



The Paradox of Informal Justice

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ABSTRACT

This article analyzes justice in informal organizational disputes involving rights-based issues by examining campus sexual misconduct and university ombuds. While designed as advocates for fairness and justice, ombuds studied between 2011 and 2014 were found to vary in their interpretation of and adherence to the role's impartiality and independence standards. Many ombuds advocate for specific individuals, outcomes or the institution. Even when acting strictly according to the role's mandates, ombuds paradoxically must make judgments about both outcomes and procedural irregularities. In many instances these judgments are made consistent with law or policy but at other times the judgments are based on personal or organizational preferences. This research demonstrates the paradox of informal justice: In carrying out an informal, impartial, and independent role, organizational ombuds make decisions about what constitutes, and then advocate for, justice. With Title IX rules changing once again to allow the use of informal dispute resolution

mechanisms, now is an excellent opportunity for organizational ombuds to rethink their standards of practice and the division between neutral and advocate.

KEYWORDS

Ombuds, Advocacy, Impartiality, Title IX, Justice, Informality



There is longstanding tension between those critical of formal dispute mechanisms as unresponsive and inefficient and those critical of informal alternatives who believe a focus on interests and common ground undermine legal rights and harms efforts to achieve just outcomes (Edelman et al., 1993). University ombuds and their handling of sexual misconduct complaints provide the backdrop for examining justice in institutional dispute settings. An organizational ombuds is a conflict management mechanism, designed to be independent, impartial, and without decision-making authority, that assists with improving organizational functioning. This study focuses on organizational ombuds at colleges and university, whose main professional association is the International Ombudsman Association (IOA). The IOA Standards of Practice guide the work of organizational ombuds, and include Independence, Neutrality and Impartiality, Confidentiality, and Informality.

Ombuds seek to lessen intra-organizational conflict in ways that are quite different from formal dispute processes. First, ombuds provide confidentiality and anonymity, and do not keep formal records (IOA SoP, 3.1-3.8). Communications to the ombuds do not put the institution on alert and create a legal responsibility to act. Second, ombuds provide information about options and help individuals to make decisions about what to do. By aggregating their visitors complaints and presenting the data anonymously or confidentiality to higher level administrators, ombuds influence system-level changes (Wagner, 2000; IOA SoP, 4.6).

Third, ombuds are impartial and do not advocate for any individual or for the organizational goals (IOA SOP, 2.1-2.6). Ombuds lack the authority to fire or discipline, or to create, enact, or alter procedures (IOA SoP, 4.3). While they are employed by the university and typically report to the president, they are independent and sit outside the formal administrative structure (IOA SoP, 1.1). An ombuds's authority includes the ability to access information, to establish professional relationships with the very top of the organization, to recommend cases to more formal options, and to use problem-solving skills and personal credibility based in charisma and moral authority (McGrath, 1997; IOA SoP, 1.2; 2.3).

Guided by professional standards of practice, best practices, and a code of ethics, organizational ombuds often hear complaints of sexual misconduct. As opposed to ombuds' informality, Title IX Coordinators are the compliance officers tasked with the formal sexual misconduct complaint handling role in schools and colleges nation-wide. Coordinators' authority is based in compliance with the law. Part of the Educational Amendments of 1972, Title IX requires equity in academic and athletics programs and prohibits sexual misconduct. The Department of Education's Office of Civil Rights (OCR) enforces Title IX and issues "Dear Colleague" Letters (DCL) to clarify the law's requirements. The DCL issued on April 4, 2011, while largely reiterating prior guidance, nonetheless dramatically shifted Title IX enforcement by prescribing the knowledge and evidentiary standards and by expanding campus oversight to include misconduct occurring between students both on and off-campus (DCL, 2011).

The 2011-2015 changes in Title IX enforcement were dramatic in nature, but sorely needed due to widespread sexual misconduct and ineffective university responses. An examination of campus responses to sexual misconduct found 54% had no sexual harassment policy, of those with policies 25% did not provide the Title IX Coordinator's contact information, and 40% conducted no trainings regarding their policies (Karjane, Fisher, & Cullen 2002, p. xiii). In 2014, 40% of 300 U.S. colleges and universities surveyed indicated conducting no sexual assault investigations in the previous five years (Marklein & Shesgreen, 2014). The 2011 DCL letter led to increased complaints, intense public scrutiny, and created uncertainty regarding how to comply with the letter's requirements.

The increased OCR oversight had an immense impact on both Title IX Coordinators and ombuds. For Title IX Coordinators, the 2011 Dear Colleague Letter led to dramatic changes and effectively



created a new profession. For ombuds, the changes raised questions about whether informal organizational dispute mechanisms should handle rights-based issues. The heightened focus pressured ombuds to be mandatory reporters, or otherwise assist in avoiding institutional liability and be viewed as sweeping abuses under the rug. Designating ombuds as mandatory reporters violates the central confidentiality tenet of the role and “erodes the purpose” of an ombuds office (Kuchta-Miller, 2015; IOA SoP, 3.1-3.8). By providing a confidential space for visitors to think through their options and by anonymously reporting trends, ombuds help to improve the institutional response to sexual misconduct (Pappas, 2016a). When abused, however, the ombuds function can also help insulate the institution from liability by convincing visitors to forego claims (Reynolds, 2012).

Policies implemented under the Trump administration swung the compliance pendulum in the opposite direction. In 2017 OCR rescinded the 2011 Dear Colleague Letter and 2014 Question & Answers guidance documents, and released a new Questions and Answers document (DCL, 2014; 2017; Q&A, 2017). On November 15, 2018 OCR released a notice of proposed rulemaking and on May 6, 2020 issued a final rule (NPRM; 34 CFR Part 106). The 2020 final rule makes significant changes to Title IX enforcement, including 1) Narrowing the definition of sexual misconduct to require severe *and* persuasive *and* objectively offensive conduct (Summary, p. 1); 2) Limiting investigations to misconduct occurring during educational activities (Summary, p. 2); 3) Requiring live hearings and cross-examination (Summary, p. 6); 4) Allowing institutions to use a higher “clear and convincing” evidentiary standard for providing misconduct (Summary, p. 5), and 5) Allowing universities to limit the number of “mandatory reporters” (Summary, p. 1).

While administrators scramble to revise policies and procedures, sexual misconduct and the university response remain a significant problem. A campus climate survey of 33 schools found nearly one-third of female seniors experienced non-consensual sexual contact during college, and only 30% or less of the most serious incidents are reported (Cantor et al., 2019, p. A7-14, A7-27). Title IX Coordinators inconsistently comply with Title IX by failing to 1) Enforce mandatory reporting requirements, 2) Provide consistent notice to respondents and explain the process to both sides, and 3) Investigate and properly document every complaint (Pappas, 2016b). A 2018 study of calls to campus police and security at 450 institutions of higher education found 32.7% of respondents could not provide the name of the campus Title IX Coordinator (Edwards et al., 2018, p. 7). Currently, there are 305 open federal Title IX investigations against U.S. colleges and universities (Campus Sexual Assault, 11 June, 2020).

Now is an ideal time to re-examine the role of informal organizational mechanisms and their use in handling rights-based complaints. This article studies ombuds and their handling of campus complaints during the first period of regulatory fluctuation (2011-2014) using the lens of multiple literature streams. Ombuds’ actions are found to differ from their stated standards of practice, including advocating for specific individuals and outcomes in order to protect the institution. Ombuds make judgments about both outcomes and procedural irregularities. In many instances these judgments are based on personal or organizational preferences. This article thus demonstrates the paradox of informal justice: In carrying out an informal, impartial, and independent role, organizational ombuds exercise discretion and must make decisions about what constitutes, and then advocate for, justice and fairness.

Campus ombuds provide an essential and unique campus role, separate from formal procedures. Impartiality and informality are complicated standards to observe in rights-based disputes, Ombuds wrestle with issues of substantive and procedural justice, and inevitably experience pressure to formalize their practices. To both protect an essential informal mechanism and to ensure any formalization is intentional, now is the ideal time to re-examine the standards to encourage greater understanding and use of an essential campus role.

LITERATURE REVIEW

The use of informal mechanisms to resolve disputes is driven by multiple factors. “Non-law” dispute mechanisms are preferred for being more private and efficient, less costly, and for providing individuals with greater control and ability to find creative solutions (Abel, 1982; Auerbach, 1983; Ellickson, 1991; Robinson, 2013; McAdams, 1997; Blocher, 2012; Kostrisky, 2013). Many communities and organizations (religious sects, commercial businesses associations, universities) establish non-law dispute systems to resolve disputes without the restrictive formality and strict procedures of the legal system (Auerbach, 1983). Non-law mechanisms include Alternative Dispute Resolution, or the use of neighborhood and court-annexed mediation, and arbitration, which grew out of views regarding the failure of institutionalized justice to effect social change (Abel, 1982).

Today, organizational processes are widely used to handle a variety of conflicts, including allegations of sexual misconduct. Instrumental-rational organization theory (Taylor, 1912[1984]; Weber, 1946) describes how conflict threatens organizational efficiency and effectiveness (Morill & Rudes, 2010; Gray et al., 2007). The neo-institutional literature examines how bureaucratic organizations develop “non-law” offices and processes in response to new laws-- which are often neither self-enforcing nor clear on what constitutes compliance (Edelman, 1990; 1992; Edelman et al., 1999; 2010; 2011; Dobbin and Kelly 2007). Organizations develop informal alternatives to achieve greater efficiency (saving time and money), to maintain control (minimizing negative publicity and liability), and to be like their peers (isomorphic pressures) (Weber, 1978; Blau & Schoenherr, 1971; Meyer & Rowan, 1977; DiMaggio & Powell, 1983; Scott & Meyer, 1983).

In order to be seen as legitimate, organizations adopt internal structures that demonstrate responsiveness to the norms of the external legal environment, which pressures internal dispute processing systems to become more formal (Selznick, 1969; Edelman, 1990; 1992; March & Olson, 1989; 1995). “Non-law” organizational dispute mechanisms fall into formal and informal categories. Title IX Coordinators, with investigative and adjudicative hearing functions that mimic police and court procedures, are framed formally. Ombuds are an alternative type of non-law organizational dispute mechanism, framed informally. Organizations founded ombuds programs to provide an alternative complaint handling mechanism outside of the formal organizational procedures (Gadlin, 2000).

Individuals evaluate the legitimacy of these dispute systems according to the “justice” they receive. Justice can be broadly categorized into distributive (what people receive), procedural (the allocation process), and interactional (interpersonal treatment) elements (Companzano & Ambrose, 2015, p. 3). Distributive justice occurs as individuals make decisions about accepting or rejecting decisions based on the perceived fairness of the proposed outcome and distribution of benefits (Hollander-Blumoff, 2010). Distributive justice in a university setting includes working to ensure equality of access to opportunities and resources. Early ombuds’ writings in the *Journal of California Caucus of College and University Ombudsmen* (1993) defined distributive justice as the mechanisms of determining “who is equal to whom and what the disparate rewards should be for each group...” (Anderson, 1993, p. 11). Former University of Kansas Ombuds Robert Shelton views justice as paramount. He notes ombuds seek to “hold the institution and its officials accountable for adequate protection of ... rights, and for assuring they are extended to persons often excluded from full participation” (Shelton 2011, p. 19). Resolving disputes will “contribute to organizational perceptions of enhanced levels [sic] distributive fairness, in addition to other types of fairness” (Shelton 2011, p. 15).

Ombuds can be seen supporting the distributive “justice” of the entire system by aggregating concerns from individuals unwilling to make formal complaints and sharing the information anonymously with management. Individuals are hesitant to file formal complaints and often do

not act directly and effectively when they see unacceptable behavior due to many factors, including fear they will not appear credible, the potential for loss of relationships, and retaliation (Rowe, 2009; Harrison, 2007). Research indicates a majority of people would not come forward were it not for the confidentiality provided by the ombuds (Harrison, 2007). By aggregating complaints and providing anonymous upward feedback to management, ombuds can serve as a source of norm elaboration, achieve organizational interests in efficiency, and develop systematic improvements in compliance with the law (Sturm & Gadlin, 2007). As a result, “[T]he [O]mbudsman’s activities and interactions are likely to influence perceptions of fairness that go beyond the specific individual relationship at hand” (Avgar, 2011, p. 7-8). IOA Director Charles Howard (2011) argues ombuds hold many roles, including as “an institutional response to curb wrongdoing or unethical behavior, a facilitator of appropriate conduct by both individuals and the organization itself, and an agent for promoting systemic change where necessary” (p. 80-81).

In addition to the distributive outcome achieved, disputants are just as concerned and motivated by the process of how a conflict is resolved (Thibaut & Walker, 1975). Disputants prefer procedures that provide control over the process (i.e. presenting evidence), even if they do not retain control over the outcome (i.e. making the decision) (Thibaut & Walker, 1978). Known as procedural justice, people experience greater satisfaction with the outcome and see it as fair when individual experience fair procedures, such as being given “voice” (Folger, 1977; Folger et al., 1979; Tyler & Blader, 2003). Studies link judgments about procedural fairness to a willingness to accept particular legal decisions, to follow the rules, and to generally comply (Kitzmann & Emery, 1993; Wissler, 1995; Kim & Mauborgne, 1993; Sparks et al., 1995; Tyler, 2006; Paternoster et al., 1997; Creutzfeldt & Bradford, 2016). Factors used to determine procedural fairness include opportunities for voice and the decision maker’s impartiality and trustworthiness (Lind et al., 1990; Hollander-Blumoff & Tyler, 2011). Avgar (2011) describes how ombuds support both distributive and procedural justice: “If the resolution of shop floor individual conflicts and disputes is likely to play a key role in enhancing perceptions of an organization’s distributive fairness, the [O]mbudsman’s coordination-related outcomes go to the core of the procedural dimension of fairness” (p. 13).

Related to procedural justice, interactional justice is whether individuals feel they were treated with courtesy and respect in terms of the quality of interpersonal treatment experienced during the decision procedures (Tyler & Bies, 1990; Bies & Moag, 1986). Where people perceive disrespect, inconsiderate actions, or derogatory judgments, they are less likely to accept the outcome or decision (Colquitt, 2001; Bies, 2001; 2015). Even with minimal procedural and substantive rules, individuals want to be treated with courtesy and respect (Hollander-Blumoff & Tyler, 2011). If conflict is handled in a way that exceeds interactional justice expectations (for example, unexpectedly taking the time to actively listen), trust and commitment are likely to increase (Harrison & Doerfel, 2006). Likewise, violating expectations in a negative way escalates grievances and increases negative evaluations of the organization (Harrison & Doerfel, 2006). Ombuds provide interactional justice, the strongest contributor to maintaining organizational trust and commitment (Colquitt et al., 2001; 2013). In one survey, despite roughly 50% of cases receiving unfavorable outcomes, the majority of students working with the ombuds who did not receive a favorable outcome thought the process was fair and felt renewed trust and commitment toward the organization (Harrison & Doerfel 2006, p. 145-146).

Critics of informal processes argue procedural “voice” and interactional justice can be used negatively for control and manipulation. In essence, informal mechanisms like ombuds can also deliver:

“[A] heady dose of apparently procedural justice...without giving them any “actual” justice... or vilify conflict while overemphasizing, as a normative matter, the importance of getting along ... [resulting in individuals] stripped of formal protections and hidden from



public view, [subject] to the vagaries and predations of coercive corporate and state interests” (Reynolds, 2012, p. 533).

Evidence also indicates the procedural “justice” of formal organizational processes may not provide actual substantive justice. Initially Title VII of the Civil Rights Act of 1964 did not define what compliance with equal opportunity laws required. Organizations created grievance policies and procedures that over time the courts endorsed as being evidence of compliance (Edelman et al., 1999; 2010; 2011). Effectively organizations “constructed” the definition of compliance and their legal environment (Edelman, 1992). The more formal the processes used, the greater the courts’ deference to the organizational structures (Edelman, 1990; 1992; Edelman et al., 2011). Edelman has long argued that this formal mimicry is merely empty symbolism as the processes and procedures do not actually determine whether or not there is true compliance with the law (Edelman 1990; 1992; Edelman, et al. 2011).

Issues of justice impact ombuds, as they frequently must manage both the individuals’ justice expectations and the organizational priorities. Ombuds face pressure to both protect the institution from harm and to advocate for individuals seeking to solve organizational problems. Justice is not a new concept in the ombuds professional literature. While not categorized as the classical or advocate form of ombuds who can conduct formal investigations and make recommendations, organizational ombuds at universities do wrestle with what constitutes justice.

The University and College Ombuds Association (UCOA), which has since merged with the IOA, adopted a statement of ethical principles in 1991 that included a focus on justice. The statement began, “An [O]mbudsperson should be guided by the following principles: objectivity, independence, accessibility, confidentiality and justice; justice is pre-eminent” (Shelton, 2011, p. 19). UCOA’s Ethical principles further argued:

[Ombuds] should be guided by a concern for and commitment to justice. Justice requires that individual interests be carefully balanced with the consideration of the good of the larger academic community. ... (this) commitment to justice should include the understanding of power, identification of the use and misuse of power and authority, and recognition of the need for access to power by the members of the institution (Shelton, 2011, p. 19).

The IOA Standards of Practice do not directly reference justice, but do describe fairness and equity:

The Ombudsman strives for impartiality, fairness, and objectivity in the treatment of people and the consideration of issues. The Ombudsman advocates for fair and equitably administered processes and does not advocate on behalf of any individual within the organization (IOA, SoP, 2.2).

Ombuds are frequently pressured to take sides and give advice. Ombuds often hear “It just isn’t fair” or “This is a real injustice” from their visitors, who are often referred to the ombuds and promised “s/he’ll tell you what to do” (Shelton, 2011, p. 21; Gadlin & Pino, 1997, p. 23). The ombuds must determine what is fair (or at least unfair), and then also must also decide what steps to take in handling the concern (Keashly, 2018; Gadlin & Pino, 1997). IOA Standard of Practice 3.1 states: “The Ombudsman exercises sole discretion over whether or how to act regarding an individual’s concern, a trend, or concern of multiple individuals over time.” Longtime Ombuds Howard Gadlin argues “Discretion means exercising judgment ... the fact that we are not judges does not mean that we do not make judgments” (Gadlin, 2011, p. 40).

Ombuds inherently make “informal” determination of justice. Informal justice occurs where informal dispute resolution actors make determinations regarding the validity of the complaint and what constitutes a process violation (Sebok, 2011). Therein lies the paradox of informal justice: While presumably maintaining their independence and impartiality and making no formal decisions, ombuds still must exercise discretion in determining and then advocating for what is



fair, equitable and just. As Gadlin and Pino note (1997), “The tension between remaining neutral and attempting to correct injustice permeates all the activities of the [O]mbudsperson” (p. 33).

The paradox itself is found directly within the IOA standards. First, ombuds must consider all individuals’ legitimate concerns, which requires they determine what is legitimate (IOA SoP, 2.5). Ombuds must also exercise their discretion to “look into procedural irregularities and /or broader systemic problems when appropriate” (IOA SoP, 4.2). This also requires determining what is irregular or systemic. Ombuds also must make decisions “whether or how to act regarding an individual’s concern, [or] a trend or concerns of multiple individuals over time” (IOA SoP, 1.3). In acting, ombuds may advocate “for fair and equitably administered process[es]” but may “not advocate on behalf of any individual within the organization” (IOA SoP, 2.1-2.2, 2.5). All of this must occur while ombuds maintain their confidentiality requirements (IOA SoP, 3.4-3.5).

The tension between advocacy and impartiality is also not new in the literature. Also referred to as neutrality, Gadlin and Pino (1997) describe it as “the ultimate standard of practice for an [O]mbuds, demanding fairness, objectivity ... and even-handedness despite personal preferences, partisan commitments, previous experiences, and individual subjectivities” (p. 19). As ombuds unavoidably influence people’s experiences and the situation, impartiality is “an elusive goal to which [O]mbuds aspire but only sometimes achieve” (Keashley, 2018; Tompkins-Byer, 2017; Sebok & Chavez Rudolph, 2010, p. 25).

Like anyone, ombuds also hold unconscious preferences and implicit biases that enter into their decision-making and choices when intervening in conflict (Brothers, 2014; Goldberg, 2009). Research indicates ombuds’ perceptions and interpretations of what constitutes “a problem,” is mediated by two factors: 1) How they define and identify the issue and 2) The visitor’s story and what they saw, heard, and felt (Escalante, 2018, p. 79, 86). Ombuds must navigate their own views of what constitutes fairness and correct process, separating what they think should happen from what their visitor wants to happen. Maintaining an open mind is not an easy task, as Ombuds only hear the visitor’s view of the situation unless and until they talk to the other individuals involved.

Despite these challenges, an ombuds’s impartiality is a source of power, providing legitimacy and trust for parties to share information and be open to thinking critically about the conflict, their role, and possible next steps. Ombuds’ views regarding impartiality vary and include pure impartiality, multi-partiality, anonymous reporting, and permitting or encouraging advocacy. Pure impartiality requires the ombuds to advocate for neither side nor for any particular result. Described as non-advocacy, under this view the ombuds should not advocate for anything, including fairness or process (Tompkins-Byer, 2017). Given the existence of implicit biases, pure impartiality may be impossible to realize. In contrast, multi-partiality is defined as the ombuds supporting all parties to the dispute and treating everyone equally (Ulrich, 2013; Sturm & Gadlin, 2007). Given different personalities and situations, both pure impartiality and multi-partiality may perpetuate power and status inequalities given the “objectivity” of bureaucratic processes (Gadlin & Pino, 1997, p. 25).

Many ombuds maintain separation between impartiality and advocacy by only making recommendations when the anonymity of visitors can be maintained. Anonymous reporting is governed by IOA Standard of Practice 4.6: “The Ombudsman identifies trends, issues and concerns about policies and procedures, including potential future issues and concerns, without breaching confidentiality or anonymity, and provides recommendations for responsibly addressing them.” Ombuds who identify problems with policies and procedures are often then asked to participate in the design of new policies. Such work can still compromise or be seen as compromising impartiality when future visitors raise complaints and problems regarding those policies (Gadlin & Pino, 1997, p. 22).



Due to these issues, many ombuds believe advocacy is a necessary part of the work and the IOA standards need to be adapted to reflect the work's reality (Ulrich, 2013; Gadlin, 2011). For many reasons, conflict resolution theorists argue for rethinking the impartiality of a neutral's role (Mayer, 2004, Sturm & Gadlin, 2007; Gadlin, 2011). First, maintaining a clear separation of advocate and neutral role is impossible, when all of a neutral's "interventions have an impact on both process and substance" (Mayer, 2004, p. 203). Second, neutrals who are ineffective advocates cannot serve their disputants, as neutrals often advocate for someone to accept a compromise (Mayer, 2004: p. 203). By embracing a more active advocacy role, Mayer (2004) argues neutrals can have a greater impact and begin to see the social change that attracted so many to the role in the first place.

Ombuds are not the only neutrals to wrestle with issues of judgement, justice, and impartiality. One of the key ways of differentiating formal from informal processes is to examine the neutral's role. In legal settings, a neutral's impartiality operate along a spectrum. with a judge on one end and a transformative mediator at the other. Where a judge in a formal process is tasked with making judgements, transformative mediators in an informal setting are to empower the parties by maximizing their self-determination over both the process and the outcome (Bush & Folger, 2004). In-between these ends are shades of gray and arbitrators, evaluative mediators, and facilitative mediators. Where an Arbitrator serves as a judge in a less formal setting, an evaluative mediator makes suggestions, pressures resolution by evaluating the situation in terms of the law and what the courts might do. A facilitative mediator controls the process and facilitates a conversation to help the parties make their own decisions about the dispute. Within ADR, there are widely varying perspective regarding the "correct" interpretation of a neutral's role and when they may be combined (Pappas, 2015). Each of these roles similarly must wrestle with the different forms of justice, adherence or departure from their respective ethical codes and professional requirements, and the paradox of informal justice.

What differentiates the impartiality of a neutral who is designed to make judgements from a neutral that is not? The Code of Conduct for United States Judges defines impartiality as "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding" (Canon 3.C.1.a). The Code also defines impartiality as avoiding a conflict of interest, such as where the judge served as a lawyer in the matter in controversy, is related to the individuals involved, or holds a financial interest in the subject matter (Code 3.C.1.b-d). While the Model Standards of Conduct for Mediators echoes many of the above issues, a mediator's impartiality is more complicated (Standard II). Commenters favoring facilitative mediation advocate for a higher level of impartiality. For example, in order to maintain their impartiality, mediators should not have the authority or responsibility to determine the fairness of any particular outcome (Mayer, 2012). Mediators should also avoid supporting any party and avoid influencing the outcome without the parties' consent (Roberts & Palmer, 2005). On the other hand, commenters favoring evaluative mediation view the mediator's role as to safeguard against injustice and ensure the final agreement is fair (Susskind, 1981). The mediator must balance too much intervention, which hinders party self-determination, with too little intervention, which creates an uneven balance of power (Coben, 2004). Intervention in the evaluative framework may be necessary to clarify a legal issue, ensure accurate advice has been given to the parties, and to intervene if negotiations are not conducted in good faith (Haynes & Charlesworth, 1996).

There are fierce debates about the proper role of a mediator, but ombuds can be differentiated from other neutrals in that they are not formulated solely as a dispute resolution mechanism. Where an evaluative mediator can advocate for specific solutions or outcomes, the mediator is not a part of the community impacted by the result. Ombuds typically operate within an organizational environment in which they are also members of the community, and may interact with the parties again in the future. Ombuds can also be differentiated from mediators in that

ombuds do not only handle issues once they become named disputes (Felstiner, Abel, & Sarat, 1981). Ombuds are also similar to mediators in that there are different ways to think about the role: Many hold themselves to a higher standard of impartiality and independence where others believe advocacy and justice are a key part of their roles. This article examines where those interpretations intersect. With multiple aspects to justice, multiple standards, and a complicated institutional environment, ombuds face difficult decisions when determining when to and how to intervene on rights-based issues.

Burgess and Burgess (1996) describe the justice dilemma and the tradeoff between impartiality and advocacy:

[I]n cases where power is inequitably distributed, neutral intervention often simply sugar-coats the domination of one group by another, leading to an unjust result. In response to this problem, the dispute resolution field has struggled to find a way to add empowerment responsibilities to the role of the neutral intervener. Unfortunately, as the neutral's empowerment efforts expand, his or her ability to successfully carry out the neutral role diminishes (p. 226).

Burgess and Burgess thus describe an additional aspect to the Paradox of Informal Justice: The very standards that provide the influence an ombuds needs to be effective in the role (impartiality, independence, informality, and confidentiality) also limit an ombuds's ability to realize and deliver impactful results. Using the frame of campus sexual misconduct, this article adds to the conflict management literature by analyzing the paradoxical nature of justice in informal settings, and explores how organizational complaint handlers navigate the tension between advocacy and impartiality.

METHODOLOGY

This study examines a period of turbulent policy change and investigates ombuds' avowed Standards of Practice versus their actions when handling campus sexual misconduct allegations. Data collected from 2011-2014 included interviews of fourteen ombuds and thirteen Title IX Coordinators from twenty-two large colleges and universities. Open-ended interviews, content analysis, and a review of twelve-hundred documents provide the basis for examining the work of campus-based organizational ombuds.

The study's population, numbered 41 institutions, was limited in several ways. First, all universities' athletics departments are NCAA Division I members, and as athletic departments often wrestle with Title IX compliance, this ensures the participants all face a certain level of complexity. Second, all universities utilized a centralized Title IX office with deputy coordinators. Third, all universities employed an ombuds practicing to the IOA Standards of Practice and providing informal services to faculty, staff, and students impacted by sexual misconduct. This essential restriction distinguished between the formal (Title IX) and informal (ombuds) dispute handling mechanisms. It was sufficient for an ombuds's website to note practicing to the IOA Standards of Practice or mention the core standards of informality, independence, impartiality, and confidentiality. To further distinguish ombuds in "name only" and ensure any deviations from the Standards of Practice are informal rather than official, the population was limited to ombuds who did not serve as institutional agents capable of receiving "notice." Likewise, institutions with ombuds serving in dual roles that included a significant management oversight function (inherently able to receive notice) were also excluded from the population.

The resulting sample numbered twenty-two institutions with 13 participating Title IX Coordinators (31.7 percent of the population). None of the 14 participating ombuds (34.1 percent of the population) served as agents of notice but one ombuds was required to report sexual misconduct by institutional rule. Concerns regarding confidentiality restricted the sample size in number but



not in geography: Five worked at universities in the West, seven in the Midwest, six in the South, and four in the East. Twenty of the twenty-two institutions are public doctoral-level universities. Of the 14 ombuds, 6 are female, 8 are male, 3 are African-American, 10 are Caucasian, and 1 is Hispanic.

The small sample size limits the ability to generalize the results to the entire population of ombuds. The sample is not skewed in any obvious ways and I believe the participants are likely more typical than unique. Participants included a range of levels of experience, from those new in the role to seasoned, long-serving ombuds. The Participants described a wide range of misconduct complaints and included both uncontroversial, low-level situations and high level situations involving egregious abuses.

Data collection included two to three phone interviews per subject and lasted anywhere from 1.5-3 hours. The interviews included a pre-determined list of questions to learn basic information about the individual, their role, and their institution. Questioning often reveals socially and organizationally acceptable answers with ombuds defaulting to their informal orientation when describing the role's basic purpose (Maynard-Moody & Musheno, 2003, p. 29) The participants also shared (and determined the definition of) three narratives: positive, negative, and most recent. Over 100 narratives were collected and data collection ended once a saturation point of no differentiating information emerged from an iterative transcribing, coding, interpreting, and interviewing process (Green & Thorogood, 2004; Gaskell, 2000).

Using narrative inquiry, common elements and themes emerged (Polkinghorne, 1995, p. 12; Clandinin & Connelly, 2000; Chase, 2005; Stake, 2006; Jones et al., 2014). To encourage participation, the use of the narratives is restricted to maintain the anonymity of all individuals, institutions, and events. Quotes from the narratives are used to support the findings and interpretations without detailing specific situations. Changing the narrative's details (i.e. gender or academic department) of very particular circumstances proved insufficient for providing anonymity and often impacted the resulting interpretation. In determining themes, both the depth and the frequency of statements were important. Data analysis also incorporated a review of twelve-hundred Title IX, ombuds, and university sexual misconduct documents, including news articles, judicial opinions, laws, government policies, professional standards and best practices, and university policies. In total, the data analyzed enabled a robust analysis of ombuds and how they navigate complex institutional environments undergoing dramatic changes in policy (Carvalho, 2014; Blomgren & Waks, 2015).

FINDINGS

Every ombuds participating in this study worked in an office designed to comply with the IOA standards of practice. Either the ombuds's website directly stated the office practiced to the IOA Standards, or the website listed the impartiality, confidentiality, informality, and independence standards without mentioning the IOA. In practice, however, ombuds varied from complete adherence to non-compliance with the IOA Standards. Complying ombuds described how their practices remained consistent with the standards. For example, an ombuds described their independence:

[I]f this office had a reputation of being an agent for the institution [no one would utilize our services] because this community is small enough that word [would] get out that you can't go to that office because they are in bed with the administration... (O12A59:15).

Another ombuds described exercising restraint in order to protect the impartiality standard:



I never tell anyone what to do because I think that impedes impartiality, but what we do is talk about options and then it's up to the individual to decide what options work best for that person (O12A59:8).

Just as frequently, ombuds stated practicing consistently with the standards but then described violating the standards in the narratives they shared. For example, here an ombuds explained their role to visitors: “[I] try to help them solve the problem and not be their advocate, per se” (O9A53:33). Yet in a situation involving a visitor in a conflict with a department chair, the ombuds described advocating on the visitor’s behalf:

I spoke on [the visitors’] behalf and then said [to them] ‘[L]ook, I can go back and talk to [the chair] again, but I can’t change his mind... and the Dean is not interested in removing him as chair so you really don’t have any options.’ The visitors were very unhappy and so I said ‘I’ll talk with them again, but I don’t think it will change anything.’ I think that led them to complain about me but there was nothing else I could do (O9B54:18).

Another ombuds noted the importance of the impartiality and independence standards: ombuds “can influence how a decision is made if they’re asking the right questions and they’re asking from a place of non-identification with the organization. You’re going to have a fresh perspective ... [t]hat’s our real power, our ability to be independent and ... take it up to the highest office within the organization and there’s no office in between” (O1A8:15). In describing a specific decision, however, the same ombuds described crossing the independence and impartiality lines:

Sometimes I have to make an executive decision. If something [is] going to do significant damage to the institution I might decide to [go forward] with that information. But I have to be careful because people didn’t give me express permission to go forward [and so] I [do it] because I weigh [the situation] and I [conclude] ‘you know, this office needs to be aware of this, it may cause significant damage to the institution.’ [P]art of my job as an Ombudsman is to give decision makers a head’s up (O1A8:32-35).

Many ombuds described their role as empowering visitors to solve their own problems. An ombuds described their visitors’ disappointment when “I don’t leap into the effort to solve their problems but help them explore things that they can do to solve their own problems, with the understanding that this is part of what it means to take responsibility for your adult life” (O4A22:19). The same ombuds also described a situation in which he advocated repeatedly for a reasonable accommodation for a visitor: “The trick is often in finding what reasonable means in terms of reasonable accommodation [and after I made the third try for the visitor] I decided it was not in the realm of reasonable” (O4B23:14).

What differentiates ombuds who practice to the IOA Standards in both theory and practice from those that appear to deviate in practice? Many ombuds described their role as being impartial towards individuals and the institution, but as partial advocates for fairness and equity. One ombuds noted, “[Y]ou don’t identify with the institution, you identify with equity, fairness, [and] just asking practical questions” (O1A8:6). Other ombuds echoed this view, with one noting, “I’m impartial, which means we’re not an advocate for any side but we are an advocate for fair process” (O14B64:48). Another ombuds stated, “[W]e can be advocates for fairness...if we see a policy or procedure has been violated, we can certainly become an advocate for fixing that” (O9B54:35). Advocating for fairness requires determining whether something is unfair, a difficult task when the role’s informality standard does not allow for formal investigations (IOA Standard 4.3). Ombuds routinely described making determinations of policy violations in interviews, with one noting, “A lot of times we have to check the policies and get information on what policies are and try to make sure whether anything has actually been violated. That’s really the first step (O9A53:16-32). Other ombuds also described their effort to determine whether an issue requires their attention:



[The visitor] came in with [a] conclusionary [sic] statement...but I wanted to probe some more to get more factual stuff...and I never got to all of that because she wanted something that she wasn't getting from me. I ...felt uneasy [when the visitor left suddenly] because I wanted to know more so that I [could] really comfortably conclude that it really was not in violation of university policy (O7B38:13).

I explain to them that my job is to sift through what you share with me or what is a legitimate concern, a concern that really needs to be addressed and attended to, and that gives me something to have a conversation about and around, and I say, 'this is where I can be an advocate' (O1B9:25).

[S]ometimes you figure out 'How far do I dig, and when do I stop?' You know...where [do] I have enough information to know what really happened and proceed without making the student feel uncomfortable... (O6B35:39).

Paradoxically, while serving as an impartial organizational mechanism that does not make judgments, ombuds nonetheless must make decisions as they determine whether there are procedural or equity violations. Indeed, IOA Standard of Practice 2.5 indicates "The Ombudsman has a responsibility to consider the legitimate concerns and interests of all individuals affected by the matter under consideration." Further, IOA Standard of Practice 4.2 describes how the ombuds may "look into procedural irregularities and/or broader systemic problems when appropriate." As a result, ombuds must determine what constitutes a legitimate concern, a procedural irregularity, or a broader systemic problem. The ombuds also must make decisions about when it is appropriate to intervene and how to do so. In navigating these decisions, the line between being a visitor's advocate in a specific instance versus an impartial neutral improving organizational processes blurs considerably. An ombuds explained how they try to explain the difference between advocating for the visitor versus advocating for fairness and equity:

I tell the visitor '[I]f your concern has legitimacy and something was done where it wasn't fair or it wasn't equitable, and we have...concrete proof, we're going to be an advocate for fairness and equity.' That's not saying we're going to be their advocate, we're going to be an advocate for...fairness...we're going to be very fierce [about] being an advocate for those principles (O1A8:19).

In order to determine whether a policy violation occurred often requires an ombuds to act quite formally in gathering information:

There is a formal intake process. The student...comes to my office and [fills out] intake forms.... Basically their basic information. We...ask them what the [type] of complaint [it is], academic, judicial, which department, which faculty person, was it personal, was it a hostile evasion...we have many things for them to fill in. ... I [also] ask them to first sign a waiver ... giving me permission to talk to particular people or offices about their situation (O5A28:16-24).

Typically what happens is I ask them to do an intake form, like I said either that's done online or via paper, and then on that intake form I ask them for demographic information as well as their college, if they've spoken to anybody before about this situation, what has been the process that they've taken to resolve. I ask those questions because I want to have an idea of how many people know about the case, who can I contact, am I starting from scratch, have they already been told no and they're coming to me to try to find yes, that gives me that sort of information (O6A34:31).

[W]hen a student [comes] in to see me it might sound like it's investigation work but it's very informal inquiries that are really pre-emptive types of information. In other words ... someone might [say] ... 'I suspect such and such is the case but I don't want to file a complaint if I might be wrong about that but ... could [you] look into that?' It'd be real easy



for an ombudsman to walk into [the appropriate] office and figure out whether/if this grant got submitted [and if it] was plagiarized. ... [the visitor asks] '[I]f it was and if it is then I'm going to file a formal complaint, if you could find out that information for me' (O13A61:38).

Once the ombuds determines whether there is a policy violation or an issue of fairness or equity, the next step is deciding what to do with the information. How do ombuds intervene while preserving the informality, impartiality, independence, and confidentiality standards that guide the role? Many ombuds interviewed practice closely the standards, but it requires taking a less direct role. For example:

I rarely, in less than one percent of cases, will contact someone, and here is why: The act of contacting someone on campus on behalf of a consultee...inevitably engenders a perception of advocacy and/or constitutes legally an investigation...[a]nd neither of those is consistent with the standards of practice of our profession (O10A55:20).

I would not report...without their permission, nor would I name the individual about whom a complaint has been made multiple times... I'd use...the generic option...[of] going to an administrator with responsibility over the alleged harasser, and suggest that some sort of training effort might be advantageous for the entire unit. But I think it's important that ombuds remain neutral and not be in[a] leading the lynch mob kind of role (O2A17:19-22).

When describing the role, nearly all ombuds described their authority as the power of persuasion: "[T]he only power you have is what you can convince people to see or do" (O954:38). In practice, however many ombuds take a more active approach that can range from acting as a mediator to directly enforcing policy. One ombuds described what could be described as an evaluative mediator's role in working with faculty and students:

I tell [faculty] '[I]f a student has a disagreement with your syllabus...they will come to me [and] I will contact you and ask you for some information to either help the student understand why you're making the decision, or I'll try to convince you that the student has a legitimate concern and try to get you to see their point and solve the issue satisfactorily their way' (O5A28:6).

Other ombuds described assuming a policy enforcement role: "For many offices [I resolve any issues] because ... their perspective is: '[J]ust let us know what you want us to do and that's what we'll do'" (O6B35:18). Another ombuds described working their way up the administrative chain to enforce policies:

[If a policy has been violated] I will try to get the person's permission to take it forward and if I get that permission we'll try to talk to the offending person and see if there was a mistake made and if they want to correct. And if they don't want to correct that and we think that it was a violation of policy and we give them an opportunity to make it right and they don't, then we'll probably go onto their supervisor and work our way up the chain (O9A53:43).

When ombuds act as an advocate for equity or fairness, those actions impact perceptions of impartiality and independence. Often ombuds' actions are viewed as enforcing policy or advocating specifically for the visitor. For example:

A visitor will come to us [and] say 'I have a problem with this person, will you contact them,' and a very common misconception when we make the call is for that person to feel that we're calling because they're in trouble...[for them] it feels like we are coming out of the blue. We've been likened to being the principal's office and they're getting called to the principal's office and we have to say to them '[W]e're not making a judgment about what's happened here. We don't know. We're telling you that we've been given permission to talk to you to get information from you to see if we can better understand what can help resolve the problem.' So that's a very common misconception (O14A63:74).



Another ombuds stated, “The problem I [have is that] faculty automatically assume when I call them [that] I am siding with the student, which isn’t true (O5A28:1). Ombuds frequently noted the greatest misperception about their role is that “we’re advocates for [the visitors] personally” (O9A53:28). Ombuds often perpetuate the perception of advocacy as they work to help their visitors. For example, here ombuds described statements to visitors that indicate personal advocacy:

[Following our discussion] I will have to speak with [the administrator]. It’s still up to them to make the final decision, however I will share your concerns and hopefully have a discussion that will allow them to understand your side. Then it’s...up to them to determine what the decision will be (O6B35:13).

I talked to the people involved and this is the answer we're getting and I can't make them do what you want them to do. We have to live with this. There isn't any other option (O14B64:48).

Further, perceptions of what constitutes “fairness” differ depending on the individual’s perspective, as noted by one ombuds:

Impartiality is tricky because...people...have their own [definition] of fairness and equity and if your [definition] and theirs don’t align, and you’re still fighting for the fairness, then [the other side will] say ‘[Y]ou’re being their advocate because you’re not letting this go (O1C10:25).

Fundamentally, it is very difficult to maintain the informality, impartiality, and independence standards, illuminated by one ombuds’s experience attending hearings:

I used to go to hearings as a neutral non-participating observer. People would say ‘[T]here are going to be three or four people on the other side of the table and I’m all alone[at the disciplinary hearing], will you come along just so I have someone there? I used to go, and say ‘As the ombudsman I am a neutral party. My presence here should not be construed as support to any particular person or position in this matter.’ I was out at one such employee hearing and I stood up to say my introduction and before I could even finish, the hearing officer told me to ‘shut up and sit down, we know who you’re here for!’ I was stunned. I shut up and sat down, it was his hearing. But I never went to another hearing because it occurred to me, that what stunned me was of course, the assumption’s going to be made that it was the employee who asked me to go there and that I am there in support, at least morally, of that employee. [First] that’s not going to be perceived as neutral, [second] It was wrong...the perceptions engendered from such activities are very risky when it comes to the standards of practice...and I quit doing it (O10A55:25).

Ombuds closely practicing to the IOA Standards remain vigilant regarding others’ perceptions of their actions. Ombuds who are less vigilant often directly advocate for their visitors’ preferred outcomes and feel bad when they are not successful . For example:

Personally speaking, I feel very bad when I’m not able to give them the outcome they’re looking for [and] I tell them upfront...we will try to help you resolve things in your best interests but sometimes that may not be the case (O5B29:18).

Many ombuds advocate for their visitors based on the individual’s specific circumstances, including whether or not the visitor made a good faith effort:

I would be more likely to get involved if the person has made legitimate, good faith efforts to solve the problem on their own. If the first two or three steps I would suggest are steps that they’ve already taken, then I might be more likely to take the fourth and fifth step to move this along. I also think I would be more likely to try if they were just so completely



beaten by the experience and it would be somehow cruel to send them back out to try again without giving them something to work with, to work from (O4B23:34).

I always ask the student first '[O]kay, can I talk to this person about this? While you're sitting here can I make this phone call on your behalf?' They have the right to say 'No, I'll do it myself' but [rarely do they object] then I'll [call the other office and] say 'okay, I'm going to send the student over to you, here's the situation, see what you can do for them.' And maybe in that case I am acting as an advocate...But I have about four or five students a semester walking in who when you get into it [the issue is] really because of an issue at home, their parents have thrown them out, their mother's a drug addict, their father's abusive, something like that (O3A21:39).

Frequently, ombuds assist by coaching visitors on how to better advocate for themselves.

Coaching occurs in various ways, from indirect questioning to providing direct instructions:

I will arm them, I will say 'In order to get the answer to that question you need to talk to so and so, here's that person's number, here's the kind of approach that works best with that person, here's how to frame the question' (O10A55:21).

It is amazing how many students come in and I'll role-play with them. [I will say] 'You need to talk to your professor about this. What are you going to say?' And they come out with something that is so adversarial that it's like 'okay, what do you think that's going to do?' Twice this week at least I went online when a student was sitting here, went to a website listing elements of a good apology – and printed it off for them and said 'Here, read this.' I'll try to work with them on how to ask and who to ask and how likely it is that they will get the response they want ... [I]f I have somebody here that needs it I might even outline it for them on a piece of paper and say 'Here it is, this is what you need to do' (O3A21:34-38).

While many ombuds coach or directly advocate for their visitors, other ombuds work to further institutional goals, including working to minimize lawsuits and avoid negative publicity:

[My goal] is to resolve problems at the lowest level...[O]rganizations prefer that issues [are] resolved at the lowest possible level to minimize lawsuits or people going to the press and saying not so nice things about people within the organization. Prevention is something that's valued...they don't say it, but I think it's an expectation that [the administration] would like us to prevent problems that are sensitive from going outside the organization. Decision makers prefer that [issues like that] are contained and dealt with accordingly (O1A8:23-25).

Ombuds are also limited by institutional norms and preferences that favor certain groups above others. One ombuds stated it most succinctly: "No, we don't get involved in grade disputes [because] [w]e're not going to interject ourselves into...second guessing a faculty member... who are above reproach here, as they are at many institutions" (O7A37:59).

In addition to visitors' and institutional goals, ombuds also act to further objectives that are important to them. One ombuds noted, "I really see my role as a retention role. That's a big part of it" (O3A21:60). Another ombuds also described a focus on student retention and support:

To be honest my favorite part [of my work is] challenging the faculty. The faculty has somewhat [of a] privileged mentality. They act as if the sun rises and sets on [them], and their particular course is the only course of value at the institution. [O]ur faculty needs to be more flexible in how they teach [and in] understanding...the complex issues facing the



students...if retention and graduation is important then providing the support to the students to be able to do that is part of what should be part of the mission (O5A28:41).

The most frequently stated ombuds goal is to maintain the administration's support for the ombuds office:

"[Y]ou still have to keep finding support for your office, because when people leave that are in the administration and they're replaced by people who may not have the understanding or appreciation for the office, you have to get in their good graces, so it's kind of a constant process" (O1A8:106).

Ombuds often try to influence the administration's perceptions of their efforts, and thus become invested in the outcome of an issue:

I did not want to see [the visitor] write [a] letter that was flaming and threatening and that kind of stuff... if somebody sends a very vitriolic letter will [the administration] look at it and [think] 'this is kind of a waste of time ...' and reflect on the ombuds office and think 'Aren't you supposed to keep these kinds of disputes away for me, and not necessarily bring them to me?' ... I am unneutral about the outcome of whatever happens here ... I have now become, I think, somewhat invested in the process going well... (O2B18:9).

Maintaining administrative support typically requires solving problems, and ombuds frequently described wanting to efficiently handle issues:

[My initial goal]... I'm hoping number one to make it our last meeting! So my goal in any session is to basically short circuit all the other stuff ...affirming their feelings, their emotions, whatever, but [at] some point while we're doing the affirmation... [we need to] get to the point of saying 'this is the bottom line. These are your options, these are the things that can be tackled in terms of trying to address this issue' (O11A57:27-28).

Ombuds also discussed challenging individuals in order to encourage and facilitate resolution:

[F]or the [people] that are a little more crafty, the ones that wanted to not compromise and get everything that they wanted at the expense of someone else, that's when I realized 'you're really going to have to develop your game in order to, in a respectful way, to challenge those kinds of personalities.' So now I...[p]ut them on the ropes, [and] don't let them off as the saying goes (O1C10:28).

In order to solve problems, ombuds work in various ways to manage their visitors' expectations.

One ombuds described what they say to their visitors:

I need you to understand [my three values]: [First] given my role as an ombudsman, I value the collaborative process. [T]he [s]econd value is compromise,' and then on the tail end of compromise [is] sacrifice, and then I also say 'I need everybody involved to be adult and mature (O1C10:26).

Another ombuds noted their standard warning as a means of providing a realistic picture of what is possible:

'This is what we call a faculty governed university. What that means is that the faculty run the show, they have the power. 'Many times when students or clients have concerns or problems, they go immediately to the Chancellor or the President or the Provost, thinking they can resolve it. In reality, those individuals actually work at the behest of the faculty. ... So I lay [it] out to them very clearly that that's what they're up against [and to avoid] any illusions that it's something other than what it is, because it isn't (O11A57:29).

Given the need to maintain administrative support, ombuds struggle with whether, how and when to pursue and fairness and equity. The following ombuds described it most clearly:



Sometimes as an ombudsman...you have to ask yourself '[I]f I'm going to be pursuing justice for justice's sake, and it's barbed with so many politics, [should I] pursue it or wait for the [correct] timing?' Like that old saying, 'fools rush in' I think sometimes you have to be smart about how you fight for fairness and justice. Sometimes I'll tell [visitors] wanting fairness and equity, '[L]et's look at the landscape...at the players...at the politics...at what can change, what might change, and what's not going to change.' And they say, 'but you advocate for fairness and equity' and I say 'absolutely, and the reality is what it is, the justice you're seeking, in the form...in the timing of the justice...may not happen [and] it goes back to being realistic and not idealistic...' [As an ombuds] you don't want to throw yourself on the sword seeking justice (O1A8:55).

Questions of advocacy, impartiality, and fairness are particularly challenging when rights-based issues such as sexual misconduct are involved. For ombuds adhering to the IOA Standards, dealing with sexual misconduct is the toughest part of the job, as the following ombuds described:

The hardest part of this job is knowing that in the next year or two there will be another one of [the faculty member's] victims in my office, and there's an innocent person out there who may not be in the program yet who's going to be victimized...if somebody doesn't stand up and stop it. The only people that have...[the] standing to do that is a victim. I will tell people, '[I]f you choose to leave...you'll be out from under this person's control, please consider writing down your experiences and sending them to the dean or appropriate individual so that some kind of record exists'...but frankly, that almost never happens...[T]hey want to start a new chapter in their life and put this behind them... But yeah, my preference is that these people stand up to these victimizers and call them out for what they are and put them and the people responsible for their behavior on notice so that we can reduce the chances of future innocent victims. Do I ever make a consultee aware that that's my preference? Absolutely not. That would not be being neutral on my part (O10B56:22).

Ombuds handling sexual misconduct issues also make judgements about the legitimacy of their visitors' complaints. Multiple ombuds described helping their visitors to understand what constituted discrimination and what did not:

A lot of what comes in here talking about discrimination is really just I've been treated badly or I've been treated unfairly. It really isn't discrimination... A lot of times...I'll wind up educating people about what discrimination really is...that it's not just rudeness and incivility and disdain for people (O9B54:16-21).

It never even crossed [the visitor's] mind that it was sexual harassment and one of the roles we play for students is that we've labeled the behavior for them. They come in and they describe and we say, 'You know that sounds like sexual harassment,' they go 'Really?' (O14B64:33).

Ombuds use multiple strategies for handling sexual misconduct complaints, including convincing visitors to report the information to the Title IX Coordinator:

[W]e do listen to sexual harassment complaints, but we always try, if we think there is any legitimacy to them, even if we don't think there is, we offer the option of walking those people to the [formal] office. O9A53:16

Certainly if I think [a case] should be going through the [Title IX Coordinator] I would send them over there... (O8A51:34).

Any time I've dealt with [sexual misconduct] I've worked to get [the individual] to the [Title IX Coordinator] and file a complaint (O3A21:21).



Many ombuds attempt to convince visitors to come forward but would not do anything to violate their visitors' confidentiality:

I would hope that I could be persuasive enough with one or more of the victims here that would put them in a place where they would be willing to speak to our Title IX coordinators or the police to go ahead and file reports about that or request a release from their confidentiality promise so I could do something on their behalf. I really do, again, think that it is a critical part of the service that I offer that it is confidential and would really protect that value, even at the risk of some others (O4A22:28).

Sexual harassment, you don't peck at numbers [and say] 'it's just one.' ... [I]f I [do not have permission, and I] have to maintain... anonymity, I'm never going to be able to go forward [because] the situations are too unique. It's really...99.9% of the time, all I can do is try to work with my visitor to try to see if there's a way that they're comfortable going forward themselves...I just feel like that person is very vulnerable and I can't do anything to endanger them. It really ties my hands... I don't think I've ever been in a situation where I felt I could provide enough anonymity for my visitors that I could go forward with those issues. O14A63:39-48-49

Other ombuds are more willing to make sure the individual makes the report, even if it means going against the IOA Standards of Practice:

[I would say to the visitor]: '[O]kay, so you're not willing to do this, can you allow me to, in an indirect way, go to the department chair and say '[Y]ou need to go to the [Title IX Coordinator] and let them know that there are allegations that this faculty member is engaging in this kind of behavior?' Kind of going in an indirect way. Another ombuds told me that we would never do nothing, we would keep moving forward until this thing got addressed. That would be my commitment. I would do whatever it would take (O7A37:35).

[After learning about the various options] the visitor wanted to have a meeting with our Title IX coordinator and...we all met together. Once the visitor started telling what happened, she was putting the organization on notice, saying that there was sexual harassment. I was part of that. Our professional association, IOA, does not approve of that, but I am willing to do whatever it takes to get one of these cases to come forward (O14A63:43).

Sometimes ombuds, on their own accord, go directly to the Title IX Coordinator. Title IX Coordinators interviewed also indicated receiving assistance from ombuds, with one noting, "I didn't know who and I didn't know what exactly...[T]hen the Ombuds came to me and gave me the who and the what and I took it from there" (T11A45:60). Many ombuds are willing to partner with the Title IX Coordinator or their staff on sexual misconduct issues. One ombuds stated, "[I]f the Title IX Coordinator said to me, 'I'd like your help in dealing with this' I would do it because the Title IX Coordinator is a party to the situation" (O14B64:27). Another ombuds described sharing information with the Title IX staff to help them execute their role:

The Title IX Coordinator is an attorney...[who] takes a very legalistic approach... [and] is not one of the people that I can go to and say 'have you been hearing things about [this] department? What's going on over there? Have we got a faculty member losing it over there? Do we need as an institution to think about stepping in and doing something over there? Would it help if I went and talked with the chair or you went and talked with the chair?' [There are a few staff members in these offices] with whom I have a relationship like that...[but their bosses] don't know it. [The staff] trust me and know that I won't out them and need my input, because what's happening in the classroom is very useful for



[them], who then based on what I have heard from students about this faculty member[can take action] (O10A55:28).

Many ombuds do not have the ability to follow the IOA Standards as many universities require the ombuds to report any known instances of sexual misconduct, impacting both the IOA independence and confidentiality standards. Ombuds described the resulting impact on their independence:

[E]ven though we're supposed to be independent, we're not independent, because we are required to be involved with Title IX Compliance. I have to coexist with the offices with responsibility for compliance, and if I don't [I am] out of here (O7A37:25).

I could not use the word 'harassment' [in my annual report] because from [the administration's] perspective, if anything fell under 'harassment' then it would have been bumped to the [formal office] and it would have been illegal, not something that I could deal with... Of course you and I both know that in most cases the harassment was not illegal, and yes of course I did deal with them, but I didn't mark them that way... you've got to go with [what] each organization and general counsel feels comfortable with... (O8A51:17).

Many ombuds under these restrictions described acting only with Title IX Coordinator approval: "[W]e used to have the option to resolve [issues of sexual harassment] informally, which of course is what we do as an office. Now, we cannot do that without asking permission from the Title IX Coordinator" (O14B64:29).

Ombuds also intervene and advocate for their visitors. For example: Tomorrow I'm going in to meet with [a] supervisor who is totally behind an employee...being accused...of very serious behavior, probably emotional abuse, and I think workplace bullying. How am I going to convince that person to look into the situation, take it seriously, and figure out what's going to be done? That's really hard (O14A63:77).

Other ombuds described what they say to try to convince an administrator to act:

[L]ook, over the last [number of] years I've had [a number of] different people come to me and tell me this general kind of story about [this faculty member's] behavior...Now I don't do investigations, I don't apply lie detector tests, but [those numbers of people] telling me an almost identical pattern of behavior...? I am concerned and I hope that you are too... [S]ooner or later one of these people is going to take one of the formal options I'm [telling] them [about] and [that will result in] an investigation, embarrassment, and hassle that could be avoided if this...behavior were to be altered. So whether there's any truth to these allegations or not, and I'm not saying there is, I'm just saying that even if they're all made up, my job is to tell [the visitors] that one of their options is to go to the [formal] office and file a charge and ultimately to the [government]...and [that will result in] federal investigators poking around...and I assume that you would prefer to avoid that. So I just thought you'd want to know (O10B56:31).

Just as in other situations, ombuds working on sexual misconduct issues also advocate for their own goals. Ombuds specifically expressed their preferences for using informal rather than formal dispute systems. For example:

I [have] never...reported something [to send it through a] grievance procedure [because I have] never seen anybody win their case. I don't want to say that I deter people from [formal options], what I do is I'd recommend that they talk to the [formal personnel] confidentially to get a feel for what that process might be like, and then decide if that's something that they'll want to do or if it's something that I can help them out with. [Right



now the formal process is]...a system of frustration for students and staff and faculty to utilize [as] I've never seen any[one] [win a case against a victimizer] (O8A51:40).

In conclusion, there are variations among ombuds in how they navigate the IOA Standards of Practice. The Paradox of Informal Justice impacts them all- in the course of the work ombuds make judgments about whether something violates policies or principles of fairness and whether and how to act in response. While in practice all ombuds interviewed work in offices structured to practice to the standards, in reality principles of fairness or equity frequently blur with advocacy for specific individuals and their preferred outcomes or for institutional goals like minimizing liability or negative publicity. Often these goals overlap, and the distinction is less obvious as ombuds assist visitors to be better advocates for themselves, or advocate for the principles of fairness that impact both their visitors and the institution. Complicating the equation, ombuds also advocate for their own interests and are very conscious of how their actions impact the reputation and efficacy of their office. As a result, Ombuds vary in how they make advocacy versus impartiality decisions. The calculation is especially heightened when handling rights-based issues like sexual misconduct, where advocacy often requires revealing confidential information. This study indicates ombuds' interpretation of the IOA standards impact how they effectuate their roles. The study raises important questions regarding the role of informal mechanisms for handling rights-based issues. In the next section, this paper discusses the implications of the paradox on the ombuds role and recommends re-evaluating the standards to provide greater clarity.

DISCUSSION

This study examines a fundamental tension within the ombuds role, described as the Paradox of Informal Justice. An ombuds's fundamental power derives from trust earned because of the role's confidentiality, independence, impartiality, and informality. Ombuds are influential because the role is seen as impartial. How do ombuds maintain their reputation for impartiality while advocating for systemic changes in the context of an individual complaint? Individuals at odds with the administration often seek help from the ombuds. How do ombuds maintain the independence of the role given the need to maintain administrative support for the ombuds function? How do ombuds practice to the confidentiality standard when a significant wrong requires attention and disclosure? While many ombuds adhere strictly to the confidentiality standard, Miller (2011) argues the ombuds model's strict adherence to confidentiality and informality is irresponsible:

Who could not want to see perpetrators of sexual violence (or any other kind of violence...exposed to the full consequence of their actions, along with those who knowingly abet their horrible behavior? Knowledge is responsibility, and those in the know must also be held responsible for not acting on what they know if not acting betrays the public trust... [F]or some, Ombudsman informality offers too much ambiguity, and confidentiality is seen as conspiracy to preserve the interests of such perpetrators against the exercise of justice..." (p. 6)

Each of these questions and the paradox itself is rooted in different interpretations regarding the ombuds role and how the IOA Standards should be executed.

As this study's findings indicate, many ombuds view the standards more strictly and take a more conservative approach to their work. Other ombuds feel strongly that their role is to solve problems and advocate for just outcomes, and they are willing to flex the boundaries of the IOA Standards in order to accomplish those goals. Regardless of how the office is framed, all ombuds experience the tension between adhering to the field's principles and maintaining their ability to be persuasive and effective.



There are both advantages and disadvantages to using a “big tent” approach to the IOA Standards. On one hand there are few “one-size fits all” approaches that govern the diversity of situations ombuds face, and the ambiguity within the Standards may provide much needed flexibility for ombuds to adapt to varying circumstances and the needs of the specific community in which they work. The myriad of factors may be too varied and complicated to be reduced to standard guidance when the easy answer may be “it depends on the circumstances.” Further, interpretation is not unique to the ombuds field: Gadlin and Pino (1997) differentiate theoretical impartiality with functional impartiality as they note “no matter how rigorously defined, every profession is interpreted differently by its various practitioners” (p. 24).

On the other hand, ambiguity makes it difficult to clearly communicate with a wide variety of stakeholders regarding the nature of the role. A lack of clarity regarding what the role is intended to do and what the role actually does can weaken the role’s efficacy. Without firm goals and boundaries, visitors’ expectations can pressure ombuds to be their advocates. One ombuds noted acting in a way that “totally goes against the neutrality [standard, but], I think [ombuds] have often been thought of as more of a consumer advocate and that might be the problem, [we need to] refine people’s understanding of what [an ombuds] should be” (O7A37:47).

Where does that leave ombuds wrestling with how to advocate for fairness while maintaining the IOA Standards? Ultimately the question becomes, what is an ombuds designed to achieve, and are the IOA Standards helpful in achieving those ends? If the goal is resolution of complaints, does the ombuds mechanism have the tools for effectuating that goal? Ombuds lack IOA standards and guidance for providing third party resolution services, including what constitutes visitor self-determination, and what exceptions apply for confidentiality purposes, including how separate meetings with the ombuds should be handled, and how any agreements might be documented and enforced. If the goal is substantive justice, does the ombuds mechanism have the tools for achieving that goal? Ombuds lack mechanisms and IOA standards for formal investigation and adjudication, useful to determining “the truth,” and have no ability to determine outcomes and enforce policies.

If the goal is procedural justice, does the ombuds mechanism have the standards and mechanisms to achieve that goal? Procedural justice provides individuals with “voice” and participation within complaint procedures and leads to greater acceptance of substantive outcomes. Achieving procedural justice requires the ombuds to advocate for procedural fairness in the context of individual circumstances. Achieving either form of “justice” is at the core of the Paradox of Informal Justice: The “impartial” ombuds must determine what is unfair, how to remedy the problem, and how to maintain their impartiality while doing so. In protecting against procedural irregularity, ombuds must determine how to advocate for fair procedures or fair results in the context of an individual complaint without appearing to represent the visitor.

With new Title IX rules in place providing for “informal resolution,” now is an excellent time for the IOA and its members to think through and clarify the goals and standards of the role. I am not suggesting that either resolution or justice should be IOA Standards, but that the conversation is an important one. Currently, the value of the ombuds role varies from campus to campus as the role’s value often relates more to the person than to the role itself. As Casey notes (2007), “The efficacy of the [O]rganizational [O]mbuds function derives from the personal characteristics and expertise of the [O]mbuds rather than the mechanisms’ processes and procedures” (p. 249).

A lack of clarity around advocacy makes it more difficult to professionalize the ombuds field. A need to professionalize does not mean the ombuds field currently lacks professionalism. Occupations seek legitimacy and influence by professionalizing and homogenizing their fellow workers. Professional associations regulate the knowledge necessary for carrying out essential functions, create and implement the standards used to execute the role, and even socialize their



members into the profession in terms of shared identities (Noordegraaf, Van Der Steen, & Van Twist, 2014, p. 23). Legitimacy and influence require occupational recognition that develops through awareness of the role and the consistency of the role's practices. Ombuds spend much of their time explaining what they do. As one ombuds explained, "I hear that a lot, 'what is [an ombuds]'" (O12A3:34)?

Clarifying the IOA Standards will aid in professionalizing the field, but that does not require homogenization. The IOA could differentiate the Standards and create "types" of organizational ombuds. Alternatively, the IOA might clarify the Standards to provide increased guidance for ombuds who advocate for resolution or justice. These options are not mutually exclusive. Of course greater specificity and guidance from the IOA on these issues may in itself formalize aspects of an informal ombuds role. Over time, as informal dispute resolution mechanisms are recognized for delivering greater satisfaction in less time and at lower cost, they are institutionalized and experience significant pressure to formalize (Nolan-Haley, 2012). For ombuds, formalization is evident in efforts to require ombuds to be mandatory reporters of instances of sexual misconduct (Pappas, 2016a).

I am not an ombuds, but as you consider revisions to the Standards, please protect what is unique and special about the ombuds function. Neither justice nor resolution are unique to the ombuds role. Yes, ombuds provide interactional justice and should 1) Treat all visitors with kindness and respect, and 2) Help their visitors to feel heard and to think through their options. Ombuds also can promise visitors' complaints will at some point be brought to decision-makers' attention, anonymously and confidentially. Fundamentally, an ombuds serves as the warning system that enables the institution to make systematic improvements. By preserving visitors' anonymity and confidentiality, ombuds become the "safety net" or "release valve" for problems that may otherwise never be expressed. This confidentiality protection, paired with the role's impartiality, is what encourages individuals to come forward and gives the ombuds the chance to inform administrators of problems that would otherwise not be on their radar. This is the special power and the value of an ombuds. Administrators can then make systemic changes that improve the justice and fairness of the entire organization. Ombuds enable organizational leaders to fulfill their obligations to deliver resolution and justice. In order to serve in this unique role, ombuds must maintain their reputations for confidentiality, impartiality, informality, and independence. Ombuds need guidance navigating the Paradox of Informal Justice and negotiating the boundaries between advocate and neutral. Rethinking ombuds' goals and standards will protect against unintended formalization and expand the influence and use of an essential campus role.



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