

8 Charleston L. Rev. 1

Charleston Law Review

Fall 2013

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS

Eric S. Adcock<sup>a1</sup>

Copyright (c) 2013 Charleston Law Review; Eric S. Adcock

I.	INTRODUCTION: A BRIEF SCENARIO, SOME BACKGROUND INFORMATION ABOUT OMBUDSMEN, AND AN OUTLINE	3
	A. Scenario	3
	B. Background Information about Ombudsmen	5
	C. Outline	10
II.	THE OMBUDSMAN ROLE AND ITS DEVELOPMENT	10
	A. Scandinavian Origins and the Migration to the United States	10
	B. The Ombudsman in the United States	12
	C. The United States Framework for Ombudsmen and Privilege	14
	1. Legislative Ombudsmen	17
	2. Executive Ombudsmen	20
	3. Corporate Ombudsmen	24
	4. Advocate Ombudsmen	26
III.	INTERPRETATIONS OF THE PRIVILEGE OF OMBUDSMEN COMMUNICATIONS	28
	A. Scenario	28
	B. Application of Ombudsman Privilege	29
	C. Common Law Precedent for Privilege	30
	1. Mattson v. Cuyuna Ore Company: Four Fundamental Conditions Must Be Met as a Necessary Basis for Establishing Privilege	30
	D. Court Interpretations Change as a Result of Federal Rule of Evidence 501	31
	1. In re Doe: The Background for Privileged Communications under Federal Rule of Evidence 501	34
	2. Shabazz v. Scurr: Federal Privilege Prevents Disclosure of Communications Received from an Ombudsman	35
	3. Roy v. United Technologies Corporation: In re Doe and Shabazz v. Scott Determine the Scope of Evidentiary and Testimonial Privilege of an Ombudsman	37
	4. Kientzy v. McDonnell Douglas Corporation: Another Favorable Ruling for Ombudsmen	39
	5. Carman v. McDonnell Douglas Corporation: The First Strike against Ombudsman Privilege	41
	6. Jaffee v. Redmond: Federal Recognition of a Privilege for Psychiatrists	43
	7. Solorzano v. Shell Chemical Company: Some Federal Laws Preempt Claims of Ombudsman Privilege	45
IV.	SUMMATION OF WHERE THE OMBUDSMAN PRIVILEGE STANDS TODAY	47

**\*3 I. INTRODUCTION: A BRIEF SCENARIO, SOME BACKGROUND INFORMATION ABOUT OMBUDSMEN, AND AN OUTLINE**

**A. Scenario**

It was the fourth time that week; the fourth time that week. Thomas<sup>1</sup> walked quickly into his office and tried his utmost not to slam the door. He didn't want to give anyone the pleasure of knowing that his supervisor had finally gotten to him. He

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

plunked down in his uncomfortable corporate chair. Thomas was livid. His blood pressure pounded in his ears, and his focus and professional demeanor had vanished. He was at his wits' end. He just wanted to lash out at everyone in the company. His work had been rock solid. He prided himself on his professionalism, but any results that were contrary to his supervisor's mindset were met with disdain and ridicule. His home life had suffered. He was on edge with his spouse, had little time for the kids, and couldn't sleep at night. His last project presentation had gotten personal. His boss had lashed out at him in front of the whole office, and he couldn't return the favor.

Business had not been Thomas's first choice in life, but he had become good at it--very good. In college, he had been an English literature major. In times of frustration and stress, he still found comfort in his favorite works. “[A]ny man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.”<sup>2</sup> John Donne's Meditation XVII was one of Thomas's favorites. He thought, “Perhaps the bell is tolling for my employment with this place.”

Thomas stared into space, too angry to think. Gently, his office door creaked open as a friendly co-worker stood in the doorway. It was one of the few people he could call his friend at his job. The friend softly told Thomas, “I have not seen you this \*4 way. What's going on with you?” Thomas asked, “Does it show?” His friend nodded a yes. Thomas looked at him then down at the floor. Thomas looked up again and said, “Come in and shut the door.” Once Thomas's door slammed shut with a resounding thud, he slowly unraveled his professional and personal problems to his friend. As his story drew to a close, Thomas still wasn't feeling any better about his work situation. He couldn't think of anything else to say. He asked his friend, “What should I do? Should I just give up and walk away? Should I file a grievance, and if I did, would it do any good? Do you think it's me?” Thomas's friend simply shrugged and said, “I can't tell you what to do but Chris in accounting had some issues with his boss and the ombudsman<sup>3</sup> helped him out. Maybe she can help you.”

Thomas had walked by the corporate ombudsman's office almost every day. The only thing that concerned Thomas was that he had no idea what an ombudsman was or what she did. Thomas was leery about talking to someone employed by the corporation, but he had few options left. As he swung open the door to the ombudsman's office, he stood in the reception area, a bundle of nervous energy as he fidgeted with his hands and anxiously tapped his feet.

The ombudsman noticed the dark circles underneath Thomas's eyes and a general look of exhaustion resonating from his face. The ombudsman invited Thomas to sit down and have a conversation with her about what he was feeling and what had happened at work. Using the ombudsman as a casual way to air his grievances, Thomas felt relieved being in a safe area away from his supervisor, especially since his boss had chastised him earlier in the week. The ombudsman told Thomas that while she was employed by the same entity as he, her role was to be an independent, informal, impartial, and confidential resource for him; nothing he told her would get back to his supervisor, or anyone within the company, unless there was an imminent risk of serious harm.<sup>4</sup> Thomas had no problem with that. He didn't \*5 want to harm anyone; he just needed to talk to someone. Thomas felt like a weight had been lifted from his shoulders in the few moments he had been in the ombudsman's office. Sitting in a snug chair, its armrests cradling him in a completely confidential environment, he felt empowered. As Thomas thought about everything that had brought him to the ombudsman's office, he let out a loud sigh of relief. He commented, “Maybe the bell won't toll for my employment.” The ombudsman's brow furrowed as she gave Thomas a look of bewilderment. “Tell me a little more about that,” she said.

## B. Background Information about Ombudsmen

Most people have heard of attorney-client privilege and physician-patient privilege,<sup>5</sup> but not ombudsman privilege. Some jurisdictions, both federal and state, do narrowly and limitedly recognize that communications between an employee, like Thomas, and an ombudsman, a dispute resolution professional like the one mentioned above, should be confidential under the

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

law.<sup>6</sup> Most ombudsmen possess a limited reporting role that is \*6 separate from the chain of command within an institution.<sup>7</sup> While ombudsmen do possess affiliations with the institution that employs them, they do not actively participate within any formal decision-making process the institution utilizes.<sup>8</sup> In this way, ombudsmen serve as separate and independent outlets \*7 outside of the procedural mechanisms most entities use.<sup>9</sup> Accordingly, the communications ombudsmen receive from visitors<sup>10</sup> are also outside of these procedural mechanisms utilized by the organization.<sup>11</sup> Most establishments and programs that use ombudsmen follow a system of guiding principles that all conversations and communications ombudsmen have with visitors are confidential.<sup>12</sup>

An ombudsman's job is to guide people to their own resolutions,<sup>13</sup> improve the administration of public or private programs,<sup>14</sup> and advocate for populations that may have been unfairly treated.<sup>15</sup> Aside from providing an outlet for employees and the public to field complaints, ombudsmen also provide upward feedback by identifying grievance patterns and trends within the entity they represent.<sup>16</sup> Employees and the public citizenry should be able to express their frustration about a work situation or the responsiveness of a public program to an ombudsman without fear of reprisal. Since “[c]onfidentiality is the bedrock on which virtually all ombudsman programs are \*8 built,” the concept of ombudsman privilege is crucial.<sup>17</sup> In the hypothetical scenario discussed earlier, it can be the difference between Thomas being able to openly express his private thoughts and emotions to the ombudsman in confidence, if the privilege is recognized, and the ombudsman not being able to keep her word to Thomas and perhaps be compelled to disclose their private communications, if not.

Ombudsmen, acting as representatives of both public and private institutions, have been afforded a narrow judicial recognition at the federal and state levels regarding the privileged nature of their communications with visitors. At first, courts recognized that ombudsmen possessed a societal worth and were afforded privilege.<sup>18</sup> However, later courts have found that far more is necessary to create an evidentiary or testimonial privilege not recognized under pre-existing federal law.<sup>19</sup> The development of federal and state recognition of privilege in the ombudsman's process began on a case-by-case basis.<sup>20</sup> Legal recognition of an ombudsman's confidential communications with a visitor began when a federal court, in applying a state statutory scheme under the Federal Rules of Evidence, found that an ombudsman's role as a dispute-resolution professional was ultimately worthy of broad societal support and consequent testimonial and evidentiary privilege under the law.<sup>21</sup> This single \*9 federal interpretation of a state law expanded into a limited federal common-law privilege based on the reasoning that an ombudsman's communications with a visitor serve the same purpose as an implied contract that bars disclosure.<sup>22</sup> Other states followed suit after this pivotal federal court ruling.<sup>23</sup> These states, over time, adopted similar evidentiary or testimonial privileges within their jurisdictions for their ombudsmen, usually for ombudsmen associated with the legislative branch of government.<sup>24</sup> Occasionally, it was extended to ombudsmen that work in the private sector, but later overruled.<sup>25</sup>

### \*10 C. Outline

The purpose of this article is to address the nature and scope of the limited ombudsman privilege recognized under federal common law doctrine. This article begins by tracing the modern history of the ombudsman occupation. Section II then defines the role of an ombudsman as a dispute-resolution professional and discusses the diverse types of ombudsmen that exist at various levels within the federal, state, corporate, and advocacy realms. Next, Section III examines the nature of privilege that ombudsmen have been granted in their communications with visitors and how this privilege has been interpreted by federal courts. This article concludes with an evaluation of the instances where federal courts have failed to grant ombudsman privilege and cases where the defenses of testimonial or evidentiary privileges have not survived.

## II. THE OMBUDSMAN ROLE AND ITS DEVELOPMENT

### A. Scandinavian Origins and the Migration to the United States

The ombudsman role originated in Sweden in the early 1800s and was originally designed to balance the power between the King of Sweden and Parliament.<sup>26</sup> By 1955, only three Scandinavian countries--Sweden, Finland, and Denmark--had an ombudsman system that was used in a systematic and functional capacity.<sup>27</sup> In these countries, ombudsmen offices \*11 operated strictly within national legislative bodies to provide efficient and smooth handling of administrative and judicial duties.<sup>28</sup> Sweden, Finland, and Denmark authorized their ombudsman offices to operate within their central national governments under each country's constitution.<sup>29</sup> Within this "classical model"<sup>30</sup> for ombudsmen, the general ombudsman offices maintained independence from all of the other branches of government.<sup>31</sup> Each office had the purpose of seeking solutions to citizen complaints through the processes of investigation and conciliation between the public citizenry and the national government.<sup>32</sup> While these Scandinavian ombudsmen had the power to investigate complaints from both citizens and government officials, depending on who contacted the ombudsman, the ombudsman had no power to take any sort of action or make decisions over the complaint raised by the visitor or order other administrative officials to take action.<sup>33</sup> These ombudsmen were only able to serve as watchdogs over governmental actions that affected society.<sup>34</sup> Ombudsmen could, however, issue and publicize their findings and recommendations for resolving the complaints they received.<sup>35</sup> What is striking about the origins of the ombudsman role is that the original foundation and framework in Scandinavian countries are still \*12 very much in place and have undergone only slight modifications to the present day.<sup>36</sup>

Since 1955, "a surge of ombudsmania"<sup>37</sup> has proliferated throughout other countries all over the world, establishing other general ombudsmen offices modeled after the three Scandinavian countries that first launched them.<sup>38</sup> By 1973, twenty-one countries had instituted general ombudsman offices or variations of such an office modeled exclusively after Sweden's ombudsman model.<sup>39</sup>

### B. The Ombudsman in the United States

The ombudsman role manifested itself distinctly in the United States by drawing on the Scandinavian influence but adapting it in a uniquely American way.<sup>40</sup> Under the Scandinavian model for ombudsmen, the original function of an ombudsman's office was defined by independence, expertise, impartiality, accessibility, and the exercise of powers of persuasion rather than control.<sup>41</sup> When the ombudsman role was applied to the United States, it underwent necessary modifications because of its differing legal system and culture when compared to the Scandinavian model.<sup>42</sup> Contrary to the development of the ombudsman in Europe, where ombudsmen were usually products of their direct government, the ombudsman profession in the United States made its way into new and previously unforeseen areas like private industry, state and local governments, and the military branches.<sup>43</sup> While all of \*13 these early ombudsman offices shared many characteristics with the classical Scandinavian model for ombudsmen, particularly because the ombudsman offices were designed to intercede between the unit of government and their constituencies,<sup>44</sup> the United States applied the classical model only when it came to state, county, and municipal systems of government.<sup>45</sup> The establishment of state, county, and other local offices for ombudsmen was designed to give the ombudsmen offices specified control and provide them with the ability to meet particularized needs under the premise that local control over a local population worked best.<sup>46</sup> Localizing and delegating control to these ombudsman offices resulted in the

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

adoption of ombudsman roles into new areas, such as long-term care,<sup>47</sup> nursing homes,<sup>48</sup> workers' compensation,<sup>49</sup> health service agencies,<sup>50</sup> state departments of correction,<sup>51</sup> within the judiciary,<sup>52</sup> and into other areas of public governance.<sup>53</sup>

The ombudsman profession continued to expand rapidly into unfamiliar areas, with deviations away from the classical model, as the vocation reached university campuses by 1966, the federal government by 1977, and was regularly utilized by private organizations in the 1980s.<sup>54</sup> Twenty-six states, after noticing the \*14 widespread success of the ombudsman model, made proposals within their state legislatures for the creation of ombudsman programs within their relevant jurisdictions.<sup>55</sup> “By 1980, some aspect[[s] of the [American] ombuds[man] model had been adopted in varying degrees by twenty-five states.”<sup>56</sup> Thanks to the widespread acclaim that ombudsmen have gained in America, more ombudsmen exist and are employed in the United States than in any other country in the world at present day.<sup>57</sup> In particular, ombudsmen are working in some 2,000 entities nationwide,<sup>58</sup> with various estimates numbering 8,000 active “ombudsman-like practitioners” throughout all of North America.<sup>59</sup>

### C. The United States Framework for Ombudsmen and Privilege

As ombudsmen gained recognition throughout American society for their role as dispute-resolution professionals, so too have professional organizations seeking to adopt a framework of ethics for them, namely the American Bar Association (ABA) and the International Ombudsmen Association (IOA).<sup>60</sup> Under both the ABA and IOA ethical guidelines, all ombudsmen are expected \*15 to be independent, impartial, and confidential outlets for any visitor who contacts their office.<sup>61</sup> While the ABA and the IOA differ slightly on what the exact characteristics of an ombudsman's office should be,<sup>62</sup> both organizations are instrumental within the dispute resolution field as it relates to the ombudsmen profession.

Despite these ethical structures for ombudsmen as advocated by the ABA and IOA, the ethical recommendations of both organizations have seldom been recognized by courts to constitute a legally privileged relationship between an ombudsman and a visitor.<sup>63</sup> In fact, some courts have noted that \*16 even when an ombudsman adheres to ethical references, there is a heavy burden that must be overcome to create a new evidentiary or testimonial privilege previously not recognized under existing case law.<sup>64</sup> While courts have recognized and grasped the totality of professional organizations and their relationship with other privileges, like attorney-client privilege,<sup>65</sup> courts have never been forced to examine ABA and IOA ethics relative to the ombudsman profession.<sup>66</sup> Nonetheless, regardless of the foundational appeal that ABA and IOA ethics have on the field of dispute resolution, no state recognizes the concept of ombudsman privilege wholly as advocated by either entity.<sup>67</sup>

Despite these challenges for professional organizations that ombudsmen are a part of, the need for an examination of the privileges afforded to ombudsmen has risen exponentially. As the role of ombudsmen has expanded to include the state and federal levels of government, educational institutions, multinational corporations, and our country's political hierarchy, so too has the need for a privilege under the law. Legal protection of ombudsmen communications is important because most ombudsmen assure visitors that the conversations they have with them are confidential.<sup>68</sup> With the numbers of ombudsmen at the federal, state, and local levels, it is sometimes difficult to \*17 trace the commonalities of the individual roles that ombudsmen have relative to their employers. However, most ombudsmen in the United States can be divided into one of four general categories: legislative, executive, corporate, or advocate.<sup>69</sup> Regardless of their particular roles or classifications, all ombudsmen have either been granted or denied the same federal privilege. Courts make no distinction between ombudsman employment categories in determining whether to recognize privilege for an ombudsman.<sup>70</sup>

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

1. Legislative Ombudsmen

Legislative ombudsmen, also called classical ombudsmen, were the first type of ombudsmen programs to exist in the United States.<sup>71</sup> First recognized by the state of Hawaii<sup>72</sup> with a heavy influence from the classical Swedish model, legislative ombudsmen exist to ensure, through a supervisory role, that federal, state, and local governmental bodies follow the law and make fair and impartial administrative decisions that benefit their constituents.<sup>73</sup> Most legislative ombudsmen resolve legal conflicts by fielding grievances from the public, by improving the administration of legislative programs, and by providing broad oversight over the legislature's actions and how they affect the public.<sup>74</sup> Legislative ombudsmen can also hold public offices \*18 accountable to the citizenry and oversee the actions of administrative agencies,<sup>75</sup> similar to offices found within corrections departments,<sup>76</sup> small business administrations,<sup>77</sup> and public counsel programs.<sup>78</sup> Legislative ombudsmen comprise a unit, established as a part of the legislative branch, that receives complaints from the public and can either resolve investigations formally (through access to governmental employees, agency records, and subpoena powers) or informally (through powers of persuasion).<sup>79</sup> Five American states have legislative ombudsmen based on the classical model for ombudsmen, as do the territories of Guam and Puerto Rico.<sup>80</sup>

Legislative ombudsmen are afforded the most legal protection and power by federal and state courts because they conduct independent and impartial investigations throughout their jurisdictions as a direct extension of the legislature's wishes, although the privilege is usually limited.<sup>81</sup> Legislative ombudsmen are not required to disclose any information regarding their independent and impartial investigations into matters within their jurisdictions regarding government officials or government employees.<sup>82</sup> Occasionally, legislative ombudsmen also have the power to criticize, confidentially or publicly, some failures of the legislative branch.<sup>83</sup> Despite this authority, \*19 legislative ombudsmen do not have the ability to reverse governmental action (or inaction) by the legislative branch.<sup>84</sup> However, some legislative ombudsmen are even granted the authority to act as public prosecutors in particular instances under distinct circumstances.<sup>85</sup>

Dispute resolution statutes have buttressed the legal protection for alternative dispute resolution professionals, such as legislative ombudsmen, that act within the federal government. The Administrative Dispute Resolution Act (ADRA) of 1990<sup>86</sup> was the first statute to do so. The ADRA's purpose was to "place government-wide emphasis on the use of innovative ADR procedures by agencies and to put in place a statutory framework" that fosters reasonable alternatives to litigation.<sup>87</sup> In effect of these measures, the ADRA required all federal agencies to adopt a formal policy on available dispute resolution mechanisms for federal employees.<sup>88</sup> The ADRA implemented this program by sending the clear message that the use of ADR in disputes is an accepted and effective practice within the federal government.<sup>89</sup>

Under the ADRA, professionals, including ombudsmen, possess legal immunity and privilege of confidentiality if certain requirements are met.<sup>90</sup> Specifically, the ADRA required that a legislative ombudsman or any neutral in a dispute resolution proceeding keep all communications confidential unless: (1) all parties to the dispute resolution proceeding and the neutral consent in writing; (2) the dispute resolution communication has \*20 already been made public; (3) the dispute resolution communication is required by statute to be made public; or (4) a court determines that such testimony or disclosure is necessary to prevent a manifest injustice, help establish a violation of law, or prevent harm to the public health or safety.<sup>91</sup>

Just like those at the federal level, legislative ombudsmen at the state level can hold significant, privileged power in their communications with visitors that strongly correlate to federal ADRA confidentiality provisions.<sup>92</sup> As a collective unit,

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

legislative ombudsmen at all levels of government can possess confidentiality in their communications with their visitors unless exceptions are superseded by federal or state laws.<sup>93</sup>

## 2. Executive Ombudsmen

Executive ombudsmen serve as dispute resolution professionals in either the public or the private sector and receive complaints from the general public or from employees within the entity they represent.<sup>94</sup> A similarity that both legislative and executive ombudsmen possess is that both can be authorized by \*21 statute;<sup>95</sup> however, legislative ombudsmen report to the legislature and executive ombudsmen report to agency heads.<sup>96</sup> These types of ombudsmen can be defined as centralized complaint-handling officials who are appointed to office and who serve at the pleasure of an elected or appointed chief executive at the federal or state levels.<sup>97</sup> Like some legislative ombudsmen, executive ombudsmen can address actions and failures of the entity the ombudsman represents--its officials, employees, and contractors.<sup>98</sup> Executive ombudsmen are usually authorized to conduct investigations and issue reports.<sup>99</sup> They often do not have general jurisdiction powers over more than one entity but can have jurisdiction over a specific subject matter that involves multiple agencies.<sup>100</sup> Executive ombudsmen must also possess the same vital characteristic of hierarchical independence that most ombudsmen attempt to portray<sup>101</sup> because they can either be employed within the public or the private sector as a representative of a high-level figure.<sup>102</sup>

Most state governments in the United States have both statutorily created legislative ombudsmen and appointed executive ombudsmen who oversee special topics that affect children,<sup>103</sup> departments of correction,<sup>104</sup> injured workers,<sup>105</sup> and the elderly.<sup>106</sup> Typically, executive ombudsmen, with their strong ties to the executive branch of government, can be perceived as legitimate "change agents" for underrepresented populations by helping those populations address their high-level governmental representatives directly through a credible review process and by providing transparency throughout their investigations.<sup>107</sup> These \*22 two elements can secure public confidence in an executive ombudsman's duties.<sup>108</sup> Executive ombudsmen, such as those employed by the Internal Revenue Service, the Environmental Protection Agency, and the Commerce Department, have enjoyed success with the implementation of their ombudsmen programs due to their perception as such change agents.<sup>109</sup>

Like legislative ombudsmen, executive ombudsmen have also been legally granted a narrow privilege of confidentiality in their communications with visitors--sometimes mandated by statute.<sup>110</sup> The most prominent type of executive ombudsman, a long-term care ombudsman, does not exist at the federal level but does exist within all of the United States and territories.<sup>111</sup> Authorized by the Older Americans Act,<sup>112</sup> long-term care ombudsmen are established and operated within each state's agency on aging.<sup>113</sup> States and territories are incentivized to create long-term care ombudsmen programs to qualify for federal grants created by the Act.<sup>114</sup> A long-term care ombudsman's office is designed to simplify the requests of state legislatures on behalf of the older and disabled populations by serving two roles: an advocate role and a therapeutic role.<sup>115</sup> A long-term care ombudsman can also facilitate "a method of dispute resolution that is cost effective, efficient, and ultimately affords individually tailored solutions . . . to the particular needs of a nursing home \*23 resident."<sup>116</sup>

Since every state and territory has a long-term care ombudsman,<sup>117</sup> long-term care ombudsmen are afforded varying degrees of confidential privilege in their communications with older and/or disabled populations.<sup>118</sup> Some state statutes explicitly provide that a long-term-care ombudsman must keep all communications confidential and disclosure of any communications can result in the ombudsman's dismissal.<sup>119</sup> In some states, long-term care ombudsmen only possess privilege in their communications

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

pursuant to the Older Americans Act of 1965, as amended.<sup>120</sup> While some statutes regarding long-term-care ombudsmen fail to directly mention the Older Americans Act of 1965 and its subsequent amendments, the most common waiver to a visitor's privileged communications with an ombudsman can occur when disclosure is authorized by a patient or the patient's legal representative and the consent is documented in writing, state or federal laws already require disclosure, through any applicable court order, via an ombudsman's discretion, or any combination thereof.<sup>121</sup>

**\*24** 3. Corporate Ombudsmen

If Thomas were working for a corporate institution, as inferred at the start of the hypothetical scenario, Thomas would have talked to a corporate ombudsman. Corporate ombudsmen possess many characteristics both legislative and executive ombudsmen use in their functions, but they are seldom authorized by law to act on behalf of an organization, a subsidiary of a state or federal government, or a corporate entity.<sup>122</sup> Usually, the corporate ombudsman office is authorized by a charter or bylaws of the organization and can enjoy hierarchical authority outside of the normal structure of the entity, only possessing a duty to report to the board of directors or the president/chairman of the organization.<sup>123</sup> Corporate ombudsmen facilitate the fair and equitable resolution of concerns that arise from within a particular organization or disputes with affiliated outside entities.<sup>124</sup> The use of corporate ombudsmen is beneficial because many workplace problems stem from poor communication, and an ombudsman can often assist employees by allowing them to handle themselves more professionally.<sup>125</sup> Contrary to their legislative and executive counterparts, corporate ombudsmen are usually authorized to make inquiries, issue reports to be seen exclusively by the head(s) of the organization, and slowly advocate for change **\*25** within the chartering entity by highlighting consistent or routine failures in policy.<sup>126</sup>

While corporate ombudsmen seldom perform formal mediations between employees and management in practice, "they do use 'shuttle diplomacy' and mediatory skills to handle internal complaints concerning issues such as unfair treatment, management practices, environmental concerns, and harassment."<sup>127</sup> All of these skills coalesce into the corporate ombudsman serving the role as an in-house conflict resolution expert by staving off the conflicts that employees have between themselves or with management and preventing similar conflicts from occurring in the future.<sup>128</sup> Like legislative and executive ombudsmen, corporate ombudsmen are still expected to be independent, impartial, informal, and confidential protectors of the ombudsman process; the only duty they possess is to help resolve and alleviate workplace disputes within the corporate entity.<sup>129</sup>

Similar to legislative and executive ombudsmen, both federal and state courts have extended a narrow legal privilege to corporate ombudsmen regarding the confidentiality of their communications with visitors that all depended on the facts in those cases.<sup>130</sup> The courts have routinely found that although the corporate ombudsman does not serve the same functional role as a mediator, the communications that they receive from visitors **\*26** are not automatically free to be disclosed.<sup>131</sup> While corporate ombudsmen seldom use formal mediations in their practice, when they do, they are often protected under law by mediation statutes that protect communications to be used as evidence in latter legal proceedings.<sup>132</sup>

4. Advocate Ombudsmen

Advocate ombudsmen are strikingly different from the other types of ombudsmen.<sup>133</sup> Advocate ombudsmen are not authorized by a legislature or an executive in government; however, they can be authorized by a charter.<sup>134</sup> Advocate ombudsmen serve as activists on behalf of a special population and may be located in either the public or the private sector.<sup>135</sup> What distinguishes advocate ombudsmen from other types of ombudsmen is the presumption that advocate ombudsmen help aggrieved individuals or groups, such as older populations, populations with special needs, or even the incarcerated, and they do so outside of



FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

formal mechanisms like ombudsmen that are authorized by law.<sup>136</sup> In contrast to established legislative or \*27 executive ombudsmen, advocate ombudsmen represent their special population in a different way. For example, advocate ombudsmen may field complaints sent by prisoners to advocacy groups or act as court-appointed ombudsmen for those prisoners.<sup>137</sup>

Advocate ombudsmen work with organizations like inmate families associations,<sup>138</sup> court-appointed special advocates,<sup>139</sup> Mothers Against Drunk Driving,<sup>140</sup> and Fathers Against Drunk Driving.<sup>141</sup> Unlike statutorily created executive ombudsmen designed to represent a special group within the population,<sup>142</sup> such as long-term-care ombudsmen, advocate ombudsmen act as the voice for the special population by advocating for change or relief outside of the normal scope of the law.<sup>143</sup> Because their function is premised on advocating for changes that benefit a distinct population, advocate ombudsmen must provide a publicly available written policy to the special population they represent and possess a basic understanding of the role of advocacy.<sup>144</sup>

Advocacy ombudsmen must respect the policies of various entities outside of their influence or control.<sup>145</sup> Though it may seem like advocate ombudsmen possess scant influence over public and administrative policies, advocate ombudsmen are able \*28 to propose or implement changes, through a consultative and supportive role by initiating action where warranted in an administrative, judicial, or legislative forum.<sup>146</sup>

The narrow privilege for advocate ombudsmen has seldom been directly addressed by the courts, particularly because the complaints that advocate ombudsmen receive are not shielded by public law or statute.<sup>147</sup> Even so, advocate ombudsmen have been protected when the communications with their visitors do not result in a miscarriage of justice or a grave injustice that directly affects the special population they represent, especially if the ombudsman office was created by a legal entity.<sup>148</sup> When the advocate ombudsman's role is limited, as long as the ombudsman does not abuse his or her role and place the special population that they advocate for at risk, there does not appear to be an issue when it pertains to the concept of privilege.<sup>149</sup>

### III. INTERPRETATIONS OF THE PRIVILEGE OF OMBUDSMEN COMMUNICATIONS

#### A. Scenario

Assume Thomas walks from his supervisor's office a few days later, having just been fired, exactly as he had dreaded. "What's my next step? What do I do? What can I do?" Thomas asks himself. The ombudsman told Thomas that anything he said \*29 in her office would be completely confidential. He had spoken openly about his supervisor, the executives, and the direction the company was going. Nothing he mentioned seemed to catch the ombudsman by surprise, but how could Thomas know? How could he be certain the ombudsman had not told the corporate hierarchy about his disdainful remarks? Thomas hired a lawyer and decided to sue for wrongful termination. The crucial element in his case was going to be preventing the communications he made to the ombudsman from being disclosed in a courtroom.

#### B. Application of Ombudsman Privilege

The concept of ombudsman privilege has been addressed and been given contradictory treatment in federal courts through [Rule 501 of the Federal Rules of Evidence](#).<sup>150</sup> While courts have turned to [Rule 501](#), it only provides that judicial interpretations must adhere to the principles of common law when no privilege already exists under federal statute.<sup>151</sup> Though this rule does not expressly create the concept of ombudsmen privilege, some courts have used it as a guide either to deny or grant privilege to the ombudsman profession.<sup>152</sup>

## FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

In federal courts, the granting of a testimonial or evidentiary privilege to ombudsmen is not easily achieved under the law. If federal courts decide to create a new evidentiary or testimonial privilege, they must show that granting a privilege has an ultimate public good and societal worth.<sup>153</sup> In our scenario for Thomas to keep the statements he made to the ombudsman confidential, he must show a federal court that excluding the evidence, which the ombudsman may or may not have, “has a \*30 public good transcending the normally predominant principle of utilizing all rational means of ascertaining truth.”<sup>154</sup> Any privilege granted to an ombudsman must promote a sufficiently important interest that outweighs the need for probative evidence, or evidence that tends to prove an issue.<sup>155</sup> A party that seeks the creation of a new evidentiary privilege must overcome the significant burden of establishing the need for such a privilege.<sup>156</sup> In particular, the creation of a new privilege or the recognition of an existing one must serve the public interest via a weighing of interests between Congress's intent and the particular facts in a case.<sup>157</sup>

In the federal courts, the granting of ombudsman privilege has not been universal.<sup>158</sup> However, regardless of whether courts have granted or denied ombudsman privilege, they have all utilized the same scope of judicial interpretation: beginning with common-law holdings and then applying the federal rules of evidence to support their decision.<sup>159</sup>

### C. Common Law Precedent for Privilege

#### 1. *Mattson v. Cuyuna Ore Company*: Four Fundamental Conditions Must Be Met as a Necessary Basis for Establishing Privilege

*Mattson v. Cuyuna Ore Co.*<sup>160</sup> served as the foundation for courts to interpret a privileged relationship when no federal or state statute existed to guide a court.<sup>161</sup> In *Mattson*, Cuyuna Ore \*31 Company sought to compel *Mattson* to disclose information concerning the employment of two of the company's engineers.<sup>162</sup> *Mattson* refused to answer the interrogatories from Cuyuna Ore Company under the argument that any answer to those interrogatories would be privileged and that *Mattson* would be unfairly prejudiced.<sup>163</sup>

In its interpretation, the court found no engineer-employer privilege existed under the common law.<sup>164</sup> The court, as a result, turned to Professor Wigmore's criteria that outlined the basis for a privileged relationship and concluded the burden of proving the existence of the privilege was on *Mattson*.<sup>165</sup> Wigmore contended that in order for a privilege to be recognized by a court, any communication: (1) must be made in the belief that it will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship should be one that society considers worthy of being fostered; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation.<sup>166</sup> The privilege can be applied by a court only when no substantiated case can be made for a privileged relationship under all of the elements of Wigmore's test.<sup>167</sup> While *Mattson* dictated the existence of a privilege under the common law, as time went on, it was cited by courts in examining the privilege afforded to the ombudsman profession.<sup>168</sup>

### D. Court Interpretations Change as a Result of Federal Rule of Evidence 501

Fifteen years after *Mattson* was decided, the courts created [Federal Rule of Evidence 501](#), which provides that any privilege recognized under a state's common law, like attorney-client \*32 privilege,<sup>169</sup> would be a valid exception to prevent disclosure of confidential communications in federal court.<sup>170</sup> In particular, [Federal Rule of Evidence 501](#) provides:

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with state law.<sup>171</sup>

Under this Rule, evidentiary privileges in federal courts are governed by [Federal Rule of Evidence 501](#) except “with respect to an element of a claim or defense as to which State law supplies the rule of decision.”<sup>172</sup> When state law does not supply the rule of decision for a court over questions of privilege in a case, the question of whether evidence is privileged becomes “governed by the principles of the common law as they may [have been] interpreted by the courts of the United States in the light of reason and experience.”<sup>173</sup> When federal and state claims of privilege are asserted, courts have consistently held that questions of privilege will be superseded by federal law under the Supremacy Clause.<sup>174</sup> Despite these nuances, what is of \*33 particular importance about [Rule 501](#) is that federal claims of privilege supersede state claims of privilege when confidentiality provisions are unclear within a state statute.<sup>175</sup> Even when state statutes point to general terms of confidentiality rather than explicit ones, federal courts will often weigh in favor of the creation of a privilege.<sup>176</sup> Conversely, when state statutes point to a specific, yet limited, confidentiality provision, courts often weigh whether or not confidentiality was always utilized in accordance with state law.<sup>177</sup> When confidentiality is not prevalent throughout the judicial record as a whole, no limited state law confidentiality provision can apply.<sup>178</sup> [Rule 501](#) has also been construed by the courts as holding that state privilege laws cannot be used to hinder discovery in cases that involve superior federal claims.<sup>179</sup>

When claims of privilege must be interpreted under federal law within [Rule 501](#), courts have consistently turned to Wigmore's four-part test, as mentioned in *Mattson*, for the conditions that lead to the recognition of a privilege.<sup>180</sup> While the burden of proof in order to prove a privilege is still on the party claiming it, what is of considerable importance is that when all four prongs of Wigmore's test are not met, no privilege can apply.<sup>181</sup> While courts have varied on their legal analysis, some citing [Rule 501](#), others citing Wigmore's criterion, and some a combination of both, [Rule 501](#) and Wigmore's test are of pivotal importance for a court to recognize any privilege for ombudsmen at the federal level.<sup>182</sup>

\*34 1. In re Doe: The Background for Privileged Communications under [Federal Rule of Evidence 501](#)

In re Doe<sup>183</sup> is an example of a case where the psychotherapist-patient privilege under [Federal Rule of Evidence 501](#) was not valid because the privilege did not exist under state common law.<sup>184</sup> In re Doe involved a Drug Enforcement Administration (DEA) investigation of a health-services corporation that revealed that it was engaged in the large-scale, illegal distribution of Quaaludes to both consumers and street dealers.<sup>185</sup>

Following his conviction at the trial-court level for a drug-related offense, the psychiatrist representing the health-services corporation argued for the existence of a federal common law evidentiary privilege for his files.<sup>186</sup> Turning to [Federal Rule of Evidence 501](#), the court determined that because no psychiatrist-patient privilege existed under the state's common law, no such privilege was applicable in Doe.<sup>187</sup>

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

Addressing the psychiatrist's argument for creation of a new federal privilege for psychiatrists, the court turned to Professor Wigmore's test and again, [Rule 501](#).<sup>188</sup> Since the burden of establishing a privileged relationship or a privileged communication was on the party claiming the privilege under [\\*35](#) Wigmore's test and the Mattson case, a balanced approach must be given to both the party claiming the privilege and party seeking for it not to be recognized.<sup>189</sup> If all of the conditions of Wigmore's test were met in accordance with [Rule 501](#), then the existence of a privilege for a true psychiatrist-patient relationship could be appropriate.<sup>190</sup>

However, the Doe case illustrated that while visitors to the health-services corporation wanted the purpose of their visit to be kept in confidence, the psychiatrist did not possess the same inference of confidentiality.<sup>191</sup> Based on the health-services corporation "assembly-line technique" of prescribing illegal drugs to patients, confidentiality could not be essential to the relationship between the psychiatrist and the visitor, therefore not satisfying the second element of Wigmore's test.<sup>192</sup> Accordingly, the court declined to create a federal psychiatrist-patient privilege based upon the facts in the case.<sup>193</sup> Even though the court closed the door on the argument for a federal common-law psychiatrist-patient privilege, it left a pathway open for a limited ombudsman privilege to be recognized under federal law, so long as it existed under state common law.<sup>194</sup>

## 2. Shabazz v. Scurr: Federal Privilege Prevents Disclosure of Communications Received from an Ombudsman

Shabazz v. Scurr<sup>195</sup> took the avenue the Doe case left open for the creation of a privilege for ombudsmen. Shabazz involved the Iowa Citizens' Aide Ombudsman Office (ICA/OO), a statutorily created ombudsman program enacted by the Iowa Legislature in 1973<sup>196</sup> that did not contain specific confidentiality provisions for [\\*36](#) its ombudsmen.<sup>197</sup> The ICA/OO's most-important function was to receive complaints from the citizenry like many other legislative ombudsman programs.<sup>198</sup> Although the ICA/OO did not have formal remedial or preventative authority of its own, it could investigate and recommend solutions to the executive and legislative branches about complaints it received.<sup>199</sup> In 1981, a major disturbance broke out at the Iowa State Penitentiary, where the ICA/OO ombudsman was present.<sup>200</sup> Once officials regained control of the disturbance, they discovered the body of Gary Tyson, also known as Zakee Rahman Shabazz (Shabazz).<sup>201</sup> Prior to his death, Shabazz had filed a complaint against prison officials through the ICA/OO ombudsman office, which had statutory authority pursuant to [42 U.S.C. § 1983](#).<sup>202</sup>

In determining whether an evidentiary or testimonial privilege applied to the communications the ICA/OO legislative ombudsman had received from Shabazz and other prison officials and employees concerning Shabazz's death, the federal court found,

[i]n drafting the Federal Rules of Evidence, Congress expressly left the task of defining the scope of evidentiary privileges in federal subject matter cases to the federal courts, asking only that they be governed by "the principles of the common law as they may be interpreted . . . in light of reason and experience."<sup>203</sup>

Linking itself to the third prong of Wigmore's criterion under *In re Doe* without expressly citing it, the court determined that the constant flow of information from citizens to the ICA/OO office would be disrupted if citizens within Iowa did not have statutory assurances of general confidentiality in federal court.<sup>204</sup>

Because the ICA/OO had to operate under the premise of [\\*37](#) confidentiality implied by the Iowa statute, all communications from prison employees and officials regarding the Shabazz's death were thus privileged because confidentiality was "necessary

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

to ensure that complaints [were] made.”<sup>205</sup> The Shabazz case marked a monumental step in advancing the courts towards the concept of a limited ombudsman privilege.

3. Roy v. United Technologies Corporation: In re Doe and Shabazz v. Scott Determine the Scope of Evidentiary and Testimonial Privilege of an Ombudsman

Testimonial privilege for ombudsmen was recognized again under Roy v. United Technologies Corporation<sup>206</sup>, which involved a corporate ombudsman's records. In Roy, a former employee filed suit against United Technologies Corporation (United), alleging race and age discrimination under Title VII and the Age Discrimination in Employment Act.<sup>207</sup> The plaintiff sought to depose the corporate ombudsman working for United and also served a request for the ombudsman to produce documents.<sup>208</sup> In response, United filed a motion for a protective order concerning the ombudsman's records.<sup>209</sup> The court held that while federal law offered limited insight into ombudsman privilege, Shabazz recognized privilege for an ombudsman's records in a case with facts very similar to those in Roy.<sup>210</sup> Relying on Shabazz, the court concluded that granting privilege to ombudsmen was necessary to promote the informal resolution of problems.<sup>211</sup>

In determining whether an evidentiary privilege should be recognized for an ombudsman's communications, the burden of proof to establish facts supporting the privilege was on the party claiming the privilege.<sup>212</sup> To prove that ombudsman privilege \***38** existed under common law, and adhering to the Second Circuit's common law establishment of privilege under the Doe case, Roy had to prove that confidentiality was essential to the relationship between the parties, confidentiality was inferred in the communications at issue, society considers the ombudsman-visitor relationship to have some worth, and injury from disclosure would outweigh any benefit gained from discovering the information.<sup>213</sup>

The record before the court showed that the ombudsman in Roy had taken all the appropriate steps and precautions to ensure confidentiality of communications in his role as an ombudsman.<sup>214</sup> In particular, the ombudsman ensured a general promise of confidentiality by using an 800 number to prevent the tracing of calls, by promoting a general tenor that communications in an ombudsman's office were confidential, and the role that accountability played within the ombudsman's program.<sup>215</sup> Ultimately, Roy adhered to the precedent in the Doe and Shabazz courts; that is, testimonial and evidentiary privilege could and did apply to the ombudsman profession, at least with regard to granting a privilege limited to the facts in the case.<sup>216</sup> In particular, the Roy court concluded that the need for confidentiality in the ombudsman's office outweighed the need for the plaintiff to obtain pertinent information.<sup>217</sup> In its totality, the Roy decision became “the seminal case [that] recognize[ed] both the federal common law privilege and the implied contract basis for barring the disclosure of [an] ombuds[man's] communications.”<sup>218</sup> The Roy court extended legal privilege recognized by Shabazz<sup>219</sup> to corporate ombudsmen.<sup>220</sup>

\***39** 4. Kientzy v. McDonnell Douglas Corporation: Another Favorable Ruling for Ombudsmen

Other courts built on the Roy decision.<sup>221</sup> Corporate ombudsman privilege was recognized again under the Kientzy case.<sup>222</sup> McDonnell Douglas Corporation (MDC) and its subsidiary company, McDonnell Aircraft Company (McAir), had established a corporate ombudsman office in 1985.<sup>223</sup> The purpose of the ombudsman program at MDC and McAir was for the ombudsman “to mediate, in a strictly confidential environment, disputes between MDC employees and . . . management.”<sup>224</sup>

Following the termination of an employee from MDC and McAir, that employee contacted the ombudsman office on company grounds.<sup>225</sup> The employee's termination was not overturned despite meeting with the ombudsman.<sup>226</sup> The former employee

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

later brought suit against MDC and McAir under federal law, arguing their ombudsman had obtained relevant discoverable information that would be advantageous to her lawsuit.<sup>227</sup>

The court, like the others before it that interpreted the concept of ombudsman privilege, turned to [Federal Rule of Evidence 501](#), the Wigmore test used in *Mattson*, and several \*40 cases that had decided the scope of ombudsman privilege, namely *Doe*, *Shabazz*, and *Roy*.<sup>228</sup> The court placed particular emphasis on the *Roy* case, since *Roy* adhered to the Supreme Court's position that the rules of privilege should be developed on a case-by-case basis.<sup>229</sup>

Upon examination of the facts in the case, the court determined the ombudsman office at MDC and McAir was an independent and neutral entity.<sup>230</sup> It did not make company policy and solely reported to the Vice President of MDC and not to the human resources or personnel offices.<sup>231</sup> In its ombudsman program, MDC and McAir had insured that confidentiality was the bedrock of its ombudsman program and other types of dispute resolution, satisfying all of Wigmore's criteria cited under *Doe*.<sup>232</sup> Such a program was also worthy of societal support, the court reasoned, because a disruption between the ombudsman's office and others would cause problems for MDC, McAir, and arguably, society as a whole.<sup>233</sup> In addition, the court also found that there was an important need to encourage candid complaints with regard to the communications that an ombudsman receives.<sup>234</sup>

In sum, the *Kientzy* court concluded that since the privileged nature of confidentiality was inherent in the ombudsman's office, neither the ombudsman nor the visitor could be subject to waiver by visitors who changed their minds after meeting with the \*41 ombudsman.<sup>235</sup> Ombudsman privilege was upheld given the precedent provided under the common law.<sup>236</sup> The ombudsman did not have to testify, even though the former employee sought to compel the disclosure of information.<sup>237</sup> The *Kientzy* decision, buttressed by the *Roy* and *Shabazz* cases, temporarily ushered in a new era that recognized the concept of corporate ombudsmen privilege.<sup>238</sup>

#### 5. *Carman v. McDonnell Douglas Corporation*: The First Strike against Ombudsman Privilege

Despite the pivotal *Kientzy* court ruling, its holding was limited and exposed in the *Carman* case by the United States Court of Appeals for the Eighth Circuit.<sup>239</sup> In *Carman*, a former management employee for MDC brought suit against his former employer, alleging his termination violated the Age Discrimination in Employment Act,<sup>240</sup> the Missouri Human Rights Act,<sup>241</sup> and the Employee Retirement Income Security Act of 1974.<sup>242</sup> During the initial trial, the former employee requested fifty-four sets of documents from MDC's corporate ombudsman, which the former employee claimed included “[m]eeting notes regarding lay-offs.”<sup>243</sup> Though the Court neglected to mention it, the MDC ombudsman program was no longer in existence at the time of the *Carman* decision.<sup>244</sup>

\*42 Upon appeal from the trial court, the United States Court of Appeals for the Eighth Circuit focused on whether there was an “ombudsman privilege” under the common law pursuant to other rulings in federal jurisdictions.<sup>245</sup> The court did not determine that MDC was arguing for the recognition of what had been found under existing common law privilege; rather, the court determined that MDC was arguing for the creation of a new evidentiary privilege for the ombudsman, which of course, has a very high standard.<sup>246</sup>

The court noted that while ombudsmen can and do have an important relationship in fostering the resolution of workplace disputes prior to the commencement of expensive and time-consuming litigation, far more is required to create a new evidentiary privilege not previously established under federal law, especially when a “strong presumption” must be overcome

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

involving federal discrimination claims.<sup>247</sup> Unlike in *Kientzy*, where that court found that MDC's ombudsman had received approximately 4,800 communications with visitors since 1985, the Eighth Circuit found there was a failure to place the significance of the statistic in context.<sup>248</sup> The *Kientzy* court's failure to effectively evaluate the significance of the ombudsman's communications relative to other forms of alternative dispute resolution also supported a compelling argument against the privileged nature of the ombudsman's office, the *Carman* court found.<sup>249</sup>

In the court's view, *Kientzy* had placed particular emphasis on the fact that MDC and McAir were very large governmental contractors where contentious workplace disputes could result in national consequences.<sup>250</sup> The court reasoned that despite this, \*43 the *Kientzy* court had failed to cite any precedent for a privileged communication between a corporate ombudsman and the corporation's employees, much less one that could overcome superior federal discrimination claims.<sup>251</sup> Noting that denying the concept of an ombudsman's privilege would not impact the ombudsman's "ability to convince an employee that the ombudsman is neutral," the court held the creation of such an evidentiary or testimonial privilege was not warranted.<sup>252</sup> In addition, this court believed MDC had failed to establish a legitimate claim that the ombudsman program benefits society in a way that granting a testimonial and evidentiary privilege would afford, and that therefore, MDC had not met the third prong of Wigmore's test outlined under *Mattson*.<sup>253</sup>

Despite this apparent reversal of the prior *Kientzy* decision, the *Carman* ruling was relatively limited and only supplied that given the facts in the case, in particular the fact that the ombudsman office at MDC was no longer active, an ombudsman privilege could not be recognized.<sup>254</sup> What is particularly poignant about the *Carman* decision is that "neither the ombuds[[man] office nor [MDC] provided the court with any evidentiary record to support the claim of [a] privilege" for ombudsmen.<sup>255</sup> After this ruling, ombudsmen advocates noted that the *Carman* decision was an important reminder for organizations and ombudsman offices that they should always be prepared to prove how their particular ombudsman program functions and why confidentiality is important within the role and function of an ombudsman.<sup>256</sup>

#### 6. *Jaffee v. Redmond*: Federal Recognition of a Privilege for Psychiatrists

In *Jaffee*,<sup>257</sup> the Supreme Court held that [Rule 501](#) protected \*44 confidential communications between a psychotherapist and a patient, stating that a psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust."<sup>258</sup> Carrie Jaffee (*Jaffee*) was the administrator for the estate of Ricky Allen (*Allen*), who was shot and killed by Mary Lu Redmond (*Redmond*), a police officer on patrol duty.<sup>259</sup> "On June 27, 1991, Redmond was the first officer to respond to a 'fight in progress' call at an apartment complex."<sup>260</sup> After being told that there had been a stabbing in one of the apartments, Redmond relayed this information to the dispatcher, requested an ambulance, and went to investigate.<sup>261</sup> Before Redmond reached the building that Allen was in, Redmond saw Allen brandishing a butcher knife and chasing a man around.<sup>262</sup> Redmond stated that Allen ignored Redmond's repeated requests to drop the weapon and she shot Allen believing that he was about to stab the man he was chasing.<sup>263</sup>

*Jaffee* filed suit in federal district court alleging that Redmond violated Allen's constitutional rights by using excessive force during their encounter at the apartment complex and sought damages under the Civil Rights Act of 1871<sup>264</sup> and under the Illinois wrongful-death statute.<sup>265</sup> During pretrial discovery, *Jaffee* learned that Redmond had participated in about fifty counseling sessions with a clinical social worker.<sup>266</sup> *Jaffee* sought access to the notes from those counseling sessions.<sup>267</sup>

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

Upon granting certiorari, the Supreme Court recognized that no federal court of appeals accepted a uniform psychotherapist-patient privilege under [Rule 501](#).<sup>268</sup> Despite this hindrance, all \*45 fifty states had adopted some form of psychotherapist-patient privilege.<sup>269</sup> In examining the concept of such a privilege, as applied to all federal courts, the Court found that “any asserted privilege must ‘serv[e] public ends.’”<sup>270</sup> The Court reasoned that just as attorney-client privilege is premised on the encouragement of “full and frank communication between attorneys and their clients”<sup>271</sup> and spousal privilege “furthers the important public interest in marital harmony,”<sup>272</sup> the recognition of a federal psychotherapist privilege serves an ultimate societal benefit.<sup>273</sup>

One of the key cornerstones of the Court's reasoning was highlighted by the fact that federal decisions that have rejected the concept of a psychotherapist-patient privilege were more than five years old and that the “need . . . for counseling services has skyrocketed during the past several years.”<sup>274</sup> While federal courts, like the Supreme Court, will often defer to state law under [Rule 501](#), the existence of a consensus among all fifty states indicated that “reason and experience” support the recognition of a broad federal psychotherapist-patient privilege.<sup>275</sup>

#### 7. Solorzano v. Shell Chemical Company: Some Federal Laws Preempt Claims of Ombudsman Privilege

In *Solorzano*,<sup>276</sup> corporate ombudsman privilege was not recognized under federal law following the same reasoning as \*46 found under the *Carman* case.<sup>277</sup> Rodrigo Solorzano Sr. (*Solorzano*) was a former employee at Shell Chemical Company (*Shell*) who was terminated after over nine years of employment with *Shell*.<sup>278</sup> Prior to his termination, *Solorzano* was selected for random employee drug testing based on his holding a safety and environmentally sensitive job.<sup>279</sup> After concluding that the urine sample *Solorzano* provided for the drug test was inconsistent with human urine, *Shell* terminated *Solorzano* for violating its Substance Abuse Policy and for falsification of company records.<sup>280</sup> *Solorzano* filed an Equal Employment Opportunity Commission (EEOC) claim in federal court alleging that his termination was the result of race discrimination under 42 U.S.C. § 1981,<sup>281</sup> Title VII of the Civil Rights Act of 1964,<sup>282</sup> and age discrimination under the Age Discrimination in Employment Act (ADEA).<sup>283</sup> *Solorzano* sought personnel records from the ombudsman program at *Shell* (*RESOLVE*), some of which involved him, but also others that involved another employee who was not a party of the suit.<sup>284</sup> *Shell* objected to *Solorzano's* request, claiming the ombudsman records it maintained were protected by an ombudsman privilege under federal law.<sup>285</sup> *Solorzano* also asserted that even if a federal ombudsman privilege existed, it had been waived when *Shell* disclosed information about *Solorzano's* complaint to the EEOC.<sup>286</sup>

The court first examined whether *Solorzano's* second argument had any merit.<sup>287</sup> Due to the fact that *Shell* had disclosed the “general tenor” of the *RESOLVE* meetings to the \*47 EEOC, no waiver was appropriate because no substantive communications were revealed.<sup>288</sup> Turning to *Solorzano's* first argument, the court examined [Rule 501](#) and determined that *Solorzano* had clearly stated claims arising out of federal anti-discrimination laws and could have also stated a defamation claim under state law.<sup>289</sup> Determining that superior federal claims like Title VII and the ADEA could not be applicable to any federal privilege for ombudsman since they do not carve out an exception to an ombudsman's records, the court then turned to *Carman*, which had examined federal ombudsman privilege thoroughly.<sup>290</sup> As a result of citing *Carman*, the court found it unnecessary to extend ombudsman privilege when superior federal claims are involved since recognizing such a privilege would be too broad, especially when federal privileges are intended to be interpreted narrowly.<sup>291</sup>



#### IV. SUMMATION OF WHERE THE OMBUDSMAN PRIVILEGE STANDS TODAY

In order for any privilege to exist for ombudsmen under the common law, any communication: (1) must be made in the belief that it will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship should be one that society considers worthy of being fostered; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation.<sup>292</sup> These guidelines continued to expand the concept of privileged communications when \*48 [Federal Rule of Evidence 501](#) was instituted by the courts. In particular, [Federal Rule of Evidence 501](#) mandates that federal courts adhere to precedent while weighing federal and state interests.<sup>293</sup> When a court is forced to weigh both state and federal interests, [Rule 501](#) provides that federal claims of privilege supersede state claims of privilege when confidentiality provisions are unclear within a state statute.<sup>294</sup> A federal court's holding, in applying a limited state confidentiality provision, grew to encompass the concept of privilege for the ombudsman profession.<sup>295</sup> Several courts continued to grant privilege for ombudsmen working in both the public and the private sector, at least until the Carman case.<sup>296</sup> Under Carman, when an ombudsman program is no longer active<sup>297</sup> and a party is unable to cite any precedent for a privileged communication between a corporate ombudsman and the corporation's employees, no privilege is appropriate.<sup>298</sup> A party seeking the recognition of ombudsman privilege must also overcome a "strong presumption" in order for it to be recognized, especially when an opposing party brings a claim under federal anti-discrimination laws.<sup>299</sup> A federal court may be apt to recognize a universal privilege for ombudsmen if there is a consensus among state legislatures that an ombudsman's communications with a visitor are privileged;<sup>300</sup> negative rulings having a disparate impact on the recognition of ombudsman privilege are a bit antiquated; and the need for ombudsmen and the dispute resolution services they provide are in high demand. Absent clear and consistent federal court rulings regarding the privileged nature of the ombudsman's communications with \*49 visitors, courts will continue to interpret each case based on the facts that they have in front of them.

#### Footnotes

- a1 Eric S. Adcock holds a Master's degree in Legal Studies with an emphasis in Alternative Dispute Resolution from Texas State University - San Marcos. A certified and trained mediator and ombudsman, he has certifications in the field of dispute resolution from Texas State University - San Marcos, the Austin Dispute Resolution Center, the Central Texas Dispute Resolution Center, the University of Texas School of Law Center for Public Policy Dispute Resolution, and the International Ombudsman Association. In addition to his training, Mr. Adcock is an active member in organizations such as the International Ombudsman Association, the Texas Mediator Credentialing Association, the Texas Association of Mediators, the State Bar of Texas Alternative Dispute Resolution section, the National Association for Community Mediation, the Association of Family and Conciliation Courts, the Austin Association of Mediators, and the Association for Conflict Resolution.
- 1 "Thomas" is a fictional character. Any similarity between the character in this story and any real person, past or present, is not intended to reveal the identity of any individual who contacts an ombudsman.
- 2 John Donne, Meditation XVII, in *Devotions upon Emergent Occasions*, together with *Death's Duel* 107, 109 (Ann Arbor Paperback 1959).
- 3 For the purposes of this Article, the term "ombudsman" will be solely used as a person's occupation and is intended to be a gender-neutral term that can include "ombudsperson," a term occasionally used in other scholarship on the subject.
- 4 For the purposes of this story, the ombudsman adheres to the standards and ethics of the International Ombudsman Association (IOA). IOA Standards of Practice, Int'l Ombudsman Ass'n, [http:// www.ombudsassociation.org/sites/default/files/IOA\\_Standards\\_of\\_Practice\\_ Oct09.pdf](http://www.ombudsassociation.org/sites/default/files/IOA_Standards_of_Practice_Oct09.pdf) (last modified Oct. 2009) [hereinafter IOA]; IOA Code of Ethics, Int'l Ombudsman Ass'n, [http:// www.ombudsassociation.org/sites/default/files/Code\\_Ethics\\_1-07.pdf](http://www.ombudsassociation.org/sites/default/files/Code_Ethics_1-07.pdf) (last modified Jan. 2007).

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

- 5 Privilege is “[a] special legal right, exemption, or immunity granted to a person or class of persons.” It is most commonly used as a legally justified avenue to prevent evidence or testimony from being used in any legal proceeding. Black’s Law Dictionary 1316-18 (9th ed. 2009).
- 6 This conclusion is mostly true for legislative and/or executive ombudsmen. However, there are nuances to this general premise of confidentiality. Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-584 (1996) (addressing the rules that distinguished neutrals abide by under federal law); Ala. Code § 25-5-294 (2012); Alaska Stat. § 24.55.260 (1975); Ariz. Rev. Stat. Ann. § 41-1378 (2002); Ark. Code Ann. § 20-10-602 (1987); Cal. Welf. & Inst. Code § 9725 (West 1996); Colo. Rev. Stat. § 19-3.3-103 (2010); Conn. Gen. Stat. § 17b-400- § 17b-412 (1999); Del. Code Ann. tit. 14, § 4112B (1995); D.C. Code § 7-2071.07 (2005); Fla. Stat. § 400.0077 (2006); Ga. Code Ann. § 37-2-34 (2008); Haw. Rev. Stat. § 96-9 (1984); Idaho Code Ann. § 67-5009 (2001) (no clear reference to an ombudsman’s confidentiality); 20 Ill. Comp. Stat. 105/4.04 (2011); Ind. Code § 12-11-13-10 (2007); Iowa Code § 2C.9 (2006); Kan. Stat. Ann. § 75-7310 (2005); Ky. Rev. Stat. Ann. § 216.541 (West 2007) (no clear reference to an ombudsman’s confidentiality except for the lawful performance of their duties made in good faith); La. Rev. Stat. Ann. § 28:453.3 (2005); Me. Rev. Stat. tit. 5, § 200-I (2008); Md. Code Ann. Hum. Servs. § 10-906 (LexisNexis 2010) (Secretary of State shall adopt rules governing an ombudsman’s confidentiality); Mass. Gen. Laws ch. 19A, § 31 (1986); Mich. Comp. Laws § 710.67 (1995); Minn. Stat. § 256.9742 (2007); Miss. Code Ann. § 43-7-69 (1988); Mo. Rev. Stat. § 660.605 (1991); Mont. Code Ann. § 2-15-210 (2001); Neb. Rev. Stat. § 81-2260 (2007); Nev. Rev. Stat. § 228.450 (2009); N.H. Rev. Stat. Ann. § 161-F:13 (2004); N.J. Stat. Ann. § 52:27G-13 (West 1977); N.M. Stat. Ann. § 28-17-14 (2003); N.Y. Exec. Law § 523-i (McKinney 2008) (confidentiality of records must be maintained by the ombudsman); N.C. Gen. Stat. § 143B-181.20 (1995); N.D. Cent. Code § 50-10.1-07 (1985); Ohio Rev. Code Ann. § 173.22 (LexisNexis 1990); Okla. Sta§t. tit. 63, § 1-2216 (2005); Or. Rev. Stat. § 441.113 (1981); 35 Pa. Cons. Stat. § 4106 (1972) (same requirements of confidentiality imposed by law on the disclosing agencies or officers); P.R. Laws Ann. tit. 2, § 712 (2000) (no clear mention about the scope of an ombudsman’s confidentiality); R.I. Gen. Laws § 23-17.5-12 (1991); S.C. Code Ann. § 16-3-1640 (1994); S.D. Codified Laws § 28-1-51 (2004) (Secretary of State shall develop reasonable rules); Tenn. Code Ann. § 68-11-910 (2005) (nursing home residents have the right to have their records kept confidential); Tex. Hum. Res. Code Ann. § 261.056 (West 2011); Utah Code Ann. § 62A-3-207 (LexisNexis 1993); Vt. Stat. Ann. tit. 33, § 7503 (2005); Va. Code Ann. § 38.2-5904 (2000); Wash. Rev. Code § 43.06A.050 (2006); W. Va. Code § 16-5L-15 (1991); Wis. Stat. § 16.009 (2011); Wyo. Stat. Ann. § 9-2-1307 (1985); *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 573 (E.D. Mo. 1991) (federal court extended privilege to corporate ombudsman); *Garstang v. Superior Court*, 46 Cal. Rptr. 2d 84, 88 (Ct. App. 1995) (right to privacy under the state constitution extends to an ombudsman’s communications with a visitor); see *Beckman v. Dunn*, 419 A.2d 583, 588 (Pa. Super. Ct. 1980) (statements made by a university professor to a university ombudsman fall under a conditionally-privileged occasion relieving a university from any liability). Contra *Solorzano v. Shell Chem. Co.*, No. Civ. A.99-2831, 2000 WL 1145766, at \*5 (E.D. La. Aug. 14, 2000); *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794 (8th Cir. 1997) (declining to follow the Kientzy decision). See generally Federal Sector Alternative Dispute Resolution, U.S. Equal Emp’t Opportunity Comm’n, [http:// www.eeoc.gov/federal/adr/index.cfm](http://www.eeoc.gov/federal/adr/index.cfm) (last visited Aug. 26, 2013) (describing the developments that have been made within the federal sector for neutrals like ombudsmen).
- 7 See Martin A. Frey, *Does ADR Offer Second Class Justice?*, 36 Tulsa L.J. 727, 731 (2001) (quoting Stephen B. Goldberg et al., *Negotiation, Mediations, and Other Processes*, 236-37 (2d ed. 1992)).
- 8 See Michele Bertran, *Judiciary Ombudsman: Solving Problems in the Courts*, 29 Fordham Urb. L.J. 2099, 2106 (2002) (stating ombudsmen can shift the resolution of complaints from formal to informal mechanisms).
- 9 See, e.g., Chelsea Dunn, *Protecting Virginia’s Youth: Establishing a Children’s Ombudsman Office*, 12 Rich. J.L. & Pub. Int. 41, 45 (2008) (stating that independence is the “core defining principle” of an effective ombudsman office).
- 10 Synonyms for “visitor” or “visitors” include participant(s), party (parties), or person(s). For the purposes of this paper, the term “visitor” or “visitors” is intended to describe an individual or group who meet with an ombudsman acting in their official capacity.
- 11 See IOA, supra note 4, at § 1.2.
- 12 E. Patrick McDermott & Arthur E. Berkeley, *Alternative Dispute Resolution in the Workplace: Concepts and Techniques for Human Resource Executives and Their Counsel* 51 (1996).

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

- 13 See, e.g., Susan Sturm & Howard Gadlin, [Conflict Resolution and Systemic Change](#), 2007 J. Disp. Resol. 1, 9 (2007) (stating ombudsmen offices represent a form of dispute resolution with responsibility for individual and systemic issues).
- 14 See, e.g., Paul R. Verkuil, [The Ombudsman and the Limits of the Adversary System](#), 75 Colum. L. Rev. 845, 847 (1975) (quoting *The Ombudsman: Citizen's Defender* xxiv (Donald C. Rowat ed., 1968)) (stating an ombudsman supervises an administration).
- 15 E.g., Elizabeth B. Herrington, [Strengthening the Older American Act's Long-Term Care Protection Provisions: A Call for Further Improvement of Important State Ombudsman Programs](#), 5 Elder L.J. 321, 336 (1997).
- 16 E.g., Sturm & Gadlin, *supra* note 13, at 10.
- 17 Charles L. Howard & Maria Gulluni, *The Ombuds Confidentiality Privilege: Theory and mechanics* 2 (1996).
- 18 [Kientzy v. McDonnell Douglas Corp.](#), 133 F.R.D. 570, 573 (E.D. Mo. 1991); [Garstang v. Superior Court](#), 46 Cal. Rptr. 2d 84, 89 (Ca. Ct. App. 1995). Six years after *Kientzy*, the Eighth Circuit court expressly declined to support the *Kientzy* court's creation of "a wholly new evidentiary privilege" with respect to corporate ombudsmen. [Carman v. McDonnell Douglas Corp.](#), 114 F.3d 790, 794 (8th Cir. 1997). In its rejection of the *Kientzy* holding, the Eighth Circuit reasoned that even if proponents of such a privilege could "establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords," courts would still struggle to find that "the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information." *Id.* In short, the era of ombudsman privilege ushered in by *Kientzy* came to an abrupt halt in the Eighth Circuit after *Carman*. *Id.* at 794-95.
- 19 [Carman](#), 114 F.3d at 794; [Solorzano v. Shell Chem. Co.](#), No. Civ.A.99-2831, 2000 WL 1145766, at \*5 (E.D. La. Aug. 14, 2000).
- 20 Howard & Gulluni, *supra* note 17, at 3.
- 21 *Id.* (discussing [Shabazz v. Scurr](#), 662 F. Supp. 90, 91 (S.D. Iowa 1987)).
- 22 *Id.*
- 23 See ALA. CODE § 25-5-294 (2012); ARIZ. REV. STAT. ANN. § 41-1378 (2002); ARK. CODE ANN. § 20-10-602 (1987); CAL. WELF. & INST. CODE § 9725 (West 2010); COLO. REV. STAT. § 19-3.3-103 (2010); CONN. GEN. STAT. §§ 17b-407 (1999); DEL. CODE ANN. tit. 14, § 4112B (1995); D.C. CODE § 7-2071.07 (2005); FLA. STAT. § 400.0070 (2006); GA. CODE ANN. § 37-2-34 (2008); IDAHO CODE ANN. § 67-5009 (2001) (no clear reference to an ombudsman's confidentiality); 20 ILL. COMP. STAT. 105/4.04 (2011); IND. CODE § 12-11-13-10 (2007); IOWA CODE § 2C.9 (2006); KAN. STAT. ANN. § 75-7310 (2005); KY. REV. STAT. ANN. § 216.541 (West 2007) (no clear reference to an ombudsman's confidentiality except for the lawful performance of their duties made in good faith); LA. REV. STAT. ANN. § 28:453.3 (2005); ME. REV. STAT. tit. 5, § 200-I (2008); MD. CODE ANN. HUM. SERVS. § 10-906 (LexisNexis 2010) (Secretary of State shall adopt rules governing an ombudsman's confidentiality); MICH. COMP. LAWS § 710.67 (1995); MINN. STAT. § 256.9742 (2007); MISS. CODE ANN. § 43-7-69 (1988); MO. REV. STAT. § 660.605 (1991); MONT. CODE ANN. § 2-15-210 (2001); NEB. REV. STAT. § 81-2260 (2007); NEV. REV. STAT. § 228.450 (2009); N.H. REV. STAT. ANN. § 161-F:13 (2004); N.M. STAT. ANN. § 28-17-14 (2003); N.Y. EXEC. LAW § 523-i (McKinney 2008) (confidentiality of records must be maintained by the ombudsman); OHIO REV. CODE ANN. § 173.22 (LexisNexis 1990); OKLA. STAT. tit. 63, § 1-2216 (2005); P.R. LAWS ANN. tit. 2, § 712 (2000) (no clear mention about the scope of an ombudsman's confidentiality); R.I. GEN. LAWS § 23-17.5-12 (1991); S.C. CODE ANN. § 16-3-1640 (1994); S.D. CODIFIED LAWS § 28-1-51 (2004) (Secretary of State shall develop reasonable rules); TENN. CODE ANN. § 68-11-910 (2005) (nursing home residents have the right to have their records kept confidential); TEX. HUM. RES. CODE ANN. § 261.056 (West 2011); UTAH CODE ANN. § 62A-3-207 (LexisNexis 1993); VT. STAT. ANN. tit. 33, § 7503 (2005); VA. CODE ANN. § 38.2-5904 (2000); WASH. REV. CODE § 43.06A.050 (2006); W. VA. CODE § 16-5L-15 (1991); WIS. STAT. § 16.009 (2011).
- 24 See sources cited *supra* note 6.
- 25 See [Kientzy v. McDonnell Douglas Corp.](#), 133 F.R.D. 570, 573 (E.D. Mo. 1991) (federal court extended privilege to corporate ombudsman); [Garstang v. Superior Court](#), 46 Cal. Rptr. 2d 84, 89 (Cal. Ct. App. 1995) (right to privacy under the state constitution extends to an ombudsman's communications with a visitor); see also [Beckman v. Dunn](#), 419 A.2d 583, 588 (Pa. Super. Ct. 1980)

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 *Charleston L. Rev.* 1

---

(statements made by an employed university professor to a university ombudsman fall under a conditionally-privileged occasion relieving a university from any liability). Contra [Solorzano v. Shell Chem. Co.](#), No. Civ.A.99-2831, 2000 WL 1145766, at \*5 (E.D. La. Aug. 14, 2000); [Carman v. McDonnell Douglas Corp.](#), 114 F.3d 790, 794 (8th Cir. 1997) (giving negative treatment to the Kientzy decision). For clarification on the status of corporate ombudsman privilege in the Eighth Circuit after Carman, see *supra* note 18.

- 26 Donald C. Rowat, *The Spread of the Ombudsman Idea*, in *Ombudsmen for American Government?* 7, 7-8 (Stanley V. Anderson ed., 1968) [hereinafter *Spread of the Ombudsman Idea*]. See generally Walter Gellhorn, [The Swedish Justitieombudsman](#), 75 *Yale L. J.* 1 (1965) (describing the role of the classical Swedish ombudsman); Stig Jägerskiöld, [The Swedish Ombudsman](#), 109 *U. Pa. L. Rev.* 1077 (1961) (examining the developmental history of the ombudsman in Sweden).
- 27 *Spread of the Ombudsman Idea*, *supra* note 26, at 7.
- 28 Donald C. Rowat, *The Ombudsman in Sweden*, in *The Ombudsman Plan: Essays on the Worldwide Spread of an Idea* 12 (1993).
- 29 Shirley A. Wiegand, [A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model](#), 12 *Ohio St. J. on Disp. Resol.* 95, 98-99 (1996).
- 30 *Id.* at 99 & n.17 (citing Larry B. Hill, *Institutionalization, the Ombudsman, and Bureacracy*, 68 *Am. Pol. Sci. Rev.* 1075 (1974)). Under the “classical ombudsman model,” the classical ombudsman possessed the following “defining characteristics”: “(1) legally established; (2) functionally autonomous; (3) external to the administration; (4) operationally independent of both the legislature and the executive; (5) specialist; (6) expert; (7) nonpartisan; (8) normatively universalistic; (9) client-centered but not anti-administrative; (10) both popularly accessible and visible.” *Id.* See generally Simone Cadeddu, [The Proceedings of the European Ombudsman](#), 68 *Law & Contemp. Probs.* 161 (2004) (explaining the procedural mechanisms of the “classical ombudsman” model as it is used today).
- 31 Wiegand, *supra* note 29, at 99.
- 32 *Id.*
- 33 *Id.*
- 34 *Id.* at 98.
- 35 *Id.* at 99.
- 36 *Id.* at 98.
- 37 *Id.* at 101 (quoting Gerald E. Caiden et al., *The Institution of Ombudsman*, in *International Handbook of the Ombudsman: Evolution and Present Function* 5 (Gerald E. Caiden ed., 1983)).
- 38 *Id.*
- 39 *Id.*
- 40 See *id.* at 103.
- 41 Stanley V. Anderson, *Ombudsman Papers: American Experience and Proposals* 3 (1969).
- 42 See Wiegand, *supra* note 29, at 102, 103.
- 43 See *id.* at 109. See generally Gregory R. Bockin & Scott N. Flesch, *From Problem-Solver to Policeman: The Ombudsman's Role in Army Compliance Agreements*, *Army Law.*, Oct. 2005, at 53, 56 (explaining the use of military ombudsmen in compliance agreements with the United States Army).
- 44 Wiegand, *supra* note 29, at 105.
- 45 See *id.* at 104-05.

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

- 46 See *id.* at 105.
- 47 E.g., [Tex. Hum. Res. Code Ann. § 101.052 \(West 1989\)](#).
- 48 E.g., [Tex. Hum. Res. Code Ann. § 161.071 \(West 2005\)](#).
- 49 E.g., [Tex. Lab. Code Ann. § 404.105 \(West 2009\)](#).
- 50 E.g., [Tex. Gov't Code Ann. § 531.008 \(West 2003\)](#).
- 51 E.g., [Tex. Hum. Res. Code Ann. § 261.103 \(West 2011\)](#) (establishing juvenile justice ombudsman); Brian D. Heskamp, [The Prisoner's Ombudsman: Protecting Constitutional Rights and Fostering Justice in American Corrections](#), 6 *Ave Maria L. Rev.* 527, 531-36 (2008) (describing the nature and scope of the use of ombudsmen in the American correctional system).
- 52 E.g., [Cal. Penal Code § 2641 \(West 2005\)](#). See generally Bertran, *supra* note 8 (explaining the role and function of an ombudsman in the justice system).
- 53 Wiegand, *supra* note 29, at 105 (“For example, in 1995 in one state alone, legislation provided that ombudspersons be hired in areas relating to long term care, nursing homes, workers compensation, institutions and facilities for the mentally retarded and for the developmentally disabled, small businesses and minority businesses.”).
- 54 Memorandum from the International Ombudsman Association, “Foundations of Organizational Ombudsman Practice” 7th Annual Conference (Apr. 13, 2012) (on file with author) based on Charles L. Howard, *The Organizational Ombudsman - Origins, Roles, and Operations - A Legal Guide 2-24* (2010), (Conference Material 1-11 on file with author).
- 55 Anderson, *supra* note 41, at 28-31. It should be noted that of these twenty-six states, only Hawaii's proposal was legally-enacted. *Id.* at 32.
- 56 Wiegand, *supra* note 29, at 105.
- 57 *Id.* at 102.
- 58 See Scott C. Van Soye, [Illusory Ethics: Legal Barriers to an Ombudsman's Compliance with Accepted Ethical Standards](#), 8 *Pepp. Disp. Resol. L.J.* 117, 119-25 (2007) (describing five types of ombudsmen and providing estimated numbers).
- 59 Wiegand, *supra* note 29, at 110 (quoting James T. Ziegenfuss, Jr., *Organizational Troubleshooters: Resolving Problems with Customers and Employees* xii (1988)).
- 60 See American Bar Association, *Standards for the Establishment and Operation of Ombuds Offices 1-20* (2004), available at [http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/ombudsmen\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/ombudsmen_1.authcheckdam.pdf) [hereinafter ABA]; IOA, *supra* note 4, at §§ 1.1-4.8. See generally Van Soye, *supra* note 58, at 125-28 (providing background information about the ethical standards adopted by some ombudsmen organizations).
- 61 ABA, *supra* note 60, at 12-15; IOA, *supra* note 4, at §§ 1.1-4.8.
- 62 Compare ABA, *supra* note 60 (placing minimal emphasis on informality as a characteristic of an ombudsman), with IOA, *supra* note 4, at §§ 1.1-4.8 (recognizing informality as one of the essential characteristics of the ombudsman office). The original ABA proposal provided that the essential characteristics of an ombudsman are:  
(1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority of the legislative body, such as two thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restrictions of

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

civil service and classifications acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; and, (12) immunity of the ombudsman and his staff from civil liability on account of official action.

ABA, *supra* note 60, at 19 n.12.

63 See, e.g., *Solorzano v. Shell Chem. Co.*, No. Civ.A.99-2831, 2000 WL 1145766, at \*2 (E.D. La. Aug. 14, 2000); *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 793-794 (8th Cir. 1997); see also Van Soye, *supra* note 58, at 128 (stating that no American state or territory embraces the ombudsman privilege as envisioned by the IOA). But see *Roy v. United Techs. Corp.*, Civil H-89-680 (JAC) (D. Conn. May 29, 1990) (explaining that ombudsman protected confidentiality of his clients by providing a toll-free, private 1-800 number contact in adhering with some elements of the ABA and IOA ethics).

64 See *Solorzano*, 2000 WL 1145766, at \*5; *Carman*, 114 F.3d at 794.

65 See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) (recognizing the ABA Code of Professional Responsibility as legally relevant in a case regarding attorney client privilege); *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) (stating that attorney model codes “confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct”).

66 See, e.g., *Carman*, 114 F.3d at 793.

67 Van Soye, *supra* note 58, at 128-29 & nn.115-25 (providing specific statutory indications of differing state and territorial approaches relative to ABA and IOA ethics).

68 E.g., IOA, *supra* note 4, at §§ 3.1-3.8.

69 Frequently Asked Questions, Int'l Ombudsman Ass'n, [www.ombudsassociation.org/resources/frequently-asked-questions](http://www.ombudsassociation.org/resources/frequently-asked-questions) (last visited Sept. 7, 2013). This article uses the term “corporate ombudsmen” to refer to what other scholars have called “organizational ombudsmen.” See e.g., Howard, *supra* note 54. The article makes this distinction because the term “organizational” can lead to a contextual misinterpretation since almost all ombudsmen represent some type of organization, regardless of whether it is public or private.

70 As a general rule, courts may be more likely to accept the concept of ombudsman privilege if the ombudsman is appointed by the legislature. See *Shabazz v. Scurr*, 662 F. Supp. 90, 91-92 (S.D. Iowa 1987) (holding that an ombudsman who was appointed by the legislature was granted privilege).

71 Van Soye, *supra* note 58, at 119.

72 Wiegand, *supra* note 29, at 105.

73 See Van Soye, *supra* note 58, at 119.

74 ABA, *supra* note 60 at 6-7. See generally Stanley V. Anderson, *Proposals and Politics*, in *Ombudsman for American Government?* 142-55 (Stanley V. Anderson ed., 1968) (discussing the role of the legislative ombudsman for the California Commission on Judicial Qualifications).

75 ABA, *supra* note 60 at 6-7.

76 Legislative Corrections Ombudsman, Mich. Legis. Council, <http://council.legislature.mi.gov/lco.html> (last updated May 12, 2009, 4:05 PM).

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

- 77 Office of the National Ombudsman and Assistant Administrator for Regulatory Enforcement Fairness, U.S. Small Bus. Admin., <http://www.sba.gov/ombudsman> (last visited Aug. 31, 2013).
- 78 Public Counsel (Ombudsman's Office), Neb. Legis., <http://nebraskalegislature.gov/divisions/ombud.php> (last visited Aug. 31, 2013).
- 79 See ABA, *supra* note 60, at 6-7; Van Soye, *supra* note 58, at 120.
- 80 Van Soye, *supra* note 58, at 120 (citing [Alaska Stat. §§ 24.55.010- 24.55.340 \(2006\)](#); [Ariz. Rev. Stat. §§ 41-1371-41-1383 \(2007\)](#); [2 Guam Code Ann. §§ 5101-5120 \(2006\)](#); [Haw. Rev. Stat. §§ 96-2-96-19 \(2007\)](#); [Iowa Code § 2C.1-19 \(2007\)](#); [Neb. Rev. Stat §§ 81-8,240- 81-8,254 \(2006\)](#); [P.R. Laws Ann. tit. 2 §§710-727 \(2004\)](#)). The state of Michigan has a legislative ombudsman, but it is not based on the classical model. Mich. Legis. Council, *supra* note 76.
- 81 See [Shabazz v. Scurr](#), 662 F. Supp. 90, 90-91 (S.D. Iowa 1987) (holding that legislative ombudsman possesses a limited privilege).
- 82 ABA, *supra* note 60, at 4, 6-7.
- 83 Spread of the Ombudsman Idea, *supra* note 26, at 36; see Van Soye, *supra* note 58, at 120 (referring to the power of legislative ombudsmen through formal or informal mechanisms).
- 84 See Spread of the Ombudsman Idea, *supra* note 26, at 36.
- 85 E.g., [Neb. Rev. Stat. §§ 81-8,240-81-8,254 \(2006\)](#).
- 86 [5 U.S.C. §§ 571-584 \(1996\)](#) (codifying and amending the Administrative Dispute Resolution Act, first passed in 1990); see also Administrative Dispute Resolution Act of 1990, [Pub. L. No. 101-552](#), [104 Stat. 2736](#).
- 87 [S. Rep. No. 101-543](#), pt. 1, at 1 (1990), reprinted in 1990 U.S.C.C.A.N. 3931, 3932.
- 88 Federal Sector Alternative Dispute Resolution, U.S. Equal Emp. Opportunity Comm'n, <http://www.eeoc.gov/federal/adr/index.cfm> (last visited Aug. 31, 2013).
- 89 See [S. Rep. no. 101-543](#), pt. 1, reprinted in 1990 U.S.C.C.A.N. at 3932.
- 90 [5 U.S.C. § 574](#).
- 91 *Id.* at [§ 574\(a\) \(1996\)](#) (stipulating that a neutral must adhere to any court order like one found within a discovery request).
- 92 E.g., [Alaska Stat. § 24.55.160\(b\) \(2006\)](#) (stating that ombudsman maintains confidentiality with respect to all matters); [Ariz. Rev. Stat. Ann. § 41-1376.01\(c\)\(4\) \(2007\)](#); [Haw. Rev. Stat. § 96-9\(b\) \(2005\)](#); [Iowa Code § 2C.8 2013](#) (providing that legislative ombudsman possesses privilege in all records and files); [Neb. Rev. Stat. §§ 81-8,240- 81-8,254 \(2012\)](#); [P.R. Laws Ann. tit. 2, §§ 710- 727 \(2004\)](#); [Ombudsman Serv. of N. Cal. v. Superior Court](#), 65 Cal. Rptr. 3d 456, 462-64 (Ct. App. 2007) (holding that California statute does provide privilege from a discovery request for a legislative ombudsman's investigatory records and files); cf. [Prelesnik v. Esquina](#), 347 N.W.2d 226, 228 (Mich. 1984) (holding that a legislatively-appointed ombudsman does possess immunity for libel under the speech and debate clause of the Michigan Constitution of 1963 regarding their communications with visitors).
- 93 See [Shabazz v. Scurr](#), 662 F. Supp. 90, 90-91 (S.D. Iowa 1987) (holding that a legislative ombudsman possesses a limited privilege under state law because there were no appropriate federal laws that supersede such a concept); Michele Deitch, [Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory](#), 30 *Pace L. Rev.* 1754, 1783 (2010) (stating that all communications between a prisoner and a legislative ombudsman in Alaska are privileged).
- 94 ABA, *supra* note 60, at 7.
- 95 Van Soye, *supra* note 58, at 121.
- 96 *Id.* at 122.

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

- 97 See id. at 121.
- 98 ABA, *supra* note 60, at 7.
- 99 Id.
- 100 Id.
- 101 See Van Soye, *supra* note 58, at 122 (citing ABA, *supra* note 60, at 7).
- 102 ABA, *supra* note 60, at 7.
- 103 E.g., *Tex. Hum. Res. Code Ann.* § 261.101 (West 2011).
- 104 E.g., id.
- 105 E.g., *Tex. Lab. Code Ann.* § 404.101 (West 2011).
- 106 E.g., Van Soye, *supra* note 58, at 121-22 nn.45-53.
- 107 See Dunn, *supra* note 9, at 48.
- 108 See id.
- 109 See Christina M. Kuta, *Universities, Corporations, and States Use Them--Now it's Time to Protect Them: An Analysis of the Public and Private Sector Ombudsman and the Continued Need for a Privileged Relationship*, 27 S. Ill. U. L.J. 389, 397 (2003).
- 110 E.g., *Alaska Stat. Ann.* § 24.55.160(b) (1990) (requiring confidentiality except to the extent “disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations,” but prohibiting disclosure of confidential agency records).
- 111 See The Nat'l Long-Term Care Ombudsman Resource Center, *Locate an Ombudsman, State Agencies and Citizen Advocacy Groups*, [http:// www.ltombudsman.org/ombudsman](http://www.ltombudsman.org/ombudsman) (last visited Aug 31, 2013) (providing contact information for long-term care ombudsmen searchable by state).
- 112 42 U.S.C. § 3001 (2006); see also 42 U.S.C. §§ 3058-3058h (2006).
- 113 42 U.S.C. § 3027(a)(9) (2006).
- 114 42 U.S.C. § 3025 (2006).
- 115 See Herrington, *supra* note 15, at 336.
- 116 Jeffrey S. Kahana, *Reevaluating the Nursing Home Ombudsman's Role with a View Toward Expanding the Concept of Dispute Resolution*, 1994 J. Disp. Resol. 217, 228 (1994).
- 117 See Kuta, *supra* note 109, at 395-97.
- 118 Id. at 397.
- 119 E.g., *Ala. Code* § 22-5A-6 (1975).
- 120 42 U.S.C. § 3058g (2006); *Ariz. Rev. Stat. Ann.* § 46-452.02 (1991); *Ark. Code Ann.* § 20-10-602 (1987); *Colo. Rev. Stat.* § 26-11.5-108 (1990); *Me. Rev. Stat. tit. 22*, § 5106(11-c) (2012); *Mont. Code Ann.* § 52-3-602 (2009); *N.C. Gen. Stat.* § 143B-181.22 (1995); *Tenn. Code Ann.* § 71-2-109 (2001); *Va. Code Ann.* § 51.5-141 (2012).
- 121 *Alaska Stat.* § 47.62.030 (2001); *Ark. Code Ann.* § 20-10-602 (1987); *Cal. Welf. & Inst. Code* § 9725 (West 1996); *Conn. Gen. Stat.* § 17b-410 (1999); *Del. Code Ann. tit. 16*, § 1153 (1995); *D.C. Code* § 7-702.06 (2012); *Fla. Stat.* § 400.0077 (2009); *Ga. Code Ann.*



FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

§ 31-8-58 (1979); Haw. Rev. Stat. § 349-22 (2007); Idaho Code Ann. § 67-5009 (2001); 20 Ill. Comp. Stat. 105/4.04(g) (2011); Ind. Code § 12-11-13-10 (2007); Iowa Code § 231.42 (2009); Kan. Stat. Ann. § 75-7310 (2005); Ky. Rev. Stat. Ann. § 216.540 (West 1982); La. Rev. Stat. Ann. § 40:2010.4 (1988); Me. Rev. Stat. tit. 22, § 5106(11-c) (2012); M.D. Code Ann., Hum. Servs. § 10-906(b) (LexisNexis 2010); Mass. Gen. Laws. ch. 19A, § 31 (1986); Mich. Comp. Laws § 400.586g (1987); Minn. Stat. § 256.9744 (2007); Miss. Code Ann. § 43-7-69 (1988); Mo. Rev. Stat. § 660.605 (1991) (proposed); Neb. Rev. Stat. § 81-2260 (2007); Nev. Rev. Stat. § 427A.155 (2009); N.H. Rev. Stat. Ann. § 161-F:13 (2004); N.J. Stat. Ann. § 52:27G-13 (West 1977); N.M. Stat. Ann. § 28-17-14 (1997); N.Y. Elder Law § 217(c) (McKinney 2011); N.D. Cent. Code § 50-10.1-07 (1985); Ohio Rev. Code Ann. § 173.22 (West 1990); Okla. Stat. tit. 63, § 1-2216(A)(7) (2005); OR. Rev. Stat. § 441.113 (1981); 71 PA. Cons. Stat. § 581-3 (2011); P.R. Laws Ann. tit. 3, § 1976e (2004); R.I. Gen. Laws § 23-17.5-12 (1991); S.C. Code Ann. § 43-38-20 (1993); S.D. Codified Laws § 22-46-9 (2011); Tex. Hum. Res. Code Ann. § 101.058 (West 1989); Utah Code Ann. § 62A-3-207 (LexisNexis 1993); Vt. Stat. Ann. tit. 33, § 7506 (2011); Va. Code Ann. § 51.5-141 (2012); Wash. Rev. Code § 43.190.110 (1983) (proposed); W. Va. Code § 16-5L-15 (1991); Wis. Stat. § 16.009 (2011); Wyo. Stat. Ann. § 9-2-1307 (1981).

- 122 See ABA, *supra* note 60, at 7; cf. Brenda V. Thompson, *Corporate Ombudsmen and Privileged Communications: Should Employee Communications to Corporate Ombudsmen be Entitled to Privilege?*, 61 U. Cin. L. Rev. 653, 655-59 (1992) (discussing the role of corporate ombudsmen).
- 123 Van Soye, *supra* note 58, at 124.
- 124 See ABA, *supra* note 60, at 7.
- 125 See Carlton J. Snow, *Building Trust in the Workplace*, 14 Hofstra Lab. L.J. 465, 482 (1997).
- 126 ABA, *supra* note 60, at 7.
- 127 Mark R. Sherman, *Is There a Mediator in the House? Using In-House Neutrals*, 50 Disp. Resol. J., 48, 49 (1995).
- 128 See *id.*
- 129 IOA, *supra* note 4, at §§ 1.1- 4.8.
- 130 *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991) (extending privilege to ombudsman); *Garstang v. Superior Court*, 46 Cal. Rptr. 2d 84 (Ca. Ct. App. 1995) (extending right to privacy under the state constitution to an ombudsman's communications with a visitor); see *Beckman v. Dunn*, 419 A.2d 583 (Pa. Super. Ct. 1980) (finding statements made by an employed university professor to a university ombudsman fall under a conditionally-privileged occasion relieving a university from any liability). Contra *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794 (8th Cir. 1997) (denying privilege to ombudsmen); *Solorzano v. Shell Chem. Co.*, No. Civ. A.99-2831, 2000 WL 1145766, at \*5 (E.D. La. Aug. 14, 2000) (denying privilege to ombudsmen). For clarification on the status of corporate ombudsman privilege in the Eighth Circuit after Carman, see *supra* note 18.
- 131 *Kientzy*, 133 F.R.D. at 571; *Garstang*, 46 Cal. Rptr. 2d at 533 (“And even when discovery of private information is found directly relevant to issues of ongoing litigation, it will not automatically be allowed; there must be then a ‘careful balancing’ of ‘compelling public need’ for discovery against fundamental constitutional right of privacy.”); see 8 John Henry Wigmore, *Treatise on Evidence* § 2285 (3d ed.1940) (injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation). But see *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794; *Solorzano*, 2000 WL 1145766, at \*5. For clarification on the status of corporate ombudsman privilege in the Eighth Circuit after Carman, see *supra* note 18.
- 132 Cal. Evid. Code § 1119 (West 1997); *Kientzy*, 133 F.R.D. at 571-72 (ombudsman performed confidential mediations within the context of the corporate entities and was protected by privilege); see *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (1998) (illustrating that confidentiality provided by statute regarding communications during a mediation may be asserted by the mediator as well as the participants). Contra *Solorzano*, 2000 WL 1145766, at \*5; *Carman*, 114 F.3d at 790. For clarification on the status of corporate ombudsman privilege in the Eighth Circuit after Carman, see *supra* note 18.
- 133 ABA, *supra* note 60, at 6-8 (illustrating differences between describing legislative, executive, organizational, and advocate ombudsmen).

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

- 134 See *id.* at 8.
- 135 *Id.*
- 136 See *id.*; Deitch, *supra* note 93, at 1823-25 (stating that within Iowa, a non-profit advocacy agency advocates for and protects the rights of people with disabilities and mental illness within jails and prisons).
- 137 E.g., *Alberti v. Klevenhagen*, 790 F.2d 1220, 1229 (5th Cir. 1986) (holding that counsel's dual role as a court-appointed advocate and ombudsman did not constitute a "miscarriage of justice" upon defendants); Deitch, *supra* note 93, at 1823.
- 138 E.g., Texas Dep't of Criminal Justice, General Information Guide for Families of Offenders 16-18 (2012), available at [http://www.tdcj.state.tx.us/documents/General\\_Information\\_Guide\\_for\\_Families\\_of\\_Offenders.pdf](http://www.tdcj.state.tx.us/documents/General_Information_Guide_for_Families_of_Offenders.pdf).
- 139 E.g., Judith Jones & Alvin W. Cohn, U.S. Dep't of Justice, Juvenile Justice Bulletin: State Ombudsman Programs 5 (2005), available at <https://www.ncjrs.gov/pdffiles1/ojdp/204607.pdf>.
- 140 See Victim Services, Mothers Against Drunk Driving, <http://www.madd.org/victim-services/> (last visited Sept. 4, 2013).
- 141 See Mission Statement, Fathers Against Drunk Driving, <http://www.faddintl.org/mission.html#mission> (last visited Sept. 4, 2013).
- 142 See *supra* notes 111-16 and accompanying text.
- 143 See ABA, *supra* note 60, at 8.
- 144 See *id.*
- 145 See *id.*
- 146 See *id.*
- 147 *Id.* at 6-8 (illustrating differences between legislative, executive, organizational, and advocate omubds).
- 148 See *Alberti v. Klevenhagen*, 790 F.2d 1220, 1229 (5th Cir. 1986) (finding court order appointed an office of the ombudsman for inmates and did not result in a grave injustice or a fundamental miscarriage of justice). See e.g., *Masat v. United States*, 745 F.2d 985, 988 (5th Cir. 1984) (holding no grave injustice); *Mitchell v. M.D. Anderson Hosp.*, 679 F.2d 88, 92 (5th Cir. 1982) ("We need only observe that there was no blatant intrusion by the judge in the trial of this case which would lead to a fundamental miscarriage of justice.").
- 149 Cf. *Alberti*, 790 F.2d at 1229 (holding that as long as an ombudsman does not abuse his or her role and place the defendants on unequal footing, the dual role of an attorney and an ombudsman does not satisfy the legal standard of a grave injustice or a fundamental miscarriage of justice).
- 150 *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 793 (8th Cir. 1997); *Roy v. United Techs. Corp.*, Civil H-89-680 (JAC) (D. Conn. May 29, 1990); *Shabazz v. Scurr*, 662 F. Supp. 90, 91-92 (S.D. Iowa 1987); *Solorzano v. Shell Chem. Co.*, No. Civ.A.99-2831, 2000 WL 1145766, at \*1, \*2 (E.D. La. Aug. 14, 2000); *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 571 (E.D. Mo. 1991). For clarification on the status of corporate ombudsman privilege in the Eighth Circuit, see *supra* note 18.
- 151 *Fed. R. Evid.* 501; see Kuta, *supra* note 109, at 399-00.
- 152 See cases cited *supra* note 148.
- 153 *Trammell v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)); *Rios v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).
- 154 *Trammell*, 445 U.S. at 50.

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

- 155 *Id.* at 51.
- 156 *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 793 (8th Cir. 1997); *Solorzano v. Shell Chem. Co.*, No. Civ.A.99-2831, 2000 WL 1145766, at \*5.
- 157 *Solorzano*, 2000 WL 1145766, at \*5 (citing *Syposs v. United States*, 179 F.R.D. 406, 409 (W.D.N.Y. 1998)); *Carman*, 114 F.3d at 793.
- 158 Compare *Carman*, 114 F.3d at 794 (denying privilege to an ombudsman) with *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 571 (E.D. Mo. 1991) (granting privilege to an ombudsman). For clarification on the status of corporate ombudsman privilege in the Eighth Circuit after *Carman*, see *supra* note 18.
- 159 See *Solorzano*, 2000 WL 1145766, at \*3; *Carman*, 114 F.3d at 792-94.
- 160 *Mattson v. Cuyuna Ore Co.*, 178 F. Supp. 653 (D. Minn. 1959).
- 161 See *id.* at 654.
- 162 *Id.* at 653-54.
- 163 See *id.* at 654.
- 164 *Id.*
- 165 *Id.* (citing 8 John Henry Wigmore, *Treatise on Evidence* § 2285 (3d ed. 1940)).
- 166 See *id.* at 654 n.2.
- 167 *Id.* at 654.
- 168 See *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 571 (E.D. Mo. 1991).
- 169 See cases cited *supra* note 65.
- 170 Fed. R. Evid. 501.
- 171 Fed. R. Evid. 501 (1975) (emphasis added). Rule 501 was restyled in 2011.
- 172 Fed. R. Evid. 501 (1975); *ACLU of Miss., Inc. v. Finch*, 638 F.2d 1336, 1342 (5th Cir. 1981).
- 173 *Hansen v. Allen Mem'l Hosp.*, 141 F.R.D. 115, 118 (S.D. Iowa 1992); see also Fed. R. Evid. 501; *Moorhead v. Lane*, 125 F.R.D. 680, 682-83 (C.D. Ill. 1989); *Unger v. Cohen*, 125 F.R.D. 67, 69 (S.D.N.Y. 1989) (“Questions of privilege in cases involving federal claims are governed by federal law.”); *King v. Conde*, 121 F.R.D. 180, 187 (E.D.N.Y. 1988) (“Questions of privilege in federal civil rights cases are governed by federal law.”).
- 174 E.g., *Hansen*, 141 F.R.D. at 121; *Nat'l Abortion Fed. v. Ashcroft*, No. 04 C 55, 2004 WL 292079, at \*4 (N.D. Ill. 2004) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Wis. Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003)).
- 175 E.g., *Hansen*, 141 F.R.D. at 121.
- 176 *Id.* at 118 & n.8 (citing *Finch*, 638 F.2d at 1342).
- 177 E.g., *id.* at 122.
- 178 E.g., *id.* at 123.
- 179 E.g., *id.* at 121.

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

- 180 See, e.g., *In re Grand Jury Subpoenas Duces Tecum*, 638 F. Supp. 794, 796-797 (D. Me. 1986); *In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983).
- 181 See, e.g., *In re Doe*, 711 F.2d at 1193.
- 182 *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 793 (8th Cir. 1997) (Rule 501); *Roy v. United Techs. Corp.*, Civil H-89-680 (JAC) (D. Conn. May 29, 1990) (Rule 501 and Wigmore's test); *Shabazz v. Scurr*, 662 F. Supp. 90, 91-94 (S.D. Iowa 1987) (Rule 501 and Wigmore's test); *Solorzano v. Shell Chem. Co.*, No. Civ.A.99-2831, 2000 WL 1145766 at \*3-\*4 (E.D. La. Aug. 14, 2000) (Rule 501); *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 571-72 (E.D. Mo. 1991) (Rule 501 and Wigmore's test). See generally Jeffrey J. Lauderdale, *A New Trend in the Law of Privilege: The Federal Settlement Privilege and the Proper Use of Federal Rule of Evidence 501 for the Recognition of New Privileges*, 35 U. Mem. L. Rev. 255 (2005) (providing a thorough history of Rule 501 and the recognition of a privilege). For clarification on the status of corporate ombudsman privilege in the Eighth Circuit, see *supra* note 18.
- 183 *In re Doe*, 711 F.2d 1187 (2d Cir. 1983).
- 184 *Id.* at 1193.
- 185 *Id.* at 1190.
- 186 *Id.* at 1193.
- 187 *Id.* *In Doe*, the psychiatrist first argued that discovery was limited by the required records doctrine under the Fifth Amendment, however, for such an exception to exist under the Fifth Amendment, the records (1) must be essentially regulatory; (2) information obtained from those records must be of the kind that the regulated party kept; and (3) the records themselves must have assumed “public aspects” which make them analogous to public documents. *Id.* at 1191.
- 188 *Id.* at 1193 (citing 8 John Henry Wigmore, *Treatise on Evidence* § 2285 (McNaughton rev. 1961)).
- 189 See, e.g., *In re Grand Jury Subpoena*, 750 F.2d 223, 224-25 (2d Cir. 1984); *Mattson v. Cuyuna Ore Co.*, 178 F. Supp. 653, 654 (D. Minn. 1959).
- 190 See *Doe*, 711 F.2d at 1193.
- 191 *Id.*
- 192 *Id.*; see *Mattson*, 178 F. Supp. at 654 n.2.
- 193 *Doe*, 711 F.2d at 1193-1194.
- 194 See e.g., *Shabazz v. Scurr*, 662 F. Supp. 90, 91-92 (S.D. Iowa 1987) (recognizing privilege implied by state statute).
- 195 *Id.* at 90.
- 196 Iowa Code § 601G.8 (1985) (transferred to §§ 2C.1 to 2C.23 (1993)).
- 197 See *Shabazz*, 662 F. Supp. at 91.
- 198 See *id.*
- 199 *Id.*
- 200 *Id.*
- 201 *Id.*
- 202 *Id.*

- 203 Id. (citing [Fed. R. Evid. 501](#)).
- 204 Id. at 92; see [In re Doe](#), 711 F.2d 1187, 1193 (2d Cir. 1983) (citing 8 John Henry Wigmore, *Treatise on Evidence* § 2285 (McNaughton rev. 1961)).
- 205 [Shabazz](#), 662 F. Supp. at 92.
- 206 [Roy v. United Techs. Corp.](#), Civil H-89-680 (JAC) (D. Conn. May 29, 1990).
- 207 [Thompson](#), *supra* note 122, at 660-61.
- 208 Id. at 661.
- 209 Id.
- 210 [Roy](#), Civil H-89-680 (JAC) (citing [Shabazz](#), 662 F. Supp. at 90).
- 211 Id.
- 212 Id.; see [In re Grand Jury Subpoena](#), 750 F.2d 223, 224 (2d Cir. 1984).
- 213 [Roy](#), Civil H-89-680 (JAC) (citing [In re Doe](#), 711 F.2d 1187, 1193 (2d Cir. 1983)).
- 214 [Roy](#), Civil H-89-680 (JAC).
- 215 Id.
- 216 [Corie Marty](#), [Carman v. McDonnell Douglas Corp.](#), 13 Ohio St. J. on Disp. Resol. 275, 276-277 (1997).
- 217 See [Roy](#), Civil H-89-680 (JAC).
- 218 [Howard & Gulluni](#), *supra* note 17, at 3.
- 219 [Shabazz v. Scurr](#), 662 F. Supp. 90, 92 (S.D. Iowa 1987).
- 220 See [Roy](#), Civil H-89-680 (JAC).
- 221 [Howard & Gulluni](#), *supra* note 17, at 5.
- 222 [Kientzy v. McDonnell Douglas Corp.](#), 133 F.R.D. 570 (E.D. Mo. 1991). Six years after [Kientzy](#), the Eighth Circuit court expressly declined to support the [Kientzy](#) court's creation of "a wholly new evidentiary privilege" with respect to corporate ombudsmen. [Carman v. McDonnell Douglas Corp.](#), 114 F.3d 790, 794 (8th Cir. 1997). In its rejection of the [Kientzy](#) holding, the Eighth Circuit reasoned that even if proponents of such a privilege could "establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords," courts would still struggle to find that "the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information." Id. In short, the era of ombudsman privilege ushered in by [Kientzy](#) came to an abrupt halt in the Eighth Circuit after [Carman](#). Id. at 794-95.
- 223 Id. at 571; see *supra* note 222.
- 224 Id.; see *supra* note 222.
- 225 Id.; see *supra* note 222.
- 226 Id.; see *supra* note 222.
- 227 See id.; see also *supra* note 222.

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

- 228 Id. at 571-72 (citing [Fed. R. Evid. 501](#) (1975); [Roy v. United Techs. Corp.](#), Civil H-89-680 (JAC) (D. Conn. May 29, 1990); [Shabazz v. Scurr](#), 662 F. Supp. 90, 91 (S.D. Iowa 1987); [Mattson v. Cuyuna Ore Co.](#), 178 F. Supp. 653, 654 n.2 (D. Minn. 1959)).
- 229 [Kientzy](#), 133 F.R.D. at 572-73; see supra note 18.
- 230 Id. at 572; see supra note 18.
- 231 Id.; see supra note 18.
- 232 Id.; [In re Doe](#), 711 F.2d 1187, 1193 (2d Cir. 1983) (citing 8 John Henry Wigmore, *Treatise on Evidence* § 2285 (McNaughton rev. 1961)); see also [Mattson](#), 178 F. Supp. at 654 (explaining the last criterion of Wigmore's test for the recognition of a privilege); cf. [Bredice v. Doctors Hosp., Inc.](#), 50 F.R.D. 249, 250-51 (D.D.C.1970) (holding committee meetings were subject to a qualified privilege since committee members understood that all communications within the meetings would be confidential).
- 233 [Kientzy](#), 133 F.R.D. at 572; see supra note 18.
- 234 See [N. Ind. Pub. Serv. Co.](#), 347 N.L.R.B. 210, 214 (2006) (citing [Kientzy](#), 133 F.R.D. at 570; [Shabazz v. Scurr](#), 662 F. Supp. 90, 91 (S.D. Iowa 1987)).
- 235 See [Andrea McGrath](#), *The Corporate Ombuds Office: An ADR Tool No Company Should Be Without*, 18 *Hamline J. Pub. L. & Pol'y* 452, 465 (1997); [Kevin L. Wibbenmeyer](#), *Privileged Communications Extended to the Corporate Ombudsman-Employee Relationship via Federal Rule of Evidence 501*, 1991 *J. Disp. Resol.* 367, 379 (1991).
- 236 See [Kientzy](#), 133 F.R.D. at 572; see also supra note 18.
- 237 [Kientzy](#), 133 F.R.D. at 571; see supra note 18.
- 238 E.g., [Acord v. Alyeska Pipeline Service Co.](#), U.S. Dep't of Labor Case No. 95-TSC-4 (October 4, 1995).
- 239 [Carman v. McDonnell Douglas Corp.](#), 114 F.3d 790, 794 (8th Cir. 1997).
- 240 29 U.S.C. § 626(e) (2006); [Carman](#), 114 F.3d at 791.
- 241 Mo. Rev. Stat. § 213.055 (1986); see [Carman](#), 114 F.3d at 791.
- 242 [Carman](#), 114 F.3d at 791.
- 243 Id.
- 244 [Charles L. Howard](#), *The Organizational Ombudsman* 234 (2010). Howard notes that the program in [Carman](#) was the same program from [Kientzy v. McDonnell Douglas Corp.](#), 133 F.R.D. 570 (E.D. Mo. 1991).
- 245 See [Carman](#), 114 F.3d at 793.
- 246 See id.; see also [Miller v. Regents of the Univ. of Colo.](#), No. 98-1012 1999, U.S. App. LEXIS 16712, at \*42 (10th Cir. July 19, 1999) (stating that whether a court recognizes the concept of an ombudsman privilege does not adversely affect the discovery rights of the parties involved, especially when the District Court grants the parties significant leeway with regard to the discovery process).
- 247 See [Carman](#), 114 F.3d at 793, 794.
- 248 Id.
- 249 Id. at 793.
- 250 [McGrath](#), supra note 234, at 465.

- 251 See [Carman](#), 114 F.3d at 791-94.
- 252 *Id.* at 794.
- 253 *Id.*; see [Mattson v. Cuyuna Ore Co.](#), 178 F. Supp. 653 (D. Minn. 1959).
- 254 See [Howard](#), *supra* note 244, at 234.
- 255 See *id.*
- 256 *Id.*
- 257 [Jaffee v. Redmond](#), 518 U.S. 1 (1996).
- 258 *Id.* at 10 (quoting [Trammel v. U.S.](#), 445 U.S. 40, 51 (1980)).
- 259 *Id.* at 4.
- 260 *Id.*
- 261 *Id.*
- 262 *Id.*
- 263 *Id.*
- 264 42 U.S.C. § 1983 (2006).
- 265 740 Ill. Comp. Stat. § 180/1- 2.2 (1995).
- 266 [Jaffee](#), 518 U.S. at 5.
- 267 *Id.*
- 268 *Id.* at 7 (comparing [In re Doe](#), 964 F.2d 1325 (2d Cir. 1992) (recognizing privilege), and [In re Zuniga](#), 714 F.2d 632 (6th Cir. 1983) (recognizing privilege), cert. denied, 464 U.S. 983 (1983), with [United States v. Burtrum](#), 17 F.3d 1299 (10th Cir. 1994) (declining to recognize privilege), cert. denied, 513 U.S. 863 (1994) and [In re Grand Jury Proceedings](#), 867 F.2d 562 (9th Cir. 1989) (declining to recognize privilege), cert. denied sub nom, [Doe v. United States](#), 493 U.S. 906 (1989)).
- 269 *Id.* at 12.
- 270 *Id.* at 11 (quoting [Upjohn Co. v. United States](#), 449 U.S. 383, 389 (1981)) (alteration in original).
- 271 *Id.*
- 272 *Id.* (quoting [Trammel v. United States](#), 445 U.S. 40, 53 (1980)) (internal quotations omitted).
- 273 *Id.*
- 274 *Id.* at 6 (quoting [Jaffee](#), 51 F.3d at 1355-56).
- 275 *Id.*
- 276 [Solorzano v. Shell Chem. Co.](#), No. Civ. A.99-2831, 2000 WL 1145766, at \*1 (E.D. La. Aug. 14, 2000).
- 277 *Id.* at \*6 (quoting [Carman v. McDonnell Douglas Corp.](#), 114 F.3d 790, 794 (8th Cir. 1997)).
- 278 [Solorzano v. Shell Chem. Co.](#), No. 00-31191, 2001 WL 564154, \*1 (5th Cir. May 18, 2001).

FEDERAL PRIVILEGE IN THE OMBUDSMAN'S PROCESS, 8 Charleston L. Rev. 1

---

- 279 Id.
- 280 Id.
- 281 42 U.S.C. § 1981 (2006).
- 282 42 U.S.C. §§ 2000e-2000e-17 (1994).
- 283 29 U.S.C. §§ 621-634 (1999).
- 284 *Solorzano v. Shell Chem. Co.*, No. Civ.A.99-2831, 2000 WL 1145766, at \*1 (E.D. La. Aug. 14, 2000).
- 285 Id. at \*2.
- 286 Id. at \*3.
- 287 Id.
- 288 Id.
- 289 Id.
- 290 Id. at \*5-6; see also *Univ. of Pa. v. Equal Emp't Opportunity Comm'n*, 493 U.S. 182, 189 (1990); *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997).
- 291 See *Solorzano*, 2000 WL 1145766, at \*6 (declining to create privilege for ombudsman since such a recognition would undermine federal interests at stake); see also *Univ. of Pa.*, 493 U.S. at 189 (declining to create privilege against disclosure of peer review materials in Title VII cases); *Carman*, 114 F.3d at 793-94 (declining the creation of ombudsman privilege since a “strong presumption” is required to be overcome involving federal claims).
- 292 *Mattson v. Cuyuna Ore Co.*, 178 F. Supp. 653, 654 n.2 (D. Minn. 1959) (citing 8 John Henry Wigmore, *Treatise on Evidence* § 2285 (3d ed. 1940).
- 293 Fed. R. Evid. 501.
- 294 *Hansen v. Allen Mem'l Hosp.*, 141 F.R.D. 115, 122-23 (S.D. Iowa 1992).
- 295 *Shabazz v. Scurr*, 662 F. Supp. 90, 92 (S.D. Iowa 1987).
- 296 See, e.g., *Roy v. United Techs. Corp.*, Civil H-89-680 (JAC) (D. Conn. May 29, 1990); *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991). For clarification on the status of corporate ombudsman privilege in the Eighth Circuit, see *supra* note 18.
- 297 Howard, *supra* note 244, at 234.
- 298 Wibbenmeyer, *supra* note 235, at 377; see *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 793 (8th Cir. 1997).
- 299 *Carman*, 114 F.3d at 793-94; *Solorzano v. Shell Chem. Co.*, No. Civ. A.99-2831, 2000 WL 1145766, at \*6 (E.D. La. Aug. 14, 2000).
- 300 See *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996).

8 CHARLR 1