



## An Overview of Ombuds Confidentiality

A primer to assist general counsel, program designers and ombuds<sup>1</sup>.

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<sup>1</sup> This resource was finalized in April 2023 and is not intended to replace legal advice. Periodic updates will be made available to address any changes in legislation or caselaw.

# An Overview of Ombuds Confidentiality

Understanding the legal parameters around ombuds confidentiality is an important part of program design. To assist, the International Ombuds Association (IOA) has created a summary of caselaw, statutory, and other established guidance relating to ombuds confidentiality. This summary is based on a number of sources and extensive overview of the most recent case law, statutes, and other sources and material.<sup>1</sup> This summary includes important updates to seminal cases and key legislative and administrative actions recognizing or bearing on the concept of ombuds<sup>2</sup> confidentiality in the United States. It is a general review of the available materials and is not intended to provide legal advice or to be a substitute for legal review and advice specific to your organization and its setting<sup>3</sup>.

## Scope

There is growing recognition of the confidentiality of ombuds communications and information and of an ombuds “privilege” that protects the ombuds from compelled disclosure of confidential information in court. This Overview provides a brief discussion of the reasons that confidentiality is an essential element of the ombuds service model. It then discusses the history and rationale supporting protecting confidentiality for the ombuds as an independent, impartial, and confidential resource that works outside of formal reporting and dispute resolution systems to assist organizations and their constituents to safely surface concerns and to resolve them informally.

## Advantages of Confidential Reporting Channels

Regardless of the type of organization, there are incentives built into U.S. law to provide confidential reporting channels as an alternative to formal reporting mechanisms. As far back as the 1909, the U.S. Supreme Court recognized that a corporation may be held accountable for the criminal activities of its employees when acting within the scope of their employment.<sup>4</sup> The trend towards encouraging confidential reporting channels for stakeholders to report fraud or other concerns has been repeatedly reinforced since. Examples include the Federal Criminal Sentencing Guidelines; a wide variety of federal whistle-blower and compliance program requirements; the USA Patriot Act; the Sarbanes-Oxley Act; and a variety of compliance acts intended to enable oversight of federal contractors. In the higher education setting, the U.S. Department of Education has expressly recognized that a properly implemented ombuds program can serve as a confidential resource to students and staff.<sup>5</sup> The Whitehouse “Not Alone” Report<sup>6</sup> and other research support the value of providing confidential reporting channels as a means of strengthening compliance reporting.

## Ombuds and “Imputed Notice”

The concept of imputed notice applies in many settings as a fundamental principle of “agency law.” In the workplace setting, simply put, the concept of “imputed notice” refers to communications that place an

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<sup>1</sup> A brief bibliography is attached.

<sup>2</sup> There are many variations on the term ombudsman used by organizations. In 2022, the International Ombudsman Association, officially changed its name to the International Ombuds Association and its updated Code of Ethics and Standards of Practice use the term “ombuds” to refer to all programs that use the organizational ombuds model.

<sup>3</sup> We gratefully acknowledge Maureen Kemigisha Walakira, graduate student at Pepperdine University, who conducted advanced legal research on the topic of ombuds confidentiality and conducted a thorough review and update of the status of mediation shield laws and the key cases bearing on ombuds confidentiality under the direction of Bruce MacAllister, J.D., who coordinated the initiative to develop this resource.

<sup>4</sup> *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481 (1909).

<sup>5</sup> The Department appreciates the opportunity to emphasize that whether a person affiliated with a recipient, such as an organizational ombudsperson, is or is not an “official with authority to institute corrective measures” requires a fact-specific inquiry, and understands the commenter’s assertion that an organizational ombudsperson adhering to industry standards and codes of ethics should be deemed categorically a “confidential resource” and not an official with authority. The Department encourages postsecondary institution recipients to examine campus resources such as organizational ombudspersons and determine whether, given how such ombudspersons work within a particular recipient’s system, such ombudspersons are or are not officials with authority to take corrective measures so that students and employees know with greater certainty the persons to whom parties can discuss matters confidentially without such discussion triggering a recipient’s obligation to respond to sexual harassment. We note

employer on notice of an issue or concern for which the employer may have an obligation to act. In the ombuds context, the concept typically applies to whether or not communications to an ombuds place an organization “on notice” and, as a result, create an obligation for the organization to respond. A typical scenario might involve whether reporting a student sexual assault, workplace sexual harassment, or a discrimination concern to an ombuds places the organization “on notice.” If an organization wishes to establish an ombuds program, it is critical that it structures the program to be a.) structurally independent from the typical reporting structure (including any collateral job roles); b.) neutral in the sense of having no decision-making authority; and, c.) advertised as a confidential resource with no duty to report such concerns. **When the ombuds program is properly structured**, the Standards of the American Bar Association,<sup>7</sup> a large volume of American case law,<sup>8</sup> and the current U.S. Department of Education Regulations interpreting Title IX of the Educational Amendments Act of 1973<sup>9</sup> all acknowledge that conversations with an ombuds do not place the organization “on notice.” Ombuds offices, when properly structured, emphasize that the program is fundamentally based on confidentiality and explicitly note in their website, all promotional materials, email, and in all communications with program users that the ombuds office is not a place of notice. With this understanding, with the permission of a program user, the ombuds *may* report a concern to the organization on their behalf and place the organization “on notice” as a result.

## The Legal Basis for Ombuds Confidentiality

While the end-result may appear similar, there are two separate legal concepts that relate to the concept of ombuds confidentiality. The first is testimonial “privilege,” based on “rules of evidence,” which protects information from compelled disclosure in a judicial review. The second is information that is protected as “confidential” based on a statutory, constitutional, or contractual basis.

### Privilege

Privilege is created by judicial rules, such as the Federal Rules of Evidence or their state analogues. In the federal context, privilege typically stems from Federal Rule of Evidence 501<sup>10</sup> (and to a lesser degree – depending on the circumstances, from Federal Rule 408).<sup>11</sup> Enacted in 1974, Rule 501 was consciously designed by Congress, to be flexible and to evolve, based on case-by-case decisions, resulting in “common

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that with respect to elementary and secondary schools, notice to any employee, including an ombudsperson, triggers the recipient’s response obligations. Informal version, 34 CFR Part 106, at p.346, 2020.

<sup>6</sup> The White House, *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault*, 7, 11 (April 2014).

<sup>7</sup> <https://abaombudsday.files.wordpress.com/2018/09/2004-aba-resolution.pdf>, Section F.(3), which provides: “(3) If an ombuds functions in accordance with Paragraph C, “Independence, Impartiality, and Confidentiality,” of these standards, then —

1. (a) no one, including the entity in which the ombuds operates, should deem the ombuds to be an agent of any person or entity, other than the office of the ombuds, for purposes of receiving notice of alleged violations, and
2. (b) communications made to the ombuds should not be imputed to anyone else, including the entity in which the ombuds acts unless the ombuds communicates with representatives of the entity in which case Paragraph 2 applies.

<sup>8</sup> See, Case discussion, *The Organizational Ombudsman: Origins, Roles, and Operations – A Legal Guide*, (ibid) pp. 198-208.

<sup>9</sup> 34 CFR Part 106 Subpart D.

<sup>10</sup> Federal Rule 501 Provides: “The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

<sup>11</sup> Federal Rule of Evidence 408 is not based on the concept of “privilege,” but is based on the concept of “relevance.” It relates to offers to settle a dispute and provides:

**(a) “Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

“(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

“(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

“(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”

law.” Simply put, Rule 501 requires a court to balance protecting information because it furthers a socially valuable function balanced against the value to the judicial process if the information is disclosed.<sup>12</sup>

Applying this concept to the ombuds setting, a number of courts have recognized that the ombuds function meets the “Wigmore”<sup>13</sup> balancing test and that the communications should be protected under Rule 501 **when the ombuds program is properly structured and the organization properly presents the case.**<sup>14</sup> In *Shabazz v. Scurr* (FN 15) the federal court recognized a common law bar to disclosure by ombuds. This case involved a former corrections employee who was prevented from testifying in matters that occurred within the scope of their official duties as an ombuds. The concept of a Wigmore-based privilege was subsequently extended to organizational ombuds programs in a number of later cases.<sup>15</sup> Research as of 2023 shows that this 1987 decision has been repeatedly cited with approval in many different settings applied to a variety of ombuds programs and models. Most recently, for example, *Shabazz* was expressly affirmed and cited as a basis to protect ombuds communications in *Sabata v. Neb. Dept. of Corr. Servs.*, 2019 U.S. Dist. LEXIS 28816. This case recognized the “unique function” and purpose of the State Ombuds Office.

An important aspect of the claim of an ombuds privilege is that, unlike many recognized privileges (e.g., the physician-patient or attorney-client privilege), it is the *ombuds* that holds the privilege as a designated neutral on behalf of the program. All stakeholders in the organization rely equally on its confidentiality. Ombuds confidentiality is not based on an individual relationship, but stems from the program’s fundamental design.<sup>16</sup>

### Protecting Communications as Confidential

Beyond the concept of an ombuds testimonial “privilege,” there are several other bases for protecting ombuds information. Protecting ombuds information as “confidential” is generally based on one or more of the following rationales:

1. Extending the protections of mediator shield laws to the ombuds function, which, at its core, functions as a broadly scoped organizational dispute resolution resource that frequently provides mediation services;
2. Extending the constitutional right to privacy included in some state constitutions or other statutes to communications shared with an ombuds **under the expectation that they will be held in confidence.**
3. Enforcing the confidentiality as an “implied contract” that a program user accepts as a term and condition of utilizing the services of an ombuds and accepting the value and benefits of the ombuds program.

1.). **Mediation Shield Laws.** Currently there are no state shield laws in place that expressly apply to an organizational ombuds function.<sup>17</sup> However, the primary federal alternative dispute resolution statute, the

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<sup>12</sup> Typically, the court considers the following key factors: 1.) The communication was made in the belief that it would not be disclosed; 2.) Confidentiality is essential to the relationship, trust, and confidence of those involved; 3.) Society sees value in this sort of confidential communication – “it serves public ends;” and, 4.) When placed in balance, the impact on the flow of information to the court is “modest,” and the value of protecting the confidential relationship outweighs the benefit gained through its disclosure (for example, it would do more harm to the doctor patient relationship to force disclosure than the system gains by accessing the information.) This widely recognized standard for evaluating whether communications should be privileged is based on leading expert John Henry Wigmore, a legal scholar best known for authoring the classic *Treatise on Evidence*, who joined the faculty of Northwestern Pritzker School of Law in 1893 and became the first full-time dean of the Law School in 1901. Among a number of other cases, the Federal Court restated the “Wigmore Test” in *Folb v. Motion Picture Indust. Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), aff’d, 216 F.3d 1082 (9<sup>th</sup> Cir. 2000), which has been referred to in other cases as “the bedrock of federal common law mediation privilege.”

<sup>13</sup> See F.N. 11, above.

<sup>14</sup> Paragraph 5.4 of the current IOA Standards of Practice, closely mirror the fundamental elements of the “Wigmore Test.”

<sup>15</sup> In addition to *Shabazz v. Scurr*, 662 F. Supp.90 (S.D.Iowa 1987), See, e.g., *Roy v. United Technologies Corp.*, Civil H-89-680 (JAC), *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo., 1991); *Van Martin v. United Technologies Corp.*, 141 F3s 1188 (11<sup>th</sup> Cir. 1998).

<sup>16</sup> *Kolozowski v. Upjohn Co.*, File No. 94-5431 NZ (Mich. Cir. Ct., 1995).

<sup>17</sup> The American Bar Association, in collaboration with the International Ombuds Association, is currently developing a model ombuds shield law.

Administrative Dispute Resolution Act of 1996 [ADRA], and nearly every state have shield laws in place to protect the confidentiality of communications shared during a mediation process.<sup>18</sup> In particular, the ADRA broadly defines a “neutral” as “an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;” and Section 573 of the ADRA Section 573 authorizes the used of neutrals in wide-ranging circumstances. Section 574 ADRA then provides sweeping confidentiality to “neutrals.” In its comprehensive report on the use of ombuds in the federal context, while discussing the wide variety of ombuds practice settings, the Administrative Conference of the United States emphasized the common attributes of federal ombuds programs, which include independence, neutrality, and confidentiality – all attributes contemplated for protection by the ADRA.

The *Model Standards of Conduct for Mediators*<sup>19</sup> defines mediation as “a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.” This is precisely what an ombuds does when assisting individuals in navigating the resolution of their conflict. Court rulings in a wide range of jurisdictions, tend to support a liberal interpretation of when mediation begins and the value of protecting communications<sup>20</sup>. In matters where the actions of the ombuds are essentially mediation activities, it may be successfully argued that an applicable shield law should apply.

2.) **Privacy rights.** In a 1995 decision, the California Court of Appeals ruled in *Garstang v. The Superior Court of Los Angeles County*<sup>21</sup> that communications made during mediation sessions conducted by an ombuds are protected by a “qualified privilege,” based on the California State Constitution’s guarantee of a right to privacy. For California ombuds, this was good news at the time because it established a judicial approach that required the party seeking disclosure to demonstrate that the need for disclosure outweighed the inherent constitutional privacy right created by the California State Constitution. However, in 2017 the California Court reversed *Garstang* to the extent that it shifted the burden from the party seeking the information to demonstrate a compelling need and, instead, made it clear that the burden of asserting confidentiality falls on the party asserting the privacy claim. The Court used a three-step analysis to determine whether confidentiality should apply similar to the *Rule 501 “Wigmore”* analysis.<sup>22</sup> Thus, at this juncture, even in California, an ombuds cannot assume that confidentiality is automatic, absent demonstrating that protecting the information meets a balancing test. The *Garstang* rationale may provide a model for other jurisdictions, if those states have similar statutory or constitutionally guaranteed privacy rights to use as leverage.

3.) **Implied Contract.** The legal concept of implied contracts is well-established and frequently applied in a variety of situations. There are two types of implied contracts – “implied in fact,” and “implied in law.” Essentially, if the facts demonstrate that both parties knew, understood, and accepted the conditions and limitations of a transaction (often demonstrated by accepting the benefits of the service), they have established an “implied in fact” contract. Examples of this type of contract may include such things as a “terms of use” agreement for software use, or something as simple as the implied contract created by

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<sup>18</sup> Mediation shield laws vary by state but, overall, are generally positive in interpreting what constitutes mediation, and in protecting information shared during a mediation session. See, e.g., *California Evidence Code*, §§ 1115-1128. See also, e.g., *Cassel v. Superior Court*, 51 Cal.4<sup>th</sup>, 113 (2011).

<sup>19</sup> Model Standards of Conduct for Mediators. [https://www.adr.org/sites/default/files/document\\_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf](https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf), see also, Virginia Va. Code Ann. § 8.01-581.21, which defines mediation as “a process in which a mediator facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.”

<sup>20</sup> See, e.g., *Foxgate Homeowners Ass’n v. Bramalea Calif., Inc.*, 26 Cal. 4<sup>th</sup> 1, 14 (2001), in which the court affirmed that the confidentiality afforded by the shield law and further stated that that there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of the mediator’s reports.

<sup>21</sup> *Garstang V. The Superior Court of Los Angeles County*, 39 Cal.App.4<sup>th</sup> 526 (1995).

<sup>22</sup> Noting that the burden remains on the party asserting confidentiality to establish an appropriate basis, the court applied a three-step analysis, which requires the court to determine: 1.) Does a legally recognized privilege exist? 2.) Is there a reasonable expectation of privacy involved? 3.) How serious is the invasion of privacy involved? *Williams v. Superior Court of L.A. Cnty.*, 3 Cal.5<sup>th</sup> 531, 554 n.7 (Cal. 2017), citing *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4<sup>th</sup> 1, at p. 40, 26 Cal.Rptr.2d 834, 865 P.2d 633 (2017).

ordering food in a restaurant, where it is implied that the person ordering the meal will pay for it. An “implied in law” contract is typically imposed by a court to prevent some obvious unfairness. An ombuds program may benefit from both types of implied contracts. For example, in one of the leading cases recognizing the ombuds privilege, the court found that “[g]iven the ombudsman’s procedures to ensure confidentiality and its announcements of those safeguards, the plaintiff must have been aware that his own communications with it [the ombuds] would be confidential.”<sup>23</sup> If properly designed and with well-communicated, clear terms under which a program user accepts the benefits of an ombuds program, both an implied-in-fact and an implied-in-law contract may be possible.<sup>24</sup>

## Exceptions to Confidentiality

Even under the most favorable legal interpretations, there are limited exceptions to confidentiality. IOA’s Standards of Practice recognize the following<sup>25</sup>: 1.) disclosing information “when failure to do so could result in an imminent risk of serious harm;” 2.) on a limited basis “to the extent necessary” to defend themselves against a formal claim of professional misconduct; 3.) as necessary and in the ombuds’ discretion, when given permission by the person providing the information to assist with the resolution of a concern.<sup>26</sup> In addition to the exceptions established within the IOA Standards of Practice, there are other situations under which it is likely that the ombuds would have either an obligation to disclose or no basis to claim confidentiality. Examples of situations where it is likely or at least possible that confidentiality will not apply include, among others: 1.) Information shared with the ombuds that triggers a statutory disclosure obligation. Examples could include child or elder abuse protection statutes, cases where specific state or federal accountability statutes apply, and ombuds’ awareness of such things as serious fraud, waste, or abuse issues, or a threat to national security. 2.) Information regarding planned or past criminal behavior. 3.) Information that must be preserved under a state official records act, where no statutory exception applies. 4.) Communications with an ombuds working within a vulnerable sector, such as with K-12 school children.

## Caveats

States vary widely in their individual approach to defining privilege and in extending confidential status to information. Each sector and particular industry may require specific adaptations. For example, an ombuds program operating within a national security context, such as the Department of Energy National Laboratory complex or other defense-oriented organization, may need to generate an organization-specific interpretation of the “imminent risk of serious harm” exception to include any threat to or compromise of national security. Corporations may deem a risk to protecting sensitive proprietary information regarding design specifications, formulas, or similar intellectual property as an “imminent risk.” In the employment or higher education context, an ombuds program may define a risk of a serial pattern of harassment or assault as requiring disclosure. Reviewing the provisions of the ADRA, discussed above, will help federal agencies properly design and implement their program.

To establish and operate an ombuds program, each organization should conduct its own analysis of the conditions and limitations that apply within its jurisdiction and its organizational sector. Almost every ombuds program will likely be subject to specific legal requirements or conditions that require individual interpretation of the IOA Standards of Practice.

There are cases in which the ombuds program failed to adequately demonstrate that it met the requirements to justify protecting confidentiality. These cases illustrate why close attention to the fundamental design elements of an independent, neutral, impartial, and confidential program are critical to sustaining confidentiality. First, an ombuds program needs to demonstrate that the role of confidentiality is imperative to its successful function. If the organization does not devote the necessary energy to demonstrate the terms

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<sup>23</sup> *Roy v. United Technologies Corp.*, *Ibid*, FN 9, *supra*. at p.26.

<sup>24</sup> The concept of “privity of contract” may pose an important limitation to the “implied contract” concept. Generally, the law recognizes that parties to a contract are bound by its terms, but others outside of that relationship (there being no exchange of benefits) are not necessarily bound by the express or implied contract terms.

<sup>25</sup> See, <https://www.ombudsassociation.org/standards-of-practice-code-of-ethics>.

<sup>26</sup> See paragraphs 5.4 – 5.8 of the IOA Standards of Practice.

and conditions under which it operates and the inherent value of confidentiality, a court may determine that the benefits of disclosure outweigh the benefits of protecting program confidentiality.<sup>27</sup> Second, the program must be structured in such a way that it is absolutely clear that, because of its confidential function, the ombuds *is not a point of contact to place the organization on notice*. Third, it must be clear that the ombuds holds no line management authority, reporting or compliance responsibilities, or any direct authority to implement corrective measures or to impose any form of resolution. The cases reviewed illustrate that program design flaws can be fatal to asserting confidentiality and avoiding placing the organization on notice.<sup>28</sup>

## Best Practices

We have noted above the importance of a properly structured program<sup>29</sup> as a foundational basis for ombuds confidentiality. This places the program in the best position to defend any threat to the program's confidentiality. To observe best practices, the organization should consider the following:

1. Ideally the reporting structure for the ombuds program should be independent from other line management functions to the greatest extent feasible within the organization. It should have an unfettered, separate reporting channel to the highest position possible within the organization, such as the CEO, or University President or senior function that is independent from any compliance or reporting channel.<sup>30</sup>
2. The ombuds program should function with independence from any compliance function, any entity that administers personnel matters, the organization's legal counsel, or other function that, by definition, holds a vested interest in the outcome of issues.
3. Consistent with the requirements of paragraphs 1.4 and 4.4 of the IOA Standards of Practice, the ombuds program should have a comprehensive, clearly written, and well-communicated and documented charter, policy, or detailed program description that clearly explains the program's structure, limitations and confidentiality expectations. Program documentation should be written with the "*Wigmore Test*" in mind and documentation should describe how confidentiality is an essential element to the work of the ombuds. Documentation should also clearly describe the terms and conditions for using the ombuds program, emphasizing that confidentiality is required as a cornerstone of the ombuds function and that respecting confidentiality is a condition for using the ombuds program as a voluntary resource. As a best practice, an ombuds should verbally review the program's confidentiality and limitations and ensure that each user of the program fully understands them. Such documentation will help form a basis for protecting confidentiality through the concept of an *implied contract*.<sup>31</sup>
4. The ombuds function should be designed to meet the fundamental requirements of the IOA Standards of Practice. The ombuds function should not be vested with any policy-making, or decision-making authority regarding the issues brought to it, and should not be identified as a place to put the organization "on notice."

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<sup>27</sup> See, *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8<sup>th</sup> Cir. 1997). This case involved an ombuds program that had been discontinued. The sponsoring organization did not vigorously advocate to defend the claimed privilege, and within that context, the Court drew a reasonable conclusion that no privilege applied. This case highlights the importance of designing a defensible program from the inception and being committed to demonstrating the compelling need for confidentiality when it is challenged.

<sup>28</sup> See, e.g., *S.S. v. Alexander*, 177 P.3d 724 (Wash. App. Div. 1, 2008).

<sup>29</sup> There are many resources available from the IOA that are available to help organizations design and implement a "properly created program, including training and mentoring programming, its comprehensive Standards of Practice, templates, and best practices descriptions.

<sup>30</sup> Naturally, it is understood, that day-to-day administrative communications may occur at different levels, such a Chief of Staff or Senior Vice President, but the ombuds should be able to demonstrate direct access to the senior executive.

<sup>31</sup> Many templates and resources exist for developing a program charter. For an over view of key elements of a program charter, see, e.g., *The Organizational Ombudsman: Origins, Roles, and Operations – A Legal Guide*, p. 280.

5. In addition to crafting program documentation that clearly outlines expectations regarding confidentiality and explains the benefits of a safe, confidential resource, (assuming the existence of an applicable mediation shield law), the program should emphasize its status as a mediation resource, which is protected by the applicable shield law.<sup>32</sup>
6. The program should operate with strict physical and programmatic safeguards to ensure that confidential information is scrupulously protected, and its record-keeping functions should align with the requirements of the IOA Standards of Practice.<sup>33</sup>
7. The program should develop a standard intake process for welcoming program users that includes a verbal overview of the expectations and limitations, and, as a matter of standard practice, asks the program user to state that they understand the conditions and requirements. This welcoming process should be informal and need not be legalistic or documented on a case-by-case basis, but it should be consistently used so that the practice can be demonstrated to a court if need be.
8. It is appropriate for the ombuds to work with the organization’s in-house legal counsel for routine legal guidance. In situations where there is an attempt to challenge the ombuds’ confidentiality or gain access to confidential information<sup>34</sup> regarding a specific matter, to ensure that the program credibly demonstrates independence and full protection of confidential information (even with respect to the ombuds’ own organization), the ombuds should have access to separate legal counsel; completely independent of the organization’s in-house legal function.

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<sup>32</sup> For an excellent example of linking the ombuds function to an applicable mediator shield law see, *Declaration of Best Practices for the University of California Ombuds Offices*, [https://www.ucop.edu/ombuds/files/uc\\_declaration\\_best\\_practices\\_ombuds.pdf](https://www.ucop.edu/ombuds/files/uc_declaration_best_practices_ombuds.pdf), p.2, FN2

<sup>33</sup> See, IOA Standards of Practice, paras. 5.1 and 5.8.

<sup>34</sup> For a definition of “confidential information,” see para. 5.1 IOA Standards of Practice.



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#### A SAMPLING OF CASE CITATIONS

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