WHAT ARE OMBUDS?

Understanding the Different Roles of Ombuds in Dispute Resolution

ABA Definition

- Ombuds receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations. (2004 ABA Resolution, Preamble)

Ombuds, Ombudsman, Ombudsperson……..

- “The term ‘ombuds’ . . . is intended to encompass all other forms of the word, such as ombudsperson, ombuds officer, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage others from using other terms.” ~ ABA Standards for the Establishment and Operation of Ombuds Offices (2004).

- “The term ombudsman is used to communicate to the widest possible community and is not intended to discourage others from using alternatives. IOA respectfully acknowledges that many practitioners use alternative forms of this word.” ~ International Ombudsman Association (IOA) website.

As a Lawyer, You May Interact with an Ombuds when…

- You represent an organization which has an ombuds office
- You represent a client who has talked to an ombuds
- You suggest that a client establish or use an ombuds office
- You contact an ombuds on behalf of a client (with the client's permission)

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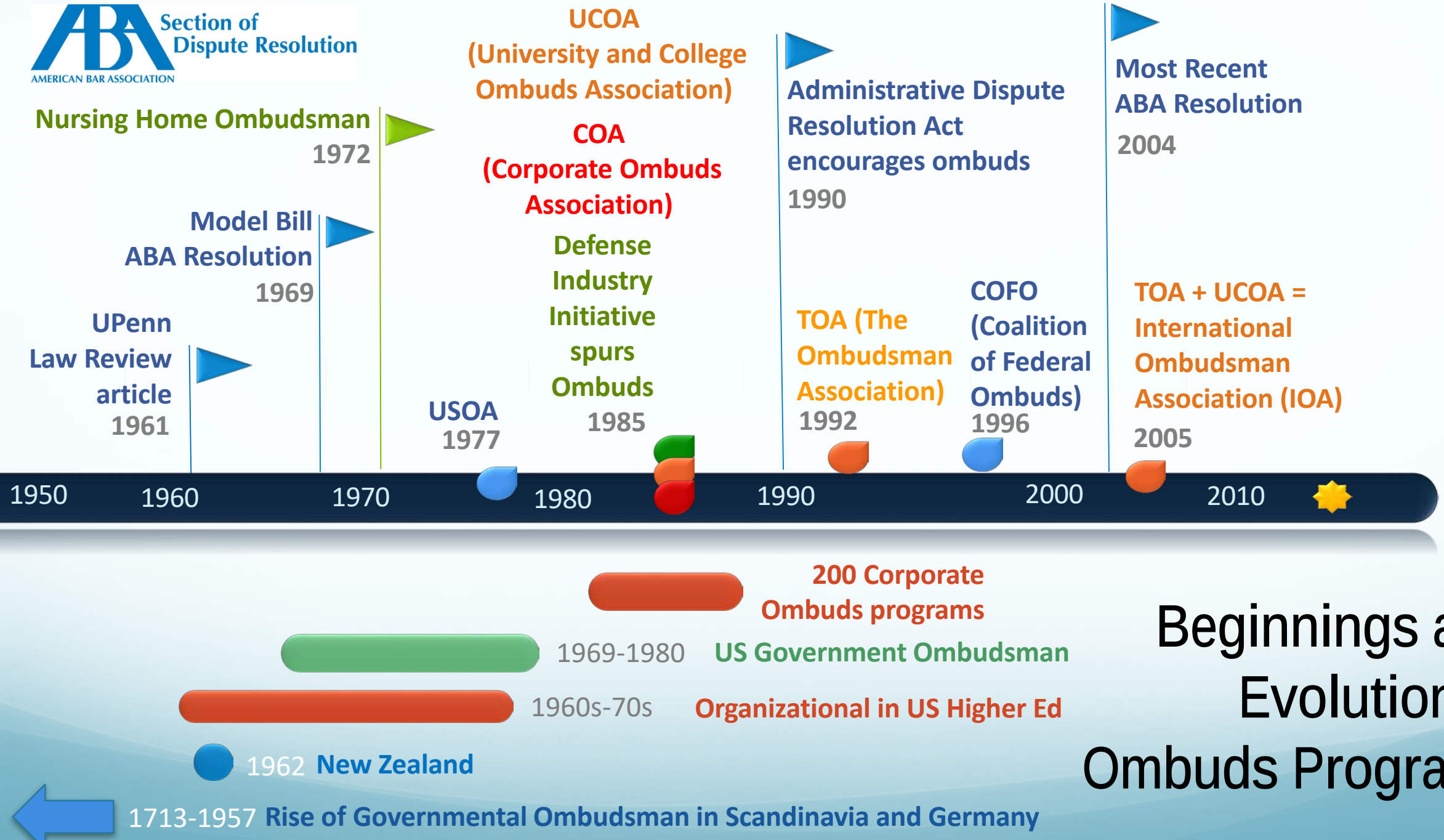
EVOLUTION OF OMBUDS ROLE

Beginnings and Evolution of Ombuds Programs



Origins in Sweden

- 1713 - Chancellor of Justice
- 1809 - Swedish constitution provided for a “Justitieombudsman”
- World War I – ombudsman created to supervise Swedish military authorities
- 1968 – offices consolidated

Global Expansion

- 1919 - Finland created ombudsman role
- 1952 - Norway created military ombudsman
- 1955 - Denmark created ombudsman role
- 1957 - Federal Republic of Germany created military ombudsman
- 1962 - New Zealand created national ombudsman
- 1960s and 1970s – global expansion continued

Early U.S. Efforts

- Professor Kenneth Culp Davis – 1961 *University of Pennsylvania Law Review* article introduces the ombudsman concept in the U.S. predicting evolution in the U.S. to meet "particularized need"
- 1967 Professor Walter Gellhorn drafts model bill to create a public ombuds office
- 1969 ABA Resolution
- During the mid-to late-1960s – expansion of non-classical model
- Early 1970s - Nursing Home Ombudsman Program Demonstration Project was developed in seven states.
- 1975, 1978 - Older Americans Act

U.S. Expansion – Classical Models

- Classical – independent officials who conduct investigations on matters of public interest to remedy injustice.
- 1969 – Hawaii became the first state to create a governmental ombudsman.
- By 1980, there were classical ombuds programs in at least 25 states.

U.S. Expansion – Organizational Models

- Beginning in the mid to late 1960s, local governments, private organizations, and colleges and universities adjusted the role to respond to “particularized needs.”
- Organizational ombuds model evolved from a need for an alternative form of dispute resolution for employee and consumer complaints.
- Provides informal, impartial, dispute resolution options.

U.S. Expansion – Advocate Model

- 1971: federal department of Health, Education, and Welfare directed to assist states in establishing ombuds to investigate complaints by nursing home patients
- 1972 Creation of the Nursing Home Ombudsman Demonstration Projects by the Health Services and Mental Health Administration.
- Beginning in 1980s, child welfare and juvenile justice ombuds offices created within state and local governments

Expansion to Universities

- 1965 – Simon Fraser University, British Columbia – first non-governmental adaptation
- 1966 - Eastern Montana College
- 1967 - Michigan State University; University of California, Berkeley
- 1970 - Following Kent State, Commission on Campus Unrest approvingly noted role of campus ombudsman
- 1971 - Carnegie Corporation's Commission on Higher Education
- 1970s - As many as 190 university and college ombudsman offices

Expansion to Corporations

- 1984 - first corporate ombudsman conference
- 1985 - Corporate Ombudsman Association (COA) formed
- 1986 - Defense Industry Initiative on Business Ethics and Conduct developed corporate responsibility principles that lead to creation of ombudsman offices
- 1987 - estimated 200 corporate ombudsman offices
- 1992 - COA became The Ombudsman Association (TOA) to include corporate, university and government ombuds.
- 2005, TOA merged with UCOA to become the International Ombudsman Association (IOA).

Expansion to Federal Government

- 1972 – Department of Health, Education, and Welfare
- 1977 - Smithsonian Institution
- 1978 - Amendments to the Older Americans Act required every state to have an ombudsman program and specifically defined ombudsman functions and responsibilities
- 1985 - the United States Information Agency
- 1987 - U.S. Secret Service
- 1990 - Administrative Conference of the United States recommended that “all government agencies that interact frequently with the public consider establishing an ombudsman service to deal with grievances from the public.”

Expansion to Federal Government

- 1996 - the Administrative Dispute Resolution Act (ADRA) encouraged greater use of alternative dispute resolution mechanisms by federal agencies; establishment of the Coalition of Federal Ombudsman
- The ADRA defined “alternative means of dispute resolution” to include an ombuds as a confidential resource.

Federal Transition to “Organizational Ombudsman” Model

- The ADRA defined informal characteristics that later became known as the “organizational ombudsman” model
- Informal, ADR-focused model distinct from the classical investigative model, in part due to lack of statutory confidentiality
- Today, U.S. government has organizational ombuds, who address internal issues, as well as ombuds who interface with the public.
- Most U.S. colleges, universities and corporations utilize organizational ombudsman models

Federal Ombuds – Assisting People or Entities Engaging with the Government

- Created by statute or by government agency
- Seek to informally resolve individual and systemic process issues before they reach a formal process
- Adhere to tenets of independence, impartiality, and confidentiality
- Standards issued by Coalition of Federal Ombudsman
- Use a wide-range of resources to assist
- Around 50 federal ombuds offices

Federal Ombuds – Assisting People or Entities Engaging with the Government

- Serve as early warning so issues can be addressed early on
- Make recommendations on individual matters as well as issues impacting many
- Provide feedback for agency's consideration
- Assist agency and public in brainstorming and considering options
- May issue reports annually as well as on particular issues reviewed

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Comparing Ombuds Models: Orientations

Classical Ombuds Orientation	Organizational Ombuds Orientation	Advocate Ombuds Orientation
Developed to ensure fair treatment for citizens, residents, and members of the public.	Developed as a resource to help manage internal grievances and conflicts within organizations.	Developed to protect individual rights and interests and serve as a resource for those who face information or power imbalance.

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Comparing Ombuds Models:Roles & Characteristics

Roles & Characteristics	Organizational Ombuds		Classical Ombuds		Advocate Ombuds	
	Yes/No	*Notes*	*Yes/No*	*Notes*	*Yes/No*	*Notes*
Neutral in receiving and considering complaints	●		●		●	
Independent	●	Operates outside ordinary hierarchy; should report to top management and/or board	●	Often appointed by a legislative body, and has jurisdiction to review the acts of executive administration	●	Operates outside ordinary hierarchy; should report to top management
Informal channel	●	Not an office of notice for the entity; no adjudicative authority; recommendations not binding	●	No adjudicative authority; recommendations not binding	●	No adjudicative authority, but some may initiate judicial proceedings
Confidentiality	●	Protected by Federal Rule of Evidence 501 and terms of office creation	●	Typically protected by enabling legislation	●	Typically protected by enabling legislation
Has formal investigative authority	▲	Emphasizes lack of investigative authority in order to build trust among all constituencies	●	Typically has subpoena power; employs discretion whether to formally investigate or attempt informal resolution	●	Degree of investigative authority dependent on enabling legislation

Yes ●
No ▲

ABA Resolutions

- Standards for the Establishment and Operation of Ombuds Offices – 1969, 1971, 2001, and 2004
- 2001 Resolution
  - Outlined ombuds' basic qualifications
  - Criteria on establishment and operation of ombuds offices
  - Defined essential characteristics of all offices as independence, impartiality, and confidentiality
  - Distinguished between "classical", "advocate", and "organizational" models

ABA Resolutions

- 2004 Resolution
  - replaced “classical ombuds” category with “executive ombuds” and “legislative ombuds” to describe public-sector ombuds
  - Term “classical ombuds” still broadly used

- Potential new resolution is working to include wide ranging viewpoints
  - Governmental
  - International

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END OF
EVOLUTION OF OMBUDS ROLE
SECTION

Organizational Ombuds

Standards of Practice

- International Ombudsman Association (2009)
- Independence
- Neutrality and Impartiality
- Confidentiality
- Informality

Organizational Ombuds - Options

- Listen
- Gather information
- Referrals
- Contact second party
- Coaching
- Negotiation
- Shuttle Diplomacy
- Mediation
- Group Facilitation
- Generic Options
- Upward Feedback – Trending
- Transfer or leave
- Legal Options

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Working with Organizational Ombuds

An Organizational Ombuds can help general counsel by:

- Providing an anonymous channel to give feedback to employees in more powerful positions than the visitor within an organization
- Coaching alleged wrongdoers in appropriate behavior
- Coaching visitors in the skills needed to resolve conflict informally
- Providing a means to raise issues so that they can be addressed early on, before they reach potential litigation
- Providing employees options other than suing the organization

BAKER HUGHES
Pfizer
NASA
Gartner

Working with Organizational Ombuds

You may benefit from working with an Organizational Ombuds if:

- You represent a corporation whose employees report mismanagement of funds due to incompetence
- You are general counsel for a university and there are claims of harassment against professors which do not constitute any actionable legal claim
- You are counsel for a company which operates in different countries and the employees are experience conflict based on cultural differences

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END OF
THREE OMBUDS MODELS
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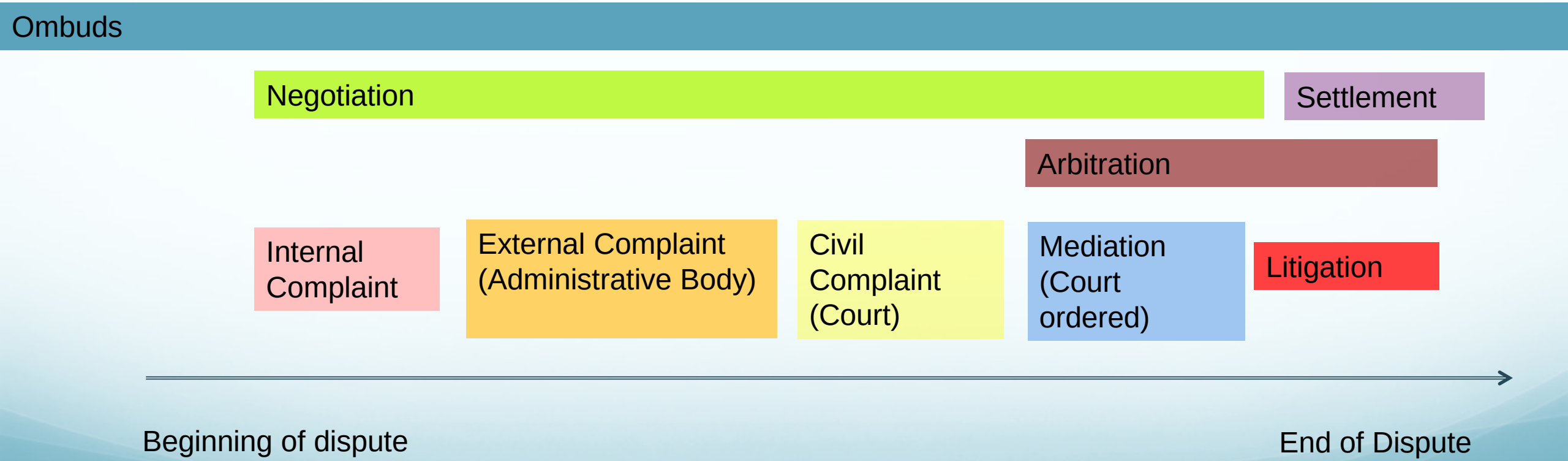
OMBUDS WITHIN CONFLICT MANAGEMENT SYSTEMS

Conflict Management Systems

- Litigation
- Arbitration
- Neutral Evaluation
- Mediation
- Negotiation
- Administrative complaints (EEOC, whistleblower, ADA, OSHA, OCR)
- Non-judicial complaint processes (inward) (audit, HR, compliance)
- Informal (inward) (HR, ombuds, conflict coaching, training, counseling)
- Customer service hotlines (outward)
- Dialogue (inward) (individual, ombuds, counseling)

Timeline of CMS



Unique Role of Ombuds: Confidential Help for Inquirers

- Information Source – a place to get answers to sensitive or embarrassing questions
- Knowledgeable guidance on options –
  - No need to first "categorize" problem as HR, Compliance, etc.
  - Particularly helpful where uncertainty about what to do or if perception is correct
  - Can help surface issue even if inquirer is not disclosed
  - Guidance on what may be involved in the reporting process
  - Available for follow-up consultations if more help is needed

Unique Role of Ombuds: Upward Feedback

- Ombuds are agents of systemic change:
  - Communicate with key stakeholders, leadership and/or the board of directors regarding organizational risks and trends
  - Make recommendations for changes to policies, practices and procedures
  - Provide feedback and considerations for committees, such as those hiring critical positions, committees to address issues of ethics & risk, compliance, equity & inclusion, organizational climate, and work-life.
  - Make recommendations for trainings & prevention programs

Benefits of Ombuds
over other alternatives

- Voluntary
- Confidential
- Early Resolution
  - before other party is aware there is a conflict
  - before relationships affected
- Addresses emotional, relational, ethical- not just legal
- Can protect anonymity
- Can initiate systemic change

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Economic Benefits

- Expanded productivity
- Increased retention
- Preserved management time
- Enhanced operational efficiency
- Advanced individual and team development
- Reduced disputing costs
- Improved reputation/brand protection

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Organizational Benefits

- Supplemented formal functions (Compliance, EAP, HR, Legal, Safety)
- Navigated Systems
- Heightened transparency
- Enhanced accountability
- Protected and maximized personal responsibility
- Increased ethical and compliant behavior
- Advanced pre/pro-ventative conflict posture

Humanistic Benefits

- Increased engagement
- Strengthened organizational trust
- Expanded fairness
- Enhanced creativity and risk taking
- Augmented individualized career development
- Heightened respect
- Improved and preserved working relationships
- Reduced incivility (bullying, sabotage, theft)

Ombuds Impact on Lawyers

Benefits to Defense Counsel, In-house Counsel

(corporations, universities, NGOs)

- Reduces workload of in-house counsel and internal DR (HR, sexual harassment office, etc.)
- Increases productivity, improves morale

Benefits to Plaintiffs' Counsel

- Addresses more than clients' legal rights- empowers
- Prevents future similar acts, may help others similarly situated

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END OF
OMBUDS WITHIN CONFLICT MANAGEMENT SYSTEMS *SECTION*

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LEGAL ASPECTS OF OMBUDS ROLE

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Legal Aspects of the Ombuds Role

- Notice
- Confidentiality
- Records

Notice – What is it?

- Legal term – What the organization knows – some areas of law require the organization to do something when it "knows or should have known"

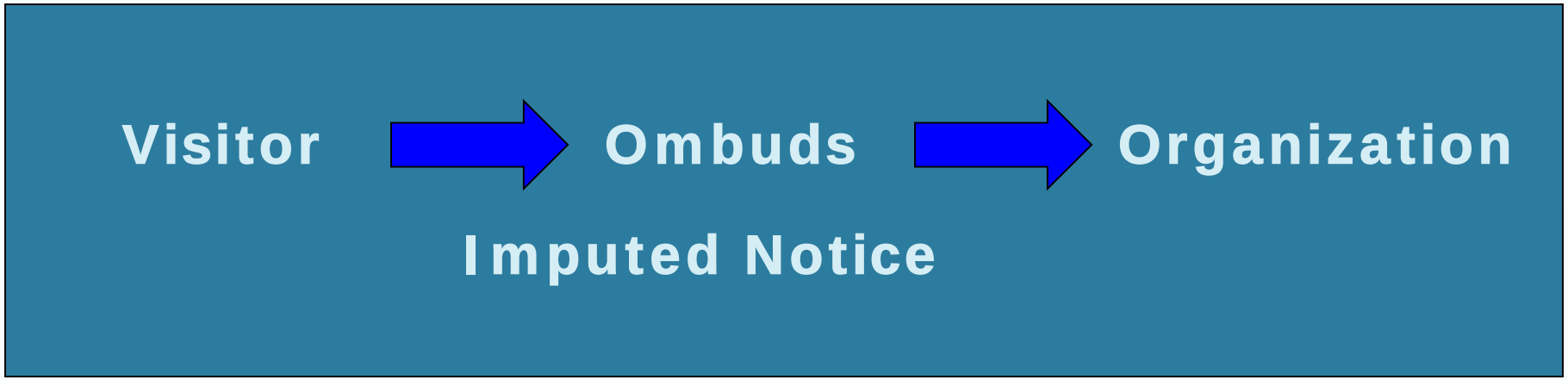
  - Example: Title VII – Sexual Harassment
    - Organization usually deemed to have notice of a claim when witnessed or brought to the attention of a manager, supervisor or faculty member who is in a position of authority to address the complaint. E.g., *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673-74 (10th Cir. 1998)

Legal Analysis of “Notice”

- Courts use “agency” principles to analyze “notice”
  - Actual authority
  - Apparent authority

- Key Points
  - Ombuds should not be “authorized” to receive notice of claims (hence, no “actual authority”)
  - Program charter and descriptions publicize lack of authority to receive notice (hence, no “apparent authority”)

Notice – TO & FROM



- 2 Parts of Defining Notice
  - Communication TO the ombuds office from a visitor
  - Communication FROM the ombuds office to anyone in the organization

Communication TO the Ombuds is not Notice

- Supported by
  - ABA Standards
  - Following IOA Standards
  - Statute or law creating office (classical or advocate)
  - Practices of Ombuds Office (not management or formal role, written materials emphasize not agent of notice, alternate channel, etc.)
  - Implied Contract (all verbal and written communications emphasize role)
  - Ombuds not an “Agent” of organization
  - Public Policy

ABA Standards & IOA Standards

- ABA Standards
  - "If ombuds functions…in accordance with…'Independence, Impartiality, and Confidentiality,' then no one…should deem the ombuds to be an agent of any person or entity…and communications made to the ombuds should not be imputed to anyone else, including the entity…." (ABA Standards, Section F.(3))
- IOA Standards
  - Independent – ombuds not within management hierarchy
  - Neutral – no authority to act or stop activity
  - Confidential – no duty to inform; affirmative duty NOT to inform
  - Not an agent of notice for the organization

- “Alternate Channel” is a key aspect of the ombuds function
- If ombudsman has other roles, then not “alternate” channel – you might be “one of the channels”
- Therefore, ombuds may be same as others in the organization
  - No privilege
  - Talking to that employee with two roles may constitute notice to the organization

Communication FROM Ombuds TO Organization

ABA Standards, Section F.(2)

- "If an ombuds communicates with representatives of the entity concerning an allegation of a violation, then –

(a) A communication that reveals the facts of

(i) A specific allegation and the identity of the complainant or

(ii) Allegations by multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful

Should be regarded as providing notice to the entity of the alleged violation and the complainants should be advised that the ombuds communicated their allegations to the entity; but otherwise,

(b) Whether or not communication constitutes notice to the entity is a question that should be determined by the facts of the communication

Communication FROM Ombuds TO Organization

IOA Guidance Document

- Section F.(2)(b) = broad catch-all which leaves ombuds vulnerable
- Practice Point – Ombuds should develop protocol for when they do choose to put the organization on notice (p. 13 IOA Guidance Document)

When Ombuds puts Organization on Notice

- When should an ombuds do this?
- If an ombuds does place the organization on notice, what are the best practices? (IOA Guidance Document)
  - Get consent
  - Identify appropriate office of notice
  - Give narrow and specific information to enable it to act
  - Provide information to preserve confidentiality to maximum extent
  - Suggest recipient to document conversation
  - Clarify – if called later to testify, will only testify to narrow questions re: this communication, nothing more (imputed notice)
  - Expressly state – limited disclosure of information to provide notice does not act as a waiver to other communications
  - Tell person you are putting org on notice to ***investigate***, but not necessarily act only based upon your information
  - Document your conversation?
  - Be prepared to testify

Status of Confidentiality Protections for Classical Ombuds

- USOA Standards
  - The Ombudsman should not reveal information when confidentiality has been promised.
  - The Ombudsman should not release information where confidentiality is required by law, or where unnecessary harm would result.
  - The Ombudsman should not be compelled to testify or release records.
- USOA Model Ombudsman Act for State Governments (may be applied to local governments)
  - Grants immunity necessary for confidential communications.
- Statutory protection (varies by jurisdiction)

Status of Confidentiality Protections for Advocate Ombuds

For governmental programs, confidentiality is generally conferred by enabling legislation

- **Children's Advocate Ombudsman**
  - Eg. Michigan, records are not subject to court subpoena, not discoverable, and are exempt from disclosure under the freedom of information act, MCL 722.929(1) (citing 1976 PA 442, MCL 15.231 to 15.246)
- **Longterm Care Ombudsman**
  - Are authorized and supported by the federal Older Americans Act, 45 CFR Part 1327 (Title VII)
  - Are prohibited from sharing resident information, including their identity, without their consent

Status of Confidentiality Protections for Organizational Ombuds

The IOA asserts that communications with an ombuds are confidential, and should be deemed privileged under law.

- ***SOP 3.2***

There is currently no statute expressly creating such a privilege.

The determination of whether there is a privilege is made by courts on a case-by-case basis. – *IOA Best Practices*

Shabazz v Scurr

662 F. Supp. 90 (S.D. Iowa 1987)

- A common law bar to disclosure by an Ombudsman was first recognized in the 1987 case *Shabazz v. Scurr.*
- The federal court recognized an Iowa State law that stated members of the Iowa State Prison Ombudsman Office could not be compelled to testify about matters within the scope of their official duties.
- The court was persuaded that confidentiality was critically important to the effectiveness of the Ombudsman Office, to informally resolve disputes, and noted a strong public policy in support of informal dispute resolution.

Shabazz v Scurr

"…the Court is persuaded that the flow of information to the office would be threatened if it became known that the statutory assurances of general confidentiality would not be respected in federal court."

"…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 v Scurr

Privilege consideration – "…whether the exclusion of the evidence in question would actually promote the creation of information which might not otherwise exist; if so the exclusion is justified."

in this case – "…such confidentiality is necessary to ensure that complaints will be made."

Shabazz v Scurr

"If state officials become less candid when contacted by an ombudsman out of fear that any submission might be used against them in a subsequent legal action, the power of the office to solve problems will diminish."

"…public policy favoring the compromise and settlement of disputes."

Roy v. United Technologies Corporation

Civil H-89-680 (JAC) (granting motion for a protective order)

- In 1990, the court in *Roy v. United Technologies Corporation* had only *Shabazz* to cite as precedent for the recognition of a common law privilege.
- The court ruled that Federal Rules of Evidence 501 allows courts to develop privilege on a case by case basis.
- Rule 501 of the Federal Rules of Evidence allows federal courts to recognize new privileges based on common law principles, applying the court's "reason and experience" on a case-by-case basis.
- The court looked to *The Wigmore Test* articulated in *In Re Doe.*

In Re Doe – The Wigmore Test

- Communication made with the belief it will not be disclosed
- Confidentiality is essential to maintain the relationship between the parties
- Society views the relationship as worthy of being fostered
- Injury to the relationship by disclosure is greater than the benefit gained by the correct disposal of the litigation

In Re Doe 711 F.2d 1187, 1193 (2d Cir. 1983)

Roy v. United Technologies Corporation

- As to the first factor, the *Roy* court found the Ombudsman Office had taken “extensive precautions” to ensure confidentiality.
- The second element was proved by showing that confidentiality was the very purpose for establishing the office and “generally understood to be a defining characteristic of an Ombudsman.”

Roy v. United Technologies Corporation

- The third element was satisfied by facts showing that, as a defense contractor, such confidential programs are necessary to encourage the reporting of waste and fraud and the informal resolution of disputes.
- Finally, the Ombudsman demonstrated that its interest in confidentiality outweighed the plaintiff's interest in discovery on the facts of the case.
- The court concluded that, "[g]iven the Ombudsman's procedures to ensure confidentiality and its announcements of these safeguards, plaintiff must have been aware that his own communications with it would be confidential."

Kientzy v. McDonnell Douglas Corp.

113 F.R.D. 570 (E.D. Mo. 1991)

- Less than a year later in *Kientzy v. McDonnell Douglas Corporation*, the court relied on *Roy* to hold that confidential communications made to an Ombudsman were protected from disclosure.
- As in *Roy*, the court in *Kientzy* held that the *In re Doe* factors (Wigmore Test) were satisfied and determined that Federal Rules of Evidence 501 protected the Ombudsman communications from disclosure.
- Since then, some state and federal courts have recognized (and denied) the common law privilege.

Other Grounds for Protection Implied Contract

- Important defense in jurisdictions which cannot or are unlikely to recognize common law privilege
- Not as strong as privilege, but easier for court to recognize
- *Roy* recognized privilege and implied contract: extensive communication from the Ombudsman Office that communications would be confidential created an implied contract between the office and those visiting the office.
- Program communications regarding confidentiality (terms of reference, website, brochures, outreach, emphasized during opening statement with visitor, etc.) should indicate that a person using the office is doing so based on program's "terms of use," including that inquirer will honor confidentiality.

Other Grounds for Protection – California State Constitution

- In 1995, the California Court of Appeals in *Garstang v. The Superior Court of Los Angeles County* found common law privilege, the implied contract theory, and held that the California State Constitution created a "qualified privilege" through the clause granting a right to privacy (because the ombuds made the commitment to confidentiality).
- Mediation statute did not apply – no writing (statute changed).

Garstang v. Super. Ct. of Los Angeles County, 39 Cal. App. 4th 526 (Cal. Ct. App. 1995)

Denial of Protection - *Carman v. McDonnell Douglas*

114 F.3d 790. 795 (8th Cir. 1997)

- In 1997, the denial of the Ombudsman Privilege in *Carman v. McDonald Douglas,* reminded the ombudsman profession that the granting of privilege is very much a case-by-case effort and dependent upon the way an office is set up and operates as well as how the office responds to a legal request for confidential information and how it presents the privilege argument in court.

Remember

There is no established Ombudsman Privilege or guarantee that other legal protections will be granted by a court. However –

“In each instance in which the confidentiality of ombuds’ communications has been recognized by a court, the facts presented to the court demonstrated that, by virtue of the way in which the ombuds program was established and operated, the program warranted legal recognition of the confidentiality of its communications.”

- Chuck Howard

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END OF

LEGAL ASPECTS OF OMBUDS ROLE

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RESOURCES

Suggested Reading List

Comparison of Different Types of Ombuds

- Consumer Financial Protection Bureau Ombudsman. "Charter for the CFPB Ombudsman's Office." 8 Dec 2011. (Document defines the role of the ombudsman that assists consumers, depositories, and non-depositories in addressing issues resulting from the agency's regulatory activities.)
- Gadlin, Howard, "The Ombudsman: What's in a Name?" Negotiation Journal 16:1 (2007): 37-48. (Essay introduces readers to the differing conceptions of the ombuds role.)
- Gadlin, Howard, and Levine, Samantha. "Stranger in a Strange World: The Ombudsman in the Federal Government." *ACResolution*, Spring 2008. (Article about the history, challenges, and evaluations of federal ombuds.)
- Hill, Larry B. "American Ombudsman and Others; or, America Ombudsman and 'Wannabe' Ombudsmen." Spring Meeting of the American Bar Association Section of Administrative Law and Regulatory Practice. 18 April 1997. Presentation. (A classical ombuds' skeptical opinion of organizational ombuds.)
- Rowe, Mary Rowe & Dean M. Gottenhrer, "Similarities and Differences Between Public and Private Sector Ombudsman." American Bar Association Section of Administrative Law & Regulatory Practice. 1997. (A comparison of options, functions and skills of ombuds in the private sector versus public sector, classical ombuds.)
- Smith, Julie C., and Howard, Charles L. "Understanding the Types of Ombudsman: A Starter Guide." American Bar Association, *Dispute Resolution Newsletter*. 20 Feb 2015. (A guide for someone building an ombuds program, talking with an ombudsman as his or her constituent, or standing outside an ombuds office during discovery stymied by the program's confidentiality.)
- Smith, Tyler S. "Ombuds & Mediation: Frequency, Circumstances and Differences Amongst Backgrounds*." Journal of the International Ombudsman Association* 7:2 (2014): 48-67. (Summary of research into differences between ombuds with respect to their willingness to mediate cases.)

Ombuds Confidentiality/Privilege

- Adcock, Eric S. "Federal Privilege in the Ombudsman's Process." Charleston Law Review 8:1 (2009): 1-49. (Article explores the nature and scope of the limited *ombudsman privilege* under the common law. Discusses the different types of Ombudsman, and includes case law, and case scenarios of Ombudman practices.)
- Howard, Charles L. "**The Sarbanes-Oxley Act of 2002** – Another Opportunity for Organizational Ombuds." 17 Oct 2002. (An analysis of how Sarbanes-Oxley presents an opportunity for ombuds to enhance legal bases for confidentiality.)
- Howard, Charles L., and Gullumi, Maria A. "The Ombuds Confidentiality Privilege Theory and Mechanics." The Ombudsman Association (1996). (Article sets out the legal foundations used by the courts to protect the confidentiality of ombuds' communications and summarizes the elements of ombuds programs that have been critical to achieving this recognition.)
- Howard, Charles L., and Wratney, George R. "In Aftermath of The Carman Decision, Ombuds 'Privilege' Still has Validity." *Ethikos* 12" 6:1 May (1999). (An analysis of why *Carman v. McDonnell Douglas*, although rightly decided on the facts, would still allow for recognition of an ombuds confidentiality privilege under Federal Rule of Evidence 501.)
- Kosakowski, Tom A. "A Legal Perspective." *Journal of the International Ombudsman Association* 3:2 (2010): 80-83. (An update on U.S. legislation and litigation relating to Ombuds including decisions from trial courts indicate that lawyers and judges continue to struggle with the legal standards applicable to ombuds.)
- United States Ombudsman Association, "Model Ombudsman Act for State Governments." Feb 1997. (A model act designed for use at the state government level.)

Classical Ombuds

- Coalition of Federal Ombudsmen. "A Unified Model for Developing an Ombudsman Function." 2009. (A manual for structuring and implementing governmental ombudsman programs that are either a workplace program or oriented toward external parties.)
- Davis, Kenneth C. "Ombudsman in America: Officers to Criticize Administrative Action." 109 U. Penn. L. Rev. 1057 (1961) (This is a seminal law review article introducing the concept of an ombudsman to the United States. It discusses the evolution and role of ombudsmen in Scandinavia to date; describes the rationale underpinning the role, including that of providing a check and balance and helping to achieve fundamental fairness; and correctly predicts that this concept, coupled with American ingenuity, could evolve in various ways to benefit administrative process.)
- Dvorkin, Jeffrey. "The Modern News Ombudsman: A User's Guide" Organization of News Ombudsmen, 2011. (A survey of issues and practices related to media ombudsmen.)
- National Association of Realtors. "Local and State Association Ombudsman Services" (Professional Standards Policy Statement #59). 30 Dec 2015. (Overview of a program requiring state and local association of REALTORS® to offer ombudsman services to members, clients, and consumers.)
- Reif, Linda C. *The Ombudsman, Good Governance and the International Human Rights System*. Springer. 2004. (Explores the role of the classical ombudsman, the human rights ombudsman and other hybrid or specialized ombudsmen in good governance and human rights protection at the domestic and international levels of governance.)

Suggested Reading List (continued)

Advocate Ombuds

- Colello, Kirsten J. "Older Americans Act: Long-Term Care Ombudsman Program." Congressional Research Service 1 Jul 2009. (Report to Congress on the effectiveness of Long Term Care Ombudsman program.)
- Moskowitz, Bette A. *The Room at the End of the Hall: An Ombudsman's Notebook*. Sense Publishers 2012. (A first person account of a long-term care ombudsman.)
- National Association of State Unit Directors of Aging and Disabilities. "State Long-Term Care Ombudsman Program: A Primer for State Unit Directors and Executive Staff." 2011. (Gives History of LTC programs, discusses state LTC practices and challenges.)
- O'Shaughness, Carol V. "The Role of Ombudsmen in Assuring Quality for Residents of Long-Term Care Facilities: Straining to Make Ends Meet" (Background Paper No. 71). National Health Policy Forum, 2 Dec 2009. (Discusses the role of the Long Term Care Ombudsman, the Older American's Act, the Long Term Care program complaint and investigation process.)
- U.S. Department of Health and Human Services, Administration for Community Living. "Long Term Care Ombudsman Program." 2013. (Overview of local ombudsmen who serve as advocates for residents of nursing homes, board and care homes, assisted living facilities, and similar adult care facilities.)
- U.S. Department of Justice, Office of Justice Programs, "Beyond the Walls: Improving Conditions of Confinement for Youth in Custody." 1988. (Section on "Use of Ombudsman Programs in Juvenile Corrections" provides a guide for establishing an ombudsman program for children in public facilities.)

Organizational Ombuds

- American Bar Association. "Standards for the Establishment and Operation of Ombuds Offices." Feb 2004. (The ABA's examination and interpretation of the rights and responsibilities of various types of ombuds, especially organizational ombuds.)
- Howard, Charles. *The Organizational Ombudsman: Origins, Roles and Operations - A Legal Guide*. American Bar Association, 2011. (The preeminent and comprehensive legal guide to organizational ombuds.)
- Kolb, Deborah M. "Corporate Ombudsman and Organization Conflict Resolution." *Journal of Conflict Resolution* 31:673 (1987): 673-691. (This article, based on interviews with ombudsmen in six organizations, using case-based data, describes the work of corporate ombuds.)
- Redmond, Arlene, and Williams, Randy. "Enter the Watchmen: The Critical Role of an Ombuds in Corporate Governance." *Risk Management* Sep 2004: 48-54. (An introduction and explanation of a corporate ombuds' relationship to governance issues.)
- Redmond, Arlene, and Williams, Randy. "When Formal Channels Are Not Enough--The Advantages of an Ombuds Program**."** ACC Docket Sep 2004: 66-85. (A comparison of ombuds to other corporate compliance mechanisms; includes summary of considerations for creating an corporate ombuds program.)
- Robbins, Lee P., and Deane, William B. "The Corporate Ombuds: A New Approach to Conflict Management." *Negotiation Journal* 2:2 (1986): 195-205. (A case study of a corporate ombuds program in the U.S.)
- Rowe, Mary P. "Options and Choice for Conflict Resolution in the Workplace." *Negotiation: Strategies for Mutual Gain*. Ed. Lavinia Hall. Sage Publications, 1993. (A review of sample cases handled by an ombuds.)
- Rowe, Mary P. "The Ombudsman's Role in a Dispute Resolution System." *Negotiation Journal* 7:4 (1991): 353-362. (An explanation of an ombuds role in relationship to other dispute resolution mechanisms.)
- United States General Accounting Office: *Human Capital: The Role of Ombudsmen in Dispute Resolution*. Washington, DC. 2001. (GAO-01-466.) (Report on a survey of ombuds programs in federal agencies.)

Section of Dispute Resolution
AMERICAN BAR ASSOCIATION

CASE EXAMPLES

EXAMPLES OF ORGANIZATIONAL OMBUDS CASES

(From *The Organizational Ombudsman: Origins, Roles, and Operations - A Legal Guide* by Charles L. Howard)

Policy clarification wanted but fear of asking

The organization had a drug-testing policy for safety-sensitive positions. An employee came to the ombuds to ask whether he would have to take the drug test if notified to do so. He said that he objected to the drug test on principle, not because he had any fear of the results. He was afraid to ask for a clarification of the policy, however, because that may mark him as a "dangerous druggie" or cause him to lose his sensitive duty status or even his job.

The ombuds reviewed the policy with the inquirer. Among other options presented by the ombuds was the possibility that the ombuds could make an inquiry of the director in charge without naming any employee to see if there were any exceptions or "wiggle room" in the policy. That was the option selected by the inquirer. When the ombuds made the inquiry, the answer was that no exceptions were permitted because the test was required by federal policies. When this information was communicated back to the inquirer, he understood and very much appreciated the chance to raise the issue without being the person identified with doing so.

Make him stop but don't disclose that I brought it up

A manager made a comment in front of several employees that the area where they worked "smelled like a whorehouse." An employee brought this issue to the ombuds but was not willing to take it to other management or HR because of concerns that the manager who made the comment would retaliate against the employee.

After discussing various options to address the issue, the employee gave the ombuds permission to disclose the comment but not the employee's identity to HR. When HR was informed of the comment, it conducted an investigation and confirmed from several sources that the comment had been made. The manager was disciplined and HR provided additional harassment training to the entire unit.

Averting a class-action lawsuit

Several African-American employees came to the ombuds office as a group to express frustration with their manager, who they felt continuously treated them inappropriately. They thought he was discriminating against them on the basis of their race and said that they were willing to file suit against the organization and the manager.

The ombuds reminded the employees that the ombuds office was neither an office of notice for claims against the organization nor a place to provide them with legal advice on any claims they may or may not have but, instead, an office where they could have confidential discussions to see if there might be an informal way to resolve their concerns. They said they wanted to speak confidentially. After a few meetings with the ombuds, during which a variety of options were discussed, they gave permission for the ombuds to contact the manager, share their concerns, and request that he meet with them as a group in a meeting facilitated by the ombuds.

When the ombuds spoke with the manager, he immediately expressed his own frustration at his inability to communicate effectively with this group of employees. It appeared to the ombuds that the manager was experiencing his own insecurities, and he clearly welcomed the opportunity to vent in a safe and confidential setting. At the manager's request, the ombuds coached the manager on active listening and effective communication techniques. The manager then began implementing these new listening and communication skills as he communicated with the employees he supervised, including the African-American group. Communication between the manager and his employees markedly improved and no facilitated meeting was ever needed. This manager contacted the ombuds on his own initiative thereafter when he felt stuck and needed to discuss options on how he might handle a situation. As a result, the manager continued to build better relations with the employees and to improve his own communication skills.

Issue raised but identity of inquirer protected

An employee came to the ombuds with a concern that a co-worker had been repeatedly using the Internet at work to review adult content videos and other inappropriate materials. While this activity was clearly prohibited by the organization's policies, the person coming to the ombuds just wanted it stopped and did not want to be identified as the source of the complaint.

After discussing various options on how to raise this issue, the employee permitted the ombuds to disclose to management the name of the co-worker and the nature of the concern. HR investigated the conduct, determined that the co-worker had violated policy, and the co-worker was disciplined. The identity of the worker who came to the ombuds was never recorded. HR also used this occasion as an opportunity to send a reminder on the Internet policy to all employees and urged them to notify their managers or HR if they had concerns. At the same time, HR reminded employees that the ombuds office was available if they wanted to protect their anonymity or discuss a matter confidentially.

EXAMPLES OF ORGANIZATIONAL OMBUDS CASES (CONTINUED)

A systemic issue identified by the ombuds leads to better policies

In separate communications with the ombuds, several employees reported that they were confused by various written and oral warnings they had received. Often employees were surprised when they were told that the verbal warning stage was over and a written warning had been issued. The ombuds identified this employee confusion as an issue in the ombuds mid-year trend report. As a result, HR reviewed its warning policies. The review resulted in revisions to the applicable procedures to simplify the process and to more clearly define and articulate when each type of warning should be given. As a result, instances of confusion were significantly reduced.

Personal coaching improves the workplace

A long-tenured senior employee had been the subject of numerous complaints to the ombuds over a period of time. One day, that employee himself came to the ombuds, and when asked how he hoped the ombuds could be of assistance, he responded with "I don't want to be an a_ _h_ _ _ anymore." Over the course of several meetings, the ombuds provided coaching around stress, conflict, and anger management. The ombuds also provided the employee with resources for additional self-learning. Two years have elapsed since this episode, and no further issues dealing with this employee have been brought to the ombuds.

Organizational culture can be a barrier to new employees

An organization reorganized its sales force and brought in several new employees with no background or understanding of the organizational culture, terminology, and philosophy. They were also not given any background on the reasons for the reorganization. Unfortunately, the prevailing culture in this organization was to let new employees learn on the job and not to provide them with training or orientation. The new employees' excitement at being a new and reenergized part of the organization soon gave way to confusion and frustration, as management and the new employees were not communicating effectively with each other. Some of the new employees reached out to the ombuds and were coached on various aspects of the organization and the history of the reorganization that led to their hiring. The ombuds also presented them with options for how to raise the issue of the need for better communications going forward.

The employees chose the option of requesting an opportunity to sit down with management and discuss their frustration over the lack of training and communication. The ombuds was given permission to make this request to management. Management agreed to the meeting, and as a result, management recognized that it needed to provide a better understanding of the organization and reorganization to these new employees. Roles were clarified, training implemented, and the employees gained a better understanding of the organization's needs, style, and expectations.

Confidential coaching for faculty members

A department chair came to the ombuds with a concern over a mentoring relationship between a minority female junior faculty member that the chair had recruited and a senior white male faculty member who was assigned to mentor her. The chair had a high regard for both faculty members and thought that it would be good for each of them to be in this mentoring relationship, but perceived that both parties were having problems with it. The chair was concerned about losing the junior woman, since the department had experienced difficulties in recruiting and retaining good minority and female faculty members. The chair did not want to go to the dean or involve anyone else out of concern that it could affect everyone's reputation and career.

The ombuds discussed mentoring guidelines and successful practices with the department chair. They considered various options, including coaching by the ombuds of one or both faculty members; coaching the department chair and then having the chair conduct separate and joint conversations with the faculty members; having the ombuds conduct a facilitated conversation between the faculty members with a view toward developing an agreed-upon action plan; hiring external coaches for one or both faculty members; and having the ombuds sit in on several mentoring activities to help assess the situation and make further recommendations.

The department chair chose a combination of these options. The ombuds provided individual coaching to the department chair and the junior female faculty member. The chair had a private conversation with the male faculty member and provided funds for an external coach for him for a reasonable period. The chair then followed up periodically with each of the faculty members to provide support. The issues were addressed without blemishing anyone's career, and the junior faculty member continues to make good progress in her career on a tenure track.

Trend report results in policy change

Company policies required employees to notify the company of any change in the number of dependents covered under benefits provided by the company. The policy required that an employee furnish the necessary documentation within 30 days of the event giving rise to the change. Several employees contacted the ombuds office for guidance in dealing with difficulties they had experienced in complying with this policy when they had a child. Thirty days frequently appeared to be insufficient time to obtain a birth certificate, resulting in a number of otherwise qualified dependents not being covered by important benefits such as health insurance. This trend was quickly spotted and reported to the corporate benefits office. As a result, the policy was changed to allow employees up to six months to furnish the necessary documentation.