5 [SOME IMPORTANT PAPERS RE: OMBUDS, CONFIDENTIALITY & NEUTRALITY] 1980s-2016

Early drafts on
Neutrality
&
Confidentiality

DRAFT

Neutrality & Confidentiality

CAN OMBUDS PRACTITIONERS AND OTHER SENIOR EMPLOYEE COMPLAINT HANDLERS BE NEUTRAL?

Early draft

Mary P. Rowe
M.I.T.

September 1984

Neutrality, objectivity, fairness.....these are qualities that non-union employees often say they want in their complaint handlers. This is especially so now that a rising proportion of such employees are well educated; many are scientific and technical personnel. Many who seek an objective review of their concerns are themselves managers, who now frequently want to raise the problems they have as employees, as well as those they have as managers. Minorities and women ask that traditionally Anglo, male establishments should treat them fairly. And in case a company is seen to be unfair, union organizers hover, ready to offer the option of "impartial grievance arbitration."

Chief executive officers also raise these questions for reasons other than just avoiding unions. For example, those interested in a far-reaching, Martin Weitzman-type shift to profit-sharing, are in fact seeking an orientation of common values with their employees. They are pushing toward management and employees working together for common goals,[especially since many employees are themselves supervisors], and away from

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Group decision-making at companies like Intel is a similar example of building toward common goals.

"management vs. employees." "Neutrality" in dealing with employee complaints is another manifestation of the same philosophy of management. In addition, the American sense of fair play runs very deep in many chief executive officers. So the question is also frequently raised at the top: Can internal complaint handlers be neutral?

This question is also being raised by the complaint handlers themselves. Some were appointed as ombuds practitioners with a public expectation of objectivity and perspective. Some simply dislike the increasing litigiousness of US society and the polarization of unionization; they seek an emphasis on mediation rather than arbitration. Since mediators traditionally are neutral,[designated to help disputants find their own settlements], internal mediators ask, "Can I be neutral?"

There are however powerful traditional views that there is no such thing as an "internal neutral." And many employees as well as managers believe there ought not to be, or "at least there are limits." This article disusses some of the major issues: external pressures and the need for advocacy, either for employee advocates or for management; the problems of individual$ psychologicl bias; the need to consider public interests; problems of confidentiality.

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External Pressures

He Who Pays the Piper.....

Many people do not believe it is possible to be a neutral complaint handler inside a company. The first problem is thught to be that one would be pushed around by management. "Inevitably one would be coopted or threatened or bribed to conform to the ideas of senior managers"..... Senior complaint handlers around the counry tend to have the view that this is mainly a theoretical problem with only occasional practical significnce, at lest at their level.

Most full-time complaint handlers report that they are left alone to do their work nearly all the time and by nearly all senior managers. Most do also know one or a few major managers in their company who believe, "He who is not with me is against me," and who will make no bones about their antipathy to "neutrals," For example, about a third of the senior compalint handlers I have talked with have been leaned on, in-house, to leak confidential information. They report however that this happens rarely and can successfully be resisted. It may be that the kind of cmpany that has an innovative non-union compalint structure in the first place is the kind of company where top management will respect the integrity of complaint handlers; for

whatever reason, little abuse by top management is reported by their ombuds practitioners.

Pressure from employees

Complaint handlers themselves are however usually quite thoughtful about the problems of being "neutral" for reasons other than cooptation or threats by management. Many came to general complaint handling from work in an Employee Assistance Program or an Equal Opportunity office. As client-centered practitioners they may have been designated as employee advocates, or they may see the need for employee advocacy to redress a perceived imbalance of power. Moreover employees who are used to the union model may expect an ombudsman to be their advocate--this is reported to happen occasionally by at least two-thirds of all ombuds practitioners I know. And it is so common for employees to speak ill of ~~general~~ traditional personnel officers who do not behave as advocates that full-time complaint handlers speak soberly about the pressure toward employee advocacy.

On balance, most complaint handlers take external pressure philosophically and feel that inappropriate requests from management and employees can be resisted and/or balnce each other out.

Companies can lessen the problem of external pressures in a number of ways. Most important is the corporate specification of neutrality or advocacy. Some complaint handlers

are expected to be "advocates for decent process, not for any person or point of view." Some Open Door Investigators are instructed to begin any investigation with the idea that a complaining employee is right, and only thereafter are they to pursue the case as an advocate for the person[s] or position found to be in the right. Some companies say up front that the "interests of the company are paramount." Some companies have appointed Employee Advocates as complaint handlers. A number of companies say that their long-run interests lie with any employee who has been wronged and that they may have a partial interest in common with each of several people in the company who have wronged each other. [For example, in the case of an employee found in an internal investigation to have suffered from discrimination, Control Data will attempt to provide a remedy equivalent to that which would have been set by the EEOC.]

IBM did this e.g.

Each of these policies is theoretically somewhat different from the others. In practice nearly all senior ombuds practitioners and complaint handlers report they try to be neutrals although only about two-thirds of those I know are designated as neutrals by their companies.

In an effort to enhance the appearance of neutrality, and to make it safer for employees to consult complaint handlers, most companies now permit or affirm the confidentiality of complaint offices. With some exceptions discussed below the ombud practitioners I have talked with expect to maintain confidentiality if asked to

do so.

Companies also try to structure the jobs of senior complaint handlers so as to minimize conflicts of interest. Theoretically an internal ombudsman should report to the CEO in order not to be vulnerable to, or cooptable by any other top managers. In practice perhaps a third of US ombuds practitioners report at or near the top, others to vice presidents and other senior Human Resource and Personnel directors. In large companies it is common that senior complaint handlers hve completely separate, confidential staff offices. It is relatively unusual for a senior complaint handler to be expectedto review the management behavior of senior managers who report directly to the CEO, so in practice high-level reporting is the rule and there is relatively little conflict with top managers.

Most full-time complaint handlers also do not adjudicate, or do so very rarely. Of the classic functions provided by complaint systems [providing information, counselling, fact-finding, conciliation, mediation, adjudication, upward feedback to management], the internal ombudsman typically does all but the one: they usually are not internal judges or arbitrators. My research indicates that it is much easier to be seen and to function as a neutral if one does not adjudicate. Many companies recognize this in their complaint structures: formal, adjudicatory complaint and appeal channels are separate; the ombuds office is called by contrast, Liaison Office

[Southland], Personnel Communications [Anheuser-Busch], Employee Advisory ~~Service~~ Resource [Control Data] or in fact, Ombudsman [Upjohn, AT&TIS, Dennison, World Bank).

Neutrality and objectivity can also be enhanced in an in-house adjudicatory structure, usually in a formal final appeal by peer review or a group of uninvolved managers or an appeal board. These structures often involve a group, rather than one person. Typically they are composed of people who are not full-time complaint handlers, who, in fact are not otherwise involved in the complaint system. In consequence, the same person is typically not both a mediator and an adjudicator. The neutrality question can also arise in the relatively rare cases where an ombudsman serves as an investigator, to make formal recommendations to line management. Many ombuds practitioners will avoid this role in cases where they have already been involved as a confidential counsellor as a mediator.

Some companies also avoid conflicts of interest by choosing, as ombuds practitioners, quite senior managers who would be thought relatively immune from pressure. At the World Bank for example the Ombuds position is a two-year, pre-retirement job with the guarantee of continued pay if the incumbent is removed.

There is some disagreement, however, about the desireable term of service for an ombudsman. Some commentators feel that full-time complaint handlers should serve for a limited

period so they won't get coopted. Others prefer the development of a long-term professionl whose continuity is expected and who therefore may feel relatively safe with respect to any one difficult situation. [A famous article contains a line favored by ombuds practitioners about the need for the job to be a "long-term job at substantial pay".]

Personal Bias

Many senior internal complaint handlers believe they should be designated as neutrals but that it is personally impossible to be a perfect neutral. This problem is shared of course by external ~~practitioners~~ arbitrators and mediators and judges: one's personal prejudices may inform one's judgment. It is a problem taken very seriously by most of the full-time senior complaint handlers I have talked with. While generally rejecting the notion of difficult external pressures most will on occasion feel strongly buffeted by internal feelings. For example, most ombuds practitioners care about their employers. If they learn something that may impact on the profits of the company they may feel a strong pull. A similar need for professional self-discipline may arise where an employee appears to have been badly treated. In order to cope, most long-term practitioners develop an extraordinary ability to take the long view, to be able to imagine and perhaps uncover many different sides to the sme story.

A company can do several things to safeguard against

the personal bias of complaint handlers. Top management shuld choose seasoned ombuds practitioners with very wide cross-cultural experience, the kind of person who builds bridges, rather than the kind of all-out ~~lawyer~~ advocate you would want in a court fight. Companies should provide confidential advice for the internal ombudsman, for example from external legal counsel or from other ombuds practitioners in the same office. Separation of counselling and mediation functions from adjudication may also help with personal bias problems.

A company should also provide a number of different options from which a concerned employee may choose. For example at Polaroid, an employee may take a given problem to a supervisor, to the ombudsman, to the Employee Council, to personnel. Providing such options at MIT is called redundancy, in the sense of engineering redundancy: fail-safe, backup, checks and balances.

Senior complaint handlers around the country differ sharply about whether a company ~~should~~ must offer ombuds practitioners of different ethnic chracteristics and both genders. About half feel that within a given plant or company a concerned employee should be able to find someone like him or her to talk with. And indeed about half of the senior complaint handlers I know are female and about 15% are minorities. On the other hand many practitioners feel very strongly that what matters is not skin color or gender but skill, empathy, caring and judgment, and that trustworthiness

any practitioner should be able at least adequately to serve anyone with a problem.

Public Interests

The traditional ombudsman may respond to visitors' concerns or instigate inquiries on his or her own motion. In the latter case, the inquiry is often provoked by some third party complaint: A expresses a concern about the treatment of B. For an internal complaint handler this can pose an unusual problem. Many internal complaint handlers prefer not to listen to third party complaints. And traditional mediators ordinarily try to help active disputants to reach their own settlements, [within the confines of the law], without the mediator injecting a personal point of view or the point of view of any third party.

Internal complaint handlers differ on how they will handle third party complaints and public interests, and whether or not they consider such activity "neutral." The majority say they prefer to deal only with first party concerns and complaints, in an effort to encourage people to take responsibility for their own concerns, and to avoid being seen as inspectors general. Probably a majority also will investigate third party and anonymous concerns, when they are considered sufficiently grave. However it appears that most complaint handlers who consider themselves neutral feel comfortable pushing a point of view on such problems only when they believe that otherwise there will be a serious infraction of the law.

Confidentiality and the Duty to Warn

A related problem occurs when a visitor, who has requested to be completely off the record, relates to a complaint handler some story which makes the listener worry about the sfety of the visitor or others. When does a confidential counsellor have a duty to warn?

About half of the senior complaint handlers I know have considered breaking confidentiality because they were seriously worried about the safety of a visitor or of others. Usually in such a case the complaint handler will state very clearly that confidentiality must be broken. This is the one subject concerning the neutrality of an ombudsman where there appears to be complete agreement among the practitioners I have known. Appropriately enough, their prevalent view appears to conform with emergent law in the field; most complaint handlers in fact report that they behave more conservatively about questions of dangerousness than the law requires.

More difficult cases arise where an ombud learns of dishonesty, or of intolerably incompetent, mean, racist or sexist behavior on the part of someone in the company. About half of the practitioners I have asked have thought about breaking confidentiality in such circumstance; it is sometimes tempting to imagine doing so. It is my impression however that most ombuds practitioners will not and have not broken confidentiality in any material way for such a reason.

This does not mean that a complint handler need simply choose between sittig on worrisome information or breaking a confidence. Experienced complint handlers report they work hard to find other alternatives. Often one can work at length with a visitor to help that person feel comfortable in seeking help overtly. Sometimes a visitor will not agree to immediate action but will feel comfortable pursuing a concern overtly after some time, for example after a change in work assignment. Sometimes a visitor will agree to one more confidential conversation—with a trustworthy manager who can help to make an overt complaint appear responsible and safe. And sometimes the complaint handler can get permission to represent an individual problem in a generic way. For example, where a manager is said by an employee to be dishonest, the ombudsman might alert financial officers to audit certain kinds of accounts without namig [or slandering] the alleged offender.

In the worst situation, when a visitor appears to be a danger to himself or others, the ombudsman can ~~often~~ sometimes accompany that person to appropriate help rather than breaking a confidence behind someone's back.

Testifying and Affidavits Outside the Company

If one is designated as an internal neutral, is it proper to testify in court? Many observers feel that an ombudsman who testifies for an employee against management will lose his or her job. And that an ombudsman who testifies for

management against an employee [or former employee] will be seen as an advocate for management and no neeutrl.

Internal complaint handlers generally try to avoid taking on cases which have gone outside to investigatory agencies or the courts. Occsionally an internal complaint system my be required to re-inherit a case which has gone outside, but usually the company then will ask that outside action, for example at the EEOC, be tabled during a [re-] activation of internal mediation and review. There is thus an attempt to prevent the mixing of internal, process [non-polarized] and external process [advocacy] wherever possible. But supposing a case does go outside to court or to an agency? About half of the senior complaint professionals I know would try hard to convince their own management not to call them as witnesses, and would ask for attempts at protection from subpoena by outsiders. About a fourth would testify for their own management s a matter of course. Some would simply comply with any subpoena.

State laws differ on "privilege"--the freedom not be required to testify--but in general there is ~~little~~ no absolute judicial or legislative privilege even for social workers, doctors or clergy who may be serving as mediators. [There are occsional exceptios in some states, for example for whistleblowers.] In prctice however many judges will quash a subpoena where the integrity of a confidential and neutral office is at stake. It seems likely that judges will be more comfortable in quashing subpoenas where

a company hs explicitly designated a complaint handler as neutral and where the office has been announced as a confidential office. It is also more likely where the complaint handler has been engaged in confidential counselling and communications or in mediation, rather than investigation and adjudication.

This is an emerging area of ethics and of practice for complaint handlers. The American Bar Association Special Committee on Alternative Dispute Resolution and many professional organizations such as the Society for Professionals in Dispute Resolution, have been working hard to develop guidelines and codes of conduct. In general practitioners are tending toward the protection of neutrality and away from testifying about the process or outcome of mediation. This is obviously an important area for management to be clear about within the company.

Record-Keeping

Is it possible to keep complete office records and to be a neutral? Most ombuds practitioners keep and report aggregated data and emergent types of problems to top mnagement. Some internal complaint handlers also keep careful, individual records, [albeit almost always apart from routine personnel files.] Occasional ombuds offices will keep written records of all counselling sessions including allegations of A about B even if B never knows that A hs come in to talk.

Other complaint handlers feel such records may

compromise neutrality [and are an intrusion on the rights of B]. Some practitioners keep no formal written records about individual cases, beyond working notes that are destroyed when a case appears to have ended. These latter prctitioners hope to protect the privacy and good name of all, and further to prevent public testimony about their cases by keeping very little information about individuals.

Yet others will keep individual records where there has been an open mediation leading to a formal settlement, or an arbitration, and where they have served as investigator or fact-finder. It has usually been presumed that records of this type would be open to subpoena.

As we review the concerns above, it seems clear that it is theoretically and sometimes practically difficult for an internal complaint handler to be genuinely neutral. Most of the problems that exist can apply also to external mediators and arbitrators, who also may be paid by the employer, who also may be presumed sued by employees, who may exhibit personal bias, have a duty to warn, and who worry about being asked to testify in court. On balance one may conclude that it is impossible to be a neutral although nearly all senior complaint handlers report that in practice ~~actually~~ they try to be.

Top management can and should decide the priorities of their employee complaint handlers. If these practitioners are to be as neutral as psssible, company policies, procedures and

structures can enhnce neutrality and objectivity, and should be designed to do so effectively.

OMBUDSMAN News

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Winter 1989-90

SHOULD AN OMBUDSMAN TESTIFY?

Dr. Mary Rowe
Special Assistant to the President M.I.T. and Adjunct Professor
at the Sloan School of Management

I believe that the unusual situation of an ombudsman is, with rare exceptions, not compatible with being a witness in a specific case in apparently adversarial proceedings. (The question of whether an ombudsman may ethically appear in such circumstance is not yet a completely settled matter among ombudsmen. But I do not actually know of any ombudsman who has appeared in a court or before a Committee of the Congress of the United States on a specific case. Many ombudsmen have declined to participate in adversarial hearings even within their own establishments. And the position of the Board of the Corporate Ombudsman Association is clear, that it would endanger the mission of our offices to compromise even the appearance of the confidentiality offered to complainants). I will first state what I see as the general case, and then speak to possible exceptions.

If an ombudsman appears as a witness in a specific case, in an apparently adversarial hearing, the image of the confidentiality of these practitioners will be damaged. I believe that this is so, even in those cases where specific complainants to the office have given permission for the ombudsman to speak about them in a public hearing. First of all, the ombudsman is not exactly like other confidential practitioners, for example, like those in Employee Assistance. The clients of an Employee Assistance practitioner are usually just those people who go for help to a given Employee Assistance office. An ombudsman, by contrast, as a designated neutral, must endeavor equally to protect the rights of everyone involved in a case, (including, for example, the complainants, the accused, witnesses, the employer, and possibly others). It has therefore been argued, that before an ombudsman spoke in an apparently adversarial hearing about a given case, he or she would have to get permission from each person involved in the case.

There is however a wider problem. If an ombudsman appears as a formal witness, the image of confidentiality is damaged. Observers may or may not hear that permission was given by each party to the case, and may simply see that an ombudsman will, after all, break confidentiality. (One can imagine the public discomfort about seeing a doctor or priest testify in public about a confidential discussion.)

There are also neutrality problems associated with an ombudsman's appearing in an apparently adversarial proceeding. If a workplace ombudsman testifies in a way that appears to favor an employer against a worker or manager, it will appear to many observers that the ombudsman is just a tool of management. If an ombudsman testifies against the employer, it will sharply reduce the interest of employers to maintain, in their midst, this kind of in-house critic and change agent. And faced with this potential dilemma, practitioners themselves may lose their courage to be outspoken in raising problems to management, and in support of those who blow the whistle.

Many employers are attempting to

(continued on page 3)

Corporate Ombudsman Conference Report

MAY, 1989
RALEIGH, NORTH CAROLINA

The sixth annual conference of the Corporate Ombudsman Association was held in Raleigh, North Carolina on May 23, 24 and 25, 1989.

The Conference enjoyed a record attendance of seventy-eight people who serve a designated ombudsman function, representing sixty-two firms across the country.

The 1989 Conference was hosted by the North Carolina Department of Transportation. Many thanks to Mary Lou Smith, Ombudsman with the Department of Transportation, and her staff, who worked diligently to make this Conference a success.

Virgil Marti, President of the Corporate Ombudsman Association, opened the conference and welcomed the participants. Mr. Marti emphasized the need for participants to agree to maintain confidentiality concerning issues and/or case studies that would be discussed at the meeting and during the social hours.

Lt. Governor of North Carolina, James C. Gardner, welcomed the participants and stressed the importance of the ombudsman function in today's society - not only in helping employees address work related concerns, but in positively influencing the overall ethical conduct of corporations.

Carole Trocchio, Franchise Liaison Manager, The Southland Corporation, conducted an audience participation

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REFLECTIONS OF AN OMBUDSMAN

When I was planning to retire I started thinking about what suggestions I might pass along to my replacement. While on an airline flight I scribbled down the following thoughts which seemed to me to be appropriate. Those thoughts were:

Be neutral.

Be cognizant of the responsibilities of management and the rights of the employees, but don't lose sight of the responsibilities of employees and the rights of management.

Management should treat the employee with dignity and respect, but the employee is expected to work. Conversely, the employee should treat management with dignity and respect.

Don't become emotionally involved with clients, stay detached.

There are always three (at least) sides to every story.

What the client sincerely believes to be fact may be misunderstood or imagined and in some cases contrived.

Look for the "Hidden Agenda." The stated problem may be the tip of the iceberg or the last straw. It only helps a little to give an aspirin when there are compound fractures.

Perception is reality. What is perceived by the employee is a real problem to them, even if it is not true.

The client must take ownership to their contribution to the problem.

Help people to help themselves; i.e., teach them to fish, don't just hand them fish.

Has the client discussed this matter with their supervisor? If not, why not?

Is it an isolated problem? Get them back into the system.

If the system needs fixing, lobby to fix it. Constructive suggestions should always be considered.

Not all problems are completely (or even partially) solvable.

You can't snatch the world out of the air and throw it into a new orbit. Keep nudging at it and you will see progress without destroying yourself.

Don't beat yourself up over an occasional failure.

Virg Marti

V.P. Ombudsman (RET)
McDonnell Aircraft Co.
COA President

Skills Needed By A Complaint Handler And Functions Required In A Good Complaint System

By Mary Rowe

- Dealing with feelings, especially rage, fear of retaliation and grief. Helping people get to the point of being able to make good decisions, and being able to deal effectively with their problem or complaint;

- Giving and receiving data on a one-to-one basis;

- Counselling with clients; inventing and exploring all the possible options, helping people choose responsible options; coaching on how clients may deal with problems directly if they choose to do so, (i.e., helping people learn a method to help themselves); problem-solving, role-playing, anticipating possible outcomes, etc.;

(Continued on page (4)

1989 CONFERENCE

(Continued from page 1)

case study which highlighted the different aspects and challenges associated with conducting an investigation surrounding a sexual harassment allegation, the ethical questions that arise during the investigation and the diverse courses of action that are available to the ombudsman.

Jerome Weinstein, Esq. and James Simon, Esq. presented the current legal issues most often facing Ombudsman, most particularly the issues surrounding right to work legislation in many states.

K. Buckler, Ombudsman, General Electric, presented issues and definitions surrounding anonymity and confidentiality; engaged the membership in an analysis of relevant case studies and facilitated a discussion of the different approaches.

The results of the 1988 Research Committee were reviewed by James T. Ziegenfuss, Ph.D.

Jeraldine Brown, State Personnel Board, Denver, Co. and Susan Hobson Panico, Director of the Ombudsman Office at the University of Colorado at Boulder, presented "Tools of the Trade". Facilitating lively discussion on methods of analyzing the power base of individuals involved in dispute.

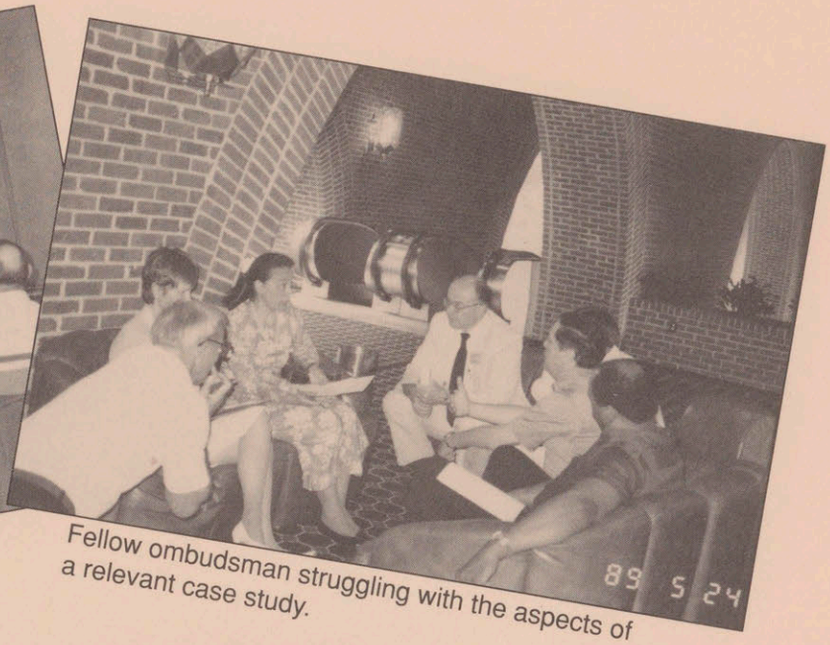
Presenting the Ombudsman as a "Catalyst for Change", Brian Gimlet of the U.S. Secret Service, presented case studies depicting the type of employee concerns that he has had the opportunity to resolve and, as a result, effect policy changes in his organization.

Mary Rowe, Special Assistant to the President, Massachusetts Institute of Technology discussed the challenges that may well face today's ombudsman in the next decade.

Following the agenda, the Annual Meeting of the Corporate Ombudsman Association was held and the Conference was then adjourned.

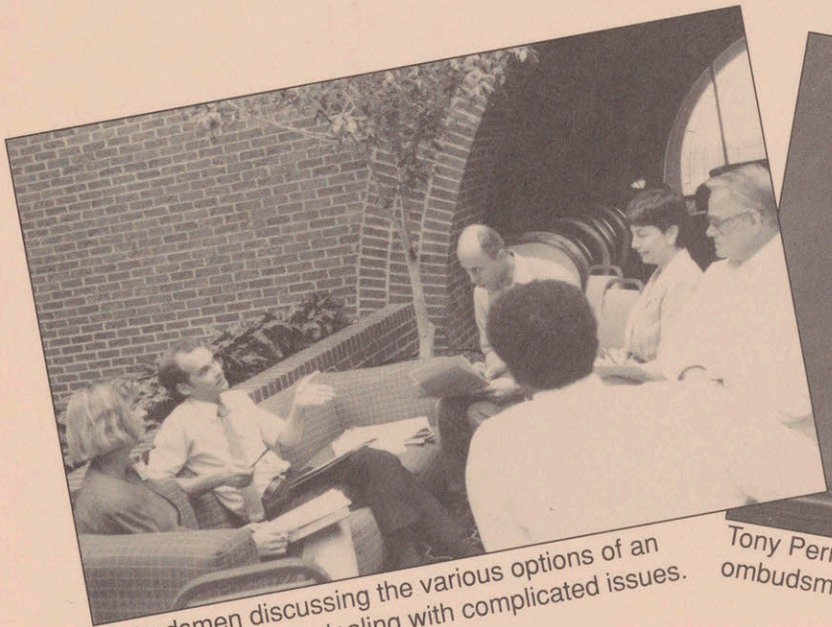
Photos From 1989 Conference

K. Buckler, General Electric, distinguishing confidentiality from anonimity.

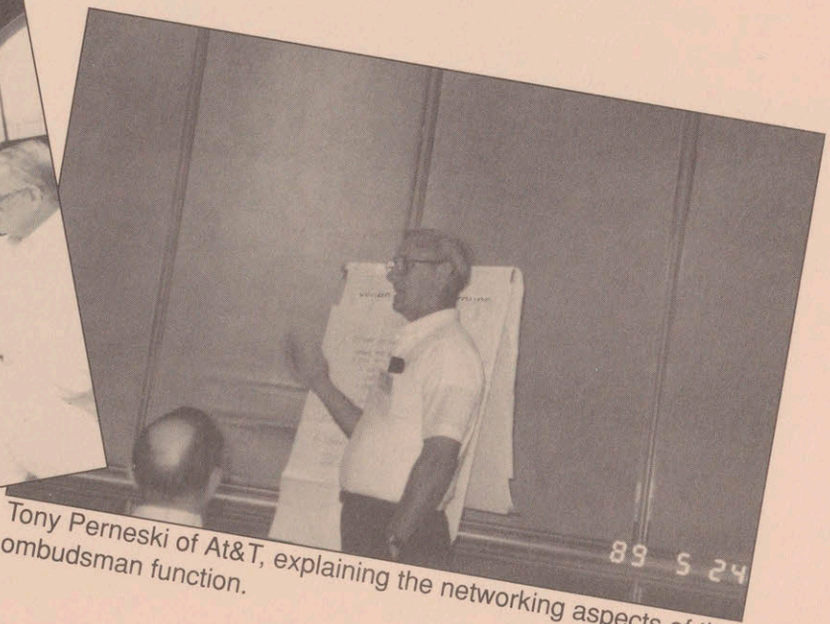


Fellow ombudsman struggling with the aspects of a relevant case study.

(L to R) Tony Perneski of AT&T enjoying the dinner hosted by the N.C. Department of Transportation with Mary and James Simon.

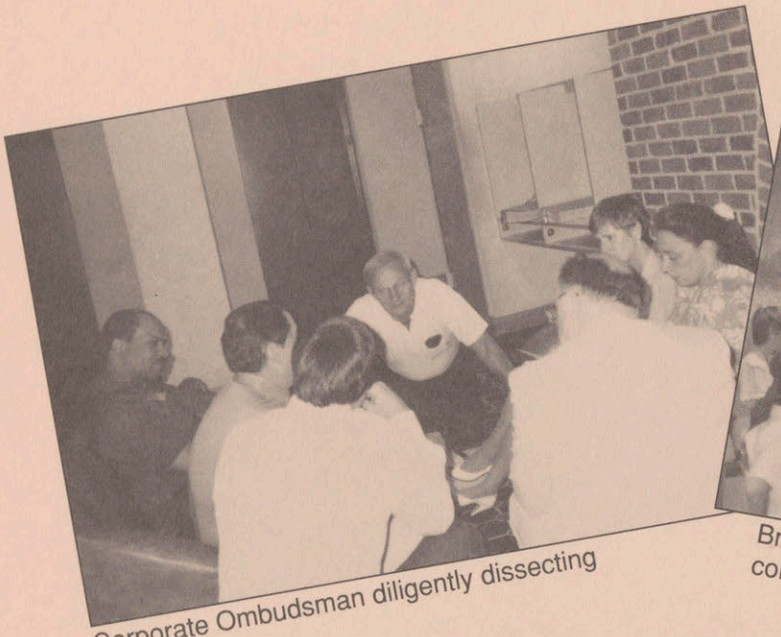


Ombudsmen discussing the various options of an ombudsman when dealing with complicated issues.



Tony Perneski of At&T, explaining the networking aspects of the ombudsman function.

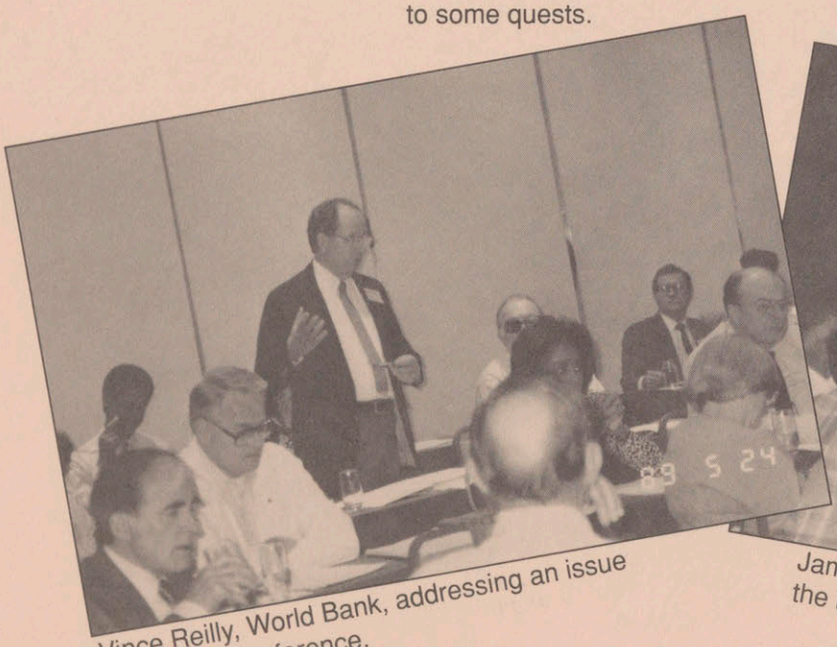
Photos From 1989 Conference



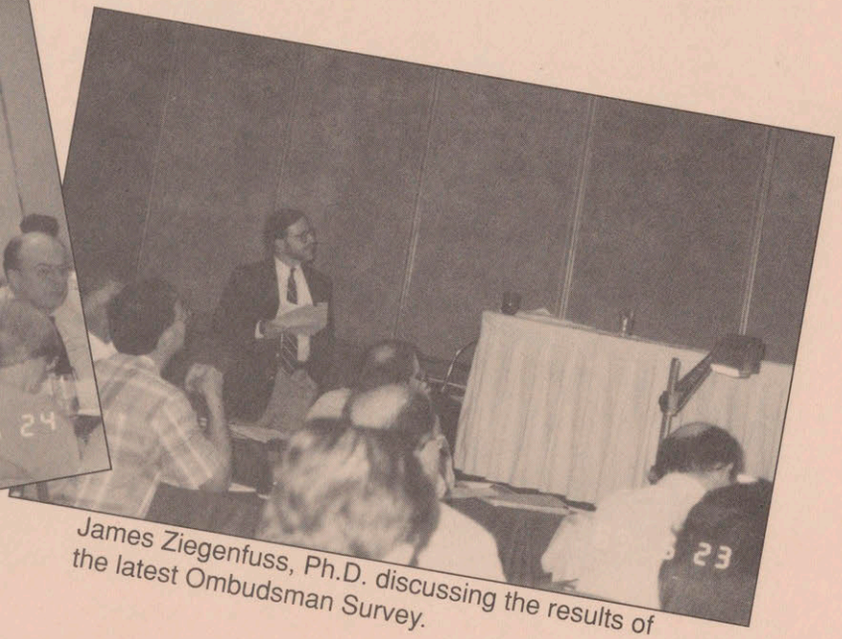
Corporate Ombudsman diligently dissecting a case study.

Brian Gimlet, U.S. Secret Service, making a point while conference attendees diligently follow the subject

Mary Lou Smith, Ombudsman for the Department of Transportation, Raleigh, North Carolina (host for the Conference) "making a point" to some quests.



Vince Reilly, World Bank, addressing an issue during the Conference.



James Ziegenfuss, Ph.D. discussing the results of the latest Ombudsman Survey.

TESTIFY

(Continued from page 1)

deal with these dilemmas by agreeing with their ombudsmen that they will not call these in-house neutrals in the employer's defense. And that they will seek to discourage the calling of ombudsmen into an adversarial hearing by anyone else. The Corporate Ombudsman Association has sought to protect the confidentiality and neutrality of its members by insisting on a Code of Ethics that supports these principles. Other major professional associations of mediators and ombudsmen similarly discourage designated neutrals from joining in adversarial proceedings and/or breaking confidentiality. Various legislative bodies have passed protective legislation in a similar vein. As an example, in my own state, there is a shield law protecting certain mediators.

I believe that the experience of recent years affirms the importance to people in the workplace and to students, of having a safe and neutral place to go. My own experience is that complaints of irresponsible, unprofessional and unethical conduct are very likely to be addressed to an ombudsman office. However it is important to note that the first question of nearly everyone who comes to an ombudsman office with problems of this type is, "Is this discussion off the record?" Other researchers and I have therefore written and spoken quite widely about the importance of building an "ombuds" capacity into complaint systems, to aid in surfacing harassment, theft, safety problems, fraud, and similar delicate problems of unethical conduct.

I do not mean to claim that ombudsmen have, or should have, an absolute privilege. If an ombudsman does a formal investigation for management, or has deliberately been a formal observer or witness of some investigatory meeting, that ombudsman should not be shielded from questioning about that investigation. An ombudsman who is direct witness to a felony should report it like anyone else. If an ombudsman hears information that indicates that a life may be at stake, plainly that information must surface, from the original informant if possible, but if necessary from the ombudsman. I also believe that if an in-house ombudsman comes to suspect criminal activity or other serious, dangerous or unlawful conduct, then that practitioner must do every reasonable thing to surface the information to the managers responsible for investigation and judgment. (Usually one can offer several different responsible options to a complainant with this kind of information.)

Finally, there may be situations where a court or management tribunal needs to know if the ombudsman behaved in a proper and ethical fashion, in a given case. Since it is always proper for an ombudsman to describe, in general, the complaint system of the employer and how this ombuds office fits into that complaint system, and how this ombudsman operates, this general testimony may suffice. But suppose, for example, the ombudsman is successfully subpoenaed about his or her actions in a given case and (the) specific client(s) give(s) permission for testimony?

Under these circumstances I believe an ombudsman may still decide on principle not to speak, and risk the consequences. (The consequences incidentally may include an unfair attack on the ombudsman, who will not be able to defend him or herself, and may also leave open the possibility that justice will not be done because the ombudsman's testimony is lacking. This will be very painful for the practitioner.)

An alternative is that the ombudsman may accept the subpoena but limit (or attempt to limit) answers to two subjects: the practitioner's own actions and the information given by (only) those persons who have given permission for the ombudsman to speak.

It is my strong recommendation that ombudsmen and their employers come to an understanding about these topics before the need arises.

Winter, 1989 - 90

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LETTER FROM THE EDITOR

Dear Colleagues:

Our next issue is scheduled for Spring, 1990. We want you to share your thoughts and creative ideas. Please send suggestions for special columns or articles. Better yet, write and send the article. What else would you like? Please call or write.

Carole Trocchio

1990 Annual Conference Agenda

COA Conference: Ombudsmanry in the 1990's
Hershey, PA

May 22-24, 1990

Tuesday, May 22nd

8:00 A.M.-11:30 A.M.
BOARD MEETING

12:00 Noon-5:00 P.M.
Ombudsman Training

Speakers: Professor Mary Rowe, Assistant to the President, M.I.T.

Mary Simon, Ombudsperson, AT&T Bell Laboratories, COA President-Elect

James Simon, Esquire, Nutter, McClennan & Fish

Jerome Weinstein, Esquire, Palmer & Dodge

This session starts with an hour on "What it means to be a neutral" and other important questions. This is followed by a very hardworking session on "Fair, Prompt and Thorough Investigations: When, By Whom, Why and How," using the example of a sexual harassment complaint. The workshop leaders are two ombudspeople and two lawyers.

5:00 P.M.-6:00 P.M. New Member Orientation. Informal.

Speaker: Mr. Virgil Marti, COA President

6:30 P.M.-7:30 P.M. RECEPTION

7:30 P.M. DINNER

Wednesday, May 23rd

8:30 A.M.-9:00 A.M.
COA President Welcome and Pennsylvania Blue Shield Welcome

9:00 A.M.-10:15 A.M.
Ethics Cases - "What are the Essential Questions?"

Moderator: Ms. Alma Montgomery, Associate Ombudsman, McDonnell Douglas Missile System.

What is ethical behavior? What are employees' expectations for ethical behavior? Using case studies, these and other questions about ethics will be examined from the ombudsman's point of view.

10:15 A.M.-10:30 A.M. BREAK

10:30 A.M.-12:00 Noon Mental Illness and Violence: "What the Ombudsman Needs to Know"

Speaker: Dr. Robert Fein, Assistant Commissioner of Forensic Mental Health, Commonwealth of Massachusetts.

What is mental illness? Is there a relationship between mental illness and violence? What do we know about dealing with very angry people?

12:00 P.M.-1:00 P.M. LUNCH

1:15 P.M.-3:15 P.M. Drugs, Including Alcohol - "How to Identify and Deal With Affected Employees"

Speakers: Mr. David Robinson, Director Human Resources Advisory Resources, Control Data Corporation and Ms. Jeanne Scott, Manager Employee Relations, Pennsylvania Blue Shield.

3:15 P.M.-3:45 P.M. BREAK

3:45 P.M.-4:30 P.M.
Waste, Fraud and Abuse - "The Corporate Hotline: Success Through Development of a Positive Image"

Speaker: Mr. Ben Simon, Director, Department of Defense Inspector General Fraud, Waste and Abuse Hotline since 1981.

4:45 P.M. - 5:30 P.M.
Annual COA Meeting

6:30 P.M.-7:00 P.M. RECEPTION

7:00 P.M. DINNER

Thursday, May 24th

8:00 A.M.-12:00 Noon
Diversity - "Dealing with the Changing Faces of the Corporate Workforce

Dr. Bailey Jackson, President, New Perspectives Professor, University of Massachusetts

Corporations are facing significant changes in the diversity of the employees of the 1990's. It is estimated that corporations prepare to deal effectively with these changes. The Ombudsman plays a vital role in facilitating the corporation's increased awareness and adaptation.

12:00 P.M.-12:30 P.M. Mary Rowe's Crystal Ball - Issues for the Ombudsman in the 1990's

SKILLS

(Continued from page 2)

- Shuttle diplomacy by a third party, back and forth among those involved in a problem, to resolve the problem at hand, (sometimes called "conciliation" or "caucusing", or thought of as one form of "mediation");

- Having a third party bring together the people with the problem, so they can reach their own settlement, (often called "mediation");

- Fact-finding or investigation; this may be done either informally or formally; results may be used, or reports made, either with or without recommendations from the fact-finder to a decision-maker;

- Decision-making, arbitration or adjudication, where a single person, (for example a line manager), or a committee or board with formal authority, decides a dispute; (this function may occur within line management channels as a normal part of management decision-making, or be structured as part of a formal complaint and appeals channel, or formal grievance procedure);

- Recommendations for systems change, ("upward feedback"); designing a generic address to a problem or a complaint; actual change in policies or procedures or structures or plans, as a result of inquiry, suggestion, complaint or grievance.

Within organizations, where all these functions are being performed, one may speak of a complaint-handling system. In building a system one should start first with a fair, accessible, complaint and appeals channel (a formal grievance procedure); otherwise the other functions of the system are not likely to be trusted. If, however, the system does have all the above functions, and they are all working well, the formal channel will rarely be used. This is because most (although not all) people prefer informal dispute resolution for most (although not all) problems. By analogy, a manager who has all these skills will usually be able to solve most problems without much "adjudication" of disputes.

OMBUDS

The Journal of the University & College Ombuds Association

Occasional Papers on Confidentiality and Record Keeping

Number 2 / Spring 1996

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Editor's Preface

We are pleased to bring you this issue with its timely and important topic. The first and third articles are written by practicing ombudspersons; the second, by an attorney who specializes in the area of privilege. There is also an interesting, personal comment by a central figure in one of the most important cases on this subject. As the profession of ombudsing matures, its principles and practices are being refined. Included in these pages are a discussion of The Ombudsman Association's Standards of Practice and the full text of the University and College Ombuds Association's statement of Ethical Principles . You will read discussion of the work of the Joint Shield Law Committee of the Ombudsman Leadership Forum which is also sponsoring the Superconference, a major meeting of groups of ombudspersons being held in St. Louis this spring. This is an exciting time to be involved in this work of Alternate Dispute Resolution. We hope this issue will be useful to the practitioners, and we are grateful to the writers and reviewers who have contributed so much to this project.

Confidentiality: How Is It Best Protected©

Gaynell Gavin

All ombuds practitioners deal with the issue of confidentiality in various, and sometimes unusual, situations. One such situation comes to mind in my own recent experience. Members of a department came to the University Ombudsman's office to express concern about the department chair's handling of a hiring matter. After conferring with these individuals at length and doing considerable research, I raised the complainants' questions to the chair without revealing their identities. In this instance, the complainants' feelings about the necessity of anonymity varied. For example, one individual felt it preferable, but not absolutely essential, that he remain anonymous while another considered anonymity essential, due to vulnerability to retaliation.

I am generally accustomed to cooperative, even cordial, responses to my inquiries, but this particular chair responded to my questions with a degree of rage which I had not previously experienced, and proceeded to send a series of memos expressing that rage. It was his last communique in this series which most concerned me. This memo, copied to a dean, stated in part, "your memo...mentioned that some...faculty members raised the issue with you. As they remain anonymous because of confidentiality, I wonder if they are really...faculty members. If they are, why did they try to cause confusion deliberately as they should know the issue clearly?"

The professional implication of this communication was that it indirectly accused me of lying about my contacts with departmental members, but if I defended myself against that accusation, I risked revealing information about the identities of those who had contacted me. As this chair had previously asked me in conversation about the complainants' identities, it seemed likely that this communication was an attempt to manipulate a response which would disclose information about those identities. In fact, the memo to which he referred did not mention faculty members. I had, in my contacts with him, refrained from giving any information about the status of those who had contacted me, whether faculty, staff, graduate students, undergraduate students, or some combination thereof. Despite the fact that this chair had copied his memo to a dean in a university community, I decided not to respond so that the confidentiality of identities would be protected in an instance where complainants might otherwise be subject to retaliation. There is increasing concern among ombuds practitioners about more threatening challenges to confidentiality than that issued by an angry departmental chair, specifically those challenges associated with litigation. It consumes time, energy, and resources to have the issue of confidentiality repeatedly litigated. Having this issue determined judicially rather than legislatively is a course fraught with risk as well as inefficiency. While it is very encouraging that courts have tended to protect confidentiality, there is no guarantee that all courts will do so. Therefore, the wiser course of action is legislatively created confidentiality to protect the ombuds dispute resolution process.

Some practitioners already have statutory protection. According to Dean M. Gottehrer, former president of the United States Ombudsman Association (USOA) and current Joint Model Shield Law Committee member, "Those in the best position are the state ombudsmen, whose records are confidential by law and who are protected from having to disclose their records or testify in court by immunity provisions in their statutes."

In the absence of such protection, some ombuds practitioners prefer to keep little or no information in files or to destroy files once the ombuds role in a case is complete. These practices are not without disadvantages. One is that the ombuds who keeps little or no information in files is forced to rely on more fallible human memory in handling cases. Also, in such instances, as well as in instances in which files have been destroyed, if ombuds misconduct is alleged, records which could help provide a defense are not available.

The Ombudsman Association (TOA) is also working on the issue of confidentiality. According to Executive Officer, Carole M. Trocchio, TOA supports state statutory protection similar to statutes that "protect mediators from being called to testify for one party or the other in a mediation;" likewise ombudsmen "should be protected from being required to testify and/or submit their records," so that individuals can "trust in the office of the ombudsman as a confidential resource."

TOA's Code of Ethics first provides that an ombuds:

> "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 second provision states:

> "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."

Additionally, TOA Standards of Practice state, in part, "We base our practice on confidentiality" and members are required to have an agreement of confidentiality with their employers. Trocchio recommends that an individual requesting assistance be told that communication between that individual and the ombuds "is confidential unless the individual gives...permission to speak to others within the organization about the situation in order to resolve it." She also recommends that the Code of Ethics and Standards of Practice be visibly displayed in the ombuds office.

Gottehrer notes that it may be advisable to inform complainants that records and the complainant's identity are confidential, but adds, "Obviously there are complaints that cannot be investigated without disclosing the complainant's identity. If the complainant is unwilling to have the identity disclosed in such a case, the complaint is closed." Gottehrer adds that occasionally complainants need to see this information in writing in order to understand it.

In the Office of the University Ombudsman at Southern Illinois University at Carbondale, we have, after consultation with University counsel, recently begun asking individuals requesting assistance to read and sign a Statement of Understanding and Authorization. We do so in order to help those requesting assistance to have realistic expectations about confidentiality as well as other issues. The Statement makes these individuals aware that their communications will not be voluntarily disclosed in judicial or administrative proceedings, but that the possibility of judicially compelled disclosure exists. We feel obligated to inform individuals of this possibility because Illinois has not established legislative or judicial protection of an ombuds privilege. Our Statement also authorizes such disclosure as is reasonably necessary to effect dispute resolution and advises of confidentiality exceptions such as threats of harm to persons or property.

The Joint Model Shield Law Committee, composed of representatives from professional ombuds groups, is working on a model confidentiality statute which will protect an ombuds from testifying or producing evidence. According to Joint Model Shield Law committee member, Mary Lou Fenili, who has worked for a statutory bar to ombuds' testimony and production of evidence in Colorado, a good rationale for such a bar may help win legislative support. Fenili points out that barring testimony or other evidence is different from creating a confidentiality privilege since the holder of a privilege can waive that privilege. In terms of rationale, she also points out that, serving as a designated neutral or impartial source of assistance in a variety of institutional settings, an ombuds guards against abuses within systems and helps develop fair solutions to a wide range of problems. Ombuds assistance is an alternative resource for individuals who, for various reasons, choose to address problems in an informal, essentially confidential system rather than in a more formal, non–confidential system. Confidentiality encourages individuals to come forth with problems which they might otherwise not reveal.

Sexual harassment is an example of an especially sensitive issue in which an ombuds may be asked to intervene. The dilemma which employers may face is that "many employees will report sexual harassment only if promised confidentiality, but once an employer learns of such alleged conduct it has an obligation to investigate and take corrective action." Mary Elizabeth McGarry argues that, if privileged, communications "cannot be used to establish employer notice," so that "an employer can assure its employees of strict confidentiality without fear that an employee's communication with the ombudsman will...trigger an employer duty to investigate and take action or serve as a basis for imposing employer liability."

McGarry reasons that because sexual harassment victims are more likely to come forward confidentially, the ombuds "will have the opportunity to persuade victims to pursue formal, non–confidential channels" within the organization and to otherwise help resolve sexual harassment problems without litigation. McGarry's reasoning corresponds with my professional experience. Within the past few months, for instance, I was contacted by a victim who made sexual harassment allegations. I did encourage her to use the University's formal procedure for investigation and remedy of such complaints. I was able to give her information about that procedure, and guidance in initiating a complaint, which is currently under investigation. In such an instance, then, an ombuds may find it appropriate to direct one seeking assistance to a formal internal resolution procedure.

On the other hand, Fenili points out that an ombuds may know the confidences of all participants and frequently accomplishes informal dispute resolution, reducing the need for resort to formal systems, thus serving a vital public interest. An ombuds may mediate, but not arbitrate, in an attempt to find a solution that is fair and satisfactory to participants. If the ombuds is unsuccessful, participants are in no way precluded from seeking more formal means of dispute resolution. Confidentiality is consistent with established non–discoverability of settlement negotiations or mediation proceedings.

Finally, Fenili points out that, for the foregoing reasons, the ombuds function fulfills all four traditional criteria for privileged communications. Communication originates in the belief that it will not be disclosed. Inviolability of that confidence is essential to the purpose of the confidential relationship. Society should foster that relationship. Anticipated danger to the relationship, through fear of disclosure, is greater than the expected benefit to justice in obtaining evidence. Granting immunity to an ombuds

protects the rights of all participants in the informal dispute resolution process.

Protecting the rights of all participants sustains the viability of informal dispute resolution within our communities and institutions. Even in the case of my anonymous complainants and the angry department chair, this process proved not only viable, but reasonably successful. A compromise interpretation of the contested hiring process requirements was reached. Shortly thereafter, I received a call on behalf of the complainants, from one of them who said, "I want to thank you from the bottom of my heart."

Citations

Mary Lou Fenili, "Model Shield Law," Personal email (November 21, 1995).

Dean Gottehrer, Letter to the author (December 6, 1995).

Mary Elizabeth McGarry, "The Ombudsman Privilege: Keeping Harassment Complaints Confidential," *The New York Law Journal* (November 30, 1995).

Carole M. Trocchio, Letter to the author (December 5, 1995).

Comments

Most of us do not use release or authorization forms. The visitor might fear that it is proof that they came to see the ombudsperson or see it as a violation of confidentiality. What if the visitor refused to sign it? Would the ombudsperson refuse to meet? What if the visitor is so upset that they can't be stopped to sign a form? Many of us "meet" with people over the phone so we can't ask them to sign a form; we might read a short statement to them. I think the crux of the issue is this: We may each do it in slightly different ways, but we need to tell people how the confidentiality of our offices works-how it supports them and how it limits us.

Mary G. Simon is the Ombudsperson at Lucent Technologies in North Andover, MA and has been a corporate ombuds for twelve years. She has been on the Board of The Ombudsman Association for six years and has served as the organization's President. She is also an instructor in TOA's training courses and is Chair of the Joint Shield Law Committee of the Ombudsman Leadership Forum.

I generally liked the thoughtfulness of this article, the opening story and the material she uses from Trocchio, McGarry, Fenili and Gottehrer. I am however concerned about the idea that an "ombud ...might direct someone to a formal process." I think an ombud usually should lay out options for the choice of the concerned person and "direct" someone only in the most serious of cases where someone's life or immediate health is at stake. If the release form anticipates compelled disclosure, people may therefore try to compel her. It may be safer to say that as an ombud she will assert a privilege and resist testimony as it is against standards of practice. I think that it may be preferable for an ombud to say that he or she has never testified and will always try not to. The terms of reference that make all this clear can be on the office door, handed out to people, and generally published within the workplace, so I am not sure that an ombud needs a release. Besides, I could not use the release within my understanding of our ethics. What could I do with it? I will not disclose whether or not someone has been to my office - how could it be used?

Mary Rowe has been an ombudsperson at MIT since 1973 and is a member of UCOA and an attender at the California Caucus meetings at Asilomar. She co-founded the Corporate Ombudsman Association (COA), now TOA. She has written a number of articles about ombudsmanry and is a member of the Joint Shield Law Committee of OLF.

Privilege of Confidentiality ©

Sharan Lee Levine

The notion of a privilege of confidentiality for organizational ombudsmen evokes thoughts of a "kinder, gentler" channel of communication. For several years ombudsmen in colleges, universities and the private sector as well as classical ombudsmen have struggled with how to protect records and conversation for the greater good. If our society values a "humanistic" approach as forming the basis of public policy, then support for an ombudsman privilege is obvious. But ombudsmen do not function and operate their offices the same way. Organizational ombudsmen and classical ombudsmen differ in fundamental ways. Organizational ombudsmen function and approach problems differently among themselves. Judges and legislators are hard pressed to extend protection in the face of such differences. This paper urges ombudsmen to work toward a consensus; to attempt to operate by standards; to define ombudsmen consistently, so that convincing legislatures and courts to extend privilege to all ombudsmen will be possible.

For the last several years, organizational ombudsmen have been enjoying successes in the lower courts and administrative bodies. Public sector ombudsmen are increasingly recognized by State legislatures and by Congress. Alternative dispute resolutions is the ombudsmen's talisman. Judges seem willing to extend protection in the name of ADR. These factors, coupled with some ombudsmen's intense interest in establishing standards have helped this cause.

This article will (1) briefly describe the judicial approval won in the last several years, (2) examine legislative alternatives to protect ombudsmen records and communications, and (3) explain the work recently completed by ombudsmen to help achieve consistency.

Privilege or immunity is defined in the dictionary as "an exemption." Privilege means at private law "one who stands out alone." Immunity means relief from the burdens of the community or public office. Therefore, in a simple way, a privilege or immunity gives an individual or group an exemption from laws burdening other members of society. To be relieved from such burdens, those seeking the exemption must show that strong public policy justified the privilege.

The law of privilege in the United States has been unsettled for decades. Evidence scholar Professor Daniel Capra of Fordham University School of Law is opposed to an expansive view of privilege: "I think it impedes the search for truth." But Professor Stephen A. Saltzburg of George Washington University National Law Center has said protecting confidential communications from litigation is protecting one's expectations and rights of privacy.[1] This conflict ebbs and flows with the political tides. In 1966, Justice Douglas warned us of the increase in official inquiry in our private lives when he said

> "these examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen-a society in which Government may intrude into the secret regions of man's life at will." *Osborn* v *United States* , 385 US 323, 341 (1966).

Privileges were codified in nearly all fifty states for traditional professionals like the clergy, physicians and lawyers. Today, privileges of confidentiality extend by State statute to social workers, mediators, classical ombudsmen and "neutrals" who aid in dispute resolution. Under FRE 501,[2] Congress and the judiciary were vague on whether privileges should be easily construed or restrictively applied. For the last twenty-five years, the Federal courts have inconsistently applied the rule. The balancing test applied on a case by case basis is sometimes referred to as Wigmore's common law analysis. In order to assert a privilege at common law, the court must find 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 incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation." *Kientzy* v *McDonnell Douglas Corporation,* 133 FRD 570, 571 (E.D.Mo. 1991).

Shabazz v *Skurr* , 662 F Supp 90 (S.D.Iowa 1987) was the first case to apply FRE 501 to omubsmen. The Iowa Citizens Aid Ombudsman's Office sought protection when a former prison ombudsman attempted to testify as a private consultant in a case as to matters with which he was aware during his tenure in the office.

Even though Iowa's prison ombudsman statute included a privilege of confidentiality, the Federal court applied FRE 501. The court was persuaded that the office needed protection and the privilege applied to all staff in the office, not just the individual ombudsman. The court

expressed concern that there should not be any restrictions in the flow of information to the office. The office cannot compel citizens and other whistleblowers 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." *Shabazz* , *supra* , at 92.[3]

In 1990, United Technology Corporation's ("UTC") ombudsman, Ann Bensinger, sought a protective order in *Roy* v *United Technologies Corporation,* Civil H-89-680 (JAC), Transcript of May 29, 1990 (D.Conn). Counsel effectively argued that the Defense Industry Initiatives conclude that "significant improvements in corporate self-governance can redress shortcomings in the procurement system and create a more productive working relationship between Government and industry." On the basis of this significant public policy, the office warranted protection. Citing *Trammel* v *United States* , 445 US 40, 47 (1980), the court said "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 an underlying case-by-case basis, and to leave the door open to change.'" The judge referred to the "characteristics" of the ombudsman's office at UTC and did not intend the decision to be construed as creating a "novel privilege."

Kientzy is the first published opinion pertaining to organizational ombudsmen in which the court applied the four-prong test. The court found first that the ombudsman "received the communication in the belief that they would be kept confidential."

The court agreed the office instituted procedures to assure confidentiality, like the ombudsman's strict pledge of confidentiality which extends to all employees; (new employees are advised of this pledge and employees are reminded in various company publications). The company has no access to ombudsmen files, and the office is a separate entity, distinct from the company's human resources or personnel division.

Other ways companies can assure confidentiality include providing an 800 phone number, beeper service and designated facsimile. Offices should be situated in locations which assure privacy to those availing themselves of the office.

The court was persuaded that the second component exists:

> "The ombudsman's office provides an opportunity for complete disclosure, without the specter of retaliation, that does not exist in other available, non-confidential grievance and complaint procedures." *Kientzy, supra,* at 572.

Third, society's benefit was evidenced by the fact that McDonnell Douglas participates and serves the defense industry as well as Government contracts.

> "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* ." *Id* . (emphasis added)

Efforts to deal with sexual harassment and discrimination in the workplace may also have reached significant public policy status. Mary Elizabeth McGarry asserts in a recent article that the workplace must deal with and eradicate sexual harassment, warranting the use of this confidential channel of communications.[4]

> "If communications with an ombudsman are privileged, shielded from discovery, and cannot be used to establish employer notice, an employer can assure its employees of strict confidentiality without fear that an employee's communication with the ombudsman will either trigger an employer duty to investigate and take action, or serve as a basis for imposing employee liability."

The balancing test contained in the fourth component enabled the Kientzy court to find that a court order requiring the ombudsman to disclose the information communicated to her in confidence "would destroy the reputation and principles of confidentiality that the McAir (McDonnell Douglas) ombudsman program and office now enjoys and needs to perform its functions." at 572.

Finally, the court pointed to the plaintiff's need for relevant information and opined that by deposing all other relevant fact witnesses, the truth will ultimately be disclosed. In addition to protecting McDonnell Douglas' ombudsman, the court also ruled that the parties "may not ask any witnesses to disclose their statements to the company's ombudsman." at 573.

Kientzy's progeny highlights the success garnered by ombudsmen across the country. See *McMillan* v *The Upjohn Company* , Case No. 1:92-CV-826 (W.D.Mich. March 8, 1995) (an unpublished order preventing both parties from inquiring into Upjohn's ombudsman's office); *Jones* v *McDonnell Douglas* , 4:94-CV-355 (CEJ) (E.D.Mo.1995); *Wagner* v *The Upjohn Company* , Case No. A91-2156-CL (Mich.Cir.Ct. April 22, 1992) (an opinion recognizing privilege); and *Kozlowski* v *The Upjohn Company* , Case No. 94-5431-NZ (Mich.Cir.Ct. August 16, 1995).

Two administrative bodies protected ombudsman offices in 1995. The US Department of Labor in the matter of *Acord* v *Alyeska Pipeline Service Company* , Case No. 95-TSC-4 (October 4, 1995), applied FRE 501 and relied on the cases mentioned above in granting privilege to Alyeska's ombudsman program. The National Labor Relations Board determined that the Polaroid Company's ombudsman program does not violate National Labor Relations Act provisions against the formation of unauthorized labor unions. *Polaroid Corp* ., Case No. 1-CA-32607, NLRB Advice Memorandum (July 18, 1995).

Finally, 1995 is significant because the California Court of Appeals granted a qualified privilege of confidentiality to ombudsmen on the basis of California's constitutional right to privacy. In *Garstang* v *The Superior Court of Los Angeles County* , 39 Cal App 4th 526, 46 Cal Rptr 2d 84 (1995), Plaintiff Garstang sued a private educational institution for slander and intentional infliction of emotional distress. Plaintiff claims she was treated unfairly when certain rumors circulated about her in the institution. Caltech's ombud, Helen Hasenfeld, conducted meetings to assist the parties to resolve the situation, but the parties were unable to resolve the matter, and Garstang filed suit. During discovery, plaintiff sought to compel Hasenfeld to testify about the substance of the meetings.

In deciding the case, the court weighed competing public values: "there must be a careful balancing of the compelling public need for discovery against the fundamental right of privacy." The court also found that "where the communications were tendered under a guaranty of confidentiality, they are thus manifestly within the constitution's protected area of privacy."

California only recognizes privileges codified by statute. The court could have applied the statutorily created mediation privilege and ruled just on the issue before it. Sandra Cooper, general counsel for Caltech said, "California feels strongly about alternative dispute resolutions; the court may have chosen to create a broad privilege because people are fed up with litigation."

After finding the right to privacy applicable, the Appellate Court also examined the facts in light of *Kientzy* . *Garstang* is the first Appellate Court in the country to recognize a privilege of confidentiality for organizational ombudsmen. Chuck Howard,[5] a litigation partner at Shipman & Goodwin in Connecticut, who represents ombudsmen, suggested caution: "Granting a privilege to ombudsmen on the basis of a state constitutional right of privacy may produce a chilling effect on legislatures and other courts. They may perceive this as a decision to open a Pandora's box and may not see where such a line of reasoning may end."

In February 1996, the United States Supreme Court heard oral argument in *Jaffee* v *Redmond* (Case No. 95-266), examining privilege for social workers. ln 1991, police officer Mary Lou Redmond, responding to a call about a fight at an apartment complex in a Chicago suburb, shot Ricky Allen, who was alleged to be armed and chasing another man. Subsequently, Redmond availed herself of counseling services from a social worker. Allen's family filed a civil rights case against the officer and the Village of Hoffman Estates. During discovery and at trial, plaintiff sought testimony and records of Redmond and her therapist; both refused to testify about the content of the nearly fifty sessions. The Federal trial judge recognized a privilege of confidentiality for psychotherapists but refused to extend it to social workers. The trial judge told the jury that it could infer from the therapist's refusal to testify that the testimony would have been negative. The jury awarded $545,000 to the estate and family. The Seventh Circuit Court of Appeals reversed the trial court (51 F 3d 1346 1995). Upon finding a common law privilege for social workers, the Appellate Court noted the high demand for counseling in "today's stressful, crime-ridden, homicidal environment." The court found that secrecy is essential to successful treatment in the therapeutic relationship. The court also found that fifty states recognize a social worker's privilege, and that must mean that the states' experience is favorable.

But it is the question of state rights on which the federal common law privilege may pivot. Counsel for the Village of Hoffman Estates, Richard Williams, and counsel for Officer Redmond, Gregory Rogus, said that the Justices' questions showed their interest in permitting states to define privileges. "This is a matter of state law certification. The court is looking for a clear, easily applied rule, rather than have a rule that applies on a case-by-case basis." The high court could curtail FRE 501, eliminate the balancing test, and leave the federal courts to grant privileges if the state recognizes a privilege by statute or by the state's common law. For ombudsmen who have successfully argued on the basis of FRE 501, such a result might make *Kientzy* arguments more difficult. Some states view privilege broadly and are willing to entertain common law privileges but many states are hostile to privileges not codified by statute.

When states view privileges narrowly, another theory available to protect an ombudsman may be implied-in-fact contract theory. This approach, successfully applied, less well known and cautiously used, was an alternate one used to protect the ombudsman's records at United Technologies Corporation. Judge Cabranes in *Roy* , *supra* , found "a separate and independent basis" to grant a protective order for UTC's ombudsman.

Implied-in-fact contract theory posits that "under appropriate circumstances which according to ordinary course of dealing show a mutual intention to contract, but the

intention is not manifested by direct explicit words between the parties, and is to be gathered by proper deduction from conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction." *Erikson* v *Goodell Oil Company* (384 Mich 207, 212; 180 NW 2d 798 1970). Another second circuit case, *Criado* v *ITT Corporation* , 61 Fair Empl. Prac. Cases (BNA) 321 (S.D.N.Y. 1993), found that New York's presumption that employment contracts are "at-will" may be modified by the language in the company's code of corporate conduct. The court found that the code, together with other corporate documents, promised employees that there would be no retaliation for disclosing illegal conduct, and, therefore, the employment contract is modified by the promise. This theory is cautiously used because companies, universities and colleges do not want to be perceived to be promising their employees more than they explicitly offer in employment agreements. Employers are concerned that if an implied promise derogates the otherwise "at-will" status, then ostensibly other promises could be construed to create additional contractual terms. But, when ombudsmen cannot rely on legislation or the common law to protect their records and communications, implied-in-fact contract may be the best and only approach.

Efforts to achieve state statutory exemptions to protect ombudsmen from testifying are growing in importance. For several years the federal government has been urging government offices to use alternate forms of dispute resolution.

The Administrative Dispute Resolution Act was originally passed by Congress in 1990 to encourage federal agencies to use ADR to resolve disputes. The Act expired in autumn, 1995 and is expected to be reauthorized. The confidentiality provisions are rewritten to strike a "careful balance between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements." (Administrative Conference Recommendation 88-11.)

In 1990, when the original legislation passed, certain dispute resolution communications became "agency records" within the meaning of the Freedom of Information Act. Senator Carl Levin is spearheading the reauthorization effort, which could occur at any time. Public university ombudsmen who are required to respond to FOIA requests may be able to use ADRA to argue, by analogy, that if ombudsmen serving in the federal government are exempt from FOIA disclosures, so should public university ombudsmen be exempt. Note, however, the ADRA only directly benefits government ombudsmen.

Last year the Ombudsman Leadership Forum formed a joint committee to draft a model shield law.[6] The discussion focused on the inherent differences between classical and organizational ombudsmen. Such issues as investigations (the formal process regularly performed by classical ombudsmen, but which organizational ombudsmen do not conduct except to the extent they gather data), record keeping (classical ombudsmen publish reports, and workplace and university ombudsmen try to avoid all writing), and confidentiality (some classical ombudsmen do not promise confidentiality while organizational ombudsmen will defend confidentiality at all costs) are just some of the differences.

For The Ombudsman Association ("TOA"), proposed legislation may not conflict with the Code of Ethics and the Standards of Practice. Among organizational ombudsmen, some regularly issue reports and write letters; others are paperless. Some are part of a human resources division or legal division. Some ombudsmen have additional duties in the workplace that conflict with their role as an ombudsman, destroying neutrality.

Negotiations and discussions for a definition of "ombudsman" in the proposed shield law focused on these points. The committee was successful in recognizing the differences and embracing the similarities among ombudsmen. The definition is one which is useful to classical and organizational ombudsmen.[7]

In 1995, TOA members approved the 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 toact 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 the file noting this action as an exception to the ombudsman role. Such investigations should not be considered privileged. We foster communication about the philosophy and function of the ombudsman's office with the 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." *(Reprinted with permission.)*

In an earnest effort to achieve consistency as an additional step toward the focus of achieving a privilege, either by statute or as approval won through the courts, TOA members are steadfast in their intention to live by the Standards of Practice. Until now, without standards, the offices that received court approved privilege were shown to be consistent with each other. But, ombudsmen have held their breath that a case may come along in which protection is sought and denied because the ombudsman seeking protection does not function the same as ombudsmen at United Technologies, McDonnell Douglas, Upjohn, Aleyska or Caltech.

For instance, see *Hansen* v *Allen Memorial Hospital*, 141 FRD 115 (S.D.Iowa 1992) in which the Iowa Civil Rights Commission sought to quash a subpoena of tape recorded interviews. In applying FRE 501, the court found that the ICRC does not contend that its files are always confidential to the parties participating in an investigation of a charge of discrimination. "If confidentiality were the norm rather than the exception, the arguments in favor of respecting the limited confidential privilege would be much more compelling." at 123. The court found that the tape recorded interviews would have been made available to the parties and were not necessarily always kept confidential. The court also found that witnesses were not always promised confidentiality.

Ombudsmen must note that a privilege, however derived, is not absolute. The privilege yields under limited circumstances including "where there appears to be imminent threat of serious harm" (TOA, Code of Ethics). Beyond that, circumstances, conditions and practice vary. For instance, ombudsmen may be mandated by state law to report instances of child abuse. Essentially, other than a *Tarasoff* kind of report, ombudsman carefully review the instances in which they must report.[8] Also, with application of the Federal Sentencing Guidelines in the corporate setting, ombudsmen who are able to assure and protect the identity of whistleblowing employees tend to be more comfortable reporting the subject matter of illegal and unethical conduct to their corporation.

In conclusion, to be effective, ombudsmen must be able to assure confidentiality. To obtain a privilege, ombudsmen must function with clarity and consistency in order to show the courts or legislatures that a privilege is warranted. Initially, privilege requires the courts and legislatures to weigh the loss of evidence against the social value of the extrinsic policies fostered by the privilege.[9] Ultimately, privileges are dependent upon our society's moral and ethical values, our respect for rights of privacy, and our willingness to accept the consequences of self-determination and personal responsibility.

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1 Stephen A.Saltzburg, "Privileges and Professionals: Lawyers and Psychiatrists," 66 *Virginia Law Review* 597 (1980).

2 Rule 501. General Rule. "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, 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 supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with the State law." FRE 501

3 The Court also noted that other dispute resolution mechanisms such as FRE 408 assures confidentiality of settlement discussions.

4 Mary Elizabeth McGarry, "The Ombudsman Privilege: Keeping Harassment Complaints Confidential," *New York Law Journal* (November 30, 1995).

5 Mr. Howard represented Ombudsman Bensinger in *Roy* v *UTC*, *supra*.

6 In addition to UCOA, the Association of Canadian College and University Ombudspersons, the California Caucus of College and University Ombudsmen, the Canadian Association of Parliamentary Ombudsmen, The Ombudsman Association and the United States Ombudsman Association.

7 Draft, Proposed Bill, An Act to Establish Ombudsman Immunity, Section 1: "Definition. For the purposes of the Act, an Ombudsman is: (a) a person appointed under a federal or state statute or local ordinance creating an ombudsman's office, or (b) a person officially designated and recognized by an organization as a neutral or impartial dispute resolution practitioner independent of the usual administrative authorities within a college or university, corporation or other business entity, government body, hospital, nursing home or other health care facility, who offers confidentiality, investigates or provides assistance in resolving disputes and concerns on an informal basis, and practices according to the code of ethics or the standards of practice of a professional ombudsman association or written terms of reference or law creating an ombudsman's office."

8 *Tarasoff v California Board of Regents of University of California*, 551 P2d 334 (1976). This case ruled that therapists have a duty to warn third parties if the therapist concludes the patient is likely to commit serious harm to self or others.

9 Edward J. Imwinkelried, "An Hegelian Approach to Privileges Under FRE 501: The Restrictive Thesis, The Expansive Antithesis, and The Contextual Synthesis," 73 *Nebraska Law Review* 511 (1994).

Comment: A Lesson in Trust

That *Garstang* v *Caltech* ended in significant recognition of Ombuds Confidentiality still evokes pain and humor for me. I will share some of the more salient events that brought us (Sandi Cooper and myself) to this point.

I became the Ombuds at Caltech in 1991. At the same time, Sandi was hired in the General Counsel's Office. I was unsuccessful in connecting with Sandi to meet for lunch for several months. Finally we met over lunch, along with our Director of Employee Relations, who had basically forced this meeting to happen. Sandi made it very clear that she was displeased with Caltech's decision to have an Ombuds Office that was confidential and outside of the Institute structure.

Our first professional encounter was regarding an existing court case during which the plaintiff said she had visited the Ombuds office. I had heard about the case during my "debriefing" with the prior Ombudsperson. Indeed, there was a huge file in my locked files in my locked closet with many of the gory details. In my prior life I was a psychotherapist, and so files meant something entirely different to me. I also had not had the opportunity to meet Mary Rowe and hear her discourse on "to shred or not to shred."

One morning I received a call to alert me that a subpoena was being delivered to me from our General Counsel's office. I knew enough about Ombudsing to know this was a VERY BIG PROBLEM and called the President's office to run this little situation by him. Within hours, the subpoena went away. But the problem of clarifying my role with General Counsel had not. I asked for, and received permission to engage my own counsel, as I wanted to talk to someone totally unattached to the Institute. She and I spent many hours reviewing existing literature, and then Sandi and I met in the President's office, along with the Provost and Vice-Provost. We had a "discussion" about the issue of an Ombuds Office, and at a certain point, I said that if Caltech decided the office was subpoenable, they could kiss the program goodbye-no one would use it. I left the office with a Presidential decision to keep and protect the office's confidentiality.

Sandi and I did not have the opportunity to work with each other until the Office of Civil Rights was contacted by the Plaintiff in regard to the same case. I was consulted about the way in which Caltech was going to handle the OCR request for information, while keeping that information confidential. Sandi was masterful in crafting a suggestion that was agreed to by OCR. I agreed to the plan and felt that it did not compromise the confidentiality of the office. The plan included me writing up some scenarios about the types of cases of sexual harassment that had come my way, as well as a statement about the office. My scenarios were folded into others that had followed the formal reporting route, as well as the outcome of these actions. I was careful to disguise any identifying information, the information was more demographic than descriptive. Resolutions were included. The report also contained information as to how information about Sexual Harassment Policy and Procedures was disseminated on campus. The Ombuds Office was listed as a confidential resource for this information.

Sandi was shocked to learn that six cases of alleged sexual harassment had been handled informally in my office without anyone else's knowledge or eventually moving into the formal process. At this point, our relationship changed dramatically and we continue to work together often and have sincere respect for each other's skills. Sandi became a true advocate for Ombuds confidentiality and worked closely with Sharan Levine on several occasions. In addition, she advocated for an Ombuds Office at the Jet Propulsion Laboratory, which is administered by Caltech and served by the General Counsel's office.

When the *Garstang* v *Caltech* case came about, Sandi not only protected the Ombuds Office, she followed the *McDonnell Douglas* court ruling that parties "may not ask any witnesses to disclose their statements to the company' ombudsman" by objecting to all questioning at depositions about discussions with the Ombuds Office. The Plaintiff's attorney was quite unhappy, as California had no explicit ruling shielding this information. He took the case to Superior Court, where the judge agreed with Sandi, that in order to resolve issues informally, confidentiality was imperative. The Plaintiff's attorney bumped the case to the Appellate Court, who refused to handle the case. When the State Supreme Court reviewed the case, they insisted that Appeals come to some conclusion about this.

I am truly grateful to Caltech for understanding the importance of confidentiality so that the office can function. The Institute provided the money to hire two attorneys who do strictly appeals work. Sandi and I again worked together in helping to craft the appeal. We both went to the court when the case was heard, and sat on pins and needles for close to seven months until the ruling came down.

We at Caltech heard about the ruling in an unusual, but technologically twenty-first century, way. I began to receive emails from many of my colleagues across the country congratulating us. It took a few minutes for me to realize that Sandi had done it.

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Reporting Ombuds Office Data: The Tension Between Confidentiality and Constructive Feedback to the Community©

Marsha Wagner

If the primary function of the organizational ombudsman is to respond to individual concerns and offer options for ethical and responsible resolutions, a complementary obligation of comparable importance is to provide timely feedback to the organization. The ombudsperson may report trends, indicating patterns of concerns that suggest either problem areas or — over time — areas that are apparently improving. A critical mass of similar complaints may prompt an ombudsman to encourage steps to enhance staff morale, organizational efficiency, equitable treatment and procedural regularity. Even a single case, however, may provide the basis for an "early warning" to the organization – especially if the issue is new to the organization – if individual confidentiality can be protected. Organizational leadership can benefit greatly from ombuds data support in "critical self–analysis" of the organization. Cases handled by the ombuds practitioner may also lead to recommendations for system change — updating or clarifying policies, improving services, developing training programs, or augmenting the internal dispute resolution processes. The ombudsman's aggregate data offer a valuable holistic reading of the organization's "vital signs" — the functioning of its various interdependent parts and systems, symptoms that need watching, its overall fitness and mental health. But whenever the ombudsman provides information or reports to managers or the community, there is a tension between this communication and the actual and apparent confidentiality of the ombuds office. Moreover, common knowledge that the ombuds office maintains a rich database of reported complaints might attract the attention of those seeking to build a case against the organization, and might make the ombudsman's statistics more vulnerable to possible subpoena, further threatening the appearance of confidentiality.

Providing Upward Feedback

When the ombudsman gives feedback to the organization, certain principles must always be taken into consideration:

Confidentiality: Since the ombuds does not identify individuals she or he has been in contact with, or the specifics of particular cases, without appropriate permission, it is important that most reported material remain anonymous or private, and that the office maintains credibility by actions that indicate concern with confidentiality. Stripped of identifying features, cases handled by the ombuds may be constructively discussed if individual confidentiality is not in fact threatened and does not appear to have been breached. Anonymous aggregate statistics are the most common means of reporting concerns that will not be individuality identifiable. Generally, ombuds practitioners would resist attempts to compel discovery of their anonymous data or to force them to testify in a formal adversarial procedure about patterns of concern or complaint trends within the organization they serve.

Timeliness: The more immediate the information, the more useful to the organization, particularly in the case of "early warnings." On the other hand, current information may be more likely to suggest actual cases in progress, and the passage of time may help to protect individuals from possible identification. In addition, some urgent areas of concern should be brought to the senior managers involved as early as possible; and other long–term concerns might be most appropriately addressed from the broader perspective of a periodic report, or a trend analysis — how a department is doing with concerns about discrimination year by year.

Need to know: When the purpose of reporting problem areas is to encourage that steps be taken to avoid repetition or continuation of that problem, it is necessary for the decision–makers and policy–implementors in that particular area to be informed of the concerns. It usually is not necessary or even appropriate for new managers or colleagues in other areas to be made aware of past shortcomings or other divisions' needs for improvement. Since areas of concern that emerge from ombuds office data do not constitute a purely random or comprehensive survey, it is not appropriate to use ombuds data to compare units of an organization: a relatively large number of complaints from Division A might indicate a number of conflicts or uncertainties in that area, but it also might reflect a high representation of "good citizens" who felt motivated and comfortable to bring concerns — such as possible health or safety risks — to the attention of the ombuds office. Conversely, a low number of contacts with the ombuds office might suggest absence of difficulties or severe intimidation and reluctance to speak out. Generally, the ombuds demonstrates respect for senior managers in a problem area by restricting awareness only among those with a need to know. Making the situation known to others might represent a form of peer pressure (or shaming) that would be reserved for only a very unusual situation or an urgent last resort to encourage change.

Distribution: General profiles of ombuds data might be of interest to all members of an organization. The broad outlines are sometimes reported in a company newsletter or a circulated annual report. They would indicate the types of issues brought to the ombudsperson, the kinds of resolutions that were pursued, and may serve to affirm the value of the function. They might highlight, for example,

that not only complainants, but also responsible supervisors seeking a confidential resource for exploring options for handling a sensitive issue find the ombuds office useful. At the other extreme, the most specific aggregate data, perhaps pinpointing a very large number of complaints about a particular individual or function, might be shared only with the senior manager(s) in charge, or just perhaps the CEO or president. Some aggregate data might also be constructively reported to senior managers' groups, administrative leaders, and governing bodies. The purposes of distributing reported data will determine their particular form and content of dissemination in each organization.

Recording Anonymous Aggregate Data

Each ombudsman must balance the tension and dual function of providing — and appearing to provide — completely confidential conflict resolution, and offering feedback on trends and problem areas to the organization's leadership. This is generally done by means of routinely destroying notes of individual cases and creating databases of anonymous aggregate statistics. However, various strategies and techniques are employed to move from temporary case notes to permanent data reports and longitudinal studies.

Even the ombudspeople who keep the fewest notes must have some kind of appointment calendars, list of names and phone numbers for possible subsequent contacts or follow–ups, and shorthand means of jogging the memory about the concerns involved. Ideally, these notes are transformed into non–identifiable data as promptly as possible — and in addition the particular records are shredded as soon as a case is resolved or closed. Many practitioners also routinely shred other notations, such as the weekly appointment calendar. When working notes are maintained in electronic format, or there is a data record on a caller from the outset, the system can be programmed to generate a reminder to delete all identifying information (individual particulars, phone numbers) after a certain time has elapsed or when the "case closed" command is entered.

The purpose of stripping individual names and other particulars from records is to make it impossible to reconstruct or pinpoint a specific case in ombuds data. It is also important to avoid substituting identifiers for specific cases, such as a case number or "date of first contact." Ideally, the data from any one year or multi–year period would be recorded, if not entered, in random sequence — or might be scrambled to eliminate chronological order. For example, the date of the first visit — if it is recorded at all, or until it is deleted — should be electronically disassociated from information about the affiliation of the complainant or the category of concern.

It is important that all data management mechanisms be secured with passwords and other protective measures. An system independent of any other company system, such as a stand–alone data server, with its hardware physically residing within the ombuds space, may help protect ombuds data security. Keeping regular back–up tapes within the ombuds office is also helpful. Those who input the raw data must be sensitive to the confidential nature of the material. Obviously, the fewest possible individuals should have access to the data input. Some staff may be able to access the individual case input function but not the overall reporting function.

Frequently, ombuds office data record the following: status and affiliation and special relevant attributes of the initial contact person (usually the "complainant"); status and affiliation of the individual alleged offender, or the office or department complained against, if any; categories of concern; perhaps time spent on the resolution process or disposition or outcome of the case; and other "notes." One way to avoid individual identification is to use only broad categories — for example, not to indicate small departments, but to restrict categories only to larger umbrella divisions (e.g., "financial operations" rather than "budget director's office" or "risk management"). Some organizations have a policy not to retain demographic data that could lead to individual identification: for example, if a unit has several hundred employees but only one or two vice presidents, a mid–level caller from that area would be identified at his/her rank, but if one of the vice presidents called the "employee level" field could be entered as "unknown."

Some ombuds practitioners track gender and race as a self–test: if 80% of the visitors to the office of a female ombudsperson were women, or only 2% of the visitors were African–American in a company in which 10% of the work force was African–American, the ombudsperson would be alerted to explore corrective steps to encourage a more representative "clientele." Generally, it may not be constructive to distribute gender and racial profiles of contacts, except to indicate that the ombuds office is used as a resource by people representing the gender and racial diversity of the organization, or perhaps to draw attention to the difficulties faced by members of minority groups if they seek ombuds services disproportionately. Alternately, it may be helpful to take an overview of the gender and ethnicity relations between "complainant" and "alleged offender" — for example, to dispel stereotypes that all harassers are male, or to indicate the prevalence of intra–group, as opposed to inter–group, conflict.

In some organizations, the ombuds follows each case to conclusion and may record "disposition." In other environments, the ombuds frequently does not know the ultimate outcome of a case, or the consequences of a conflict would change from month or month or year to

year, long after it had been an "open case" in the ombuds office. It might be difficult to come to a neutral judgment or "outcome": for example, a supervisor might feel the situation was "resolved through progressive discipline" and the subordinate might have a more negative view of the outcome. With open–ended cases, recording a "disposition" might be misleading or less than objective. Some practitioners restrict their information to communications within their own meeting contacts, such as "option chosen by the visitor" — regardless of whether or not the visitor changed his or her mind or tried a different option later on.

In some organizations, it is only the ombuds office assistant who maintains the database. Security is higher when fewer people input or manipulate data. Some ombuds people keep statistical records themselves and input the data at home; this eliminates the possibility of being observed in the process of data manipulation — though it would not protect the information from subpoena. When office assistants do the inputting, the data might sometimes appear on the screen of the computer monitor when visitors are passing through the office or, catastrophically, a disk could be stolen. Therefore, an ombuds might take steps to avoid any possible recognition or identification of individual cases by using a system of codes. When codes are used, it is more confidential for only the ombudsperson, not the office assistant or other staff, to assign the codes. Still, coding does not shield against subpoena or discovery procedures.

A code system could be a means of avoiding specific identifiers of status, affiliation, and category of concern. A hypothetical ombuds at a university might use a variety of short (3– to 5–letter) words in place of the actual descriptors. For example, the rank of an individual (applicant, undergraduate student, graduate student, alumnus; tenured faculty, untenured faculty; professional staff, unionized support staff, etc.) could be coded into 3–letter animals: cat, cow, bat, elk, bee, gnu, fox, etc. Affiliations (schools and administrative units, from engineering school to journalism school, from library to security department) could appear as foods, with subcategories such as fruits (melon, berry, peach, apple, pear, lime and grape), and prepared edibles (pizza, sushi, scone, bagel, soup, stew, and cake); thus, the affiliation column in the database would look like a grocery list. Special code words such as colors (blue, green, pink, red, brown), flowers (poppy, iris, peony, daisy, rose), and birds (lark, robin, eagle, dove, jay) might indicate certain "notes" on particular kinds of situations (needs legal advice, violence assessment issue, "political correctness" concern, needs psychological counseling, hate speech or free speech issue, etc.) or cases in which a self–identified characteristic of the visitor is relevant to the complaint (sexual orientation or disability or non–U.S. citizen status, for example).

To record categories of concern, some practitioners identify only one issue per case. Many count types of issues only in very broad terms — "personnel," "ethical," "interpersonal," etc. In some organizations, managers prefer more particular feedback and personnel categories, for example, might be broken down into "benefits" — which could be further subdivided into retirement or health insurance or child care concerns, "performance evaluation" — which might or might not differentiate between probationary and annual performance assessment, "vacation days dispute," "overtime conflict," etc. Some ombuds when recording data may allow each case up to three issues, or more. In a coded system, the issues could be indicated by 2– or 3–digit numbers, and the first digit might correspond to the larger category; for example if all personnel issues were in the 600s, concerns could be coded:

601 retirement benefits issue
602 health insurance issue
603 child care issue
604 Family Medical Leave Act issue
605 unemployment insurance issue
620 performance evaluation issue
630 vacation days issue
631 overtime issue
632 use of sick days issue etc.

If the codes are completely arbitrary, the passer–by casually glancing at the computer screen during inputting, or the hacker who might — despite multiple security measures — break into the database or steal the disk, could not draw conclusions from the recorded information. However, encoding would not in itself protect data records from a legal discovery process.

In addition to individual case notes, destroyed as soon as the ombuds has followed up, the practitioner could also keep temporary notes on an *area* of concern in which there is an unfolding pattern involving a number of cases. These file notes would not contain individual identifiers but they might suggest some sensitive issues and would be maintained in a secure way. Many ombuds keep such personal memory aids, as well as statistical logs, at home to insure privacy and to avoid traveling with them or possibly misplacing them. A practitioner who accumulates notes on particular topics on which to recommend organizational change, and wishes to avoid any possible individual case identification (even by office staff), might name the files in which he or she is aggregating information to continue a review in a completely private code — "the cowboy file," "The Mont Blanc Expedition," "Pinocchio," or "Into the Woods."

Reporting of Aggregate Data

The ombuds practitioner provides upward feedback in a variety of ways. In addition to facilitating resolution, with permission, on particular individual cases, the

ombudsperson may take action on patterns of concern if confidentiality and appearance of confidentiality can be maintained: On a particular issue, an alert to an oversight or a recommendation for better communication might be made to a individual supervisor who could ameliorate the situation. A "heads up" to a particular unit is often shared only with management or employees from that unit, particularly if appropriate corrections are internally achieved, promptly and constructively.

When issues arise, the ombuds may attempt to arrange, as early as possible, to convey the substance of a concern to a senior manager, either with the permission of the individual(s) who brought the information to the ombuds or in a general way that conceals individual identities if anonymity is requested. The report of a budding concern or an "early warning system" is one of the greatest values of the ombuds function.

Periodically, the ombuds will meet with each member of the organization's leadership to maintain open channels of communication and to report on trends, patterns, areas to watch, and recommendations for systems change, as needed. Reporting excellent management practice, areas of improvement, or a *decrease* in complaints, is as important as alerting management to new concerns or problem areas. These periodic reports often confirm other sources of information available to the senior manager. Meetings with senior managers may indicate trends over time (such as several years).

From time to time, perhaps on a systematic schedule (such as an annual report), the ombuds may give reports to senior management on overall organizational developments. Several ombuds practitioners use these group occasions to present graphs and charts, but a general precautionary measure would be not to distribute reports or writing, or not to provide any carry–away written materials.

In some organizations, especially when there exists unquestioned commitment to the "value added" function of the ombuds office, no systematic or overview reporting occurs. Many ombuds practitioners, for various reasons, do not report statistics but they do give annual reports that call attention to certain themes — new or outstanding problem areas and improvements over the past year. Omitting all statistics has the advantage of not alerting others to a database containing material that, if misused or taken out of context, might damage or embarrass the organization.

On the other hand, the credibility of the ombuds office might be enhanced by reports that appear more concrete and objective, and statistical reporting can reinforce others' perception of the accountability and neutrality — as well as perhaps the significant caseload — of the ombuds function. Many different factors may affect the degree of detail of the overall report: some companies generally give only a very brief report to all senior managers including the CEO, but when a new CEO is appointed the annual ombuds report in the first year of his/her tenure goes into much more detail to help explain the ombuds function, and is presented only to the CEO or distributed much more narrowly. Some organizations feel that, particularly when the ombuds function is new and not yet fully understood or recognized within in the company, it is important to distribute to *all* employees an annual report giving the history, description, and utilization statistics of the office, as well as a breakdown of the ranks of visitors and most frequent categories of concern. In general, the more widely the report is distributed, the broader its categories — such as "company policy issues," "work environment issues," "leadership issues."

The size of the organization served by the ombuds also has an impact on the nature of the reporting. A heavily used office in a very large organization might be able to present complex demographic and category data without suggesting any individual cases. In a smaller organization with fewer annual cases, any written report could appear to qualify confidentiality, and some ombuds would meet annually with their CEOs to give very brief written or perhaps only oral report on trends and areas of concern, in the broadest or vaguest possible categories. Some organizations have a tradition or ritual of systematically and officially shredding data as soon as the periodic reports are made.

Comparative Reporting

Sharing and comparing data from various organizations has significant advantages and disadvantages. The more public are the ombudsman's data, the more likely they may be to be subpoenaed, or used in unconstructive ways. Comparisons among organizations might be over–simplified, giving insufficient attention to underlying differences in institutional or sector history, population and purpose. Developing a common software package could facilitate comparative reporting, but the particular needs of each organization might involve enough differences that few companies could share identical programs without sacrificing some of their own priorities and reporting preferences.

On the other hand, individual ombudspeople have much to learn from each others' experiences and observations. Moreover, broad patterns of national, social or industrial change might be confirmed if several organizational ombuds reported comparable trends or categories of concern. New issues and early warnings might be identified more quickly through collaborative efforts. The effects on ombuds data of certain kinds of organizational systems change could be compared to underscore or predict results. Moreover, articulating a consensus view of

standards of practice for maintaining and reporting anonymous aggregate statistics might also both enhance the professionalism of this function and also build a stronger foundation to protect ombuds data from discovery. The potential for development in the area of comparative reporting is very promising and open–ended.

Ethical Principles for University and College Ombudspersons

University and College Ombuds Association

An ombudsperson is guided by the following principles: objectivity, independence, accessibility, confidentiality and justice; justice is pre-eminent.

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 bias toward any individual or group.

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 to himself 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 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 recognition of 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 time 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.

Editor's Notes

The Journal of the University and College Ombuds Association publishes Occasional Papers that are of outstanding quality and of significant service to the profession. We welcome the submission of articles, letters, book reviews, case studies and responses. All submissions undergo review by the Review Panel. Since submissions are judged anonymously, indications of authorship and affiliation should not appear within the text. It is the responsibility of the authors to remove or disguise all identifiers of a case. The authors of the articles in this issue have asserted their copyright; the Journal does not assert any additional copyright. If you have any concerns about copying from the articles, please communicate directly with the authors. Fair Use Guidelines and the traditions of citation apply. Please, cite both the author and this Journal when quoting. The views expressed herein are not necessarily those of UCOA, its Board or officers. This Journal and its Occasional Papers are distributed free to the current members of UCOA while supplies last; they are also available from the editor at nominal cost. For membership information, contact any member of the review panel or the editor.

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ERRATUM

The following sentence should be added to the Ethical Principles on page fifteen and should be placed at the end of fifth paragraph as the final sentence in that paragraph, which begins "An ombudsperson treats..."

"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."

Apologies for the omission.

The Editor

June 6, 1996

The remaining contents of this folder have been redacted.

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