the ombudsman  
has been asked to provide <sup>general</sup> information regarding the operation  
of the ombudsman office and the processes employed.



United Technologies Building  
Hartford, Connecticut 06101  
203/728-6447

Ann Bensinger  
Corporate Consultant  
Office of the Ombudsman

March 22, 1990

Memo to: Elizabeth Clark  
Lou Garcia  
Jan Newcomb  
Dave Robinson  
Mary Simon

cc: Jim Hendry  
Virg Marti  
Mary Rowe  
Jim Simon  
Jerry Weinstein

Re: Meeting of the Shield Law Committee

Thanks to all of you who have been struggling with this issue. Our charge is to submit a proposed bill to the COA board during the May director's meeting. By then we should have:

- completed any proposed revisions,
- anticipated and written up any exceptions that the committee feels should be included,
- completed a statement of purpose, rationale and any accompanying memoranda you feel are needed.
- developed a strategy to proceed.

Enclosed you will find a slightly modified version (thanks to Lou Garcia) of the legislation suggested by Jim Simon for COA in 1988 (Thanks, Jim).

I recognized that schedules are tight and that we are all trying to preserve financial resources. Most of the work is being done in individual projects with phone conferences. However, your presence is requested for a single, day-long meeting on **Thursday, April 12** to work-out any needed revisions and to finalize both a strategy and, recommendations for COA.

Lou Garcia has offered to host this meeting at his offices at TIAA-CREF.

Location: TIAA-CREF  
750 Third Avenue (between 46th and 47th)  
New York City

Please stop for a pass at the lobby desk.  
The ombudsman's office is on the 25th floor

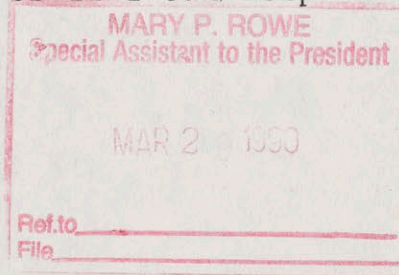
Time: 9:00 a.m. - 4:00 p.m.

Please let me know what your plans are or if I can help in anyway.

Regards,

Ann Bensinger

enclosures



Proposed privilege statute:

Any communication relating to a matter which has been made as part of a process conducted under the auspices of an ombudsman, whether by a participant, ombudsman or any other person, shall be a confidential communication and shall not be subject to disclosure in any judicial or administrative proceeding. All related memoranda, work product, notes, or case files of an ombudsman are confidential and not subject to disclosure in any judicial or administrative proceeding.

Drafted by Jim Simon  
May 25, 1988

Provided however, that such privilege shall not obtain when:

- a) the ombudsman is personally witness to a felony;
- b) where threats of bodily harm are communicated to the ombudsman;
- c) where threats of extensive property damage are communicated to the ombudsman; and
- d) where the ombudsman has been asked to provide general information regarding the operation of the ombudsman office and the processes employed.

OK b) where threats of serious harm to identifiable person(s) or property are communicated to the ombudsman; (c) = d above

#### AN OMBUDSMAN IS...

A person designated as a neutral or impartial dispute resolution practitioner within a corporation or other business organization, government entity, hospital, nursing home or other health care facility, who offers confidentiality and provides assistance in resolving disputes and concerns.

CORPORATE OMBUDS ASSOCIATION

LEGAL ISSUES IN INVESTIGATIONS

By

James H. Simon, Esq.

and

Jerome N. Weinstein, Esq.

- I. What legal authority, if any, underlies a duty to investigate complaints
  - A. Statutory duties, e.g., Title VII (sexual harassment)
  - B. Common law duties, e.g., negligent supervision
  
- II. Regardless of a legal duty to investigate, what legal consequences if an investigation occurs
  - A. The risk of "negligent investigation," e.g., if a sloppy investigation occurs
    1. Failure to consider relevant evidence
    2. Bias/prejudice in conducting the investigation
    3. "Prompt," "fair" investigations -- if the employer promises, what legal duty to deliver?
  - B. Miscellaneous torts
    1. Defamation
    2. Invasion of privacy
  - C. Duty to inform management of results of investigation
  - D. Ability to compel coworkers to cooperate and give information



- D. Record keeping -- confidentiality
- E. "Due process" considerations
  - 1. Right of the accused (and others) to counsel
  - 2. Right of parties to see preliminary findings
  - 3. Right of complainants (or others) to see the investigative report
  - 4. Right of the accused to see what the complainant has charged
  - 5. Right of the accused to confront witnesses
  - 6. Right of the accused to see all evidence
- F. What is the standard of proof
  - 1. Who has the burden of proof
  - 2. Standards of evidence:
    - a. Preponderance of the evidence
    - b. Clear and convincing
    - c. Beyond a reasonable doubt
  - 3. Credibility determinations
- G. Legal status of mediated agreements

## MEMORANDUM IN SUPPORT OF AN OMBUDSMAN PRIVILEGE STATUTE

Ombudsmen serve as designated neutrals or impartial sources of assistance in a variety of settings. They work in prisons, nursing homes, hospitals, corporations, newspapers, colleges and universities, federal agencies and state governments providing an alternate resource for individuals. Their purpose is to guard against abuses within systems and to develop fair solutions to a wide range of problems.

An ombudsman facilitates resolution of problems that individuals have been unable or unprepared to handle in other formal or non-confidential systems.

The ombudsman works to protect the rights of everyone involved - not just a single client.

The ombudsman's offer of confidentiality encourages individuals to come forward and report problems that they are otherwise reluctant to reveal. This serves a vital public interest.

The ombudsman is not a direct participant and is not necessary to achieving justice. Information is discoverable from direct sources.

Unlike other representatives, an ombudsman is likely to know the confidences of all parties.

The ombudsman must remain neutral and not take sides. Should an ombudsman be drawn into an adversarial process confidence, the ombudsman's neutrality may be critically jeopardized.

Use of an ombudsman does not preclude or jeopardize future use of other resources.

The ombudsman function fulfills all four of the traditional criteria for privileged communications:

- 1) The communication originates in the belief it will not be disclosed.
- 2) The inviolability of that confidence is essential to achieve the purpose of the relationship.
- 3) The relationship is one that society should foster.
- 4) The expected injury to the relationship through fear of later disclosures, is greater than the expected benefit to justice in obtaining later evidence.

The ombudsman works to promote a solution that is satisfactory to all participants. The ombudsman is not a trier of fact.

Confidentiality of the ombudsman is consistent with now established nondiscovery of settlement negotiations or of mediation proceedings.

In other privileged relationships the privilege belongs to the client. Because an ombudsmen works with multiple parties, testimony on one issue may compromise the rights of another individual. This is why the privilege must remain that of the office (as well as a client).

There is a growing nationwide recognition that Alternative Dispute Resolution (ADR) systems are necessary. ADR legislation proliferating in numerous states is ample support for the notion that the time has come to find alternatives to litigation for many reasons -- cost, timeliness, appropriateness of the forum to the dispute, etc.

The concept of Ombudsmanship is an integral part of this evolution in dispute resolution processes. An Ombudsman is "one who investigates complaints, reports findings, and helps to achieve equitable settlements."

Ombudsmen serve as designated neutrals or "impartial sources of assistance" in a variety of settings. They work in prisons, nursing homes, hospitals, corporations, newspapers, colleges and universities, and state governments. Their purpose is to guard against abuses within systems and to develop fair solutions to a wide range of problems.

For an Ombudsman to be effective he or she must be trusted by the parties to the dispute. Trusted to be neutral; trusted to be fair; trusted to be committed, above all, to a resolution of the dispute that is both fair and acceptable to the parties. This solution is not based in law but in fairness and consideration for the individual needs of the disputants.

If any party, including the Ombudsman, is not secure in the knowledge that it is safe to be open, honest, and thoroughly candid for the purpose of creating this equitable solution, the integrity of the process is destroyed. The ombudsman has an obligation to protect the rights of everyone involved.

Given the already intolerable burden on our state and federal court systems, we can ill afford to render ineffective this alternative method of resolving disputes. We must encourage non-adversarial proceedings by protecting them from the adversarial process.

For this reason we are asking you to endorse the proposed legislation attached, in support of an Ombudsman privilege. We believe we have addressed any potential areas for abuse of this privilege by providing for appropriate statutory exceptions to the privilege in the legislation.

Your active support of this proposal is earnestly requested.

# Corporate Ombudsman

A S S O C I A T I O N

## PROPOSED

A BILL TO BE ENTITLED  
AN ACT TO ESTABLISH A PRIVILEGE  
FOR CONFIDENTIAL COMMUNICATIONS MADE  
TO AN OMBUDSMAN

Be it enacted by the Legislature of the State of \_\_\_\_\_:

Section 1. Definition. An ombudsman is a person designated as a neutral or impartial dispute resolution practitioner within a corporation or other business organization, government entity, hospital, nursing home or other health care facility, who offers confidentiality and provides assistance in resolving disputes and concerns.

Section 2. Any communication relating to a matter which has been made as part of a process conducted under the auspices of an ombudsman, whether by a participant, ombudsman or any other person, shall be a confidential communication and shall not be subject to disclosure in any judicial or administrative proceeding. All related memoranda, work product, notes, or case files of an ombudsman are confidential and not subject to disclosure in any judicial or administrative proceeding; provided however, that such privilege shall not obtain when:

- a) the ombudsman is personally witness to a felony;
- b) where threats of serious harm to identifiable person(s) or property are communicated to the ombudsman;
- c) where the ombudsman has been asked to provide general information regarding the operation of the ombudsman's office and the processes employed.

Section 3. This act shall become effective \_\_\_\_\_.

For further information or a local contact in your state, please contact: Ann Bensinger, Office of the Ombudsman, United Technologies Corporation, 1 Financial Plaza, MS-522, Hartford, CT 06101. Phone: 203/728-6447 or toll free at 1-800-843-8595.

# Corporate Ombudsman

A S S O C I A T I O N

August 15, 1989

Dear Fellow Ombudsman:

The next annual conference of the Society of Professionals in Dispute Resolution (SPIDR) will be held in Washington, D.C., October 19-22, 1989, at the Hyatt Regency. (Call SPIDR at 202-833-2188 for information.) Please come.

We are writing to you for two reasons. The first is to ask your views on confidentiality with regard to the Ombudsman and his/her communications. Colleagues have been working on this question in various states, and Mary Simon is participating in the SPIDR conference in the session on "Confidentiality in Mediation." Do you think an Ombudsman should testify or produce records about any of the following: 1) the process he/she uses to resolve complaints, 2) formal investigations in which he/she participated, 3) the Ombudsman's own personal views about a situation, 4) any written or spoken communication in a case he/she was investigating, etc., and 5) should an ombudsman testify in adversarial proceedings within his/her workplace? Do you believe there should be shield laws for Ombudsmen? Should all Ombudsmen have written agreements with their employers stating they will not be called to testify on the company's behalf? Do any of you have examples of this type of agreement? What other issues should we be considering? Please let Mary Simon know what you think should happen in this area.

Secondly, we solicit anything you may know to have been written, especially recently, on any aspect of ombudsmanry. The profession is expanding; other ombuds practitioners are interested, and non-ombuds members of SPIDR are very interested. Please consider bringing up to 500 one- or two-page summaries of your work (or listings of your ombuds writings, or copies of your articles, or flyers for your book) to share with others at the session on Ombudsmen, chaired by Mary Rowe. Larry Hill will share his most recent research, as will several others; please also come and tell us of yours. The intent of this Saturday morning session, "Everything You Wanted to Know about Ombudsmen..." is to give the widest possible spotlight on writing and research in our area. For that matter, please also consider bringing one to 500 copies of ombuds cartoons, office posters, office brochures, etc.

Do come to Washington if you can, and please notify any ombudsman we may not have contacted. Also, please call or write Mary Simon with your views on confidentiality.

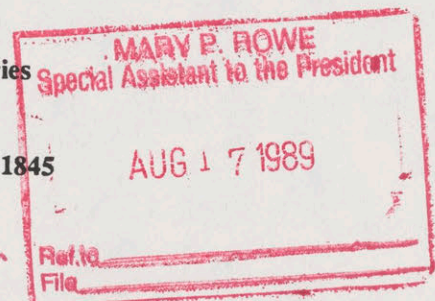
Sincerely,

*Mary P. Rowe*

Mary P. Rowe  
Special Assistant to the President  
Massachusetts Institute of Technology  
77 Massachusetts Avenue  
Room 10-213  
Cambridge, MA 02139

*Mary G. Simon*

Mary G. Simon  
Ombudsperson  
AT&T Bell Laboratories  
1600 Osgood Street  
Room 3S-5  
North Andover, MA 01845



Copy (with att.) to  
College and University Ombudsmen  
Corporate Ombudsman Association Members  
United States Association of Ombudsmen Members

ombudsman\öm-bodz-men\One skilled in dealing with reported  
complaints to help achieve equitable settlements