***S.S. v. Alexander*, 177 P.3d 724 (Wash. App. Div. 1, 2008)**

The court in this Title IX discrimination case imputed to the university defendant knowledge of claims made to the university ombuds (and other university officials) by a female student against a varsity football player at the University of Washington. In doing so, the court found that the ombuds was an "appropriate person" under Title IX who was aware of the discrimination and who then failed to act reasonably. This decision by the State of Washington Court of Appeals, however, well illustrates the point that where an organizational ombuds office is not appropriately established and operated, it will be deemed to be a notice channel for its institution.

The facts cited by the court in *S.S. v. Alexander* are so problematic that they merit extended discussion. A female student who held a campus job as an assistant equipment manager for the varsity football team became involved in a consensual sexual relationship in the fall of her freshman year with Alexander, one of the star players on the team. As a result of increasingly demeaning actions by Alexander, the plaintiff broke off the relationship. She alleged that five days later he pushed his way into her room, removed her clothing, and had intercourse with her against her will and despite her verbal protest. The plaintiff did not report this to anyone at that time. The following summer she told an assistant coach that she had been sexually assaulted. She subsequently reported the assault to the equipment manager, the associate athletic director, and also to his supervisor (Tuite) and the assistant athletic director. None of these people advised her of her options for reporting the assault to a formal channel. Tuite spoke with the plaintiff and advised the plaintiff that Tuite would arrange for counseling sessions and that something would be done. When the plaintiff subsequently did not hear back from Tuite, she went to Tuite and said that she wanted to file a police report. Tuite again did not give her options for reporting but specifically told her to wait because Tuite was working on a solution.

Tuite contacted the athletic director and the Title IX coordinator, who then met with the university ombuds to determine how to proceed. Collectively, they decided that the ombuds would conduct a mediation between the plaintiff and Alexander. In footnote 4 of the court's opinion, the court specifically noted the authority of the ombuds office: "The ombudsman is charged with the *authority* to receive complaints from students with regard to 'alleged inequities,' to seek to

Not IOA standard!

resolve such inequities and 'recommend to the President redress when the Ombudsman believes that an individual has been improperly treated and when the Ombudsman has been unable to resolve the matter.'"[28]

By the time the ombuds met with the plaintiff for the mediation, the ombuds had already met with Alexander, and she reported to the plaintiff that he had said that he was sorry and had cried when she spoke with him. The ombuds met with the plaintiff twice more before the mediation at which the plaintiff, Tuite, Alexander, and the ombuds were present. The court specifically noted that up to this point, no one had conducted any investigation of the alleged rape, despite detailed accounts of it, and that no one gave the plaintiff other options for reporting the incident. Moreover, the court pointed out that despite the plaintiff's request that Alexander be suspended, *Tuite and the ombuds decided* that he would undergo counseling and community service.[29] When the plaintiff subsequently complained first to the ombuds and then to Tuite about the outcome of the mediation, they still did not advise her of other reporting options. And finally, as evidence of even more outrageous conduct by the ombuds, the court stated that the ombuds made the plaintiff fill out a form indicating that the plaintiff had spoken with Alexander and was satisfied with his response and considered the matter closed.[30]

The key issue with respect to the plaintiff's Title IX claim was whether an "appropriate person" was aware of the discrimination and then failed to reasonably respond. The court cited a leading Supreme Court case for the proposition that an "appropriate person" is "at a minimum an official of the recipient entity with *authority to take corrective action to end the discrimination*" and that this is a fact question.[31] The court held that the assistant coach and the equipment manager were not "appropriate persons" because their duties were "more akin to a classroom instructor" (and thus were not appropriate persons for receiving notice), but the ombuds, the Title IX coordinator, the athletic director, assistant athletic director Tuite, and the associate athletic director were held to be "appropriate persons."[32]

28. S.S. v. Alexander, 177 P.3d at 730 n.4 (emphasis added).
29. *Id.* at 730–31.
30. *Id.*
31. *Id.* at 737 (emphasis added).
32. *Id.* at 738.

Actual Ombuds Example

The ombuds helps the student and helps preserve evidence of wrongdoing

A student employee came to the ombuds office to describe a situation she did not know how to handle. She wanted to discuss the matter confidentially with the ombuds before taking any action.

The problem arose in connection with her job in the campus housing office. Her manager told her when she started work that his mother was sick and could not afford food or medicine, so he wanted to add six hours each week to her timesheet and assured her that she would still be paid for the eight hours a week that she in fact worked but that she would give him back the extra money so he could give it to his mother. The student agreed, and they operated under this arrangement for several months. When she received her W-2 form, however, she realized that not only would she owe taxes on the extra money, her earnings were so high that she would no longer be eligible for her scholarship.

The ombuds advised the student to turn herself in to the dean's office, but also offered options on how to deal with the misconduct of the manager. The ombuds was aware of the need to preserve evidence, an issue that had not occurred to the student. They agreed that, before the student went to the dean, the ombuds and the student would go to the senior vice president in charge of student life. Because of the ombuds' knowledge of the university, the ombuds felt that going to the most senior level first was the best way to proceed and was able to arrange for such a meeting. The senior vice president immediately arranged for HR and security to gather the necessary information in a professional and discreet manner before alerting the manager involved. The ombuds had been concerned that a less thorough or easily noticed investigation might have been done if the matter had been reported at a lower level.

Only after this was accomplished did the student report the incident to the dean and deal with her own situation. Since the university had already obtained the incriminating documentation on the manager, there was no risk that he could destroy the

evidence or flee. He was subsequently confronted, arrested, and later terminated from employment. The student's assistance led to some leniency in terms of disciplinary action by the university and the financial aid office helped her explore other sources of financial aid, but her W-2 form was not changed and she was ineligible for her scholarship for the following year.

While the holding that notice to the ombuds should be imputed to the university is problematic as a general proposition, the facts considered by the court in this case compel such a conclusion. The ombuds program in *S.S. v. Alexander,* however, is readily distinguishable from ombuds programs created and functioning in accordance with the IOA Code of Ethics and Standards of Practice. For example:

- The University of Washington ombuds program appears to have been improperly structured from the beginning, having expressly been given the authority to receive complaints;
- It appears to have had management functions and participated in the management decision to require the plaintiff to go to mediation;
- Based on the facts found by the court, it appears to have colluded with the athletic department administrators and the Title IX compliance officer to put the interests of the football team ahead of those of the plaintiff;
- None of the formal channels, or even the ombuds, advised the plaintiff of other options to report the incident;
- No one investigated her complaint; and
- The mediation appears to have been a sham, both in what occurred in the mediation and in compelling the plaintiff to report that it was successfully concluded.

For these reasons, any attempt by a party to cite the *S.S. v. Alexander* case for the proposition that an ombuds should be consider an agent of notice or an "appropriate person" under Title IX should be coun-

tered with the factual differences between the program considered by the court there and a properly structured ombuds program.[33]

D. IOA and the 2004 ABA Resolution

This review of the basic principles of imputed notice and agency law on imputed notice, together with the case law, provide a context in which to look more closely at the positions on imputed notice taken by the IOA and in the 2004 ABA Resolution.

The IOA Standards of Practice specifically disclaim ombuds as an agent of notice. Section 3.8 of the IOA Standards of Practice provides:

> Communications made to the Ombuds are not notice to the organization. The Ombuds neither acts as agent for, nor accepts notice on behalf of, the organization. However, the Ombuds may refer individuals to the appropriate place where formal notice can be made.[34]

The provisions in Paragraph F the 2004 ABA Resolution, however, take a somewhat different position: it provides that if an ombuds

33. The University of Washington is not alone in vesting the ombuds with authority to receive complaints and participate in investigations. In another recent case, *Herndon v. College of the Mainland*, 2009 U.S. Dist. LEXIS 12425 (S.D. Texas, Galveston Div., Feb. 13, 2009), the court cited the sexual harassment policy of the defendant, which provided that a student filing a sexual harassment complaint would have an initial conference with the college ombudsman and that the "College Ombudsman or designee shall coordinate an appropriate investigation, which ordinarily shall be completed within seven days of the receipt of the complaint." *Id.* at *14. Herndon failed to file a complaint as required by the policy, but the court nevertheless denied the college's motion for summary judgment on the issue of sexual harassment. The court observed: "Moreover, a complainant's failure to follow a formal sexual harassment complaint procedure is not dispositive in a Title IX case. '[U]nder *Gebser* and its progeny, an aggrieved student or employee need not follow the institution's official route for reporting sexual harassment. She must merely report to someone with authority to take corrective measures.' *Crandell v. N.Y. College of Osteopathic Med.*, 87 F. Supp. 2d 304, 321 (S.D.N.Y. 2000)." *Id.* at *69–70. The lesson in cases like *S.S. v. Alexander* and *Herndon* is to structure the ombuds program so that it does not have either actual or apparent authority to receive notice, investigate, or participate in taking corrective actions.

34. INTERNATIONAL OMBUDSMAN ASSOCIATION, STANDARDS OF PRACTICE, 3.8. *See* Appendix 5 at 460 (IOA Standards of Practice in effect prior to October 2009); *see also* Appendix 5 at 463 (Standards of Practice effective October 2009).

functions in accordance with the "Independence, Impartiality, and Confidentiality" provisions of Paragraph C of the Resolution, the ombuds should not be deemed an agent of the entity for notice purposes, but that if an ombuds communicates with the entity, communications with the ombuds can be, in some circumstances, imputed to the entity.[35] The issue of imputed notice in the context of an ombuds communicating with the entity, however, is an issue that was never addressed in any iteration of the Ombuds Association's Codes of Ethics or Standards of Practice. The 2004 ABA Resolution sought to address the issue of notice left unaddressed in the 2001 ABA Resolution and in the association's standards of practice and has been recognized for reinforcing the notion that ombuds, as a supplement to formal communication channels rather than a formal channel itself, should not in most cases be seen as imputing notice to the organization.[36] Unfortunately, the solution it articulates is vague and confusing, does not comport with the general principles of agency law presented above, and ultimately is unworkable.

Paragraph F, "Notice," of the 2004 ABA Resolution has three subsections.[37] The first addresses an ombuds's need to supply accurate information about the office and is often referred to by ombuds as the "Miranda warnings." The practices of many organizational ombuds have largely adopted these provisions, except where they implicate the subsequent subparagraphs to which most organizational ombuds have taken exception, and thus the provisions in this section are largely not in dispute. These warnings serve to make sure at the beginning of an ombuds communication that both the ombuds and the inquirer are proceeding with the same understanding of the role of the ombuds and the confidential nature of the communications. The second subparagraph, however, addresses the particularly thorny question of when an *ombuds's* communication with others in an entity should be considered notice. The final subparagraph attempts to summarize when notice is imputed

35. American Bar Ass'n, Standards for the Establishment and Operation of Ombuds Offices (revised Feb. 2004) [hereinafter 2004 ABA Resolution]. *See* Appendix 7 at 501–02.

36. *See* Katherine A. Welch, *Note: No Notice Is Good News: Notice Under the New Ombuds Standards for the Establishment and Operation of Ombuds Offices*, 2005 J. Disp. Resol. 193 (2005).

37. 2004 ABA Resolution, *supra* note 35. *See* Appendix 7 at 500–02.

to an entity from communications with an ombuds and when it is not. Paragraph F, together with its footnotes, reads as follows:

NOTICE

F. An ombuds is intended to supplement, not replace, formal procedures.* Therefore:

(1) An ombuds should provide the following information in a general and publicly available manner and inform people who contact the ombuds for help or advice that—

(a) the ombuds will not voluntarily disclose to anyone outside the ombuds office, including the entity in which the ombuds acts, any information the person provides in confidence or the person's identity unless necessary to address an imminent risk of serious harm or with the person's express consent

(b) important rights may be affected by when formal action is initiated and by and when the entity is informed of the allegedly inappropriate or wrongful behavior or conduct

(c) communications to the ombuds may not constitute notice to the entity unless the ombuds communicates with representatives of the entity as described in Paragraph 2

(d) working with the ombuds may address the problem or concern effectively, but may not protect the rights of either the person contacting the office or the entity in which the ombuds operates**

(e) the ombuds is not, and is not a substitute for, anyone's lawyer, representative or counselor, and

(f) the person may wish to consult a lawyer or other appropriate resource with respect to those rights.

(2) If the ombuds communicates*** with representatives of the entity concerning an allegation of a violation, then—

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* An ombuds program as envisioned by these Standards supplements and does not substitute for the need of an entity to establish formal procedures that may be necessary to *protect legal rights* and to address allegedly inappropriate or wrongful behavior or conduct.

** The notice requirements of Paragraph F do not supersede or change the advocacy responsibilities of an Advocate Ombuds.

*** Under these standards, any such communication is subject to Paragraph C(3).

(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 the communication constitutes notice to the entity is a question that should be determined by the facts of the communication.

(3) If an ombuds functions in accordance with Paragraph C, "Independence, Impartiality, and Confidentiality," of these standards, then—

(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

(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.

One of the reasons that subsection 2 of Paragraph F is problematic is that it uses terms that are unclear and difficult to apply. For example, subsection (2) begins with a reference to a communication between the ombuds and the entity "concerning an allegation of a violation." A subsequent provision in subsection (2) makes reference to "allegations by multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful." As drafted, it is not at all clear what is meant by a "violation" as opposed to "conduct that is either inappropriate or wrongful." From an ombuds perspective, this subsection appears to assume that an ombuds determines what behavior is a violation, inappropriate, or

wrongful. Such decisions are not typically within the province of an ombuds; an ombuds may disclose facts to the entity, but the determination of whether the actions are a violation, inappropriate, or wrongful is the responsibility of the entity.

A more serious problem with the imputed notice provisions of Paragraph F is that, if the ombuds makes disclosures to the entity as described in subsections (a)(i) and (ii), those communications can be read as imputing notice to the entity of what is communicated to the ombuds by an inquirer.[38] If the ombuds office has been created as an independent and neutral office, there no reason that this result is required based on either the general principles of notice and agency law or case law.

Finally, the provisions of the 2004 ABA Resolution are highly impractical, hard to apply, and make it virtually impossible for both the entity and the ombuds to really know when the entity has been placed on notice. Consequently, the 2004 ABA Resolution was a laudable but ultimately flawed attempt to wrestle with the difficult issues of notice and confidentiality, arguably influenced more by lawyers representing the interests of their clients in employment cases than by a coherent attempt to help develop the law. In responding to this resolution, however, the IOA developed a more workable and legally consistent response to the issue of notice to the entity based on communications from an ombuds. In doing so, the IOA in effect sidestepped the issue of imputed notice. Their response provides a much clearer and more workable rule: what an inquirer says to the ombuds is not considered notice to the entity, but if the ombuds then speaks with a formal channel of the entity about an issue, the entity is on notice of what the ombuds communicates to it, not what may have been communicated to the ombuds.

> [A] communication to the ombuds *never constitutes notice to the organization*. As ombuds office administrative manager,

38. This is because of the provisions in subsection (3)(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*." (Emphasis added.) Paragraph 2 states that a disclosure made by the ombuds to the entity under the circumstances described in subsections (i) and (ii) "should be regarded as providing notice to the entity *of the alleged violation* and complainants should be advised that the ombuds communicated their allegations to the entity. . . ." (Emphasis added.)

Actual Ombuds Example

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.

the lead ombuds may be responsible for receiving notice about wrongful behavior of any ombuds office staff member whom the lead ombuds supervises. Except in this ombuds's administrative capacity as manager of the ombuds office, the ombuds is never an agent of notice or a designated point of contact to accept formal claims or concerns. A communication between an ombuds and an organization's point of contact may serve as notice under some circumstances, as explained below, but the scope of that notice is limited strictly to the substance of the communication between the ombuds and the point of contact, and *never* includes any communications between the visitor and the ombuds.[39]

39. International Ombudsman Association (IOA), Guidance for Best Practices and Commentary on the American Bar Association Standards for the Establishment and Operation of Ombuds Offices (Revised Feb. 2004) [hereinafter IOA Guidance and Commentary] (emphasis in the original). *See* Appendix 10 at 549. *See also* IOA Best Practices, A Supplement to IOA's Standards of Practice Version 3, Oct. 13, 2009 (herinafter October 2009 IOA Best Practices) at 5–9, Appendix 11 at 557.

While this rule eliminates the vagaries of the provisions of the 2004 ABA Resolution and creates a bright-line rule that can be easily applied by the ombuds and communicated to inquirers, it also serves as a caution to ombuds in communicating with a formal channel about an issue. This should not present problems for ombuds, however; they should be able to structure any communications with formal channels of the entity with this rule in mind—not disclosing information that is not necessary or that the ombuds does not have permission to disclose. Indeed, the IOA Response enhances the ability of ombuds to assist their inquirers by making limited or partial disclosures to the organization when given permission to do so while protecting the identity and other aspects of the inquirer's communication with them. Likewise, from the organization's perspective, the IOA Response is clear and workable: the entity is on notice and obligated to act only on what the ombuds says to the formal channel, not on information that was not communicated to it.

E. Imputed Notice—Conclusion

As the discussion and case law cited above illustrate, a person can decide whether to place an organization on notice of any claims he or she may have. When the plaintiff has elected to make those complaints in confidence and with the request that no investigation be conducted, courts either have not imputed notice of those claims to the organization or have held that the organization did not breach any duty to eliminate the harassment or discrimination. Of course, as noted by the court in *Elezovic*,[40] an employer remains free to adopt policies that would discipline any supervisor or manager who did not report a claim that he or she learned about, and many organizations in fact have such policies. Thus, when an individual chooses to speak confidentially with an ombuds under a program that is created specifically as a confidential and off-the-record channel, and the ombuds office publicizes the fact that it is not authorized to receive notice of claims on behalf of the organization, the promise of confidentiality should

40. Elezovic v. Ford Motor Co., 472 Mich. 408, 427 (2005). *See also* EEOC Enforcement Guidance, *supra* note 3, in which the EEOC may impute notice to an employer if a management representative is aware of harassment but which would permit anonymous calls to a phone line if it is clear that the person taking the calls is not part of management.

not result in imputed notice to the organization. Where the ombuds, with the permission of the inquirer or under an exception to confidentiality, communicates with the organization, the better rule is that what the ombuds communicates to the organization—not what may have been communicated to the ombuds—places the organization on notice. In this circumstance, the ombuds becomes the notice giver, and the organization is on notice of only what is communicated *by* the ombuds; imputed notice of what was communicated *to* the ombuds is inappropriate.

Imputed Notice Practice Tips

To prevent communications with an ombuds office from being imputed to its organization, the organization and the ombuds office should take the following steps:

1. Create and publicize the ombuds office as an alternate and confidential resource that supplements, but does not replace, existing compliance and formal reporting channels.
2. Create the ombuds office so that it has structural independence and is not subservient to one of the existing reporting channels, such as HR or compliance, so that potential inquirers will not be misled as to the apparent authority of the ombuds office. This information should be publicized and made available to all employees or other constituents.
3. In all of the documentation evidencing the creation and publicizing the existence of the program, expressly state that communications with the ombuds are considered confidential and off the record, and that the ombuds office is not part of management and not authorized to receive notice of claims against the organization.
4. Monitor the way in which the ombuds interacts with the formal channels so that the ombuds office does not, in fact, become an extension of those offices or participate in making management decisions, conducting investigations, or have other management responsibilities.
5. Make sure that the ombuds and inquirers understand that, even though communications with the ombuds do not constitute imputed notice to the organization, if an inquirer and the ombuds agree on an option that involves an ombuds

communicating an issue to a management agent, that communication may be giving the organization notice of a claim.[41] For this reason, an ombuds should agree to undertake this action only after careful consideration and only with the express permission of the inquirer. In making such a communication, the ombuds should convey only the information that is necessary and authorized. The organization, therefore, is placed on notice of only what the ombuds communicates to the management representative, not everything that may have been communicated to the ombuds by the inquirer.

6. A formal channel should not expect ombuds to confirm or deny that any particular person consulted with the ombuds office.
7. A formal channel should not expect or ask an ombuds to discuss confidential communications with people with whom the ombuds may have spoken.
8. A formal channel should not inquire of people who come to them whether they have spoken with the ombuds office or what may have been communicated with the ombuds.