

# Journal of the International Ombudsman Association



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**Keywords:** Deposition, Testify, Subpoena, Publicity, Motion for Protective Order

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**Keywords:** Ombudsman, privilege, Garstang, confidentiality

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**Keywords:** Confidentiality, ombudsman practitioner, individual, interests, needs, informal dispute resolution, discourse

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**Keywords:** zero barrier office, confidentiality, organizational ombudsman, zero tolerance, whistleblowing, Ombudsman Code of Ethics

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**Keywords:** Confidentiality, Imminent Risk, Exceptions

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**Keywords:** Ombudsman, confidentiality, mediation, violation, accountability, standards, role, multiple parties

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**Keywords:** Ombudsman, Online Dispute Resolution, ODR, Case management system, Technology-assisted ODR, Conflict Resolution

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**Keywords:** Ombudsman, Conflict Management System, Economic Value, Cost Effectiveness, Conflict Competent, Fiscal Relevance

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## EDITORIAL

# In Whom Can We Trust?

DAVID MILLER

In the light of present-day developments, discussed below, our profession has serious issues to consider, particularly regarding the adequacy of its Standards of Practice and the degrees of protection that adherence to these standards affords the Organizational Ombudsman practitioner. This is especially so in the matter of Confidentiality. Our SoP is written as follows:

“CONFIDENTIALITY

3.1 The Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following:

**The Ombudsman does not disclose confidential communications unless given permission to do so in the course of informal discussions with the Ombudsman, and even then at the sole discretion of the Ombudsman; the Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman Office, nor does the Ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman Office, without that individual's express permission; the Ombudsman takes specific action related to an individual's issue only with the individual's express permission and only to the extent permitted, unless such action can be taken in a way that safeguards the identity of the individual contacting the Ombudsman Office.** *The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the Ombudsman.*[Emphasis added]<sup>1</sup>

Well-publicised developments on campuses and in state agencies in the US<sup>2,3</sup> have potentially far-reaching ramifications for organizational Ombudsmen. They include the receipt of the US Department of Education Office for Civil Rights ‘Dear Colleague Letter’ on sexual violence<sup>4</sup>, and requirements for reporting matters which might affect a US Government security clearance. The net result of these and the tragic events that form the backdrop for their appearance is that the Ombudsman profession's long journey toward accepted status as an office asserting privilege, in which confidentiality is a *sine qua non* of practice, appears to be facing unwanted and significant pressure.

On the one hand, who could not want to see perpetrators of sexual violence (or any other kind of violence, for that matter, including bullying, cyber bullying, administrative harassment and so on) exposed to the full consequences of their actions, along with those who knowingly abet their horrible behaviour? 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. In many countries, in professions of privilege such as psychiatry, psychology and medicine, confidentiality is rigorously defended apart from those areas where the law is definite — for example, where revealed knowledge of sexual abuse of children results automatically in that knowledge — and details of those involved — being given to the appropriate authorities. It may be that, for some, Ombudsmen informality offers too much ambiguity, and confidentiality is seen as conspiracy to preserve the interests of such perpetrators against the exercise of justice.

On the other hand, the provision of a safe place in which options for action and response can safely be heard, away from the clamour of police sirens and media-fuelled public approbation, can help to protect the individual and public interest by ensuring that

matters have a greater likelihood of swift resolution. At least, that's what we tell ourselves. The existence of an office of privilege, unlinked to management, helps to ensure that the smallest voice can be heard without fear of retaliation, where matters can be stated and addressed on a level playing field, where might is not necessarily right and truth — with all its modern-day nuances and subtleties — can stand a chance of affecting outcomes. Our very informality, neutrality and confidentiality enable the exercise of justice by ensuring that alleged victims and perpetrators can safely and more fully consider their options for exercising their rights.

The gathering tide of pressure for mandatory reporting demands a response from the IOA. It also requires us to re-examine our *raison d'être* and the standards by which we regulate our profession. Knowledge is responsibility, and our knowledge of the realities of organisational life requires our responsible affirmation of this.

Yet there are some things of which we as Ombudsmen can be confident: we are credible because of what we are and how we practice. We make a beneficial difference precisely because we remain unlinked and unshackled — because we remain informal, neutral, independent and confidential. We are also able to make such a difference because of the nature of our relationship with companion offices and services. The quality of collaboration — within the operational parameters our Standards of Practice mandate — between organizational Ombudsmen and lawyers, auditors and Inspectors General, among others, deserves greater explication because it is the nature of such collaboration that helps define our professional boundaries and capacities. I suspect it is the nature of such collaborations that may also give our profession some leeway in responding to the recent calls for us to betray confidentiality via mandatory reporting and, crucially, offer protections against the threat of sanctions for having done our job in accordance with our professional Standards. As long as we remain clear in our own profession about the nature and limits of our responsibilities, we will be appropriately equipped to not only remain an office of privilege with respect to confidentiality, but to build upon that. If our professional internal examination places protection — of the Ombudsman role, of Ombudsmen and of those we serve — at the forefront of any review of our Stan-

dards of Practice, our focus and motivation should be ensured, perceptions of our roles clarified and our Standards of Practice strengthened. Hopefully then, informality will not be perceived as ambiguity, nor confidentiality as conspiracy or a contemptible silence.

Examination of our Standards has been part of the inspiration behind this Volume of JIOA (as well as its predecessor and successor Volumes). In this Volume we have contributions considering the significance of our Standard of Practice of 'Confidentiality', and we are fortunate to have a wide range of contributions from eminent and esteemed colleagues. **Charles Howard** discusses what we should be considering in the face of possible public challenges to our confidentiality, and how we might respond to protect ourselves and our credibility as a profession. **Helen Hasenfeld** writes of her reflections from inside a pivotal case that helped secure Ombudsman privilege. The crucial interplay of her office with the Senior Administration is also examined in this paper.

**Craig Mousin** gives a wake-up call to our profession by illustrating the ubiquity of our digital footprints and their significance for e-discovery. Mousin's paper asks crucial questions of our readiness as a profession to withstand the dilemmas associated with electronically stored information. **Indumati Sen** illustrates how the Ombudsman profession endorses a limited and narrow exception to confidentiality in order to protect the individual visitor, but that may result in gaps in felt protection for Ombudsmen adhering to their professional standards. Sen looks at the options provided by informal dispute resolution for ensuring true equity in enabling rights and interests.

**Mary Rowe** asks a similarly key question — how do we respond to reported unacceptable behaviour when our visitors do not want to act? This goes to the heart of the dilemmas raised above, and Rowe gives a timely reminder of the options we usually all have that might serve as aids at the time or in advance of such situations. Ilene Butensky gives a practice note on determination of imminent risk, using some case materials that will resonate with many. **Nicholas Diehl** explores another case study exemplifying our professional vulnerability and the importance of being as clear as possible about how we might respond when the challenge comes.

**Frank Fowlie** draws on his experience of online

dispute resolution to chart how the Ombudsman role may embrace this increasing reality of everyday Ombudsman practice. And finally, in a continuation of the discussion started in our earlier Volume on 'Ombudsman Effectiveness', **Jason Waxman** provides a welcome description of recent research he has undertaken across organizations, comparing the impact of corporate ombudsmen on nine 'effectiveness metrics'.

To all our authors we at the JIOA offer most grateful thanks for their enthusiasm and active support for our Journal. Thanks also to our patient and hard-working reviewers, without whom we would not have established a growing reputation for editorial probity and rigour by our determined adherence to anonymised ("blind") reviews and standardised formats for reviewer feedback that keep within the spirit and practice of the IOA Standards of Practice. I also want to thank our IOA Board colleagues, and our colleagues at PMA for their warm support for JIOA activities. And I want especially to mention **Wendy Webber**, who has been the graphic producer for JIOA since its inception – she frames our words, and does so patiently, thoroughly, and beautifully.

The editorial team sees the JIOA as a conversation opener – we see our role being that of catalyst, as well as disseminators of Ombudsman scholarship and beneficial critical comment. The Associate Editors meet monthly, on average, and such meetings are master classes of mentoring, critical enquiry and professional development. My deepest thanks and admiration go to Alan Lincoln, Brian Bloch, Laurie Patterson, Mary Rowe and Tom Sebok for the leadership and humanity they exemplify in the ways they develop our profession.

## ENDNOTES

<sup>1</sup> International Ombudsman Association: IOA Standards of Practice, 2005. [www.ombudsassociation.org](http://www.ombudsassociation.org)

<sup>2</sup> Danny Hakim. For Disabled Care Complaints, Vow of Anonymity Was False. *The New York Times*, 11 November 2011

<sup>3</sup> Nina Bernstein. On Campus, a Law Enforcement System to Itself. *The New York Times*, 11 November 2011

<sup>4</sup> United States Department of Education Office for Civil Rights (The Assistant Secretary). Dear Colleague Letter: Sexual Violence, 4 April 2011.



# Protecting Confidentiality: Considerations for the Ombudsman Subjected to Adverse Publicity or a Subpoena to Testify

**CHARLES L. HOWARD**

## **ABSTRACT**

This article discusses steps ombudsmen can take to prepare for the possibility that they might become implicated in a public controversy or receive a subpoena to testify or produce records. These steps include making sure that documentation related to the office is complete and securing independent counsel. The article also discusses how and when an ombudsman may respond to public attacks on the ombudsman office as well as how to respond when subpoenaed to testify or produce records.

## **KEYWORDS**

Deposition, Testify, Subpoena, Publicity, Motion for Protective Order

It is a recurring nightmare: After working every day for months or perhaps years, confidentially helping people find options to resolve workplace conflict or report matters of concern to formal channels, the ombudsman learns one day that he or she is now the center of a very public controversy. The details can vary from reading about it in a newspaper to receiving a call from the general counsel's office stating that they have just received a subpoena for the ombudsman. Worse yet, the message may be that the ombudsman or the office has been named in a complaint that has been filed in court. It is at this point that a panic reaction sets in. What should the ombudsman do? What can he or she say to those who ask what this is all about? Is there anything the ombudsman can say publically to defend the ombudsman or the office?

These are only a few of the many questions that come flooding through the mind of the ombudsman when the nightmare turns out to be real. The good news though is that while this may still seem like a nightmare, there are some practical steps that an ombudsman can take now to minimize the panic and disruption and to maximize the likelihood that the ombudsman and his or her office can navigate the crisis with their reputations and practices intact.

In offering the following suggestions, I am only trying to outline general points for consideration. I am not offering specific legal advice, which of course, is always dependent on an analysis of the particular facts at issue and the applicable law.

## Things to Do Now — Before the Crisis

Many ombudsmen — as well as the executives, administrators, and in-house lawyers with whom they routinely work — regularly fail to appreciate that effectively dealing with an adverse publicity or subpoena crisis almost always depends on the steps that are taken *before* the crisis occurs. This means that there are things that should be done *now*, before any of the dreaded triggering events of a crisis occur. The simple reason is that once publicity or a subpoena puts an ombudsman program under the magnifying glass, all of the fundamentals relating to such issues as how the ombudsman office is established, why it is important, and how it operates, are essentially frozen in time. Yet, the answers to these questions are critical to the issue of preserving confidentiality. At the point the crisis occurs, it is almost always too late to address items missed or change the facts on which the program and its claim of confidentiality will be assessed. Remember that issues in lawsuits are analyzed on the basis of the facts as they were at the time the dispute arose, without consideration of changes that may thereafter be made.

### DOCUMENTATION

The single biggest step an ombudsman can do to prepare for a possible crisis is to make sure that documentation relating to the office is as complete as possible. If the ombudsman's office and the organization have not previously adopted a charter or other formal understanding that forms the foundation on which the office operates, that should be done now. This is a perfect place to describe why the office was created and why it is important to the organization. It should also set forth the principles on which the office is expected to operate (independence, neutrality, informality, and confidentiality, as well as the IOA Code of Ethics and Standards of Practice), and any exceptions to confidentiality. Reporting channels and other programmatic features of the office that support those principles should be included. Creating such a charter is important because in any subsequent dispute involving the office, the charter will be a key piece of evidence that can be used to support confidentiality. Conversely, the opposite is also true — without a charter (which IOA considers to be a best

practices standard), it is harder to convincingly assert that the bases for confidentiality were fully articulated and that the relevant constituency was adequately informed of the way in which the office operates.

Two of the most important features of a charter relate to the issue of imputed notice and the underpinnings for the claim of confidentiality. Although it is beyond the scope of this article to present an extended discussion of the legal basis for asserting that a properly created organizational ombudsman office is not a place for imputed notice of claims against the sponsoring entity<sup>1</sup>, it is vitally important that documentation state that the ombudsman office is not a proper channel to give the organization notice of claims that someone may have. Likewise, all too often ombudsmen assert that communications with an ombudsman *are* privileged, while the issue of whether communications will, in fact, be considered privileged depends on the court, the jurisdiction involved, the adequacy of the documentation, and practices that comply with that documentation. It is better to state that communications with the ombudsman office are considered confidential. Going a step further, it can be stated that the IOA Code of Ethics and Standards of Practice (and hopefully, the office) *will claim* that communications are privileged, because this allows the office to assert a claim of privilege in appropriate circumstances while not categorically representing that communications have in fact been determined to be privileged. Articulating a claim of confidentiality also gives the office and the organization the opportunity to document potential bases for asserting confidentiality other than privilege. One of the most significant of these other bases is what is often described as the “implied contract” — that the ombudsman program is made available to its constituency with the understanding that those who use the office agree to abide by the principles upon which the office was established. Depending on the jurisdiction involved, an ombudsman office may also rely on confidentiality based on mediation or other statutory provisions.

A charter is only the starting point for proper documentation. Publicly available information about the office is very important and especially so for large multiple-site entities. This should include information that can be accessed electronically as well as in print form. Examples include posters, videotapes, Frequently Asked Questions, speeches, articles about

the office, and brochures. The message given through all of this publicity should be consistent and reiterate the key principles on which the office operates and on which confidentiality is asserted. Exceptions to confidentiality and the issue of imputed notice must be addressed simply and consistently.

The failure to present the key programmatic features of the office in each of these forms of publicity can be a problem. A couple of examples I have encountered demonstrate the importance of this point. An ombudsman was deposed in a case in which the plaintiff claimed that the only information about the office that he had seen was (conveniently) the only brochure that did not explicitly describe the confidentiality of the office. The claim of confidentiality was, in fact, described elsewhere in newer brochures, but the employee claimed that he had not seen and was not aware of the other descriptions of the office. On another occasion, a brochure mentioned that among the issues that could be discussed with the ombudsman were claims of harassment and discrimination, but that brochure was silent on the issue of the ombudsman office not serving as a notice channel for the organization. That warning was stated elsewhere, but again the plaintiff asserted that the first brochure was the only one he had seen and that, therefore, discussing such claims with the ombudsman put the entity on notice.

A third category of documentation — documentation of the internal policies and procedures of the office — is easy to overlook, principally because it is viewed as internal to the ombudsman office rather than publicized to those outside of the office. Yet, paradoxically, such information — or the lack of it — can be highly relevant in litigation, because these policies and procedures cannot be claimed to be confidential communications. Indeed, even if an ombudsman does prevail on a motion for a protective order to be excused from testifying with respect to confidential communications, there is virtually no basis on which an ombudsman would be able to avoid testifying as to the general policies and procedures used by the office to handle inquiries. The internal policies and procedures relating to what confidential information is kept, and when and how it is to be destroyed are of paramount importance. If responses to questions in this line of inquiry reveal that procedures have not been established or, if established, the procedures have not been complied with, arguments over confidentiality may be doomed from the start.

A related documentation issue is access to data. With the ubiquitous use of computers and email communications, where is confidential data kept and who has access to it are of critical importance. In this regard, while it may be important for the ombudsman to be connected through email servers to others in the organization, I strongly recommend that confidential data should not reside on the organization's servers.

A final area of documentation is information that does not originate from the ombudsman office. For example, the review should include looking at how the organization refers to the ombudsman office in documents created elsewhere in the organization. It has not been unusual for a general business ethics code or a policy on harassment and discrimination to indicate that issues related to those forms of misconduct may be "reported" to the ombudsman office. Another example is that descriptions of other functions or offices can be described in the same way that the ombudsman office is described. If another office (such as compliance or HR) makes reference to a person's ability to report a matter confidentially to those channels, the question that will arise in court then becomes what does "confidentiality" mean when it is used in both that context as well as the context in which the ombudsman office operates. These areas have proven to be some of the most intractable areas for ombudsman to address because they often involve internal organizational politics, but that makes them no less important, as the threat of dilution of the ombudsmen's confidentiality message from these other sources is very real.

## COUNSEL

One of the hardest conversations for many ombudsmen is the discussion over the need for access to outside counsel, yet such a discussion also should take place well in advance of any crisis. When having this conversation with executives or administrators of an organization or its in-house counsel, there are three critical points that need to be made.

First, as demonstrated above, the time to establish the documentation for the office and thus the framework for defending any challenge to the office is before there a challenge. A legal audit by a lawyer knowledgeable about ombudsman issues is not generally an expensive or time consuming process, but the improvements or supplements to the documentation can make all the difference if and when there is a challenge to the program.

Second, the claim of confidentiality is what makes the ombudsman office different from other formal channels and represents the value to the organization added by an ombudsman office. Moreover, the claim of confidentiality is not just one of the principles on which an organizational office depends; it is also a by-product of creating an office that is independent, neutral, and informal. Without adherence to these other principles, a claim of confidentiality is not sustainable. The principle of independence is a particularly important plank in the platform supporting the claim of confidentiality. Independence is the first ethical principle in both the IOA Code of Ethics and its Standards of Practice. In articulating best practices as a commentary and supplement to the Standards of Practice, IOA has recognized that a critical aspect of independence is the right to independent counsel:

The Ombudsman should obtain assurance from the organization at the outset, and apart from any particular dispute, of access to outside legal counsel at his or her own discretion.

The expense of outside counsel should be covered by the organization and included in the overall budget for the Ombudsman Office. The Ombudsman should have an understanding with the organization that the Ombudsman is not required to inform the organization when it communicates with or accesses outside counsel.<sup>2</sup>

The practical effect of the failure to have independent counsel can be significant, particularly when, as discussed below, it becomes necessary for motions to be filed in court. In one of the early challenges to ombudsman confidentiality, the entity for which the ombudsman worked filed the motion for a protective order on behalf of the office. The plaintiff opposed the motion, however, on the grounds that the office was not truly independent and that the communications could not be held to be confidential if for no other reason than because both the office and the entity were represented by the same lawyer. The argument was that that the lawyer representing both would have had a conflict of interest in the dual representation if the office and the entity were independent of each other. It was only after separate and independent counsel appeared for the ombudsman office that the court granted the motion for a protective order.

Third, it is important for the ombudsman and for the organization to recognize that the role of outside counsel for the ombudsman office is not to the exclusion of legal advice from in-house counsel or regular counsel for the entity. There are many occasions where the relevant legal issue relates to policies of the organization and do not relate to or impinge on the issue of confidential communications. In those situations, it is appropriate for the entity's counsel to provide advice. Resorting to independent counsel is both unnecessary and impractical. On issues that implicate the independence of the office and preservation of confidential communications, however, the need for outside counsel is clear in order for the proper functioning of the office is to be maintained. Likewise, on overall strategy for how to deal with challenges to the ombudsman office, both the organization's counsel and outside counsel should have a role. Ideally, they would be working cooperatively, albeit from different perspectives, to help sustain the value of the ombudsman program that the organization has established.

## Public Attacks on the Ombudsman Office

The IOA Code of Ethics and Standards of Practice contain several provisions that limit the ombudsman's ability to disclose information. Standards of Practice sections 3.1 through 3.8 direct an ombudsman not to disclose the identity of inquirers, not to maintain records containing identifying information on behalf of the organization, to assert a claim of confidentiality and privilege, and require steps to safeguard what confidential information the office has and to destroy it when it is no longer needed. While it is important to adhere to these Standards to preserve confidentiality, they should not serve as a complete muzzle on the ombudsman when a public crisis occurs involving the office. There are occasions when ombudsman offices become embroiled in a public controversy that an ombudsman may be able to make limited comments either to people in his or her organization who are inquiring or to a broader audience.

For example, not every communication with an ombudsman is confidential. As discussed above, general office practices and procedures are not confidential,

and it may be appropriate for an ombudsman to offer an explanation of how the office operates without disclosing any confidential communications. Again, these are not confidential communications and the manner in which the ombudsman conducts his or her professional activities, *in general*, is a fair area for inquiry and disclosure.

If an exception to confidentiality was used to make a limited disclosure, an ombudsman would likely be required to reveal that he or she made the determination that the exception to confidentiality was appropriate and then what was disclosed. Likewise, when an ombudsman is given permission to make a disclosure to a formal channel such as HR or Compliance and then does so, that communication is likely a notice event for the organization and the ombudsman cannot properly assert confidentiality to avoid disclosing to an in-house counsel, for example, what had been disclosed to the formal channel. (Note: the ombudsman should still claim that the conversation with the inquirer is confidential; it was only the subsequent [and perhaps more limited] disclosure with permission that would not be confidential.)

None of these areas where disclosure or comment is permitted really helps address the larger and, often more strident, inquiry about what was said to the ombudsman or eliminate questions put to the ombudsman (often by others in the ombudsman's organization) about how the plaintiff could possibly be making the claims he or she is asserting without the ombudsman advising the organization about it. An example of this type occurred on one occasion when an ombudsman office was named in a complaint filed in court in connection with an allegation that the plaintiff had disclosed to the ombudsman conduct by another person that could fairly be said to qualify as an imminent threat of serious harm. The problem, of course, was that the allegations in the complaint were not what had actually been disclosed to the ombudsman. In situations such as this, the ombudsman was not able to contradict the allegations in the complaint without breaching confidentiality. The ombudsman was able, however, to reaffirm to in-house counsel that it had consistently practiced in accordance with the IOA Code of Ethics and Standards of Practice. In other words, the ombudsman was implying, without disclosing confidential communications, that if such conduct had been disclosed to the ombudsman, there would have been an applicable exception to

confidentiality and the ombudsman would have made a disclosure to the appropriate person.

In the final analysis, the ombudsman should recognize that a public defense of the office and the confidentiality of particular communications is best left to others in the organization. Depending on the facts, the public defense of the office can emphasize the overall importance of the office to the organization's compliance or corporate governance efforts or to provide assistance to the organization's employees to improve the workplace environment and resolve workplace conflicts. If, however, the dispute has resulted in a legal action, defense of the ombudsman office is best left to motions filed in court by the ombudsman's counsel working in conjunction with counsel for the organization.

## Responding to a Subpoena or Document and Testimony Demands on the Ombudsman Office

Let's start with what a subpoena is: it is a legal paper that, in effect, orders a person to appear at a particular time and place (usually a court for trial testimony or a lawyer's office for a deposition) and can include a demand that specified documents also be produced. While there are administrative proceedings in which subpoenas may be issued, a subpoena almost always indicates that a matter is in litigation. In other words, a lawsuit has been filed and someone, usually the plaintiff who on some earlier occasion consulted with the ombudsman, believes that the ombudsman has information that is relevant to the claims asserted in the lawsuit.

There are essentially two ways an ombudsman may learn that he or she is being subpoenaed or compelled to provide testimony or documents. The first is that a sheriff or a marshal may appear at the ombudsman's home or office and personally "serve" the subpoena on the ombudsman. If this occurs, the ombudsman should immediately notify the appropriate legal office for the organization that a subpoena has been served and forward a copy of it to them. The second way, and by far the most common way, is to receive one of those heart stopping calls from the organization's lawyers indicating that another party in

a lawsuit (which the ombudsman may not even know anything about) has notified the organization that they want to depose or obtain documents from the ombudsman. In this latter situation, there may not be a subpoena at all; most court rules allow for one party in a lawsuit to provide a “notice” of its intention to obtain discovery (here a deposition and / or documents) from another party.

Once the ombudsman learns of an effort to obtain documents or testimony from him or her or their office, there are some important considerations to remember. First, independent counsel for the ombudsman office should be notified or retained if that has not previously been done. Second, since most court rules require objections or motions addressed to a subpoena or a notice of deposition to be filed within a certain time period, which is often quite short, there is a need for prompt action. In this regard, counsel for the organization and the ombudsman office can advise on when and how any such motion should be filed. It is extremely important to calendar the date by which any such motion must be filed.

Third, once the ombudsman learns of legal attempts to obtain testimony or documents, any otherwise routine document destruction that relates to the issues in dispute must cease. Because this is a bright line prohibition, the ombudsman office should at all times take seriously the admonition to maintain as few records as possible and that document retention and destruction policies be rigorously complied with. Indeed, even before a subpoena or notice arrives, the ombudsman may be under an obligation to preserve any relevant documentation. The current practice in many courts in the United States is that when an entity anticipates that litigation is reasonably likely in a dispute or matter, counsel for the organization send out a “Litigation Hold Letter” to people and offices in the organization that may have relevant information. Such letters instruct the recipients to preserve and forward to the organization’s counsel any such relevant paper or electronic information. While disclosure of any information from the ombudsman’s office is a more complicated issue that should be discussed with the ombudsman’s independent counsel, there should be complete compliance with the direction to preserve any information that exists at the time a Litigation Hold Letter, a subpoena, or a notice of deposition is received.

Fourth, the ombudsman should realize that there will be great pressure by lawyers and others in the organization to “tell us what this is all about.” This is the moment of greatest vulnerability for ombudsmen, because the institutional pressure on them will be great. It is not uncommon for the request to come in the form of a directive — the ombudsman *must* disclose all known facts so that the organization can defend the claims and the ombudsman in a deposition. If such disclosure is made, however, the chances for a successful defense of a claim of confidentiality are seriously undermined. It would be highly unlikely for a court, in ruling on a motion for a protective order that may be filed, to permit disclosure to one party (the organization) without ordering disclosure to an opposing party. A far better approach, for both the organization and the ombudsman, is for the office to reaffirm its commitment and practices to the IOA Code of Ethics and Standards of Practices and to work with the organization to oppose any such attempts to compel testimony or documents from the ombudsman office.

A formal motion to quash the subpoena or a motion for a protective order should only be used as a last resort. It has not been uncommon for such attempts to compel information from the ombudsman’s office to be resolved informally. Bringing us back to the starting point, particularly good charters and brochures that describe the way the office operates and that state that those who use the office agree to respect those principles can be particularly effective in persuading opposing counsel to yield. A telephone call from either counsel for the organization or counsel for the ombudsman office, armed with this type of program documentation, can sometimes resolve the dispute over compelling documents or testimony from the ombudsman. This approach can be especially effective when the claims for confidentiality do not rest exclusively on an assertion of privilege. If, however, such informal attempts to resolve the dispute over testimony or documents from the ombudsman office are unavailing, a timely motion must be filed.

And finally, if any such motion is to be filed, it must provide both a factual and legal bases for granting the relief requested. It is the obligation of the party making the motion to demonstrate why it should be granted. This is frequently accomplished with affida-

vits and legal argument, but the lessons of *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997) should not be forgotten — the lack of an adequate *factual* record for granting a motion for a protective order will be fatal. In appropriate cases, it may be appropriate to offer to provide information to the court *in camera*, that is, to disclose it to the court only for a preliminary determination without making a disclosure to the other parties to the lawsuit.

## Conclusion

Confidentiality is frequently described as the defining characteristic of an ombudsman office, and for good reason, since it is the commitment to confidentiality that makes the ombudsman office different from other resources and formal channels. Apart from making the work of an ombudsman possible and important, however, confidentiality also limits the ways in which an ombudsman can defend himself or herself when a public controversy occurs. Some limited disclosures or explanations about the office may be possible, but generally there is little that the ombudsman can say or do publically without breaching confidentiality. When the controversy spills over into a lawsuit, there are ways — and good ones at that — in which an ombudsman can provide a defense for the office and its practices. Particularized advice always depends on the specific facts and circumstances, but the general approach is clear: an ombudsman should be prepared in advance with good documentation and independent counsel, and then when the crisis comes, the office and its organization, as well as their counsel, can work cooperatively to preserve a function that they all consider important.

## ENDNOTES

<sup>1</sup> See, Charles L. Howard, *The Organizational Ombudsman: Origins, Roles, and Operations--A Legal Guide*, at 193-220 (2010).

<sup>2</sup> IOA Best Practices, A Supplement to IOA's Standards of Practice, Version 3, October 13, 2009, available on the IOA website.

# Lessons Learned: A Revisit to the Garstang vs. California Institute of Technology Ruling

HELEN HASENFELD

## ABSTRACT

The Garstang vs California Institute of Technology lawsuit has played a pivotal role in the Ombuds quest for attaining privilege. Helen Hasenfeld, who was the Ombudsperson at Caltech during this time, gives her recollections of the various aspects of the case; how the case came about, how it unfolded, and what seemed to lead to the appellate decision that was decided in 1995, establishing case law for Ombuds privilege (in the State of California). Hasenfeld concludes this article with discussion of how she performed her role on the campus, shedding light into the processes of trust gained by the Senior Administration and therefore allowing the Institute to show strong support of the office.

## KEYWORDS

Ombudsman, privilege, Garstang, confidentiality

## INTRODUCTION

By way of introduction, I was the Ombudsperson at Caltech during the time when the Institute was sued by a staff member, and I (the Ombuds Office) was named in the suit. I watched this landmark case wend its way through the California court system in 1994-95. I was in Court with Sandi Cooper, Caltech's General Counsel, who was so instrumental in helping determine the outcome of this case while the case was debated and the verdict announced. It was quite an amazing experience.

JIOA has asked me to write a short article for this issue of the Journal, and speak about the particulars of the case.

In many ways, the stage was set for this situation several years prior to the case, when I was hired as the Ombudsperson in 1991. At the same time, Sandi Cooper was a new member of the General Counsel's Office, and had issue with the fact that I, not a lawyer, was granted confidentiality by the Caltech Administration. Several meetings about this occurred in the President's office, the outcome being that Dr. Thomas Everhart, then President of the Institute, declared that he stood by my confidentiality role, and "invited" General Counsel to "leave me alone". Although he knew that, by law, I did not have confidentiality rights, he put this in writing. More than a few feathers were ruffled.

Later that year, Equal Employment Opportunity Commission (EEOC) came on campus to investigate a sexual harassment complaint. Sandi asked me what, if anything, I could share with her about sexual harassment on the campus. I was able to answer that request by sharing demographic information that would later be in my annual report to the community. I gave her a number with no further information. None of those visitors whom I had counseled had surfaced on her radar, none had filed a further complaint, and each had reported that the harassment had ended. She knew of one case, I knew of 6 complaints. She was impressed. Rather, she was shocked. From then on, all Ombuds were friends of Sandi's, and later on, Sandi gave her time without charge to helping the Ombuds community in any way she could.

A few years later, in 1994, Caltech was sued by a staff member, Ms. Garstang, regarding an issue of "slander". She felt that rumors were circulating around the campus defaming her. While it was true that both the Ombuds office and Human Resources/Employee



Relations had been involved in addressing some aspects of this matter, she was not willing to let it be resolved informally or quietly. Sandi Cooper was assigned the case. She would not allow anyone giving a deposition to talk about whether the Ombuds office had been involved at any point. Ms. Garstang's lawyer was appalled that Sandi was, in effect, ascribing confidentiality to the office when none officially existed. Sandi persisted in exclusion of any mention of the Ombuds office. The plaintiff's lawyer, "in exasperation", (Sandi's words) challenged Sandi and essentially took her to court on this specific issue.

The process began at the Superior Court level. The Judge was sympathetic and said, in essence, that if Ombudspersons could problem-solve informally and help him clear his docket, then it was just fine that they be offered confidentiality. The court issued the following statement:

**"Our conclusion does not, however, render the communications discoverable. In our opinion, private institutions have a qualified privilege not to disclose communications made before an ombudsman in an attempt to mediate an employee dispute. That qualified privilege is based on California's constitutional right of privacy."**

Ms Garstang's lawyer sought to challenge this finding and the next level to receive this issue was the California Court of Appeals. They refused to hear or comment on this issue and sent it up to the California Supreme Court. The Supreme Court sent it back to Appeals with the message that they needed to tackle the issue.

In the meantime, Caltech now had both their Ombudsperson and General Counsel embroiled in a case that was working its way up through the California Court system. They hired an appeals law firm to help sort out and defend the Institute (us) on this issue. I met several times with the lawyers from the hired firm but basically, I just did my work and didn't give much thought to what was happening. It certainly did not consume much of my time or energy.

Then one day Sandi called to tell me that the case was being heard in the Los Angeles Court, and both of us went to hear the arguments. Sandi asked me

what I would do if we lost the case, and I answered I'd stop at Macy's to get my "going to jail" outfit. She was surprised at that answer and asked me if I was serious. I indicated that I was very serious.

The discussion was fascinating, but essentially the decision pivoted on the fact that the Institute deemed that the Ombuds Office was a confidential place, that all of the material about the office stated that it was confidential, that the Caltech population believed that they would have confidentiality in all discussions with the Ombuds, and therefore, they deemed the office confidential. Part of the Appeals decision follows:

**"Evidence provided by Caltech shows that employees participating in informal mediations before its ombudsman do so in the belief that the communications will not be disclosed. Caltech gives to all employees a strict pledge of confidentiality and assurance that they may rely on the confidentiality, independence and impartiality of the "ombuds" office. fn. 5 While Caltech has formal mechanisms for resolving harassment complaints, those members of the Caltech community who elect not to avail themselves of the institute's formal complaint and resolution procedures, may utilize the services of the "ombuds" office which was established in 1986 to "provide the Caltech community with confidential, informal assistance in resolving intra-campus conflicts, disputes and grievances; in promoting fair and equitable treatment within the Institute, and in fostering the general well-being of the Caltech community." [39 Cal.App.4th 535]."**

I've been asked many times how I felt this impacted the way I did business at Caltech, and the answer then, and now is that I did nothing different. Nor did I feel any sense that I might not ever be named in a case or subpoenaed in yet another issue. But it certainly allowed all of us to breathe a collective sigh of relief.

Those of you seeking more information about this case should Google Garstang VS Caltech and read more of the ruling. It does bring up interesting past cases on which the decision was reached, as well as establishing the right to privacy at private institutions. I would imagine, but don't know for sure, that the criteria applies to public institutions as well.

David Miller has asked me to reflect on what the outcome of this case means for our profession. During my tenure as an Ombudsperson, and after, there has been an on-going quest for privilege in our profession. My understanding is that this piece of case law has been used time and time again in the attempt to gain that privilege. Although the issue has not been resolved to anyone's satisfaction or comfort level, I will comment on the unusual actions of the Institute's Administration during this period. I believe that a large part of Caltech's trust and their willingness to go to bat for the office, was due to the fact that I was a very collaborative person (without crossing any of the neutral boundaries that we all adhere to). My past experience had been in Community Development and my way of doing business was shaped by my former professional life and the environment of the Caltech workplace. For example, I met regularly with the Director of Employee Relations about campus/staff climate issues. From those meetings came many positive changes within the formal systems at the Institute pertaining to staff. In many ways, what I did was provide upward feedback to her based on the kinds of things that came regularly to the office. For example, Human Resources chose not to share employee handbooks with each employee. To find out what the rules/regulations were, an employee had to ASK his/her boss to see the handbook. Everyone felt this was a red flag issue, and so people came to my office to see the handbook. After a short while, all employees were provided with their own copies.

I also was the first office to develop a Q/A pamphlet where I addressed many of the thorny problems inherent in an Ombuds Office, such as "how can I trust your confidentiality if you are being paid by the Institute?". My annual report was posted on the Ombuds website. Appropriate things were public, other appropriate things were very private.

I did the same with General Counsel to a smaller extent. However, I made myself available to "discuss Institute issues", should they want to do this. I worked as much, if not more, on a macro/community level than a micro/individual level. All of this allowed the campus the transparency I felt was needed to be trusted by EVERYONE on campus (other than the people who would have loved to see the earth swallow me in one gulp.....we all have our "detractors"). What I recognized again in this job, as I had previously, was the importance of knowing the climate and culture of the place where you are employed. Had I walked blindly into this sort of trust relationship, I probably would have been eaten alive. But over time, I learned how to work with much of the Institute on a positive and trusting level, and was lucky that I had read the environment correctly.

# Ombuds in a Cloud of Exabytes — Understanding the Ombuds' Digital Trail

**CRAIG B. MOUSIN**

## **ABSTRACT**

This article examines Ombuds Standards of Practice as Ombuds increasingly rely upon electronic communication. It first explores the expansion of electronically stored information (ESI) due to the many different electronic devices Ombuds rely upon or interact with including computers, smartphones, and printers. It then reviews how novel legal issues caused by e-discovery — the search for relevant digital documents in litigation — will impact Ombuds. Finally, it offers Ombuds suggestions on managing and controlling ESI while raising the question of whether the International Ombudsman Association must review its Standards of Practice in light of these ESI developments.

## **KEYWORDS**

Ombudsman, confidentiality, e-discovery, Standards of Practice, electronically stored information (ESI), digital records, record retention, Ombuds

It's 2011; do you know where your records are? Ombuds have worked tirelessly to develop policies that protect confidentiality and minimize, if not eliminate, any records that might be used to breach confidentiality if they were turned over internally or provided to litigants in any court proceeding. As offices evolve from an environment when records could be locked up in a box and kept relatively secure to a world where electronically stored information (ESI) can be maintained on computers, cell phones, video recorders, thumb drives, lap tops, tablets, printers and scores of similar devices, new challenges confront Ombuds assurances of confidentiality. In addition to storage at an Ombuds' institution, technology experts now tout the benefits of working in the cloud, where information will be stored on off-site servers, outside of the physical control of the Ombuds. Thus, Ombuds need to understand the full extent of their records or be lost in a cloud of information overload. How does one make sure all records are reasonably secure if the multiplicity of locations where records are produced and stored remains unclear? In addition, the expansion of ESI has placed demands on the legal system which will also force Ombuds and their institutions to respond. This article explores the diverse ways an Ombuds produces electronic records, intentionally or without knowledge, and offers some preliminary steps to address the electronic age's innovations that increase the challenges to the Ombuds best practices.

Ombuds provide safe havens for Visitors to explore sensitive issues revolving around conflict, brainstorm options to access different conflict resolution strategies, and consider whether to become a whistleblower and the consequences of such action. Disclosure of records that reveal identity and/or issues undermines

confidence in Ombuds ability to fulfill their mission. Moreover, as the profession seeks to convince legislators or the courts that public policy supports the establishment of an Ombuds privilege to not disclose information, Ombuds must show consistent practices and careful control over any documents or records that must be maintained to prevail.

In examining these concerns, Ombuds face at least three questions regarding the security of one's office information. The first concern addresses the scope of the technology relied upon by Ombuds. Ombuds must worry not just about securing records, but know how, when, and where records are produced; how, when, and where they may be transmitted; how, when and where are records stored; and how, when and where they are preserved and for how long. If records are destroyed, how, when, where, and how thoroughly are they destroyed?

A second concern involves identifying the parties that might want to pierce confidentiality and what steps must be taken to respond to those distinctive entities. In keeping with professional principles, Ombuds seek to keep Visitors' identities, conversations, and any notes or memoranda about the Visitors confidential from internal constituencies, to preserve the trust in the Ombuds' safe haven. Once a party seeks to litigate against the Ombuds' institution, the Ombuds will face requests from outside the organization and, perhaps, internally as General Counsel may request information to assist in any defense of a lawsuit.<sup>1</sup>

The third concern addresses a personal and professional issue. As technology offers seamless communication, Ombuds should evaluate how their personal lives interact with their professional lives. Cell phones may contain both professional and personal contacts and information. Tablets may contain the bestselling novel for leisure reading and the notes from a confidential call. Working from home may make one more efficient, but what confidentiality questions are raised when one sends emails or memos from one's personal home computer to one's work computer or to others with whom the Ombuds communicates electronically? Social media sometimes connect professional and personal lives as well and raises similar concerns.

The International Ombudsman Association (IOA) has established Standards of Practice (SOP) guiding Ombuds responsibility regarding confidentiality. Ombuds have sought to minimize or eliminate the production of any records, but especially those that might be held on behalf of the institution.<sup>2</sup> To comply with the SOPs, Ombuds must demonstrate that they have taken all necessary steps to ensure confidentiality regarding the production, maintenance, and destruction of records. Given the necessity of retaining some information to properly fulfill one's duties, the SOPs further require that any such information retained be kept secure and protected from inspection by others or deleted pursuant to a consistent destruction practice.<sup>3</sup> Securing, safeguarding and shredding records remain key to ensuring that an Ombuds fulfills the SOPs. These SOPs were prepared, however, in a time when most records and information were composed on paper. Today, Ombuds frequently produce digital records. Although simply recorded as ones and zeroes which collectively become a unit of information called a byte, specialists now talk of exabytes of information—enough storage to include the information found in one trillion books.<sup>4</sup> Fred Cates, an expert in cyber security notes: "...more data than ever are created and stored in digital form. As Stanford law professor Kathleen Sullivan has written, 'Today, our biographies are etched in the ones and zeros we leave behind in daily digital transactions.' Government officials now routinely access data that didn't even exist two decades ago."<sup>5</sup> Some estimates suggest that 99% of all information is now stored electronically.<sup>6</sup> In 2010, the world's ESI exceeded 2,000 exabytes — a zettabyte of information.<sup>7</sup> One estimate suggests American business sends 2.5 trillion emails each year.<sup>8</sup> Wireless text messages exceeded two trillion in 2010.<sup>9</sup> One hundred or more emails a day has become standard professional fare.<sup>10</sup> As electronic information has expanded, so have breaches of private information with over 250 million data records of U.S. citizens breached through security lapses from 2005 to 2010.<sup>11</sup>

Electronically stored information, thus, challenges compliance with IOA's SOP 3.6—what records are under the control of the Ombuds? ESI "includes all information stored in an electronic medium, including audio and video files, e-mail messages, instant messages, voice mails, websites, word processing documents, databases, spreadsheets, digital photos, information created with specialized business or engineering software and backup or archival copies of that same

information.”<sup>12</sup> Backup systems, archiving systems, and computer programs all maintain information that add layers of record retention that did not exist when typewriters produced documents. Computers also contain metadata: “information about electronically stored files that is hidden in the files themselves. Metadata usually includes information such as the file’s creator, creation date, and dates on which the file was opened, read, modified or printed.”<sup>13</sup>

## The Challenges ESI Poses to Ombuds

Our own institutions and society are simultaneously adapting to these changes. We need to be aware of the currents that are channeling those institutional and governmental responses in the technological and legal context as IOA articulates its professional standards.<sup>14</sup> As National Institutes of Health Ombudsman Howard Gadlin warned us, our professional “principles were about professional practice standards and there is a difference between professional practice standards and the legal environment in which they operate.”<sup>15</sup> Developments in the law, however, will impact Ombuds practice. The legal environment, specifically the influence of e-discovery — the search for relevant documents within a litigant’s ESI — raises issues that our own institutions must address, and simultaneously necessitates a response by the Ombuds profession. Litigation in the United States has primarily depended upon discovery of information prior to trial as an essential component of seeking the truth. The legal world, however, has only recently begun to grasp the extent of how seeking all relevant ESI has changed the landscape of contemporary court proceedings.<sup>16</sup> When multiple employees working with their own computers and telecommunications devices become involved in a case, the cost of document retrieval, review, and production can conceivably run far greater than the potential liability of any one case, influencing institutions to consider critical legal decisions based on cost instead of actual liability. Thus, understanding the evolution of e-discovery litigation may assist Ombuds work within their own institutions to address confidentiality issues raised by ESI. At the same time, observing how other professions adapt to the burgeoning challenges of e-discovery may assist Ombuds resolve these practice issues.

Thus, an Ombuds has a responsibility to know who has access to all of those records and second, must work with General Counsel when a litigant requests ESI to understand what might be claimed as confidential and whether an ombuds privilege of confidentiality can be claimed.<sup>17</sup> When legal action is commenced or reasonably anticipated, best legal practice calls for the General Counsel to issue a legal hold letter ordering the recipient to preserve all data subsequent to the receipt of the letter. Frequently, negotiations will take place to see what must be turned over in the litigation or other legal matter. If a reasonable record destruction policy calls for routine shredding of records and the policy is consistently followed, there typically would not be a duty to produce any record destroyed prior to any anticipated litigation. Information that was not routinely destroyed pursuant to an established policy may be subject to discovery. For an example of the extent of ESI subject to potential discovery, one court has ordered:

a party to provide a “copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses.” More specifically, Rule 26(a)(1)(B) disclosures should “describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information...”

“Computerized data and other electronically-recorded information includes, but is not limited to: voice mail messages and files, back-up voice mail files, e-mail messages and files, backup e-mail files, deleted e-mails, data files, program files, backup and archival tapes, temporary files, system history files, web site information stored in textual, graphical or audio format, web site log files, cache files, cookies, and other electronically-recorded information.” Furthermore, the disclosing party should take “reasonable steps to ensure that it discloses any back-up copies or files or archival tapes that will provide information about any ‘deleted’ electronic data. (Footnotes omitted).”<sup>18</sup>

General Counsel will work both with the institution's employees to first determine whose ESI may be relevant to the particular case and then normally negotiate with opposing counsel over the scope of discovery, subject to the court's approval. Imagine, however, if only five employees are subject to this discovery order, the extent of potential ESI records that must be reviewed.<sup>19</sup>

If in the course of subsequent litigation, the court determines that one side either failed to produce relevant information or destroyed information that should have been available, it can order sanctions against the party failing to comply, up to and including that the information which was destroyed or failed to be produced should be considered adversely, permitting the implication of wrongdoing by the party failing to produce. The overall impact of destroying relevant electronic information comes under the term spoliation, which one court defined as "the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."<sup>20</sup> That court emphasized the dire effects of spoliation noting, "Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence... But, when critical documents go missing, judges and litigant alike descend into a world of *ad hocery* and half measures — and our civil justice system suffers."<sup>21</sup>

Ombuds have longed for legislative and court recognition of a privilege of confidentiality similar to the attorney-client privilege. Attorney Charles Howard, who has litigated a number of cases defending Ombuds claims to confidentiality, has stressed that our practices will be examined closely when we seek the privilege to keep information confidential.<sup>22</sup> The failure to protect records from destruction of ESI, even if unintentional, because an Ombuds did not know of all the ESI under his or her control would certainly undermine a claim of consistent practice in accordance with the SOPs. In addition to the negative consequences of spoliation, moreover, the overwhelming amount of information contained in ESI has resulted in inadvertent disclosure of material that might otherwise have been protected by a privilege. In *Mt. Hawley Insurance Co., v. Felman Production, Inc.*,<sup>23</sup> for example, the lawyers for one party disclosed a large number of documents that might have been protected by attorney-client privilege. When the lawyers requested that the privilege precluded reliance on the docu-

ments at trial, the court held, in part, that because of the large number of disclosures, the lawyers' failure to take reasonable precautions to avoid inadvertent disclosure, and the failure to promptly address the issue, the party waived the attorney-client privilege. Because the Ombuds claim to confidentiality has not yet received the same judicial and legislative protection offered under the attorney-client privilege, equivalent inadvertent disclosure of information an Ombuds might try to protect, would likely lead a court to require disclosure of that information. Thus, even if an Ombuds persuades a court to grant the privilege of confidentiality, inadvertent disclosure by an Ombuds would eliminate the victory by waiving the privilege. The rise of e-discovery raises the bar to require understanding of the size and shape of ESI produced by an Ombuds office and the care of its retrieval, review, and/or regular destruction prior to litigation being anticipated.

## Understanding the Ombuds Digital Trail

A typical Ombuds day may generate very few traditional paper records, but leaves open the question of whether the Ombuds has lived up to SOPs 3.5 and 3.6 as seen in the following hypothetical. Preparing his breakfast, a certain Midwest Ombuds decides to check his electronic calendar to make sure he is aware of all his appointments for the day, proudly noting that the code he has established permits him to know which Visitors will arrive that day, but anyone looking at his calendar will see nothing but letters and numbers. He recalls that a Visitor asked to meet outside of the office for confidentiality purposes and he agreed to meet the Visitor at a local coffee shop. Walking the half mile to his train, he calls an Ombuds colleague at West Coast State University for some collegial advice. Given the time zone difference, he calls her cell phone and requests a copy of an article his colleague is writing regarding bullying in which he had provided her with some examples of egregious behavior. She emails him a draft of the article. Meanwhile, realizing that he is late for his first appointment, he calls the Visitor to inform her of his tardiness. After meeting the Visitor at the coffee shop, he takes public transit to his office. While on the train, he calls his office assistant to check in and confirm his arrival time, replies to two emails and responds to one of the voice messages on his cell phone. Leav-

ing the train, he walks through campus to his office building. He greets the security guard in his building's lobby and reminds the guard that an alumnus who does not have a current university ID card will be visiting later in the day. Arriving at the office, he turns on his computer, checks emails and downloads his colleague's article on bullying. He forgets about one voice message that he opened on the train, but notes that a colleague in Human Resources has sent him a confidential attachment. He opens the attachment, but realizing what it is, closes and deletes the email and attachment. He then responds asking that nothing be sent by email, indicating that he will walk over to her office and read the document in the HR office. He meets one Visitor in a conference room in a faculty office building which requires all entrants to swipe their university ID card. One Visitor asks him to copy a sheet with several phone numbers and contact information for the Ombuds to call when the Visitor is on vacation. As the Ombuds complies, he makes a mental note to destroy the sheet of paper once he no longer needs it. He gets an email from Facebook that concerns him — the Visitor he met at the coffee shop entered a note on her Facebook page lauding the Ombuds office for helping her solve a conflict. After a day with several Visitors and many phone conversations, he turns off his computer and heads home to finish an article he is writing for the IOA Journal. On the way home, he listens to the two voice messages that have been left by two staff members seeking appointments, but does not immediately delete them so that he will remember to follow up in the morning. After dinner, he finishes a draft of the IOA Journal article and emails it to the Editor just after midnight. Content with a good day's work, secure in the knowledge that he has kept only one written note that is filed securely in a locked file cabinet, he believes he has lived one more day consistent with the IOA SOPs. The Ombuds heads for bed as his cell phone purrs with new messages, including one from his colleague on the West Coast who asks him to delete the draft research paper because she found a mistake where she had inadvertently included information that might disclose the identity of some Visitors. As our Ombuds drifts off, one small worry nags him — how many records has our well intentioned Ombuds developed in his one day of work that he must account for under the IOA SOPs? That small nagging feeling will soon overwhelm him when he realizes the avalanche of information that now is intentionally and sometimes unknowingly kept through his daily work through ESI.

Although this discussion does not exhaust all the potential records, there is little doubt that this hypothetical produced an extensive digital trail. Each time an electronic device was opened, the Ombuds produced an electronic record and a metadata chain of information regarding the activity itself. Voice messages are frequently digitized, and perhaps replicated in an email system, so that information has left a digital trail and when not deleted prior to normal back up policies, becomes a second set of records in the back up files.

The Ombuds should work closely with a team within the institution to determine the best methods for seeking the greatest protection for confidentiality. Working with the institution's document retention and destruction policy with added safeguards for increased confidentiality of Ombuds material should be an early step. Courts will examine if regular destruction policies are followed when no litigation is reasonably anticipated. The Ombuds should be aware of his or her institution's back up policy, if any, for electronic communications. Ombuds should consider deleting all electronic messages before back up occurs. Deleting emails and voice mails prior to back up on a consistent basis can also show good faith efforts to maintain confidentiality. Care should be taken, however, knowing that deleting destroys neither the message nor the metadata. Computer forensic experts can retrieve data that has been deleted unless additional wiping or destroying the hard drive itself eliminates the ESI. Deleting reduces the number of records maintained by the Ombuds, but does not delete all records. Encryption programs may be utilized to protect from internal review or outside hackers, but encryption still leaves "ones and zeroes": they may have to be unencrypted if they are left on hard drives or in archives prior to the anticipation of litigation. When computers or cell phones are replaced, care needs to be taken that the original hard drives or SIM cards are properly disposed of to prevent outsiders from obtaining information that is retrievable by forensic experts.<sup>24</sup>

Did the Ombuds check his electronic calendar on his cell phone or home computer? Even if a code describes the appointments, has the Ombuds recorded the code and its keys on a written document prepared by computer? The Ombuds needs to know that just checking his calendar produces additional metadata

on those separate devices leaving a record that might identify the Visitor. Recall that metadata includes information that is stored on any computer every time a computer is turned on and a file opened.

Cell phones, especially smartphones, present particular problems. The ease of use and ubiquity of cell phones have led people to not use passwords for the phones themselves or the voice messages left on cell phones. A technique known as ID spoofing can enable another person's phone to disguise their phone and access voice mails.<sup>25</sup> If passwords are not employed, the Ombuds places all his information at risk of possible theft. Moreover, cell phones leave a digital trail as they seek out cell towers leaving a trail corresponding with the actual Ombuds journey which can identify the location where the Ombuds met his Visitor at the coffee shop.<sup>26</sup> When combined with the record of the calls, it could lead to the identity of the Visitor. Smartphones offer backup availability to the cloud — a server not owned by the Ombuds or the Ombuds' institution, but one where the Ombuds information is stored until needed by the Ombuds. Third parties may have access to that information through court ordered subpoenas or by hacking. Relying on servers in the cloud may be the way of the future, but it places the responsibility on the Ombuds to reasonably know how to protect the confidentiality of the information stored in the cloud. Cell phones should be password protected with the ability to wipe out information if stolen or lost. As smartphones lead to millions of new apps, Ombuds should investigate whether a new app opens security concerns to their personal information. One app that advertised as a full service for owners with the bonus of encryption did not encrypt the metadata which included the file name.<sup>27</sup> Thus, an unsuspecting Ombuds might innocently place a file name that provided identification which would not be protected under the apps encryption promises. Tablets raise many of the same confidentiality problems.<sup>28</sup>

Modern copiers and printers often include a chip that digitizes all copies made on a machine. The Ombuds should use a copy machine or printer that does not have that option, or at least know that destroying the sheet of paper that had vacation phone numbers will not eliminate the record if the machine still has a digital record of the paper.

When the Ombuds stopped at the security desk, did a video camera record his image or the image of the alumnus Visitor later that day? If so, what is the institution's policy on maintaining and destroying the video recording?<sup>29</sup> Likewise, the Ombuds and Visitor both swiped ID cards to meet at the faculty office necessitating that the Ombuds know the retention policy on tracking entries into university buildings.

The consequences of social media and confidentiality have just begun to be investigated. A Visitor's use of social media may explicitly reveal communication with the Ombuds, but if privacy controls are not properly managed, may also disclose meeting locations and make more information public than either the Ombuds or Visitor would desire. IOA has already begun to discuss the use of social media and Ombuds practices.<sup>30</sup>

Use of the cell phone, authoring the IOA Journal article at home, and receiving the email from the West Coast colleague all left a digital trail on multiple devices. Depending upon what the Ombuds worked on with a home computer or what emails might be sent or received from a personal email account, the Ombuds may have discoverable material, and therefore, General Counsel might put a legal hold on the home computer.<sup>31</sup> Although it is less likely that a litigant could demand that a third party such as the West Coast Ombuds have her computer reviewed by a forensics expert, at least one court has ordered a forensic review of a non-party's home computer to see if an email sent by the non-party to one of the litigants could be used as evidence in the trial.<sup>32</sup>

This daily routine of an Ombuds production of ESI does not intend to frighten us into paralysis or back to the quill pen days when the unique paper record could be shredded to ensure confidentiality. With the size of some of our institutions, electronic communication may be the only way to permit access for some of our Visitors. Moreover, if history is any guide, most Ombuds will not be party to a lawsuit or subject to discovery. Under the SOPs, however, the Ombuds still has a duty to understand what records are under control of the Ombuds office. The intent, moreover, is to look for ways to encourage access and communication with maximum protection and control. Indeed, the Ombuds profession may have been a few steps ahead of others in understanding the complexity of



confidentiality and electronic communication. IOA's professional training has long emphasized the importance of alerting Visitors to the possible breaches to confidentiality through the use of email. Just recently, however, the American Bar Association released a new Formal Opinion regarding an attorney's duty to warn a client that if the client uses a company owned electronic communication device, there is a significant risk that the communications will be read by the employer or a third party.<sup>33</sup> If such a policy exists, attorneys should warn their clients that all emails sent or received through the employer's computers, cell phones, or telecommunications devices are subject to employer review, and therefore, face the potential that the attorney-client privilege would be unavailable to protect the communication from serving as evidence in litigation.

## Steps to Protect Electronically Stored Information

Given the scope of ESI, the following suggestions may help all Ombuds sleep better at night. First, develop a team approach with your information services staff (IS), your document retention and destruction policy staff, and your General Counsel's office to anticipate issues and seek resolution. Work with your IS team to understand the many different ways you produce a digital record of your daily activities and what steps you can take to minimize unauthorized access as well as complete destruction of data as a routine course of business. Continue your education about how technology creeps into normal Ombuds practices and how one can encourage access without breaching confidentiality.<sup>34</sup> Invite your IS team to find computer programs or apps that enhance security and organize the Ombuds' ESI. Explore encryption programs that permit ease of communication. Follow the spirit of SOP 3.6 to use technology to secure all ESI produced by the office and enable efficient and effective review of ESI if the office receives a legal hold letter.

Know your institution's document retention and destruction policy and, in communication with your institution's staff, enhance it to meet the particular requirements of the Ombuds' SOPs. Follow your document retention and destruction policy consistently to preclude any question that document destruction was done because of litigation, rather than as part of the normal practice.

Smartphones and tablets are easily lost or stolen. Ensure that information is encrypted; use passwords both for the device and for voice mails to avoid the spoofing problem. Investigate and add effective malware protection specifically for your smartphone. You may also download apps to block or wipe clean your smartphone if it falls into the wrong hands. Make plans to cover such possibilities knowing that human error remains one of the most vulnerable elements of computer security.<sup>35</sup>

Compare notes with colleagues in other professions such as health care, the law, and government who face similar issues. The International Legal Technology Standards Organization was recently established at the American Bar Association's Techshow and it has started to list standards for attorneys while seeking feedback from the profession.<sup>36</sup> Several state bar associations have made it clear that attorneys have a duty to continue to educate themselves on the issues raised by new technologies. One scholar suggests that an attorney who litigates today and does not understand metadata, commits malpractice.<sup>37</sup> The Seventh Circuit Court of Appeals has instituted a trial program for attorneys to understand the challenges of e-discovery. Its final point tellingly establishes a duty of continuous education regarding e-discovery.<sup>38</sup> The state bar of Arizona includes within its Professional Responsibility rules, the following caveat:

... whether a particular system provides reasonable protective measures must be 'informed by the technology reasonably available at the time to secure data against unintentional disclosure.' N.J. Ethics Op. 701. As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients' documents and information.<sup>39</sup>

The Arizona bar further emphasized the duty of attorneys to "recognize their own competence limitations regarding computer security measures and take the necessary time and energy to become competent or alternatively consult available experts in the field."<sup>40</sup> Ombuds should have no less standard of reasonableness. IOA might consider gathering interested Ombuds to explore how Ombuds can best work with new technologies with integrity to our mission and continue to educate Ombuds regarding the use of electronic devices. The author is a member of the IOA Legal and Legislative Affairs Committee which is cur-

rently reviewing all SOPs. The Committee welcomes your ideas for ways to help all Ombuds enhance communication while maintaining protection of their data.

We live in a time when the ESI tsunami brings both blessings and curses. We can use the technology to assist our mission of assisting resolution of conflict and build a more peaceful world. At the same time, we can be so overwhelmed with the onslaught of “ones and zeroes” in our lives that we fear paralysis from attempting to leave no trail of ESI records. The courts have begun to recognize the overwhelming costs and burdens associated with e-discovery. They have sought proportionality and intentional cooperation between competing parties in the midst of litigation to preserve the court’s ability to find the truth in difficult controversies and limit the cost of reviewing “exabytes” of information to find that one email that sheds light on liability. Not surprisingly, seeking cooperative and peaceful resolution of conflict defines Ombuds work. Through collaboration with IS staff, document retention and destruction staff and General Counsel’s office, Ombuds seek a similar goal and bring a new level of security to the records we produce in our work.

At the same time, the ESI expansion may call for a review of the scope of Ombuds confidentiality. The profession may want to explore proportionality in terms of balancing access and working in partnership with one’s institution and Visitors to clearly express what can be kept fully confidential and what can be reasonably protected. At the very least, IOA may consider expanding the language we use to inform our Visitors about the confidentiality consequences of ESI. We can bring our resources to bear and exploit the new technologies without betraying our principles. Otherwise, if we hide our head in the cloud, we run the risk of disclosing far more information than we ever dreamed we possessed in the midst of all those “ones and zeroes.”

## ENDNOTES

<sup>1</sup> Two other additional groups may seek access to Ombuds information. Hackers, malicious or otherwise, may troll the data from Ombuds seeking confidential information or passwords that unlock other information. Finally, federal or local law enforcement may seek information or hacking by foreign governments may test the protection of an Ombuds’ ESI. These two additional areas also need to be examined, but are beyond the scope of this article. Nonetheless, some of the steps taken to safeguard ESI discussed in this article may also protect against these other risks.

<sup>2</sup> IOA Standard of Practice 3.5 states, “The Ombudsman keeps no records containing identifying information on behalf of the organization.” See IOA. “Standards of Practice.” Accessed September 8, 2011. <http://www.ombudsassociation.org/about-us/mission-vision-and-values/ioa-best-practices-standards-practice>.

<sup>3</sup> IOA SOP 3.6 states in full, “The Ombudsman maintains information (e.g., notes, phone messages, appointment calendars) in a secure location and manner, protected from inspection by others (including management), and has a consistent and standard practice for the destruction of such information.” Ibid.

<sup>4</sup> Jason R. Baron writes: “The world... is simply awash in exabytes.” “Law in the Age of Exabytes: Some Further Thoughts on ‘Information Inflation’ and Current Issues in E-Discovery Search,” 17 *Richmond Journal of Law and Technology* (2009): 3. “An Exabyte is 2 to the 60th power, or 1,152,921,504,606,846,976 bytes.” See TECHTERMS. “Exabyte.” Accessed September 8, 2011. <http://www.techterms.com/definition/Exabyte>. For an entertaining video on how quickly the data expands, see Ralph Losey and Jason Baron, “e-Discovery: Did You Know?” Accessed November 3, 2011. <http://vodpod.com/watch/3036029-e-discovery-did-you-know-by-baron-and-losey?u=e-discovery&c=blogvideos>.

<sup>5</sup> Fred H. Cates, “Government Access to Private-Sector Data,” *IEEE Security and Privacy* 8 (2010): 68-71, accessed September 13, 2011, doi:10.1109/MSP.2010.176, quoting Kathleen M. Sullivan from “Under a Watchful Eye: Incursions on Personal Privacy,” *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, Public Affairs, 2003, 131.

<sup>6</sup> Inst. for the Advancement of the American Legal System at the Univ. of Denver, “Electronic Discovery: A View from the Front Lines,” 10 (2008), quoted in David L.C. Thomson, “Law School 2.0, Legal Education for a Digital Age,” (Newark, N.J., LexisNexis, 2009), 51-3.

<sup>7</sup> Jerome M. Wendt, “A Zettabyte of Data Puts New Premium on Scale-out Storage Solutions,” DCIG, accessed September 16, 2011. <http://hpstorageworks.d cig.com/2011/07/a-zetta-byte-of-data-puts-new-premium-on-scaleout.html>.

<sup>8</sup> Institute for the Advancement of the American Legal System, University of Denver, "The Emerging Challenge of Electronic Discovery: Strategies for American Business." (2008): 2. Accessed November 7, 2011. <http://www.du.edu/legalinstitute/pubs/EDiscovery-Strategies.pdf>.

<sup>9</sup> CTIA: The Wireless Association, "Wireless Quick Facts: Year End Figures." Accessed September 16, 2011. [http://www.ctia.org/consumer\\_info/service/index.cfm/AID/10323](http://www.ctia.org/consumer_info/service/index.cfm/AID/10323).

<sup>10</sup> Losey and Baron, "Did You Know?"

<sup>11</sup> Catherine Sanders Reach, "A Chance of Rain: Ethics and Cloud Computing," *Law Practice Today* (2010). Accessed November 7, 2011. <http://apps.americanbar.org/lpm/lpt/articles/ftr10105.shtml>

<sup>12</sup> Institute for the Advancement of the American Legal System, "Strategies," 2.

<sup>13</sup> *Ibid.*, 17. For other concerns about electronic communication, see IOA. "Crystal Ball 2011." Accessed September 8, 2011. <http://www.ombudsassociation.org/sites/default/files/FINAL%20crystal%20ball.3.8.2011.pdf>

<sup>14</sup> This article addresses questions raised by the consequences of ESI and litigation within the United States, and thus, cannot address how other jurisdictions will be impacted. All Ombuds, however, need to be careful in protecting their own ESI. Moreover, this article does not provide legal advice, but raises questions about the impact of ESI and e-discovery that Ombuds should address with their attorneys or General Counsel.

<sup>15</sup> Howard Gadlin, "New Ombuds Standards Create Tensions and Opportunities," 11 *Dispute Resolution Magazine* (2005): 15.

<sup>16</sup> See, e.g., Timothy J. Chorvat and Laura E. Pelanek, "Electronically Stored Information in Litigation," 66 *The Business Lawyer*, (2010); 183. See also, Institute for the Advancement of the American Legal System, University of Denver, "Strategies," 2.

<sup>17</sup> For a more thorough description of the discovery process and the relevant legal issues regarding Ombuds confidentiality, See Charles Howard, *The Organizational Ombudsman: Origins, Roles, and Operations; A Legal Guide* (ABA Publishing, 2010) 311-38.

<sup>18</sup> *Super Film of America, Inc. v. UCB Films, Inc.*, 219 F.R.D. 649, 656-7 (D.Kan., 2004).

<sup>19</sup> For a description of the potential burden a party faces in responding to an e-discovery request, see e.g., "An Open Letter to the Judiciary—Can We Talk (Part One)?" Accessed November 7, 2011. [http://e-discoveryteam.com/2011/09/11/an-open-letter-to-the-judiciary-%E2%80%93-can-we-talk-part-one/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+wordpress%2FQbzZ+%28e-Discovery+Team%29](http://e-discoveryteam.com/2011/09/11/an-open-letter-to-the-judiciary-%E2%80%93-can-we-talk-part-one/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+wordpress%2FQbzZ+%28e-Discovery+Team%29) and "Part Two" <http://e-discoveryteam.com/2011/09/18/an-open-letter-to-the-judiciary-%E2%80%93-can-we-talk-part-two/>.

<sup>20</sup> *United Medical Supply Co., Inc. v. U.S.*, 77 Fed. Cl. 257, 263 (2007).

<sup>21</sup> *Ibid.*, 258-9 (emphasis in the original). See also, Baron, *Exabytes*, \*20-\*29 describing how parties have to cooperate in the age of e-discovery.

<sup>22</sup> Charles Howard, *Organizational Ombudsman*, 190-91, 292-95.

<sup>23</sup> 271 F.R.D. 125, 135-136 (2010). See also, Kroll Ontrack. "Year in Review: Kroll Ontrack 2010 Discovery Trend Data Reveals Organizations Struggle with Preservation, Production, and General Discovery Protocols." Accessed September 8, 2011. <http://www.krollontrack.com/blog/post/Year-in-Review-Kroll-Ontrack-2010-Discovery-Trend-Data-Reveals-Organizations-Struggle-with-Preservation-Production-and-General-Discovery-Protocols.aspx>.

<sup>24</sup> The ABA Journal reports how a reporter obtained information on the legal defenses used by one party from a computer found in the garbage of a building. Debra Cassens Weiss, "NYT Learns of Goldman Trader's Legal Defense from Discarded Laptop," *ABA Journal*, June 1, 2011, accessed September 8, 2011, [http://www.abajournal.com/news/article/nyt\\_learns\\_of\\_goldman\\_traders\\_legal\\_defense\\_from\\_discarded\\_laptop/](http://www.abajournal.com/news/article/nyt_learns_of_goldman_traders_legal_defense_from_discarded_laptop/).

<sup>25</sup> Ron Lieber, "Your Voice Mail May Be Even Less Secure Than You Thought," *The New York Times*, August 19, 2011, accessed September 9, 2011, [http://www.nytimes.com/2011/08/20/your-money/your-phone-may-be-less-secure-than-you-thought.html?\\_r=1&ref=yourmoney](http://www.nytimes.com/2011/08/20/your-money/your-phone-may-be-less-secure-than-you-thought.html?_r=1&ref=yourmoney).

<sup>26</sup> Although beyond the scope of this article, government surveillance has increased with less judicial oversight. As Fred Cates writes, "In years past, the government might physically follow a suspect or search his or her home, thereby creating at least the possibility (and often the legal requirement) for notice and an opportunity to object, whether through a judicial, legislative, or other process. Today, surveillance is far more commonly conducted through cell phone service providers or GPS transceivers, thereby eliminating the opportunity of individuals to be aware of, much less object to, the activity." Cates, "Government Access," 69.

<sup>27</sup> Richard Acello, "App-Solutey Perilous? Security of Mobile Apps Spurs Concern," *ABA Journal*, (September 2011): 32.

<sup>28</sup> Littler Privacy and Data Protection Practice Group, "What Does the 'Year of the Tablet' (or of The iPad) Mean for Em-

ployers?" *Littler Workplace Privacy Counsel Blog*, January 13, 2011. Accessed November 7, 2011. <http://privacyblog.littler.com/2011/01/articles/data-security/what-does-the-year-of-the-tablet-or-of-the-ipad-mean-for-employers/>.

<sup>29</sup> In my three block walk from my train to my office, I have counted at least 10 video surveillance cameras that appear to be operated by my institution. During the half mile walk to my train, entering the train station, and leaving, I have counted more than thirty other public and private cameras recording my daily commute. Had I met my Visitor at the coffee shop next to the station, our meeting may well have been recorded by the city police camera. My electronic card that I swipe for my fare each day records my movement on public transit and my colleagues' toll payments on the expressway have been expedited by automatic toll collection while leaving an additional record of their daily commute.

<sup>30</sup> See "Crystal Ball."

<sup>31</sup> Philip L. Gordon and Hillary R. Ross, "E-Discovery: Three Major Challenges For Employers," *ASAP: A Littler Mendelson Time Sensitive Newsletter*, January, 2007, 3.

<sup>32</sup> *Berryman-Dages v. City of Gainesville Florida*, Case No. 1:10-cv-00177-MP-GRJ (N.D., D.C. Fl), 2011. The Order permitted a computer forensics expert to "image the hard drive...to search for the letter in question, and any related metadata, including the unallocated free space on the hard drive." The court was also sensitive that private information on the home computer might be disclosed, and therefore, it ordered an independent expert conduct the review and ordered that all private information be kept confidential. Nonetheless, the e-discovery revolution will probably find lawyers constantly urging courts to enlarge the scope of subpoenas seeking ESI.

<sup>33</sup> American Bar Association Standing Committee on Ethics and Professional Responsibility, "Formal Opinion 11-459, Duty to Protect the Confidentiality of E-mail Communication with One's Client," August 4, 2011. Such risk may also exist if a personally owned device links to a company's network.

<sup>34</sup> Find both internal and external resources to keep one up to date. For example, see the website sponsored by the Indiana University's Center for Applied Cybersecurity Research for helpful tips. Accessed September 16, 2011. <http://www.securitymatters.iu.edu>.

<sup>35</sup> Philip L. Gordon, "Managing Employees' Use of Personal SmartPhone's and Tablets for Work," *Littler Workplace Privacy*

*Counsel Blog*, April 26, 2011, accessed on September 9, 2011. <http://privacyblog.littler.com/2011/04/articles/data-security/managing-employees-use-of-personal-smart-phones-and-tablets-for-work/print.html>. See also, Richard Jaroslovsky, "Left to Our Own Devices, We Fail to Keep Them Secure," *Chicago Tribune*, September 12, 2011, B2.

<sup>36</sup> Richard Acello, "Setting Standards, Group Aims for Technology Use by Attorneys," *ABA Journal*, September 2011, 30.

<sup>37</sup> Inst. for the Advancement of the Am. Legal Sys. at the Univ. of Denver, "Electronic Discovery: A View from the Front Lines" 10 (2008), quoted in David L.C. Thomson, *Law School 2.0, Legal Education for a Digital Age*, (Newark, N.J., Lexis-Nexis, 2009), 52.

<sup>38</sup> See the Seventh Circuit's E-Discovery Pilot Program website, accessed September 16, 2011. <http://www.7thcircuitbar.org/displaycommon.cfm?an=1&subarticlenbr=109>.

<sup>39</sup> State Bar of Arizona Committee on the Rules of Professional Conduct. "Rule 09-04: Confidentiality; Maintaining Client Files; Electronic Storage; Internet," Last modified December 2009, Accessed November 7, 2011. <http://www.myazbar.org/Ethics/opinionview.cfm?id=704>.

<sup>40</sup> *Ibid.*

# Can We Talk? Confidentiality and the Ombudsman as an Individual

INDUMATI SEN

## ABSTRACT

Rather than introducing an exception to confidentiality, this piece reaffirms the critical and central role confidentiality plays, while recognizing that ombudsman practitioners too have important interests as individuals and as a part of collectives, with various attachments to identity and real world obligations. At times, the breadth of confidentiality under the IOA Standards of Practice and Code of Ethics may prevent practitioners from voicing concerns and raising issues that emerge from confidential settings but that impact them directly. As a profession that advocates for fairness and equity, we should be able to discuss, understand and provide guidance on whether and how practitioners may adequately address their concerns in a fair and equitable manner, while also protecting confidentiality of the underlying communications. Informal dispute resolution mechanisms, such as external ombudsman and mediation, should be further explored as viable avenues for creating a safe space where ombudsmen may raise issues (or defend their interests) while still guarding confidential communications. Gaining clarity on options and process for the ombudsman can serve to strengthen the independence and impartiality of the ombudsman's role, as well as satisfy an existing gap between the profession and practitioner.

## KEYWORDS

Confidentiality, ombudsman practitioner, individual, interests, needs, informal dispute resolution, discourse

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Before all else, I convey my deep gratitude to the steadfast yet warm tenacity of David Miller, who I think is quite remarkable. And, to my dear colleague in New York who always takes the time to give me honest and critical feedback.

## INTRODUCTION

I still remember that evening years ago walking to class going over the reading assignments in my head, with my shoulders leaning forward to bear the weight of the books in my backpack, when my stride was suddenly interrupted by, "Hey, I'm talking to you, you affirmative action bitch!"

I also remember the relief of being able to speak with someone I trusted in confidence. Nothing was more comforting than knowing I had a way to privately explore and evaluate the situation before making a decision on how to address it, or whether to address it at all. In that instance, I was a "visitor".

Years later, as an ombudsman practicing under the Standards of Practice ("Standards") and Code of Ethics ("Code") of the International Ombudsman Association ("IOA"), a different scenario raises questions. What if I, for example, were trying to confidentially inform a visitor there was nothing more I could do on their matter within my role as ombudsman, and the visitor shouted similar utterances? Certainly, I have an interest in being free from gender, racial and verbal harassment, and in exploring viable options to address the situation in a way that is fair. However, how can I begin to do this if out of a duty to provide the visitor with confidentiality, I could not identify the visitor or the content of our communications<sup>1</sup>? And, if confidentiality would not allow me to raise the issue, then it is no surprise that there is insufficient clarity regarding the process by which I could securely explore options for resolution.

There is a gap in guidance, therefore, from the profession regarding how to recognize and protect the ombudsman's interests as an individual, a family and community member, and as a professional who is still subject to organizational cultures and environments despite functional independence for his or her role. As people, we too have underlying interests such

as respect, equality, job security, reputation, career advancement, and other needs to meet. Ironically, the types of interests we as ombudsmen try to assist others to meet through fair and informal dispute resolution, we are ignoring for ourselves.

Confidentiality serves a fundamental purpose and is of utmost importance in the effectiveness of our work to say the least. The IOA Code, Standards and Best Practices provide clarity on the essential needs of the function, including on confidentiality. However, they do not necessarily provide much emphasis or guidance on the needs of the individual fulfilling the function, such as for fairness. In fact, the breadth of confidentiality, without a discussion of how a practitioner may raise his or her own concerns, can be perceived as an impediment to a fair opportunity to understand and resolve conflicts that arise out of confidential communications.

My goal is to reaffirm the vital nature of confidentiality, but also delve deeper into conversations we need to have about ombudsmen as individuals. Specifically, the dilemma an ombudsman may face in wanting to guard confidentiality of communications but also needing to safely raise issues out of a confidential environment that may not necessarily rise to the level of an exception, or “imminent risk of serious harm.”<sup>2</sup>

One idea for bridging the gap and reaching a balance lies within a realm where ombudsmen already have expertise: informal dispute resolution. The Office of the Ombudsman (“Office”) and its staff, the host organization, and constituencies the Office serves could consider informal dispute resolution processes to help resolve issues arising out of the Office, including from the ombudsman’s interaction with visitors or the organization.<sup>3</sup> Well known processes such as negotiation, organizational ombudsmanry and mediation would help transition an issue from one confidential setting to another while enabling the ombudsman (or a visitor or the organization, for that matter) to raise issues that would normally lack clarity in whether and how they may be raised. The profession, through the IOA’s Best Practices, could be a strong source of support for such an opportunity.

## Balancing Interests of the Profession and the Practitioner

Rather than introducing or examining an exception to confidentiality, this piece revolves around recognizing the critical and central role confidentiality plays, yet acknowledging and recognizing the needs of practitioners as individuals. After all, individuals are a part of collectives, with various attachments to identity and real world obligations. Impartiality and other aspects of our role do not wash those aspects of our individual and group identities away. In fact, I propose that a profession that advocates for fairness and equity should also remember the *individual* who breathes air into the role of the ombudsman, and ensure that its practitioners are able to adequately address their own concerns and interests in a fair and equitable manner. Such recognition and support can only serve to strengthen our independence and impartiality, and positively impact our practice and profession.

### Let us look at confidentiality and interests through a hypothetical scenario.

A is of Central Asian background, a young, single woman, and a newer ombudsman with a limited network of colleagues. She is passionate about ombudsmanry and has finally been able to get a position with an organization after searching for employment in the ombudsman field for almost a year, following several years of graduate school and incurring student loan debt. She is proudly traditional, and is the sole provider for herself and her widowed mother, who is prominent in her community and is helping to arrange a marriage for her daughter. A and her mother are immigrants who live in the United States.

A is a Certified Organizational-Ombudsman Practitioner (“CO-OP”) and is the sole practitioner for an Office that follows the IOA Standards and Code. A is working with Z, a top manager and a rising star in the organization, to help resolve an issue with Z’s assistant. Z, knowing the conversation will be confidential, makes comparisons between his assistant’s body and A’s, while staring at A’s breasts. He calls her “exotic.” As he leaves, he makes further sexual comments about A’s body and sex appeal, making A feel extremely vulnerable and angry.

In looking at some of the issues involved in the above scenario, sexual harassment is clearly one that jumps out. There are also potentially ethnicity-based and gender-related issues, among others. In this particular scenario, there is also an abuse of power within the confidential setting of the Office. The question is how A could or should proceed and according to whose terms.

## Protection of Confidentiality as a Core and Shared Interest

First, let us look at confidentiality from the organizational ombudsman profession's perspective. Under the IOA Code and Standards, A cannot disclose any part of the conversation with Z unless there is an imminent risk of serious harm or without Z's express permission. The Standards provide that as the ombudsman, A "holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality..."<sup>4</sup>

This also includes the following requirement by the Standards:

"The Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman Office, nor does the Ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman Office, without that individual's express permission, given in the course of informal discussions with the Ombudsman; the Ombudsman takes specific action related to an individual's issue only with the individual's express permission and only to the extent permitted, and even then at the sole discretion of the Ombudsman, unless such action can be taken in a way that safeguards the identity of the individual contacting the Ombudsman Office..."<sup>5</sup>

Therefore, as a practitioner, A is bound by confidentiality and cannot raise the sexual harassment or other issues based on the communications with Z from their session. This is true even if she withdraws from the matter (as she should do in this case since impartiality cannot be maintained, along with other reasons). As a CO-OP, raising the issue in a way that may become public may even open her up to being "disciplined" by the Board of Certification, which states in its Ethics Complaints Procedure that "Certified professionals who violate the Code of Ethics or the Standards of

Practice, or engage in other unprofessional conduct as defined in Section 3.01 hereof, are subject to prescribed disciplinary procedures and sanctions set forth in this document."<sup>6</sup>

This seems like a win-lose situation at first glimpse as we have a view of A as an individual and the circumstances behind the event. However, it is important to remember that the organizational ombudsman field has a fundamental interest in protecting confidentiality as a core principle of the function as well. Confidentiality has evolved to become a central characteristic for the organizational ombudsman profession, practitioner, visitor and the organization committed to an effective ombudsman programme.<sup>7</sup> As the profession was developing in the United States and although the 1969 American Bar Association (ABA) Resolution did not mention confidentiality as an essential characteristic, by the time of the 2001 ABA Resolution, "a consensus had developed that the essential characteristics of an ombuds, and those of an organizational program in particular" must include confidentiality.<sup>8</sup> The influence of mediation and other alternative methods of dispute resolution on the inclusion of confidentiality in the evolution of the organizational ombudsman are noted:

"In mediation and other forms of alternative dispute resolution, confidentiality had long been seen as a critical element of the process, because only with the assurance of confidentiality will the parties reveal their real concerns and goals. The mediator, privy to the claims and hopes of both sides, can then begin to try to find common ground or means to resolve the dispute. Because so much of what organizational ombuds now do closely resembles this type of mediation, application of similar process confidentiality to organizational ombuds was a natural development."<sup>9</sup>

Through the adoption of confidentiality in the IOA Standards and Code, the organizational ombudsman profession has identified an essential element for the function and effectiveness of the role, which also complements and supports the elements of independence, impartiality and informality.<sup>10</sup> Indeed, confidentiality helps define the ombudsman's function and the nature of the Office's services, so much so that even though the ombudsman is the one who asserts the confidentiality privilege, it is a *shared* interest and understanding between visitor, organization, profession and practitioner.

The reason that confidentiality is so important is that it works to establish trust and is a stabilizing factor in an unstable, conflict-ridden environment. Confidentiality directly helps protect the visitor by enabling an environment and process for sensitive discussions to take place, and keeping sensitive information, such as identity, safe from disclosure.<sup>11</sup> For organizations, confidentiality allows certain concerns to be raised that would not have been raised otherwise and promotes the improvement of organizational health. Confidentiality “is critical to making the Ombudsman Office a place where people can raise any issue, including an alleged violation of statute, regulation, rule, policy, or ethical standard.”<sup>12</sup>

The point where there is a gap forming between the professional principle of confidentiality and A’s ability to raise the issues is partly the breadth of confidentiality under the IOA Standards without providing for the recognition and accommodation for A’s need to be able to talk about what took place during the confidential session and understand what options there may be to try to address the matter if she wishes to do so. According to the Standards, the ombudsman asserts a confidentiality privilege, does not testify and resists testifying in a formal process, keeps no identifying records, protects confidential information from disclosure and inspection, and does not serve as a source for receiving or normally giving notice to the organization.<sup>13</sup> And, as the Code mentions, the exception to confidentiality is imminent risk of serious harm,<sup>14</sup> the best practice for which “should be to limit any such disclosure to only that needed to prevent or warn of imminent and potentially serious harm.”<sup>15</sup> Thus, the profession endorses a limited and narrow exception to confidentiality. This creates a source of conflict between A’s needs and her professional duty towards confidentiality.

Protection of the individual contacting the Office is paramount under the Standards, and the breadth of what is confidential is therefore vast. Within this vastness, however, appears the gap for fairly recognizing the needs and interests that may emerge for the ombudsman. That is, within communications that are considered confidential under the Standards there may be instances where the ombudsman feels unfairly treated, abused or targeted, but has no clear avenue to raise such issues without offending professional norms.

## Earthly Needs and Interests: The Ombudsman as an Individual

Not too long ago, there was an intriguing dialogue among IOA members about confidentiality that started with a question on the listserv. At the core of that passionate discussion was the issue of at what point in practice should / would we divulge information in order to protect our own interests. There seemed to be some conflict between the ideas of when we “should” versus when we actually might. Thoughts and responses (on and off-line) varied from not divulging anything unless the exception of imminent risk of serious harm applied and strongly resisting any external formal process, to complying with subpoenas and court orders, to highlighting that our role as ombudsmen is a source of livelihood on which we may depend, and to acknowledging that our reputation and careers are important to us. The discussion danced around the issue of the core interest of confidentiality and the potential conflict it could generate if our own needs, interests and rights were at stake. It was a discussion that included a spectrum of ombudsman perspectives, with one point of the spectrum focused on guarding confidentiality against all odds, and the other determining that at the end of the day, ombudsmanry is just a job.

Individuals have interests that need to be met through fair processes and agreements, and if unmet can lead to conflict<sup>16</sup> — no one understands this in practice better than the ombudsman who identifies the organization and the visitor’s interests on a regular basis to develop options for resolution to conflicts that surface. Although the ombudsman function requires observation of strict confidentiality (less exception) and impartiality, an individual with a life story fills the role of the ombudsman.

We can see A as an ombudsman, but hopefully also as a whole person. Her interests include the need for respect, equality, dignity and a harassment and retaliation-free environment. It is also within her interest to be treated with fairness, have clarity of options, be empowered, continue her livelihood and career, and be able to continue to observe professional Standards. We have a view of her ties to identity, to community, obligations, and priorities that make her a person as well as an ombudsman, and she has an



interest in protecting those. It is natural for A to consider how her financial situation would be affected if she chose to leave her position at the organization, or how the signs of unrest in her role with the organization may reflect on her career or within her tight-knit community. We can go further to imagine the impact sexual harassment claims may have, if somehow publicly available, on A's mother, A's sense of Self within her community, the flourishing of gossip, humiliation, etc. Furthermore, if she found no other way to address the issue and eventually left her position, how would A's perception of the ombudsman profession change?

Turning to how A may address the issues, the following options arise under the Standards. First, withdrawal from the matter is appropriate because actual and/or perception of impartiality has been affected. After withdrawal, A will be out of the specific case with Z, but it really does not address the issues that arose, and leaves open the possibility of future abuse. She can try to address the issues directly with Z, and/or if she has access to independent legal counsel<sup>17</sup>, she may be consult with counsel on next steps. Addressing the issue directly with Z can also be problematic as it could escalate and there is a very real political power imbalance in the relationship dynamic. Access to independent legal counsel instead of the organization's counsel would be appropriate to protect confidentiality. However, such access could very much depend on whether there is an understanding between the organization and the Office, and if so, what the specific understanding regarding independent counsel is. If A is an employee of the organization, she could also theoretically go to Z's boss, her own reporting line, Human Resources or the compliance office for sexual harassment to raise the concern via the applicable policy, but any real complaint would identify Z. The above options also run the danger of isolating the issues to sexual harassment, without the opportunity for more discussion on other specific or broader issues, such as power and relationship, and abuse of the ombudsman context within which the incident took place.

Alternatively, if the exception of "imminent risk of serious harm" applied, A could disclose the problem without fear of violating the Code or Standards. However, as previously discussed, this exception is intended to be narrowly interpreted. As another option, A could possibly disclose and place the organization on notice if there is a procedure to do so in her

role, but such disclosure could violate confidentiality under Standard 3.1 and 3.4. A may also violate Standard 3.3 if the matter leads to a formal process she has to be involved in as an informal channel. The other options include not doing anything, leaving the job, or seeking assistance from legal counsel or possibly an administrative body external to the organization if available and accessible. However, although there may seem to be a myriad of options, given the confidential, impartial, independent and informal nature of our role, the path for decision-making is not so clear.

Guided by the same interest and need-based philosophies alternative dispute resolution ("ADR") professionals, including organizational ombudsmen, so often apply toward clients and visitors, the question arises whether the above options will adequately meet and uphold A's needs and interests, including having an avenue, or a range of avenues, to raise the issues that concern her. In practical terms, it is important to picture what A may be weighing: disclosure and pursuing the protection of her own legitimate interests vs. protecting confidentiality and the sanctity of the profession as she has learned it. It is not an easy choice, and A may even be left without a person with whom she can consult. Ultimately, A may find that in practice the very role that helps others to raise concerns, and advocates for fairness and equity, may be confining her in being able to raise her own concerns, understand her options better and seek a fair resolution. She is not just without an ombudsman for herself, but confidentiality makes it unclear how she may consult a third party in the first place. If the Code and Standards did not intend for this gap to exist, then the IOA Best Practices can help by providing guidance and bridging it.

## Guidance under the IOA Best Practices

Currently, the IOA Best Practices<sup>18</sup> provides the following regarding the subject of retaliation, something the Ombudsman and the Office should be guarded from:

"The Ombudsman should be protected from retaliation (such as elimination of the office of the Ombudsman, or reduction of the Ombudsman budget or other resources) by any person who may be the subject of a complaint or inquiry."

Although the language seems to protect the practitioner as well as the Office, the examples that are provided relate more to retaliatory actions against, and effects on, the Office rather than on how the practitioner is affected. It is also limited to “retaliation” and does not touch on other forms of potential harms for the practitioner, such as harassment or abuse. The language also falls short of providing guidance on how to protect or resolve such issues if they come up.

Best Practices address the issue of “fair process and procedure” for the ombudsman, and it is recommended that processes for ombudsman should be addressed in the charter or terms of reference of the Office.<sup>19</sup> However, this is geared towards the discipline and removal of the ombudsman from Office rather than if the ombudsman had to raise an issue.<sup>20</sup> If the language could be broadened to include any or other issues arising out of the ombudsman function rather than only discipline and removal, the fair process in the charter could then extend to apply in instances the ombudsman needed to raise an issue herself.

### Let us take consider another hypothetical situation.

B is a university ombudsman who advised Y confidentially on a matter relating to Y’s relationship with her manager. Y in turn shared information with her manager that was partially true but largely false and identified B as the source of the false advice to justify her actions that had gravely violated an organizational policy. The manager took the matter to Human Resources, which turned to the Chancellor to speak to the ombudsman regarding the particular situation. Meanwhile, Y filed a complaint against the ombudsman using the university’s formal complaint process for misconduct. There is an Office charter, but nothing in the charter specifies how a complaint against the ombudsman may be resolved.

Realities of a desperate economy, the responsibilities of raising a family, supporting a mortgage and other financial obligations, and professional advancement may raise themselves as issues and interests for B. B is a middle-aged man who identifies himself as a father of 3 young children, a husband, a donor to his church, and a middle class professional who loves his job and is actively involved in the profession.

Here, B faces a formal complaint procedure, as well as inquiries and pressure from senior leadership. As A did, B may also feel strongly about protecting confidentiality and not participating in a formal process,

and at the same time feel conflicted given his own need to defend himself. On the one hand, deciding not to defend against the claims may mean the loss of his job, damage to his reputation and his career, humiliation, financial stress, among other real life consequences. On the other hand, defending himself might mean he discloses information that would be considered to be confidential under the Standards and Code. In the absence of “imminent risk of serious harm”, there is doubt that B would be able to defend himself without offending the confidentiality Standards.<sup>21</sup> Absent process and procedural guidance through his charter or Best Practices, B also has to decide whether he will participate in the formal process of the organization, which may further violate the Standards and Code. However, this may allow him the forum to defend himself and his interests<sup>22</sup>. And, what if B is released from his position for not participating in the formal complaint process, not providing confidential information to the Chancellor, or no reason at all — to what options would that road lead B? If released from his position, B will also have to consider how our profession now views him—there is a shadow over what “really” happened in the employment relationship with the organization even if he stood up for confidentiality.

These are all difficult questions, the breadth of which is beyond the scope of this paper, but raise real concerns about how, as practitioners, we can maintain the balance between legitimate self-interests and confidentiality. While the critical nature of confidentiality in the organizational ombudsman’s function is highlighted, it should also be acknowledged that practitioners could find themselves feeling unfairly cornered by the breadth of confidentiality without adequate avenues that address their needs. Confidentiality in effect may become a barrier to the opportunity to weigh options on how to address an issue, a fair process and outcome for the ombudsman. For example, if B should not go through the organizational formal complaint process, then the IOA Best Practices should provide guidance on what alternatives should be considered by the organization and the Office. In sum, IOA Best Practices would be an important starting point for providing guidance on whether the ombudsman may raise and address issues that may harm them as practitioners and individuals, on the types of processes that could address such issues, and on how the organization and the Office might negotiate language regarding the same on a charter or terms of reference.

## Allowing a Space for Discourse

The vital role of confidentiality and the reality of human interests both exist and may create tension if certain ingredients exist. The question now turns to how we can openly talk about this tension and understand what options there may be to bridge the gap between the profession and the practitioner.

In many ways, the ombudsman is like the community mediator who, although impartial and independent, has relationships within a cultural and communal setting with the constituencies, with one major distinction: the hovering organization. The constant presence of the organization as an employer; management as decision-makers; the ombudsman's power to criticize and heal; and, organizational politics and memory all help create a fragile dynamic and co-dependency ripe for conflict and retaliation against the ombudsman. This makes it all the more imperative that we recognize the need for clarity in what options and processes may be available for the ombudsman in difficult situations like those of A and B.

It is also worth noting the burden we can sometimes place on one another as colleagues who are "neutral" third parties and advocates of "civility". The idea of neutrality sometimes carries the danger of imposing the notion that we should be clean slates, without associations, bonds or identity, in order to reach a higher level of neutral consciousness without such attachments. A similar tendency applies with the idea of the need for "civility"; which, although may be well intentioned, can work to suppress necessary dialogue, expressions of civil disobedience and conflict if defined too broadly or attempting to regulate "civilized" conduct. "Civility" can also carry with it different, negative connotations and historical contexts for individuals and groups.

Although in our field we are growingly a diverse group of people from around the world who encourage fairness and equity in the treatment of parties in disputes, the quest for perfection in neutrality and civility can hinder much needed celebrations and sometimes, uncomfortable conversations, about our own identities and needs. To be impartial, it is important to be able to discuss freely what makes us partial. For example, we could benefit from more and ongoing discourse about the elements of our lives such as religion, national or regional identity, race, gender, age, socio-economic status, political affiliations, and other factors that help define who we are as individu-

als and groups. It is also healthy for an inclusive profession such as ours to have a deeper discussion on topics that its practitioners are not immune to, such as how we ourselves are affected by white privilege<sup>23</sup>, colonial or post-colonial identity, immigration, education, sexual identity, poverty and other social barriers, war and disasters, and other difficult conversations that may be pertinent to how we measure our needs and interests.

Such ongoing conversations will help us in recognizing what our interests are as individuals and professionals who practice under a common set of Standards. It would also help the profession understand where there are gaps between professional guidance and practitioners from around the globe, and how it may help bridge those gaps. The lack of discourse, on the other hand, can be a disservice as it fails to recognize the challenges and enrichment diversity of interests can bring within our own practice and profession, and we may not be well prepared to tackle difficulties that arise. As a profession, we should be better prepared to engage on a topic such the exoticizing and sexualization of A's gender and cultural identity. Or, what the balance is between self-interest and impartiality — for example, does B's heavy financial dependence on the university make him less impartial and more vulnerable to disclosing confidential information?

While it is true that as third parties in a case we are serving in we are not the first or second party disputants, it is also true that we are certainly not humanly above them or shielded from conflict ourselves. Carrying the burden of either trying to be, or be perceived as, immune to conflict also carries the danger of shifting to a perception of ourselves as immune to process and from accountability. This can be a hurdle in the relationship with our host organization, especially given the breadth of our desired confidentiality and independence from organizational structures and processes.

Howard Gadlin offered the following thoughts on racial conflict on campus as the outgoing President of the former University and College Ombudsmen Association (UCOA) on April 7, 1990.

"Clearly, there is a need for racial conflict: racial differences, distrust, hostilities and suspicions exist and need to be voiced, not suppressed. But they need to be voiced in such a way and in a context that keeps them from becom-

ing destructive and vicious. The idea behind conflict resolution and mediation is that conflict is a natural, inevitable and acceptable part of life. The role of mediation and other forms of conflict resolution is to allow conflict to occur in ways that are not destructive.<sup>24</sup>

The context of HG's speech related to racial harassment policies (and similar harassment policies) on university campuses, but the core message also involves process and making a genuine effort to engage conflict in constructive ways rather than suppressing the flow of conflict which may need to surface. I take the liberty to apply this to our own professional context in recognition that our independent, impartial and conflict resolution expert status do not make us conflict-resistant or harassment-proof, nor does it free us from misunderstandings or unfair treatment. In fact, our unique claim of independence, our veil of confidentiality, and our sometimes dubious relationships with organizations and their leaders make us all the more vulnerable. HG's eloquent discussion of the need for surfacing conflict, providing a constructive space and the role of mediation helps transition to the issue of what processes the profession may wish to encourage in order to protect confidentiality and support practitioners in raising issues when necessary.

## Informal Dispute Resolution and Options for the Ombudsman

As HG pointed out, informal forms of conflict resolution can allow conflict to occur in ways that are not destructive. As ombudsmen, we are continuously tapping into processes that can create a "win-win" outcome through fair, trust-worthy and collaborative communication for visitors. In addition, the practice of organizational ombudsmen under the IOA Standards, including the incorporation of confidentiality as a key component, is closely intertwined with the components of mediation.

The organizational ombudsman profession can better utilize informal conflict resolution for its own process needs, namely to allow concerns that affect practitioners to be raised and defend their interests, but in a confidential setting. Best Practices should recognize practitioners' interests more clearly and provide that Office charters can include a dispute resolution sec-

tion. This dispute resolution section would serve as a guide for the organization, visitors and the Office on how issues may be addressed by the ombudsman if they arise in the course of confidential casework. This could create an opportunity for confidentiality of the underlying matter to be maintained and the new layer of issues to be raised and managed by the ombudsman experiencing the conflict. Essentially, we would be putting into practice for ourselves what we have been doing for others. Trust in the ombudsman resource could still be maintained while allowing reasonable outlets for the ombudsman should the need arise.

As practitioners already know, informal dispute resolution carries with it the beauty of flexibility to match the needs of those who use it. In this case, the organization and the Office can tailor an agreement on dispute resolution to fit their needs, including tackling the issue of how to preserve voluntariness of informal dispute resolution while making it the preferred path for conflict resolution involving the Office.<sup>25</sup> The process of negotiation and involvement of the organization and constituents in approving and implementing the dispute resolution section could be powerful in gaining buy-in and to ensure input and a collaborative process from the very beginning. In addition, it would gain broader recognition that informal dispute resolution options allow multiple interests to be served for multiple parties — the visitor, organization, the ombudsman, our profession, and the ombudsman practitioner by: (a) protecting the confidentiality of underlying matters; (b) providing a private and fair environment in which the ombudsman could raise and resolve issues<sup>26</sup>; (c) for at least some issues, gaining more assurance about staying out of formal processes; and, (d) creating clear expectations regarding what process the ombudsman can rely upon and fall under if an issue arises.

The following are examples of options and the interests they meet:

### • ACCESS TO EXTERNAL OMBUDSMAN

As ombudsmen, A and B are without confidential, informal, independent and impartial advisors of their own. When problems first arise, and if the ombudsman needs to consult, discuss and explore options confidentially, s/he could have access to an external ombudsman to advise him or her. This option, as we know, allows an opportunity to be heard

and the beginning of dialogue. The ombudsman can receive coaching on negotiation from a third party neutral and help with evaluating the conflict situation, with issue and interest identification and analysis, as well as with the generation of options. If agreed to by the other individual involved in the conflict, shuttle diplomacy may be a valuable tool in reaching an understanding in a conflict. Imagine A having access to an external ombudsman, who then was able to confidentially relay A's concerns to Z and help reach an understanding that remained informal and confidential. Communications remain confidential, thereby protecting the interests of confidentiality in the underlying matter. Such an option could be provided for in the charter or terms of reference (similar to making a provision for independent counsel) and can be discussed with visitors openly.

#### • NEGOTIATION

Another helpful option that can be expressly provided for and encouraged is negotiation. The individuals involved (that is, the Ombudsman and the person with whom he or she is in conflict) may wish to negotiate a resolution directly between themselves and come to an understanding informally and privately. Negotiation involves a process of communication that allows those in a conflict to be able to plan for and work towards a resolution and allows space for a cyclical process with "a repetitive exchange of information between the parties, its assessment, and the resulting adjustments of expectations and preferences; there is also a development process involved in the movement from the initiation of the dispute to its conclusion — some outcome — and its implementation."<sup>27</sup>

A negotiation process allows the flow of direct communication, the exchange of perspectives and information, and getting on the same page towards a resolution. There is potential for the healing of the relationship. However, direct communication and negotiation may not be possible in all cases. A, for example, may feel uncomfortable raising the issues that resulted from her interaction directly with Z. However, it may be useful for B's communication with the Chancellor — he may communicate directly with the Chancellor on the issues anyway, but having a clear framework to work within may help ensuring privacy, security, and be conducive to a non-adversarial ap-

proach. As with the external ombudsman option, the process for negotiation could be clearly laid out in the charter.

#### • MEDIATION

A natural, familiar and related option to explore is mediation, where there is more active intervention by an impartial third party and the process may be more structured and guided, to a point where the mediator may make a proposal for agreement to help resolve the conflict. The mediation process also maintains all that is sacred to the ombudsman: confidentiality, informal process, independence and impartiality of the third party. The mediation process also creates a common theatre for the actors to share their stories more closely, and empowers them to determine their fate in resolving the matter. There remains hope that relationships will survive. Thus, if A and Z were able to engage in mediation, perhaps A would be able to at least voice her concerns and the conversation could lead to a positive outcome such as acknowledgment, an apology, and practical remedies consistent with the values of the organization, such taking a course on sexual harassment for Z, etc.

There are questions regarding if there is an agreement reached through mediation, whether it should be signed by the ombudsman who is now a party, and if so, where it should be housed. However, these are not completely unfamiliar questions by any means since many ombudsmen who mediate have raised these record-keeping related questions that would need further consideration.

Other questions to think through include whether the organization should receive a copy of any written agreement as the employer, what rules for mediation would apply, and whether financial settlements can be reached through the process against the Office. However, if the kinks are worked out, it could create an opportunity to surface conflicts, let them take a constructive course, and learn from the experience. For instance, mediation between B and the university could lead to discussion and creativity about the missing elements of the ombudsman programme, such as amending the charter to include a specific and fair process for complaining against the ombudsman, or how the organization will support the Office in the future to protect confidentiality.

## • FINAL AND BINDING ARBITRATION

If applicable, final and arbitration may be an alternative to going to court on issues and maintaining confidentiality even though the process is more adversarial. It is a more determinative and formal process than mediation or consulting with an external ombudsman, and it can be costly. However, if the issue can be arbitrated, it could allow the parties to be heard in a private setting, hire a subject-matter expert as an arbitrator, and reach an outcome through a third party determination. This option may be especially interesting for international organizations because of the proliferation of the usage and understanding of international arbitration.

Issues regarding arbitration may include whether there will be legal representation for disputants, the rules for procedure, cost, among other issues. The most difficult step for practitioners and the profession here may be, as it is for me, to agree to the possibility of an adversarial process. However, for certain issues, it is worth weighing against going to court.

Regardless of what type of option is used, the profession and practitioner would have to be vigilant and carefully examine how confidentiality would be guarded through such options, especially from the organization if it is not privy to the confidential communications the ombudsman needs to protect. Other complex issues may arise as well, such as negotiating and providing clarity on collective bargaining agreements regarding represented employee participation in alternative processes with the Office. Furthermore, whether and how the issue of giving or receiving “notice” is affected by using alternative dispute resolution should also be examined. Thus, implementation and protocol would also need careful consideration and discussion.

Clarity and security regarding process could also serve to deter retaliation against the ombudsman or Office by organizational actors and help strengthen our role as impartial third parties because such deterrence would relieve some of the burden. Just as we may encounter the need to access independent counsel, we may encounter instances when we need access to a clear, fair, confidential and informal process as practitioners. Although this paper focuses on conflict for the ombudsman practitioner out of the confidential setting, as a profession we may wish to explore the broader role informal dispute resolution can play if applied to the greater organizational ombudsman context. For example, we should consider whether

informal dispute resolution mechanisms may be helpful in the following environments: (a) disputes within the Office among Office staff; (b) when the organization receives a complaint about the ombudsman or other Office staff, and discipline and removal of the ombudsman; (c) when the CO-OP Board receives a complaint against a certified practitioner; and (d) how the IOA as an organization may address disputes.

What is most appealing is that the Office would be promoting, modeling, applying, and learning from conflict resolution techniques ombudsmen are already familiar with and those that complement the ombudsman profession. If tracked, the issues that arise for the ombudsman may provide the profession with valuable data going forward in creating dialogue, evaluating practices and standards, and making improvements.

## Conclusion

We do not necessarily have to choose between sacrificing confidentiality and our own legitimate interests. Ombudsmen A and B are no Wonder Woman or Superman, but mere mortals striving to achieve best practice in their roles within an organizational setting that can be fragile. They play a unique role, but in no way did they come into ombudsmanry as unpainted canvases or without complex, tangled identities that define them and their limits. The profession can help support a healthy discourse about the needs and interests of practitioners and tensions with the principle of confidentiality. This will help generate better guidance to practitioners and organizations on how to address difficult situations that arise for ombudsmen within the realm of confidentiality. Informal dispute resolution mechanisms in particular may be the most natural course that nurtures fairness and process for the ombudsman, and protects confidentiality of underlying communications.

As recently as this past month, a lawsuit filed by a former ombudsman claiming retaliation by the college she had worked for in New York caught my attention.<sup>28</sup> Other than retaliatory actions for acting in her role, she also raised issues of age, gender and disability being motivating factors behind the college's adverse actions. It is a powerful reminder indeed that although our interests as practitioners and individuals can be discussed through a safe distance with hypothetical scenarios as in this paper, our need to be able to express and meet them is as real as we are.

## ENDNOTES

<sup>1</sup> Assuming there is no imminent risk of serious harm.

<sup>2</sup> IOA Standards of Practice, "Confidentiality", Section 3.1.

<sup>3</sup> Or, even for disputes between staff members of the Office, who as a result of working for the Office, may not have access to informal dispute resolution within the organization or may be privy to confidential information relevant to the dispute.

<sup>4</sup> IOA Standards, *supra*, Section 3.1.

<sup>5</sup> *Id.*

<sup>6</sup> <http://www.ombudsassociation.org/certification/certification-board-policies/ethics-complaint-procedure>

<sup>7</sup> Charles L. Howard, *The Organizational Ombudsman, Origins, Roles and Operations, A Legal Guide*, ABA Publishing, Chicago (2010), See pp. 27-29.

<sup>8</sup> *Id.* at p. 28.; Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, Negotiation J., Apr. 1997, at 3.

<sup>9</sup> *Id.* at 28-29.

<sup>10</sup> IOA Standards and Code, generally. The importance of confidentiality of information has also led to the seeking of legal protection in the form of a privilege. However, since this paper will focus on confidentiality as an interest rather than discuss in great detail privilege or other legal contexts.

<sup>11</sup> IOA Standards of Practice, Section 3.1-3.8, "Confidentiality"

<sup>12</sup> IOA Best Practices: A Supplement to IOA's Standards of Practice, "Confidentiality," guidance for Section 3.2.

<sup>13</sup> IOA Standards, *supra*, Sections 3.2-3.8.

<sup>14</sup> Even then, disclosure is encouraged only when no other responsible option is available.

<sup>15</sup> Howard, *supra*, at 362. For discussion on "special relation" obligation in the American legal context, see also, *supra*, pp. 354-363.

<sup>16</sup> Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, (New York: Penguin Books, 1983)

<sup>17</sup> This is also an example of the importance of addressing the question of independent counsel in the Office's terms of reference or charter and how the determination may be made to access counsel.

<sup>18</sup> It should be noted that the Best Practices are under revision and this paper does not take into account changes that may result.

<sup>19</sup> IOA Best Practices, October 2009, Preamble and following language; Howard, *supra*, pp. 48-50, on 2004 ABA Resolution, and 278-286, on charter and contract.

<sup>20</sup> IOA Best Practices, October 2009, "Independence." Interestingly, the organization and the Office could agree that

informal dispute resolution steps will constitute the procedure, or part of the procedure, for removal of an ombudsman from Office as well.

<sup>21</sup> Remembering also that organizational ombudsmen claim that they are the "holders" of the confidentiality privilege and not the visitor, it is difficult to argue that because Y has revealed communications from the session with B, the privilege has been waived thus freeing B to defend himself.

<sup>22</sup> However, if he is able to successfully defend himself, what precedent does this set for the Office and what does this mean for his role in the future?

<sup>23</sup> To provide a very general idea, "white privilege" is a part of critical race theory that looks at privileges that concepts of race establish in society, and is usually focused on North American and European societies or structures; Dr. Peggy McIntosh is one of the leading thinkers on this topic and was actually part of a panel at an IOA conference in Boston to present on this topic. Unfortunately, the session had low turnout. <http://nymbp.org/reference/WhitePrivilege.pdf>

<sup>24</sup> Amendment to speech, available at [http://www.creduca-tion.org/resources/4thR\\_1991\\_v33\\_Gadlin.pdf](http://www.creduca-tion.org/resources/4thR_1991_v33_Gadlin.pdf)

<sup>25</sup> There may also be an opportunity to have a more direct confidentiality and dispute resolution agreement with constituents. For example, as a part of organizational policy or process, all employees of an organization (or Office constituents) may expressly agree to the IOA Standards and Code in order to use the ombudsman resource through a contractual understanding. This agreement could also include a dispute resolution section that provides what options for dispute resolution would apply in case of an issue arising out of the Office, and what the ombudsman is protected from (retaliation, harassment, abuse, etc.). Since such an agreement would be offered to all employees equally and a part of regular practice, there would be no issue with identifying visitors as the agreement would exist even if an employee never visited the Office. Housing the agreement could be with a department such as Human Resources, but if the Office is not identifying a particular visitor, it could potentially house copies of all the agreements. This would give the Office the independence of not having to ask the organization for particular copies if they were needed.

<sup>26</sup> As mentioned above, it may also allow Office staff an interesting option for resolving issues arising in their unique workplace. In addition, it may also provide a private setting for visitors and the organization to raise concerns regarding the Office or Office staff.

<sup>27</sup> Gulliver, Phillip H., *Disputes and Negotiations: A Cross-Cultural Perspective*, (1979), p. 81.

<sup>28</sup> The Ombuds Blog, <http://ombuds-blog.blogspot.com/2011/10/court-dismisses-lawsuit-filed-by-ombuds.html>; *Sank v. City Univ. of N.Y.*, 2011 U.S. Dist. LEXIS 125016, 2-3 (S.D.N.Y. Oct. 27, 2011).

# What Happens to Confidentiality if the Visitor Refuses to Report Unacceptable Behavior?

MARY ROWE

## ABSTRACT

This article examines a common question frequently posed to organizational ombuds about what they would do if a visitor refuses to report or otherwise act responsibly about a situation that might present a risk of serious harm. It briefly reviews the Code of Ethics on confidentiality, and the concepts of “imminent risk” and serious harm. The article affirms the importance of seeking advice if there is time, without mentioning identities of those involved if that is possible, but being prepared to breach confidentiality if necessary to prevent serious harm. It discusses some options for getting information where it needs to go, on a timely basis, without the ombuds practitioner having to breach confidentiality, and points out that such options usually exist.

## KEYWORDS

zero barrier office, confidentiality, organizational ombudsman, zero tolerance, whistleblowing, Ombudsman Code of Ethics

## ACKNOWLEDGEMENTS

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Practicing “near-absolute” confidentiality is one of the four major principles of being an organizational ombud. “Near-absolute” confidentiality in the ombuds office can be seen as the cornerstone for being, and being seen as, a “zero-barrier” office within an organization.

This professional practice is often interpreted as meaning: that ombuds keep no case records for the employer, that ombuds will not take action or speak about a visit to the ombuds office without permission to do so (and even then the ombuds has to agree to act or speak) and that the only exceptions to this practice are in very extreme cases.

However, people are often puzzled by how it is possible to keep confidences nearly all the time. People often ask organizational ombuds about the “limits of confidentiality.” For example, a manager may be concerned about ombuds action if faced with a visitor who describes totally unacceptable behavior. If the visitor refuses to act to stop the behavior, and this visitor also refuses to report it, what will the ombud do?

Questions about confidentiality sometimes are couched in the context of an imagined scenario. The ombud might be asked, “What happens to confidentiality when your visitor discusses a terrible safety problem, or a racial or sexual assault, or a major embezzlement, and the visitor will not report it? Will you breach confidentiality?”

The ombud may wish to answer such questions in three separate steps. The first is to quote, and perhaps discuss, the relevant sentences in the IOA Code of Ethics. The second step is to outline what visitors to the ombuds office are told about confidentiality. And the third step is to point out that—almost always—there are options other than a) keeping silent or b) breaching confidentiality.



### 1) The IOA Code of Ethics<sup>1</sup>

The Code of Ethics gives the following instruction about confidentiality:

The Ombudsman holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm.

It is clear from the Code of Ethics that all organizational ombuds should be prepared for an imminent-risk situation when they do have to breach confidentiality. “Near-absolute” confidentiality is not the same as “absolute” confidentiality. It is important therefore to understand the parameters of *imminence* and *serious harm*.

Imminence may vary by context, and serious situations are usually quite complex. How might the ombud judge if serious harm is imminent? For example, if a visitor discusses possible destructive action by an individual, the ombud will likely be thinking, is this an imminently dangerous situation with this individual? In particular, according to the guidance of experts<sup>2</sup>, “Under what circumstances might the named individual act in a dangerous fashion with respect to a specific target?”

Predictions of “dangerousness” are generally not very reliable beyond a few hours or days. An ombud may therefore think about “imminence” in terms of a day or a couple of days unless a specific date is named for the “serious harm.” An ombuds practitioner will likely consider breaching confidentiality — *if that is the only alternative to serious harm* — when, in the ombud’s judgment, serious harm will ensue within a day or two, or by a credible specified date, if there is no intervention.

It follows that, when the question arises, the practitioner might first ask himself or herself is, “**Is this an emergency?** Could I call someone in my organization, or an expert outside the organization, and ask advice in a way that does not breach confidence? Could I speak in hypotheticals, disclosing no names, and get the information that I need? **Do I have time to ask advice**, for example, from another ombud?” If so, the ombud will usually seek advice — and usually in a way that does not compromise confidentiality. In a true emergency, however, the ombud must be prepared, alone, to make a judgment of imminent risk and serious harm.

### 2) Expectations of Confidentiality

Visitors to an ombuds office should know what to expect about confidentiality. Many ombuds post their Terms of Reference and Code of Ethics and Standards of Practice on the office website, and in brochures and other materials. Many ombuds introduce themselves, and mention their code and standards, in an opening statement with all visitors. (These introductions may vary somewhat from office to office, and the organizational context may affect how an ombud might define “serious harm.”)

### 3) Options Other Than Breaching Confidentiality

In real life, in almost all situations, the ombud can help to develop responsible options, within an acceptable time frame, that avoid an unacceptable alternative of silence, and the unwanted alternative of breaching confidentiality.

For example, frequently a visitor may not adequately understand rules and laws and policies relevant to the situation. A thoughtful discussion of the facts, of laws and rules, and of responsible conduct, may suffice to persuade a visitor to act or come forward in a reasonable way. Often a visitor may agree to act responsibly in order to prevent harm to others in the future. And as outlined below, there are many additional options for getting information surfaced in a responsible fashion.

It may be important to start by exploring the options already considered by the visitor. Some visitors have indeed thought about reporting their concerns, but they do not trust the supervisor that would be the obvious person with whom to speak. Extensive discussion may serve to identify other relevant managers who may be seen to be approachable. As a common example, the visitor might be willing to go to a senior manager, after refusing to go to the immediate supervisor.

Many people will agree to talk with (just) one particular person in the organization, although not with others. This fact may be especially helpful when the visitor reports that he himself has done something unacceptable, and when he knows at some level that the facts must be told. It may also work when he or she has been *planning* to do something unacceptable.

A person who might be a danger to self or others might be willing to seek help from just one particular person in a medical department. A person who has done something very wrong is sometimes willing to “turn herself in” to one particular person in security who is known to be respectful and trustworthy. Sometimes a person will agree to act if the ombud accompanies him or her to the medical department or security, or to another line or staff manager.

Some visitors will not act immediately, in the moment, but may be willing to act after some time has passed or after the situation has changed in some way. A person might be willing to come forward after he or she has gotten a transfer to a different job. Some students might feel safer reporting a very serious problem in a class when they have completed the given class. After discussion, the ombud may feel the suggested time frame is acceptable, under the circumstances.

Sometimes what is most needed is just for accurate and sufficient information to get where it needs to go. Some visitors are willing to provide an anonymous factual account to the appropriate managers. For example, a visitor may be willing to slip an effective, polite, factual, anonymous note under the door of a senior manager or compliance officer.

As a different option of the same kind, an ombud may be given permission to act, in place of the visitor, while protecting the identity of the visitor. Many visitors will give permission for the ombud to provide information to relevant managers for action to be taken about the issue, if the ombud can offer a way of doing so without betraying the source of the information. Many ombuds agree to listen to visitors who do not give their names — that is, visitors who come in or call as Person X. Persons X (anonymous visitors) sometimes ask an ombud to get information where it needs to go<sup>3</sup>.

In yet a different option, the ombud may be given permission to instigate a “generic approach” to find and take care of the problem. As an example, suppose the visitor speaks of a serious potential safety problem. Could an apparently routine safety audit catch the relevant problem fast enough? Might the situation then be further improved by enhanced safety training? If so how can the relevant information get to the relevant Environmental Health and Safety office, to catch the problem, and provoke relevant action or training? For a financial issue, how can the relevant

information be provided, anonymously, to the relevant auditors? Could an appropriate new policy on unacceptable behavior, and a training program, serve to prevent unacceptable behavior on field trips?

Some visitors just need to learn the skills they need to act effectively on the spot, or to report a problem effectively. For example, after preparing with the ombud, a visitor may be willing to try a direct approach to a perceived problem person or to a compliance officer. This may happen even in cases where at the outset the visitor flatly refused to take action on his or her own. Sometimes this becomes easier after the visitor has painstakingly collected all the facts of the situation. Some visitors find a direct approach easier if they prepare. As an example, they might write out what they want to say: about facts, apparent damages or potential damage, and any possible remedy<sup>4</sup>.

Some visitors can find an “accompanying person” who shares their concerns, so they do not have to take action alone. Some “bystanders” may be willing to take action if they can do so together with other “bystanders.” Some visitors may be willing to come forward if they know they may be protected by credible policies against retaliation, or whistleblower protection laws. Some can be persuaded by the wish to protect other people: (*“Am I right that you would not want anyone else to be hurt as you describe yourself to have been hurt?”*) Some people may be willing to come forward about part of a problem, in the hopes and expectation that the whole problem will come to light.

The list above is obviously not exhaustive. If none of these ideas work, one need not give up. An ombud may decide that a situation is not an emergency, and find a way to say to the visitor, *“Obviously we both know that some action must be taken here — let’s just touch base every day until we find an option that seems right.”* Thinking about a situation collaboratively, in this way, will — often enough — turn up an acceptable option. On the other hand, an ombud must take care not to be “used” in a subtle fashion, by a visitor who does not wish to take action about something serious. This might for example, be some one who says, *“Well there is no urgency here; after all I can always come in to talk with you here in the ombuds office.”* In situations where there should be an on-going discussion, the ombuds will wish to take care to stay in close touch with the visitor until an acceptable solution is found.

Organizational ombudspeople are in a position of great trust and are required to try their best to live up to this trust<sup>5</sup>. Nowhere is this more important than with maintaining near-absolute confidentiality—and in understanding the need to breach confidentiality where there is no other reasonable option. Ombuds are designated as independent neutrals, and must try to be duly mindful of the interests of all who are stakeholders in a specific situation, including the employer. An ombud might — in a very few cases — have to breach confidentiality, though some organizational ombuds have never had to do so. In nearly all cases an ombud can develop other reasonable options.

## ENDNOTES

<sup>1</sup> When organizational ombuds formed professional associations, one of their first actions was to draft Codes of Ethics. Confidentiality was, from the first, considered essential for professional practice. Carole Trocchio of Southland Corporation drafted the first confidentiality provision for the (then) Corporate Ombudsman Association and a group of academic ombuds drafted the confidential provision for UCOA. The resultant Codes were melded when IOA was formed. Confidentiality is also included in Standard of Practice 3.1: The Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following:

The Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman Office, nor does the Ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman Office, without that individual's express permission, given in the course of informal discussions with the Ombudsman; the Ombudsman takes specific action related to an individual's issue only with the individual's express permission and only to the extent permitted, and even then at the sole discretion of the Ombudsman, unless such action can be taken in a way that safeguards the identity of the individual contacting the Ombudsman Office. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the Ombudsman.

<sup>2</sup> This question is discussed in depth in the IOA Ombud Booklet *Dealing with the Fear of Violence: What an Organizational Ombudsman Might Want to Know*

<sup>3</sup> In this respect the ombuds office is in the same role as a hot line. The ombuds practitioner may however be more helpful than a hot line can be, because the practitioner may be able to ask a number of questions to get more information.

<sup>4</sup> An example of an advisory to help in such preparation may be found at <http://web.mit.edu/ombud/self-help/drafting-letter.html>

<sup>5</sup> IOA Standard of Practice 4.8: The Ombudsman endeavors to be worthy of the trust placed in the Ombudsman Office.

# Practice Note: Imminent Risk — A Serious Exception to Confidentiality

**ILENE BUTENSKY**

## **ABSTRACT**

Confidentiality is a cornerstone of an Ombudsman's role so any exceptions to it are not taken lightly. As such, the determination of the exception for imminent risk of serious harm should be determined in advance so that a process is in place to deal with such cases. Often however, the cases that are presented to us allow for alternatives to breaching confidentiality. This article discusses some of our recent examples to serve as a case study of sorts.

## **KEYWORDS**

Confidentiality, Imminent Risk, Exceptions

Confidentiality is the one tenet that is often cited as the most important of the Standards of Practice. As Organizational Ombudsmen, we often meet with employees to explain the role of the Ombuds Office at our company. The presentation, which we call Ombuds Office Rollout, for new employees, or Refresher, for current employees, focuses on what we mean by Confidentiality, and why it is so important in the context of the Ombuds Office and our role. We explain how Ombuds confidentiality is very different from the confidentiality they have with their supervisors and even the Global Ethics and Compliance Office. It is often the trust in the security of the Ombuds confidentiality that will make an employee feel comfortable coming forward to discuss their concerns with us.

So then, why would there ever be an exception to this important standard? Well, according to the Standard of Practice 3.1, the only exception to the privilege of confidentiality is "where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the Ombudsman." This seems very simple but in actuality the determination of imminent risk can be very difficult and in so many cases cannot be made without careful determination, but in some cases an immediate determination must be made. The determination of imminent risk is therefore only one level of the analysis. The other key determinants of the decision on whether there is imminent risk include consideration of whether there are reasonable options to breaking confidentiality. This is an important decision that is made by the Ombudsman.

Certainly, the most dire cases of imminent risk, and we are grateful to say they are few and far between, are fairly straightforward. For example, if someone is calling our office and tells us they are at the end and have no option but to end their life, we of course would consider this an imminent risk. In such unfortunate and unusual cases, we would handle the call by making every effort to keep the caller on the line and by way of a “soft transfer” would link them to the Employee Assistance Plan (EAP), where a trained professional will provide them with support. Most of the work we do as Ombudsman at our company is over the telephone where employees call us on free phone or toll free lines for discussion. This poses extra challenges since we cannot rely on body language or non-verbal communications. We have to use our active listening skills to sort out the details of the call. Another example that typically meets the imminent risk exception is where there is a dangerous weapon in the workplace. It is ironic that in so many of the potential imminent risk calls that come to our office, the callers tell us they want something done immediately so that no one’s life is put at risk, but they just don’t want their identity to be known. In the hypothetical case of a dangerous weapon in the workplace, we would contact local security or the police. It is often not so simple though, as we try to determine whether there is an imminent risk of serious harm. A recent case we dealt with in our office had to do with a caller who discussed that there was what appeared to be a toy gun in the workplace. Is this or could this be considered imminent risk of serious harm? We had to ask ourselves, is this imminent risk of serious harm, and if so are there any alternatives? I don’t recall the exact outcome of this case, and of course we have not written records, but my recollection is the caller was willing to go forward and speak with his Human Resources Manager so that a confirmation could be made that the gun was not real and that even if it was real enough looking, that a panic didn’t ensue. The standard in our office is when in doubt, we use our expert Ombuds skills to help us determine whether an imminent risk exists and if so, what are the options to look at to avoid disclosure. Safety is an extremely high standard in the company’s manufacturing facilities, and this is therefore another area of potential imminent risk exceptions. Again, only after a two-step determination that 1) the issue poses an imminent

risk and 2) there are not reasonable alternatives can the determination be made. It is our job and obligation as Ombudsmen to be as creative and knowledgeable to come up with options to discuss reasonable alternatives.

Going back to the discussions we have with employees and leaders in the company, we try very hard to explain how our confidentiality standards are different from a manager’s or the Global Ethics and Compliance Office. It is common for all three (that is, Ombuds, ethics, and manager) to say that conversations are held confidential, but this has a different meaning when it comes to Ombuds. A conversation with an employee and manager are not confidential since the manager has a duty to act. The same duty does not exist in the role of the Ombudsman. A manager is required to come forward, even in cases where an employee tells the manager “as a friend” that there is a situation that rises to the level of a duty to act. The same is true for the Global Ethics function, where they too have a duty to act and investigate to determine the facts. This is not the same for Ombuds but we would have a similar duty to act if in our determination there is an imminent risk of serious harm.

In terms of the determination process, it is seldom that the Ombudsman will need to make an immediate decision on the imminent risk. One example we faced in our office related to this point was a caller who said she received “death threats”, which were related to her work. She wanted to take the threat seriously but didn’t want anyone to know about this. Our Ombudsman was able to protect the identity of the caller and arrange for the caller’s protection on an absolute “need to know” basis. The caller then gave us permission to give her name to the firm who would provide protection to her. Later on when the caller felt more comfortable, she gave us permission to divulge her identity. So what we did in this case was to “At the very least, the best practices of an Ombuds should be to limit any such disclosure to only that needed to prevent or warn of imminent and potentially serious harm.” (Howard, 361)<sup>1</sup> We likely could have determined at the outset that this was a case of imminent risk, due to the caller’s allegation of a death threat. In the course of our work as Ombudsmen, we always work to find other options to breaching confidentiality, as we did in handling this case.

The process that is used in our office for determining imminent risk, in cases where we have the time to do so, is to discuss with the Ombuds team or at a minimum another Ombudsman the facts as we know them to determine whether there is a case of imminent risk. We have other resources available to us within the company who can assist with providing support, even without disclosing confidential information. Resources that are available to us include the Safety and Security function, Environmental Health and Safety function and Human Resources. Often it is not necessary to determine whether there is an imminent risk of serious harm and therefore a need to make an exception to the confidentiality standard, simply because the caller gives us permission to go ahead. In those unusual cases where permission is not granted, then the office should have a protocol on how to handle such difficult cases. This is especially true in cases where time is of the essence and little time exists to make decisions, due to the urgency of the case and there do not appear to be any alternatives.

## ENDNOTES

<sup>1</sup> Howard, Charles L. ,*The Organizational Ombudsman – Origins, Roles, and Operations a Legal Guide*, American Bar Association, 2010.

## I WAS JUST THINKING

# An Ombudsman's Role in the Face of Confidentiality Violations

NICHOLAS DIEHL

### ABSTRACT

This case study explores a dilemma for an ombudsman who is torn between practicing to the standards of confidentiality and neutrality and addressing a confidentiality breach by a party following a mediation session. It raises questions of the role of the ombudsman and special challenges of working with multiple parties.

### KEY WORDS

Ombudsman, confidentiality, mediation, violation, accountability, standards, role, multiple parties

A number of years ago, after having facilitated a mediation session between two co-workers, I received a jolting call from Danny, one of the participants who had a particularly abrasive style. "I know I wasn't supposed to do this, but I just knew Alex was lying during that mediation session, so I went around to the people who he said were badmouthing me and sure enough, he was lying about it. They all told me they never said anything bad about me. Now I want another mediation session to set the record straight."

The mediation had been especially challenging with two people who had a long history of animosity toward each other including altercations that had nearly come to blows. The fact they had sat down together for a conversation seemed like a minor victory in light of their mutual mistrust; even though the session went well their agreements seemed tentative. The call from Danny was disheartening and, frankly, I felt like I was being put on the defensive.

In the conversation I had with Danny regarding his complaint and request for a new session, many questions were raised for me regarding my role as an ombudsman/mediator and my responsibilities, if any, related to parties' behavior following a process I had managed. First, how would I address the issue of Danny admitting to me he had violated ground rules he himself had agreed to and knowingly broken? Second, was there any obligation on my part to share with Alex what I knew about the violation? Third, was there any kind of consequence related to the violation in the absence of a written agreement? Finally, how I would respond to Danny's request in the moment in a way that would be congruent with my neutrality?

In this case it was not a matter of Danny learning additional information about the situation incidentally. Instead, he knowingly violated the agreement the parties made regarding confidentiality and readily admitted he had done so. One of the ironies of this case is the fact Danny believed Alex had been untruthful, violating Danny's trust. Meanwhile, by taking steps to prove Alex had lied, Danny himself broke his promise to keep the substance of the mediation confidential.

It is no surprise confidentiality is frequently violated in mediation processes, but as an internal conflict resolution practitioner I had to consider whether I had an obligation to Alex to share my knowledge of the breach. I also had to take into consideration the implications for the integrity of the mediation process and the credibility of the Ombuds Office. It is certainly imaginable that many people knew of the violation of confidentiality — since Danny had spoken to them about the mediation session — and such a violation might impact the perception of the office for others in the organization.

Just as it is impossible to guarantee the parties in a mediated process will not violate their own agreements to confidentiality, there is a reality that the organizational ombudsman role has an inherent vulnerability in that practitioners are limited in defending themselves since the standards of practice frequently preclude any discussion of a particular case.

## POLICING CONFIDENTIALITY

Although confidentiality is a central principle for both mediation and ombudsman practice, it is very difficult to hold parties accountable for maintaining confidentiality, especially when multiple parties are working together. In reality, the only confidentiality a mediator or ombudsman can promise is related to his or her own handling of information that has been provided, within the parameters of the practitioner's standards and the law.

Even in ombudsman cases in which there is just one party, there are times when an inquirer might believe an ombudsman has breached confidentiality when in fact it is the inquirer who has inadvertently done so. For example, I worked with an inquirer who was convinced I had divulged to her co-workers information she had shared with me. I had not. When I asked her who else she had spoken with about the situation she said she had only told three close friends in the office...but they would never say anything to anyone.

It was not hard for her to track down the source of the leak once she realized she had shared her private information with people who had not promised her confidentiality.

As most ombuds do, when I first work with an inquirer I am careful to describe how confidentiality applies to my role at the beginning of our meeting. If the inquirer is particularly dubious that I might break confidentiality I encourage the person to consider carefully what they feel comfortable sharing based on their level of trust in me. I also acknowledge that although I make a promise of confidentiality directly to the inquirer (of course with the imminent risk of serious harm disclaimer), our office charter describes my obligation to maintain confidentiality and I practice to the International Ombudsman Association standards, the inquirer is still making a leap of faith in sharing information that is likely sensitive and could potentially put the inquirer in a very vulnerable position if it were revealed.

Although I have always asked parties in a mediation session to discuss their expectations for confidentiality — and to make an explicit agreement whether they will maintain confidentiality and to what extent — both at the beginning and the end of the joint process, I have refined the way in which I present the idea of confidentiality in one-on-one meetings and in joint sessions. Similar to my approach in ombuds cases, I give my perspective on the pros and cons of engaging in mediation and I discuss the realistic limits of confidentiality and how difficult, or impossible, it is to hold others accountable for maintaining confidentiality. While I believe there is a risk of making people pessimistic or overly cautious, I recommend people share what they are comfortable sharing and while one would hope all parties involved would honor the confidentiality of the process, it is generally very difficult to substantiate whether someone has violated confidentiality (unless they call you and tell you directly) and generally there is very little or no recourse for holding another party accountable for a violation. Ultimately, the party or parties involved should consider whether the potential benefit of sharing information outweighs the risks.

In the case of Danny and Alex, I declined Danny's request for a follow-up mediation. I felt Danny was not acting in good faith. Danny was very upset and



mildly threatening to me in response to my decision. I did not contact Alex to share that confidentiality had been broken. There is a high likelihood Alex knew about the violation before I did, but I never heard from him. There is also the possibility the parties would have both been agreeable to having an additional mediation session, but I was struggling to balance my obligations to confidentiality and neutrality with an ethical dilemma regarding my role in sharing information in light of Danny's confidentiality breach.

Although accountability is low in regard to parties maintaining confidentiality, in this case there was a minor consequence for Danny: I did not fulfill his request for a subsequent session. Of course, there may have also been consequences I was unaware of related to his violation of confidentiality.

# Online Dispute Resolution and Ombudsmanship

FRANK FOWLIE

## ABSTRACT

Online Dispute Resolution (ODR) is an emerging and growing field in Conflict Resolution. Ombudsmanship, and in particular, organizational Ombudsmanship, is a practice that has relied on in person communication. This article examines the applicability of ODR to Ombudsman practices, and provides Ombudsman practitioners with checklists that will help determine the viability of technology assisted solutions as an aid to their 'Ombudsman toolbox'.

## KEYWORDS

Ombudsman, Online Dispute Resolution, ODR, Case management system, Technology-assisted ODR, Conflict Resolution

## INTRODUCTION

This Article focuses on the applicability of Online Dispute Resolution (ODR) for a specific dispute resolution mechanism, the Ombudsman. The Article is based on the experiences and observations of Dr. Frank Fowlie, who served as the Inaugural Ombudsman for the Internet Corporation for Assigned Names and Numbers (ICANN).

It is submitted that ODR is a process that may be applied to Alternative Dispute Resolution (ADR) techniques. Specifically, ODR uses technology, especially the Internet, to augment ADR processes. It has been emphasized that ODR may be applicable to disputes which emanate from either online or real world activities. For example, ODR may be used as a vehicle to handle consumer disputes relating to online purchasing of goods, or it may be used as a resolution system for small claims in direct business to consumer transactions (B2C).

## Two Types of Online Dispute Resolution

There are two basic branches of ODR, both based on the role of technology. The first branch may be called "Technology Based". Technology-based ODR refers to those systems where technology plays an active role in conducting the dispute resolution. A prominent example of technology-based ODR systems are 'blind-bidding' systems. The technology uses multivariate algorithms to help parties arrive at the optimal outcome.

Blind-bidding systems are, for the most part, nascent technologies. They are usually most applicable in situations where there are some tangible and monetary remedy sought by the parties, for example, a refund on a faulty good, or a value for an insurance claim following a car accident. The technology-based system will assist parties to determine Best and Worst Alternatives to a Negotiated Agreement (BATNA and WATNA). The technology receives inputs from the parties, and then draws from them to develop an optimal outcome.

Blind-bidding systems are less likely, as nascent technologies, to be able to provide for the inclusion of the non-quantum based variables, such as apologies, or the creation of new alternative solutions or options beyond the quantum values.

The second branch of ODR consists of technology-assisted solutions. Technology-assisted ODR refers to the use of technology to augment ADR processes that exist independently of the technology. As the following discussion will demonstrate, technology-assisted ODR is well suited for ombudsman work, as its tools allow for an increased efficiency of human-based transactions and activities.

The ICANN Office of the Ombudsman is a good example of a technology-assisted ODR operation. The most important aspect of this position as an ODR provider is the use of an online case management system. The case management system (CMS) facilitates communications and correspondence between complainants, the organization, and the Ombudsman. The CMS augments, but does not replace, the human aspect of the communication.

The ICANN community is an online community. By definition, participants in ICANN are online users, as the role of the organization is to administer the Domain Name System (DNS), which is the addressing backbone of the Internet. Disputes that occur within ICANN may be either in the real world, or online in nature. A unique element of the ICANN Office of the Ombudsman is that it serves a global community. ICANN stakeholders come from every nation in the world and span all 24 time zones. As the ICANN Office of the Ombudsman is a sole practitioner office, it would be impossible to be operational 24 hours a day to communicate synchronously with complainants. However, using the CMS complainants, the organization and the Ombudsman may engage in asynchronous communication. Asynchronous communication may be described as parties sharing communications that is not a direct real-time conversation. For example, a complainant in Asia may use the CMS to initiate a complaint while the Ombudsman is sleeping in North America; the Ombudsman may then respond to the complainant after office hours have closed in Asia.

The CMS also allows for the collection and analysis of data for statistical reporting. During the case intake process, information such as the country location and category of complaint are recorded. In closing the complaint, the Ombudsman designates the resolution type, and confirms the complaint category. These statistical records help to identify complaint trends which may assist in providing early intervention on systemic issues.

These three technical adjuncts — case management, asynchronous communication, and trend identification — all assist and augment the human-based activity in handling complaints. However, the Ombudsman process is still driven by the human-based activities of investigating; developing questions, options, and recommendations; and communicating findings and reports. Thus, we may conclude that technology-assisted ODR is appropriate for Ombudsmen.

Generally, ODR is a relatively new field in dispute resolution. It remains in its infancy, but it continues to grow in a rapid manner. As ODR has grown, it has begun to codify its activities. For example, in 2009, the Advisory Committee of the National Centre for Technology and Dispute Resolution (NCTDR) developed the 'Online Dispute Resolution Standards of Practice'<sup>1</sup>. These standards inform ODR practitioners about basic rules of practice.

Similar to the Best Practices Standards developed for organizational ombudsman by the International Ombudsman Association<sup>2</sup>, the NCTDR Standards of Practice covers broad principles of practice, as opposed to prescriptive rules.<sup>3</sup> The Standards of Practice include these subject matters: Accessibility, Affordability, Transparency, Fairness, Innovation and Relevance, Third Parties, and General Standards.

## Four Practitioner Roles in Technology-Assisted Dispute Resolution

There are four broad categories of practitioners who are well suited to using technology assisted ODR functionalities. These roles include:

- Online mediators,
- Online Conflict Managers,
- Online Conflict Resolvers, and
- Ombudsmen.

In the first role, ODR practitioners may act as mediators. People in conflict with another party may come to an ODR practitioner and say, "Can you help me to negotiate with the person with whom I am in conflict?" The mediator is somewhat passive in the process, in that they are uniquely a conduit for the flow of communication between the parties and are not at all a protagonist. There are several very good examples of this mediation role.<sup>4</sup>

Second, there is the role of conflict manager. This role kicks in when one party says that there is a problem and requests the neutral third party to assist in keeping the issue from escalating. The question posed by the parties to the practitioner might be, "Look, we have a relationship, and there is a problem, and we want you to help us manage it before it gets worse."

ODR systems that look at issues such as levels of support or child access in family law are examples of this role.<sup>5</sup>

Third, there is the role of conflict resolver. The conflict resolver takes on this role when the parties say, “We were not able to manage the conflicts between us, or we did not come to you in time to manage those conflicts, and there has now been a meaningful change to our relationship that we need the help of a third party to resolve.” Both parties may not necessarily share this perspective simultaneously. For example, your bank, because it is a big institution, may think it simply needs to manage an issue when it inadvertently overdraws your account; however, to you as the consumer, it is a conflict that needs to be resolved, rather than be managed, because the overdraft has caused you to distrust the bank, and there has been a fundamental change in your relationship with the bank.<sup>6</sup>

Fourth, there is the role of the Internet-based Ombudsman, meaning Ombudsmen who are online practitioners. In this final scenario, the parties would come to the Ombudsman and ask the following question: “We have a conflict between us because one of us feels unfairly treated by the other. Can you work with us, evaluate this situation, and if one of us was treated unfairly, can you help us work out a solution that we all can work with and that is fair?”<sup>7</sup> This Article concerns itself with this last category of practitioner; however, Ombudsmen use a wide range of tools in handling conflict, and they may use the same skill sets as mediators, conflict managers, and conflict resolvers.

## The Ombudsman and Dispute Resolution

An ombudsman is an independent, objective investigator of people’s complaints against government agencies and other organizations, both public and private sectors. After a fair, thorough review, the ombudsman decides if the complaint is justified and makes recommendations to the organization in order to resolve the problem.<sup>8</sup>

Ombudsmanship came into being in 1809, when the Swedish Parliament appointed the first ombudsman to protect citizens from the excesses of bureaucracy.<sup>9</sup> The word ombudsman consists of two parts: *ombuds*, meaning representative; and *man*, a gender-non-specific term meaning the people. Historically, an om-

budsman has been the representative of the people in dealings with bureaucracy. In Quebec the ombudsman is referred to as “The Protector of the Citizens,” while in France the ombudsman is called “The State Mediator.”<sup>10</sup>

Ombudsmen are generally concerned with ensuring that the bureaucracy or agency they oversee fairly treats the members of their constituency. Ombudsmen are generally characterized as being independent, impartial, and neutral advocates neither for the agency nor the complainant, but rather for the principles of administrative fairness. It is worthwhile to consider the distinction between substantive fairness, which can be defined as a fair outcome of an administrative process, and procedural or administrative fairness, which is defined in the following paragraphs.

Ombudsmen are generally concerned with administrative fairness, as opposed to results in regulatory or criminal processes. Ombudsmen deal with the redress of unfair situations rather than the administration of compliance frameworks. The Code of Administrative Justice by the British Columbia Ombudsman lists at least 16 criteria for administrative fairness. These include issues such as unreasonable delay and unfair procedures.<sup>11</sup>

This Article relies primarily on that Code of Administrative Justice to provide a working definition of administrative fairness that can be applied consistently and universally for ombudsman purposes. Fairness can have different meanings across context, culture, language, and tradition. The Code of Administrative Fairness provides an excellent example of describing “being fair” in neutral and explicit terms.

Administrative fairness has been defined in the following manner:

[...] our judges have had an historic association with the concept which we call ‘due process of law.’ The phrase, which has its roots in the Magna Carta, sums up our attachment to civility no less than to legality. In popular terms, it means fair play: assuring a hearing on the pros and cons of an issue to those affected; apprising them of what they have to meet or, in a criminal case, of the charges against them; giving them an opportunity to produce witnesses and to counter evidence adduced against them; allowing them to present argument on the facts and legal issues raised in the litigation; and assuring them finally of a considered decision

by an impartial judge. What is important about due process is the fact that its rationale has taken hold beyond the courtroom and has been applied in administrative proceedings and to public affairs generally. It has, in short, become a social norm, implying both a right of individuals and groups in our society, who have grievances to air, or demands to press, or claims to litigate, to make themselves heard; and correlatively, an obligation to advance their causes through rational procedures which, after painful experience, have displaced naked force as the means through which the case is made for change and the redress of wrongs.<sup>12</sup>

Ombudsmen can be important actors in the overall operation of the civil justice system. They provide alternative dispute resolution<sup>13</sup> services, which may reduce the propensity for costly and time-consuming grievances and litigation. Their existence and presence ensures that administrative fairness is supported in a wide variety of civil and business institutions.

## What's driving the uptake in ODR?

There are a number of factors driving the adoption of ODR systems. Access to justice is important. It is undeniable that there are increasing numbers of people in disputes who either lack the resources to engage a lawyer, who do not meet the means test for legal aid, whose issue is outside of the legal aid remit, or those who simply choose to act without representation. Recently, the Supreme Court of Canada published an unrepresented litigant's guide, due to the growth in cases heard by the Court where citizens appear without counsel.<sup>14</sup>

ODR is a vehicle that allows the parties to a dispute to resolve the matter, with or without the participation of third parties. It allows the private ordering of affairs, regardless of locale, jurisdiction, or legislative paradigm. The ability to seek resolution, redress, and potentially justice from the comfort of one's own living room, with little or marginal expense, is attractive to many. This is not to say that ODR is a replacement for brick and mortar court rooms. In fact, ODR may be particularly well-suited to a number of areas where the courts already have jurisdiction. It has its greatest potentials in e-commerce, small claims, and interpersonal disputes.

The astounding growth of e-commerce has drawn the attention of international organizations, such as the United Nations and the Organization for Economic Co-operation and Development (OECD). In 2007, the OECD produced a set of consensus recommendations on Consumer Dispute Resolution and Redress. These recommendations state that processes should enable consumers to conduct the redress procedure without the need for legal representation or assistance, as much as possible. The OECD also recommends the greater use of technology to resolve disputes.<sup>15</sup>

The United Nations, through a number of its bodies, including the World Intellectual Property Organization, the United Nations Commission on International Trade Law,<sup>16</sup> and United Nations Social and Economic Commission for the Asia Pacific, has shown great interest in Online Dispute Resolution.

One of the first and most often accessed ODR systems is the Uniform Domain Name Resolution Policy (UDRP). The UDRP is a policy that has been instituted by the ICANN to deal with disputes over the rightful ownership of domain names, and in particular, cyber-squatting. ICANN has developed a set of rules that describe when someone is disputing a domain's ownership or claims someone is cyber-squatting on a domain. ICANN works with four international arbitration providers: the National Arbitration Forum from the United States, the World Intellectual Property Organization from Geneva, the Czech Arbitration Court Center for Internet Disputes in Prague, and the Asia Domain Name Arbitration Centre headquartered in Hong Kong. To give examples of those involved in a UDRP process, a trademark owner who wished to register a domain name may be located in Vancouver, the cyber-squatter in China, and the arbitrator in Europe. This process has worked for thousands of cases around the globe privately, trans-nationally, and outside of the courts. A large body of UDRP related jurisprudence has been established, and this is used by the national courts, who are the appeals bodies.

Finally, in a world that is increasingly concerned with being "green" or eco-friendly, ODR inherently reduces the amount of paper used. Now and in the future, it is possible that disputes may be resolved without the use of paper. For example: small claims discoveries may be conducted by the filing of documents online, parties may be examined through chat rooms, and whole Ombudsman investigations may take place entirely online.

Based on all of this information, it is submitted that the world is increasingly witnessing an accelerated growth in the use of ODR systems and techniques.

## Is there a role for ODR in Ombudsman programs?

The previous section underscores reasons why ODR is increasingly becoming used across a wide selection of dispute techniques. The uptake of ODR into Ombudsman programs may be based on any of these factors of economy, efficiency, the environment, or changes in professional acceptance of the technology. ODR techniques may be well used in Ombudsman programs, but in looking at the applicability of ODR three factors must be taken into consideration. First, the Ombudsman practitioner must understand the differences between technology-based and technology-assisted ODR, and must select and implement the appropriate form of ODR for his or her practice. Second, the Ombudsman practitioner should consider a number of criteria to determine how, and in what manner, ODR provides a 'fit' with his or her operations. Third, Ombudsman practices may need to be modified in order to integrate ODR into the conduct of work.

### FACTOR ONE : Technology-based or technology-assisted ODR for Ombudsmen?

Earlier in the Article, we looked at the two forms of Online Dispute Resolution – technology-based and technology-assisted ODR. Briefly, we described technology-based ODR primarily as a blind bidding system which allows two parties in a dispute to use multivariate matching to obtain a win – win outcome. Technology-based ODR is likely most applicable for disputes where there is a quantum involved, i.e., the value for a vehicle in an insurance claim that is disputed between the car's owner and the insurance company.

Technology-assisted ODR uses technology to improve the efficacy of human-based processes. For example, the use of fax machines rather than postal services has improved the rapid exchange of correspondence. Technology-assisted ODR is scalable to the needs, finances, and technical competencies of dispute resolution programs.

In our previous analysis of Ombudsmanship, we underlined that the basis for Ombudsman work is established in the concept of fairness. We emphasized that the concept of fairness is the basis of Ombudsman work. Fairness is not a concept that may be easily actualized in a blind bidding environment. Therefore, we can conclude that technology-assisted ODR is the most appropriate form of ODR for use in Ombudsman programs.

### FACTOR TWO: Criteria to Determine Whether ODR fits into an Ombudsman Practice

Ombudsmen may wish to consider a number of criteria when planning to implement ODR as a tool, or when considering the scalability of their ODR programs. Consideration of these criteria will inform Ombudsmen about the level of technology they will require to conduct a successful ODR-assisted practice.

The criteria that Ombudsman may wish to consider include:

- Geography,
- Legislative requirements,
- Case management users and complaint volume,
- Literacy and language,
- Internet connectivity,
- Time zones,
- Service requirements,
- Client or audience characteristics,
- Synchronous and asynchronous usage, and,
- The socio-cultural context.

## Geography

Ombudsmen must take geography into account when they contemplate the use of ODR. Ombudsmen should consider such questions as: Where are the potential system users located? Are they all in one building, or dispersed over several countries or continents? Is the Ombudsman operation located in one place, or is it a decentralized operation with many offices where information needs to be shared? Does the mandate of the Ombudsman cover a defined geographic area such as a country, province or state, city, or a hospital or university campus? If the Ombudsman operation is located in a corporation or organization, is the client group located in the same location or building, or in multiple locations, cities, provinces or states, or continents?

## Legislative Considerations

Before embarking on ODR implementations, Ombudsmen practitioners must evaluate their chartering documents, bylaw, statute or legislation to determine if there are any barriers to using ODR. Ombudsmen must determine if complaints must be delivered in a particular manner. For example, if a signature is required, do intakes have to be done in person to verify identity? Are there privacy or information access laws that impact the use of ODR in the Ombudsman operation?

Ombudsmen must also have an awareness of legislative frameworks which impact on privacy, confidentiality, access to information and compellability of records, as these will be determinative factors in considering ODR. Practitioners may wish to design specific user agreements which add thicker layers of confidentiality around the ODR processes.

## Case management users and complaint volume

Ombudsmen need to consider the scalability and cost of ODR with respect to the volume of complaints received, and the number of system users. Obviously, the unit cost for implementation drops if the number of complainants or ombudsman officials using the system is greater. Ombudsmen must carefully consider the per-unit costs against existing costs for travel, investigation interviews, etc., prior to implementation.

ODR has particular appeal when Ombudsman investigations involve systemic events, or when there are multiple complaints on a file. The use of ODR technologies easily track large volumes of correspondence, and enables Ombudsman investigators differentiate or combine fact patterns, evidence, communications, and outcomes, as the investigation and redress process progresses.

## Literacy and language

Ombudsmen must be aware of the languages in which system users may wish to communicate, and ombudsmen must also take into consideration both the general literacy and computer literacy of their client group. If Ombudsmen serve a multi-lingual client group, the ODR system should be designed to accommodate system inputs in all the languages served, or to take into consideration translation services. Translations may be accomplished by using online translation tools, or by using native language translators. Ombudsmen must take translation as a matter of concern for both incoming correspondence from complainants and for outgoing correspondence to them.

Ombudsmen must include the use of language and idioms as part of the general literacy factor. For example, is a client group that usually communicates in slang or patois well served in a written environment?

Ombudsmen, when considering the implementation of ODR, must evaluate the general literacy level of their client group, and their computer literacy.<sup>17</sup> If clients or Ombudsman staff lack either general literacy or computer literacy skills, Ombudsmen should reconsider the implementation of ODR.

## Internet connectivity

Ombudsmen must evaluate the Internet connectivity of their clients. There is an obvious difference between local dial-up access and broadband high speed Internet. Ombudsmen should also consider the availability of computers or mobile technologies that enable clients to access the ODR system. If Ombudsmen are serving clients in areas where there is limited network connectivity, or where there is limited computer access, then ODR may be less successful than an area where there is high broadband or device penetration.

### Time zones

Ombudsmen must consider the hours of access they wish to offer, the time zones they serve, and the appropriate times that clients can access the system. Does the Office wish to be available on a 24/7 basis? Does the Ombudsman serve clients in multiple time zones, i.e., are clients spread across all of Canada – which has 6 time zones? Are the clients most likely to use the ODR system during working hours, or outside of them?<sup>18</sup>

### Service requirements

Ombudsmen must reflect on the need for service requirements in designing and implementing an ODR system. A Human Rights Ombudsman who investigates unfair *habeas corpus* practices in a conflict zone may have different service response requirements than a consumer-oriented banking Ombudsman program. If clients are at immediate risk, then the ODR system must be designed to be very reactive.

### Client or audience characteristics

Is there anything specific about the client group which would inform the Ombudsman about the design of the ODR system? For example, the ICANN Office of the Ombudsman serves a specific audience that is based on some sort of relationship with the Internet. One may infer that this client audience may be highly computer literate. The same may be said for audiences in universities. If the Ombudsman serves a client group that consists of person with disabilities is ODR likely to have the same impact as face-to-face activities?

For example, persons who have disabilities which restrict their mobility may find it more accommodating to use ODR technologies as opposed to having to take great efforts to attend an Ombudsman's office. As well, persons who have disabilities which affect their ability to communicate in person, such as deafness, or psychiatric or cognitive disabilities may find the use of synchronous ODR technologies to be a preferred manner of dealing with their complaint.

### Synchronous and asynchronous usage

Synchronous use of an ODR system means that the client and the Ombudsman are able to communicate in real time. These real-time online conversations or chats may be conducted through the case management or ODR system, or by other means, such as email or social networks. Asynchronous communication

means that the conversation between the parties does not occur in real time.

Well this principle easily applies when there is a time zone change; it also applies in a social or familial context. For example, a young family with children may find it convenient to communicate with the Ombudsman at the end of the day, when the chores are done and the children are tucked away in bed, and this correspondence is received by the Ombudsman the following morning. The Ombudsman replies to the family, and it is received by them later in the evening, etc. This allows provides the family the convenience of having their complaint attended to without having to take time away from work or home responsibilities to visit the Ombudsman's office.

### The socio-cultural context

Ombudsmen wishing to implement ODR systems should take into consideration the general socio-cultural context in which they operate. There will be differences in communication and culture between high context and low context societies. This will help inform the Ombudsman of the potential for success. The ODR system must be designed to accommodate the cultural requirements of the client group.

## FACTOR THREE:

### Modifying the Ombudsman Practice

Each of the three basic forms of Ombudsmanship — Classical, Executive, and Organizational — to some greater or lesser extent, has the capacity to use ODR as a tool in the practice of Ombudsmanship. Classical Ombudsmen are appointed by a government to receive complaints at a provincial, state, or national level. These complaints relate to the general functioning of governmental administrative activities.

Executive Ombudsmen may be appointed by a government, ministry, corporation, association, or entity to take complaints about specific administrative functions. This is the group of Ombudsmen presently experiencing the greatest growth. Executive Ombudsman may hear complaints from a wide populace that exceeds state or territorial boundaries. For example, the client group may be all of the customers of an international bank, or they may be all of the passengers of a world-wide airline.



Organizational Ombudsmen usually deal with internal clients of an institution, such as employees or students. Organizational Ombudsmen may deal with issues beyond fair administration, and often are involved in relationship issues.

Of these three types of Ombudsman practice, the Executive Ombudsman role is likely the one with whom ODR would have the greatest impact. That is not to say that Classical and Organizational Ombudsmen would not benefit from ODR, but simply that because of the nature of Executive Ombudsmen's potentially wide client bases, ODR may most benefit Executive Ombudsmen.

Ombudsmen might have to modify their practices to accommodate ODR in a number of ways, which might include:

- An appropriate case management and correspondence system. This could be a one — off purpose built ODR system, or it could simply be an existing email program.
- For security reasons, it is strongly advised that the case management or mail systems be housed on a separate, secure server, independent of other applications within the organization, business, or government.<sup>19</sup>
- Be proactive in providing a website that promotes the Ombudsman function and that links to the complaint intake case management system. The website should contain a reasonable amount of self help information to educate, inform, and assist potential clients.
- Have the capacity to provide native language translators for complainants. Community resources may be available to assist.<sup>20</sup> Translators must be covered by either privacy laws or non-disclosure agreements to keep the correspondence they review as private and confidential.
- Be prepared to develop effectiveness measures relating to the use of ODR.
- Ombudsmen, especially those who deal with multi-cultural client groups, must develop a sense of self and their own culture, as they work with online documents to conduct dispute resolution. Culture, in this case, refers especially to how people develop a socio-cultural context to the manner in which they resolve disputes. Practitioners need to be particularly aware of their own culture as they work

with clients or institutions that are different from them in the high context — low context<sup>21</sup> scale. In ODR scenarios, Ombudsmen must be prepared to allow correspondents to display their own conflict culture, without the Ombudsman forcing complainants to adopt the Ombudsman's conflict culture.

- Ombudsmen must be able to allot time and energy to work with complainants who have low general or computer literacy skills. The same skills used in active listening may be applied to 'active writing'.
- Ombudsmen must practice writing skills that will assist in developing a "trust" environment.
- Ombudsmen must be aware that correspondents may have a tendency, with the written word, to stray from core issues and processes. Much of the Ombudsman process will be to focus on these core issues and to use the many tools in the Ombudsman tool box to develop options and possible outcomes.

## Conclusion

Ombudsmanship is a field of dispute resolution which can greatly benefit from the use of Online Dispute Resolution as a tool. There are presently very few Ombudsman operations that practice ODR.<sup>22</sup> Those who have engaged ODR have found that it has the capacity to increase effectiveness in complaint handling. As we enter the second decade of the 21st century, we can expect to see an uptake of ODR in the practice of Ombudsmanship.

Ombudsman practitioners may wish to take the following guidelines into account as they consider the use of ODR technology:

- **Timing:** is this the appropriate point in time to launch an ODR program? Are there risks or benefits to waiting to start using ODR?
- **Economy:** Can a case be made for the expenditure of resources, both capital and human to use ODR? Will there be an efficiency gained in managing files or the technology process which makes the operation run more effectively? How can we measure that?
- **Audience:** Does the use of ODR increase access to Ombudsman operations? Will new users be attracted to the system? Will other users be affected due to a lack of computer literacy? Are there strategies

to overcome barriers? Are there particular audience segments which will particularly benefit from ODR?

- **Technology:** Will ODR technologies replace — improve — or make redundant any existing case management system? Are there compatibility issues? Is a custom designed system most appropriate?
- **Organizational communications:** How will we inform our audience of the movement towards ODR?
- **Practitioner accommodations:** What will the Office of the Ombudsman need to do to accommodate the use of ODR into its practice?

Ombudsmen who determine that there is place in their practice for the deployment and use of ODR will be at the cutting edge of both fields (ODR and Ombudsmanship). We may predict that, as both fields continue to grow, the use of technology to assist in dispute resolution will become commonplace.

## ENDNOTES

<sup>1</sup> <http://www.icann.org/ombudsman/odr-standards-of-practice-en.htm> (Accessed December 10, 2010)

<sup>2</sup> <http://www.ombudsassociation.org/about-us/mission-vision-and-values/ia-best-practices-standards-practice> (Accessed October 20, 2011)

<sup>3</sup> "The Standards are based on the current literature and research in the field of Online Dispute Resolution and are offered as guidelines for practice across the spectrum of ODR." "The Committee Members recognize and honour that each Online Dispute Resolution scheme will be unique in its application of technology, and dependant on the community it serves. The Committee Members also recognize the importance of national and international law in the performance of Online Dispute Resolution schemes. Thus, these recommended Standards of Practice must be considered as principles, and not necessarily as individual operational frameworks." <http://www.icann.org/ombudsman/odr-standards-of-practice-en.htm> (Accessed December 10, 2010)

<sup>4</sup> See, for example, The Mediation Room: [www.themediationroom1.com](http://www.themediationroom1.com) (Accessed December 12, 2010)

<sup>5</sup> See, for example, Our Family Wizard: [www.ourfamilywizard.com](http://www.ourfamilywizard.com) (Accessed December 5, 2010)

<sup>6</sup> See, for example, The Financial Consumer Agency of Canada: [www.fcac-acfc.gc.ca/eng/contactus-eng.asp](http://www.fcac-acfc.gc.ca/eng/contactus-eng.asp) (Accessed December 7, 2010)

<sup>7</sup> See, for example, ICANN Office of the Ombudsman: [www.icannombudsman.org](http://www.icannombudsman.org) (Accessed December 1, 2010)

<sup>8</sup> Forum of Canadian Ombudsman, 2006, **What is an Ombudsman?** [http://www.ombudsmanforum.ca/whatis\\_e.asp](http://www.ombudsmanforum.ca/whatis_e.asp) (accessed January 13, 2011)

<sup>9</sup> United States Ombudsman Association, 2006, **History of the Public Sector Ombudsman**, [http://usoa.non-profitsites.biz/en/About\\_Us/history.cfm](http://usoa.non-profitsites.biz/en/About_Us/history.cfm) (accessed January 13, 2011)

<sup>10</sup> Protecteur de la Citoyenne; Mediateur de L'Etat

<sup>11</sup> British Columbia Ombudsman, 2003, **Special Report 42, Code of Administrative Justice**, [http://www.ombudsman.bc.ca/images/resources/reports/Public\\_Reports/Public%20Report%20No%20-%2042.pdf](http://www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Public%20Report%20No%20-%2042.pdf) (accessed January 13, 2011)

<sup>12</sup> Justice Bora Laskin, SCC, quoted at Zacks, Micheal, 1999, **Administrative Fairness in the Investigative Process**, in Reif, Linda, Editor, **The International Ombudsman Anthology**, Kluwer Law International, The Hague, pp 555-556

<sup>13</sup> "ADR is any method of dispute resolution other than formal adjudication such as court litigation or administrative proceedings. ADR is not a fancy, new approach but rather an alternative — characterized by common sense and flexibility." Costantino, Cathy, et al., 1996, **Designing Conflict Management Systems**, Jossey Bass, San Francisco p33

<sup>14</sup> The Supreme Court of Canada [www.scc-csc.gc.ca/rep/index-eng.asp](http://www.scc-csc.gc.ca/rep/index-eng.asp) (accessed January 13, 2011)

<sup>15</sup> Organization for Economic Co-operation and Development, July 2007, OECD Recommendation on Consumer Dispute Resolution and Redress, [www.oecd.org/dataoecd/43/50/38960101.pdf](http://www.oecd.org/dataoecd/43/50/38960101.pdf) p.12 (Accessed January 5, 2011)

<sup>16</sup> See, for example, [www.uncitral.org/pdf/english/colloquia/ODR/IICL\\_Bro\\_2010\\_v6.pdf](http://www.uncitral.org/pdf/english/colloquia/ODR/IICL_Bro_2010_v6.pdf) (accessed January 4, 2010)

<sup>17</sup> Col. Patrick Stogran was the inaugural Ombudsman Veteran's Affairs Canada. In conversation he assessed his clients' computer literacy and presented an interesting conundrum. On the one hand his client group consisted of young veterans who had served in the Afghanistan conflict. These veterans were all very computer literate and have high internet skills. On the other hand, his clients also consisted of older Second World War and Korean War veterans whose computer literacy skills were generally much lower.

<sup>18</sup> A website access visit study conducted by a federal agency in Canada showed that the highest web access by clients occurred after 9 p.m. Client interviews indicated that this was the time of day where young families had put the children in bed, and that parents had time to access the internet without being disturbed.

<sup>19</sup> The Standards of Practice also includes a discussion on the relevance of confidentiality and security, "Online Dispute Resolution schemes must provide for confidentiality and data security as required by national, regional and international law."

<sup>20</sup> The ICANN Office of the Ombudsman works with a local refugee, immigrant, and new citizen centre in suburban Vancouver, British Columbia to provide translation services. This creates a win-win scenario.

<sup>21</sup> "...the expressions "high context" and "low context" are labels denoting inherent cultural differences between societies. High-context and low-context communication refers to how much speakers rely on things other than words to convey meaning. Hall states that in communication, individuals face many more sensory cues than they are able to fully process. In each culture, members have been supplied with specific "filters" that allow them to focus only on what society has deemed important. In general, cultures that favor low-context communication will pay more attention to the literal meanings of words than to the context surrounding them." MQJeffrey, **High Context vs. Low Context Communication**, <http://hubpages.com/hub/High-Context-vs-Low-Context-Communication> (accessed January 13, 2011)

<sup>22</sup> See for example, the ICANN Office of the Ombudsman: [www.icannombudsman.org](http://www.icannombudsman.org)

# The Conflict Competent Organization: Assessing the Perceived Economic Value of the Corporate Ombuds Office

JASON A. WAXMAN

## ABSTRACT

The purpose of this article is to attempt to satisfy the knowledge and information gap in measuring the efficacy of comprehensive conflict management systems within firms that demonstrate conflict competence, by testing the hypothesis that these systems, most notably the utilization of a corporate ombudsperson as a channel for dispute resolution, can aid in improving nine (9) effectiveness metrics, including: creating value for the company, saving managerial time associated with conflict management, saving money overall, improving productivity, reducing the need for outside consultants, positively impacting talent retention, increasing the likelihood than an individual will report a complaint, improving communication and improving morale. Surveys were disseminated to twelve (12) companies with ombuds programs. The findings will then be compared and analyzed in order to examine the perceived financial value of this system, and its impact on these benchmarks.

## KEYWORDS

Ombudsman, Conflict Management System, Economic Value, Cost Effectiveness, Conflict Competent, Fiscal Relevance

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## INTRODUCTION

Upon even a cursory analysis, it is axiomatic that conflict in organizations is unavoidable. In fact, it is an organic byproduct of any interpersonal relationship. Conflict as a positive phenomenon, however, can serve as a valuable tool for change and improvement, as well as a platform for communication, creativity and collaboration (Tjosvold, 1993). Conversely, when poorly managed, conflict can lead to a systemic breakdown in organizational effectiveness. Unfortunately, the absence of conflict competence among many organizations seems to be a rather salient trend. Studies indicate that companies suffer measurable damage when they do not manage conflict effectively (Slaikeu & Hasson, 1998). Such issues can manifest themselves in the form of decreased productivity, increased turnover, lack of complaint reporting, increased legal costs and a reduction in employee morale. Implementing effective conflict management systems (CMS), however, can aid in ameliorating these stresses.

This article<sup>1</sup> is predicated on the notion that the majority of companies fail to manage conflict effectively. Although CMS may not be appropriate for all firms, they are conducive to many organizations that, for reasons unknown, continue to employ approaches to conflict resolution that result in high costs and low satisfaction for all parties concerned. The seemingly symbiotic nature of an organizations' proclivity for litigation and its dissatisfaction with the concomitant results is not a radically new notion (Slaikeu & Hasson, 1998). Simply put, the costs of ineffective conflict management are becoming a burden that many companies simply cannot sustain.

The central argument of this article is not to replace litigation, or other costly distributive frameworks, at

all stages of the conflict management process, but to implement non-adjudicatory methods, especially use of an ombudsperson, at an early stage in order to positively affect value benchmarks, while promoting healthy and sustainable interpersonal relationships within organizations.

To date, no known inquiry has been made into the value determinant on the origins of the ombuds program. There is no research concerning the perceived or realized monetary benefit in the establishment of an ombuds program through crisis<sup>2</sup> or non-crisis<sup>3</sup> means. The decision to differentiate between crisis and non-crisis adopter firms is necessary to articulate discrepancies associated with the genesis of a system. In other words, are there implications if the establishment of an ombuds program was forced onto a corporate ecosystem as opposed to one that was born of natural evolution?

Moreover, no studies have been conducted documenting the perception dissonance, if any, within the corporate strata toward the ombudsperson and the consequential effects on fiscal relevance. The addition of data coding to include the different hierarchical levels is based on research from field practitioners, which demonstrated, in particular, middle management's resistance to the ombuds concept (E. Berger, personal communication, February 23, 2010). Considering the typical role that the ombudsperson assumes within an organization, middle management seems to be the most affected upon implementation, especially as it relates to human resource managers. In fact, the inclusion of an ombudsperson may cause these managers to feel threatened, largely due to a perceived threat to their autonomy (Lipsky, Seeber & Fincher, 2003). Human resource managers, in some instances, believe that the ombuds function is being employed due to their own inadequacies with respect to conflict management (E. Berger, personal communication, February 23, 2010).

Offering a comparison, therefore, of perceived value differences between crisis and non-crisis adopters, in addition to a cross strata sensitivity analysis, is the first of its kind. By illuminating the impact of this framework, organizations should be convinced that an ombuds office, like other business functions, is a valuable component in a successful and sustainable business plan. Moreover, the data may demonstrate ways in which existing frameworks can be improved.

Overall, the profession has "not yet found a clear definition of effectiveness [that it] can use to attempt to

influence the expectations of key stakeholders regarding the added value of [this function]" (Miller, 2010). Moreover, the examination that has been conducted focuses solely on overall satisfaction with the process itself, rather than on its relevance to organizational effectiveness (Lipsky et al., 2003). In short, the field has not yet justified its successes in financial terms. This has proven to be a significant impediment to growth and expansion, largely because the advantages of these systems have only been documented in "speculative and immeasurable" fashions (Lipsky et al., 2003, p. 308).

## Data Introduction and Perceived Efficacy of the Ombuds Concept

The primary method of data collection for this research was through a non-probability survey process. In sum, two crisis-adopter and 10 non-crisis adopter companies were targeted for a total of 12 organizations. The characteristics of these companies are shown in Table 1. The survey, which was confidential and anonymous in nature, as it reveals no employee or company names, was disseminated to approximately 280 individuals within these various firms. The research process was carried out in March 2010. The total number of completed/returned surveys was 33 (N=33).<sup>4</sup> The response rate was approximately 11%. The distribution in responses between crisis and non-crisis companies was 14 to 19 respectively. More

**TABLE 1.**  
**Crisis & Non-Crisis Adopter Companies Compared**

	<b>Crisis Adopters</b>	<b>Non-Crisis Adopters</b>
<b># of Companies</b>	2	10
<b>Employees (Av.)</b>	3,484	71,325
<b>Ombuds Program</b>	Yes. SEC mandated.	Yes. Voluntarily implemented.
<b>Industries</b>	Financial Services	Communications, Financial Services, Manufacturing/ Beverage Services, Pharmaceuticals/ Healthcare, Power Management, Technologies

specifically, the completed questionnaire was submitted by five (5) entry-level employees, 16 middle managers and eight (8) executives (and four respondents whose place within the organizational strata was not identified).

Although a full summary of both crisis and non-crisis surveys is available in the complete version of this work, a specific set of questions will be utilized to illuminate patterns for comparison. Based on the data, it is evident that the sample population within both crisis and non-crisis adopters views the conflict management system in their respective firms favorably, as illustrated in Table 2.

**TABLE 2.**  
**Sample Population: Rating Conflict Management Capabilities in their Organization**

	<b>Crisis-Adopter</b>	<b>Non-Crisis Adopter</b>	<b>Aggregate</b>
<b>Very Poor</b>	0%	0%	0%
<b>Poor</b>	0%	5.3%	3.0%
<b>Ineffective/Neutral</b>	21.4%	10.5%	15.2%
<b>Good</b>	57.1%	47.4%	51.5%
<b>Excellent</b>	21.5%	36.8%	30.3%

The data clearly demonstrates that employees perceive these systems to be effective in managing workplace disputes. In the crisis-adopter segment, 78.6% of respondents believed that the CMS in their companies were either good or excellent. The

non-crisis adopter group viewed their respective CM frameworks in an even more favorable light; 84.2% indicated that their firm's CM capabilities were either good or excellent.

Sentiments regarding whether or not the ombudsperson operates according to prescribed guidelines, including precepts such as confidentiality and neutrality/impartiality, are particularly germane to assessing the effectiveness of the ombuds function. Moreover, this is especially relevant given the widespread awareness of the ombuds program within the sample population. In fact, 100% of respondents in the crisis adopter group knew about the ombudsperson prior to receiving the survey, while 94.4% of those in the non-crisis segment were aware of the office. This level of cognizance is a fundamental component in permitting an accurate analysis of the economic value of this framework.

A comparative question was posited to the sample population in an attempt to gauge any discrepancies between the ombudsperson's prescribed characteristics and the realized perception in practice. In other words, this question, in particular, measured any differences between the guarantees the ombuds office proffered with respect to its processes and the actual operationalization of these guarantees. This is shown in Table 3.

The results reveal numerous trends, both within and between the crisis and non-crisis adopter companies, which are of particular importance. The comparative statistics indicate two relatively large divergences in theoretical perception. While 88.9% of non-crisis

**TABLE 3.**  
**The Ombudsperson SHOULD (hypothetically) vs. DOES (in operation)**

	<b>Crisis Adopters (Should / Does / Difference)</b>	<b>Non-Crisis Adopters (Should / Does / Difference)</b>
<b>Available to all employees and management</b>	100% / 100% / 0%	100% / 100% / 0%
<b>Available only to management</b>	0% / 0% / 0%	0.0% / 6.3% / 6.3%
<b>Available only to employees</b>	0% / 0% / 0%	5.6% / 12.5% / 6.9%
<b>Remain neutral</b>	64.3% / 57.1% / (7.2%)	88.9% / 81.3% / (7.6%)
<b>Remain confidential</b>	100% / 92.9% / (7.1%)	99.4% / 93.8% / (5.6%)
<b>Operate independently</b>	85.7% / 64.3% / (21.4%)	77.8% / 68.8% / (9.0%)
<b>Report systemic issues*</b>	78.6% / 64.3% / (14.3%)	88.9% / 81.3% / (7.6%)
<b>Address systemic issues*</b>	85.7% / 64.3% / (21.4%)	66.7% / 56.3% / (10.4%)

\* while remaining confidential

respondents believed that their ombuds office should operate neutrally/impartially, only 64.3% of those in the crisis adopter group believed the same. In fact, from a normative perspective, the hypothetical or theoretical category represents the ideal and should, therefore, generate responses approaching 100%. The low figure in the crisis adopter segment does not necessarily translate into an ineffectual ombuds program, but may imply that the ombuds need to improve in the areas of educating and promulgating their true roles and responsibilities.

In addition, this particular data provides for an interesting comparison outlining the manner in which the sample population's perceptions bifurcate according to the expected and actual operation of this framework. Interestingly, employees and managers in the non-crisis adopter segment once again viewed the operation of their ombuds more positively. 81.3% of non-crisis adopter respondents indicated that they perceive the ombudsperson to operate in a neutral/impartial fashion, relative to only 57.1% of the crisis-adopter respondents. Similarly, 68.8% of non-crisis adopter respondents believe that the ombuds operates independently. 81.3% of those same respondents believe that their ombuds does, in fact, report systemic issues (while maintaining confidentiality). This is compared to only 64.3% of crisis-adopter respondents in both categories of operating independently and reporting systemic issues. It is evident, therefore, that the sample population within the non-crisis segment believes that their ombuds program functions in a more neutral and independent fashion, while appearing more adept at reporting systemic issues. Paradoxically, crisis adopters have a higher expectation (85.7%) than their non-crisis counterparts (66.7%) when it comes to addressing systemic issues, pertaining to whether or not the ombudsperson should undertake this task in the first place. Finally it is important to note the disparity between the expected hypothetical versus the perception in operation. This discrepancy is greatest in the categories of operating independently and reporting and addressing systemic issues and is almost twice as much in the crisis adopters versus that of the non-crisis segment.

## Aggregated Data: Perceived Financial Impact of the Ombuds

The underlying purpose of this research lies in measuring and assessing the sample population's perception regarding the financial impact of the ombuds programs in these 12 companies. The following nine (9) metrics were included in the survey process: overall value for the company, managerial time savings, money savings overall, productivity, the effects on the need for outside consultants, turnover/talent retention, complaint reporting patterns, communication and morale.

The nine metrics chosen for study were selected based on a collection of earlier studies conducted within the ombuds fields on related issues. It was important to have a basis for comparison, which could only be accomplished by utilizing a similar set of metrics to other prominent studies within the ombuds pedagogy. In addition, these metrics best encompassed the overarching theme of this article, while remaining useful for further research and analysis.

From a generalized perspective, the aggregated sample population, including crisis and non-crisis adopters, as well as all strata of the corporate hierarchy, indicates a strong belief in the financial viability and fiscal advantage of the ombuds function. In fact, when asked about the efficacy of the ombudsperson overall, the amalgamated responses demonstrate that 70.0% of the sample population believe that the ombuds program is either somewhat effective or very effective in resolving/managing disputes, while 0% felt that it was ineffective or detrimental.

In all, the evidence of the perception that the ombudsperson creates financial value for the firm in which it operates was overwhelming. When analyzing the results from an amalgamated standpoint, three value metrics, in particular, were highlighted by the sample population: 68.56% of all respondents indicated that the ombuds function created value for the company, while 67.9% believed that this practice markedly reduced the need for outside consultants and increased the likelihood that they would report a complaint. Notwithstanding the variation in responses, it is evident that the sample population perceives the ombuds concept to be financially valuable, as shown in Table 4.

**TABLE 4.**  
**Crisis vs. Non-Crisis Adopters: Perceived Fiscal Impact of the Ombudsman**

METRICS	Crisis Adopters	Non-Crisis Adopters	Aggregate*
Creates value for the company	53.8%	76.5%	68.56%
Saves managerial time by dealing with conflict	30.8%	41.2%	37.42%
Saves money overall	30.8%	11.8%	25.97%
Improves productivity	30.8%	29.4%	30.02%
Reduces the need for outside consultants	76.9%	58.8%	67.85%
Positively impacts talent retention	38.5%	41.2%	40.30%
Increases the likelihood that you would report a complaint	76.9%	58.8%	67.85%
Improves communication	69.2%	64.7%	66.73%
Improves morale	61.5%	52.9%	56.95%

\* Aggregated totals are calculated using a weighted-average formula

## Crisis vs. Non-Crisis Adopters: Data Comparison

The results reveal that the crisis adopter population's perception of positive financial value was higher than its non-crisis counterpart in six out of the nine benchmark categories, including; overall money savings, improved productivity, reducing the need for outside consultants, improved complaint reporting opportunities, enhanced communication and improved morale. A more comprehensive comparison is offered in Table 4.

The aggregated data is particularly illuminating regarding broader trends. Prior to the data collection phase, it was assumed, as suggested by the existing literature, that turnover and management time-savings would be the most conducive metrics for research collection, while also proving to be the most affected by the ombudsperson. Following the analysis, however, it is evident that the ombuds programs in these 12 companies are perceived to have the most value in respect of: reducing the need for outside consultants; increasing the likelihood that an employee, manager or executive would report a complaint; improving systemic communication; and, creating overall value. Furthermore, three out of the four aforementioned value categories, namely reducing the need for outside consultants, improved com-

plaint reporting and enhanced communication were believed to be higher in the crisis adopter organizations. On the other hand, 76.5% of non-crisis adopters perceived the ombuds as creating overall value versus only 53.8% of the crisis-adopters.

The statistical evidence posited here is an important consideration for all companies within the sample population. The savings associated with a reduction in outside consulting fees, for example, is certainly a figure that can be ascertained by these firms. Simply put, any given organization can calculate the savings generated by the ombuds by comparing the consulting fees prior and subsequent to the initiation of the ombuds program (while still accounting for the ombuds' salary). Despite its simplicity, this can illuminate the economic benefits of this program, at least in one dimension. Creating overall value represents a proxy for all the metrics chosen for study. In addition, the perceived improvement in complaint reporting patterns could have a monumental impact on the financial bottom line of all 12 firms. Unfortunately, these calculations are beyond the scope of this work and illuminate the need for further study.



## Cross-Strata Analysis: Perceived Value Differences of the Ombuds within the Hierarchy

There was a sharp divide between the crisis and non-crisis groups with respect to the sentiments of the three levels of actors within the strata regarding both the overall effectiveness of the CMS and the efficacy of the ombuds program. A comparison is offered in Figures 1-4.

Figures 1 and 3 reveal a trend that is especially noteworthy. Confirming the claims made by experts, middle management was, in fact, the least convinced in the overall efficacy of the CMS, as well as in the ability of the ombudsperson to mitigate workplace conflict. Interestingly, however, middle management's negative outlook was most pervasive in the crisis segment of the sample population. Middle management sentiment in the non-crisis adopter group regarding these aspects was significantly more encouraging, as highlighted in Figures 2 and 4. While entry-level employees demonstrated favorable views in both crisis and non-crisis firms, the executive respondents, specifically in crisis companies, possessed extremely positive views toward the CMS generally, and the ombuds program's capabilities in particular.

Similar patterns emerged regarding the perception of the financial impact that the ombudsperson affected in these 12 companies. In this regard, the executive respondents in the crisis adopter firms viewed the ombuds program with overwhelming favor, as shown in Figure 5. Although executives within the non-crisis group were somewhat less positive, it is evident that they too believed the ombuds contributed to the financial bottom line in a myriad of ways (see Figure 6). It was not altogether unexpected, but troublesome nonetheless, that middle management in both crisis and non-crisis organizations were least satisfied in the ombudsperson's capacity to generate monetary savings, on a relative scale. According to the data, entry-level employees perceived the ombuds to function in a manner that had positive financial benefits for the firm. Figure 5, however, highlights the fact that entry-level employees in the crisis group perceived this impact to be significantly greater.

Overall sentiment regarding the financial value of the ombuds program from the viewpoint of comprehensive cost savings was rather confounding. While respondents indicated that the ombudsperson was able to reduce costs relating to outside consultants and improved complaint reporting patterns, among a multitude of other metrics, it was apparent that they were the least convinced about the ombudsperson's ability to save money overall as an explicit benchmark.

Figure 1. Cross-Strata Analysis: **Crisis Adopter** Views of Overall CMS

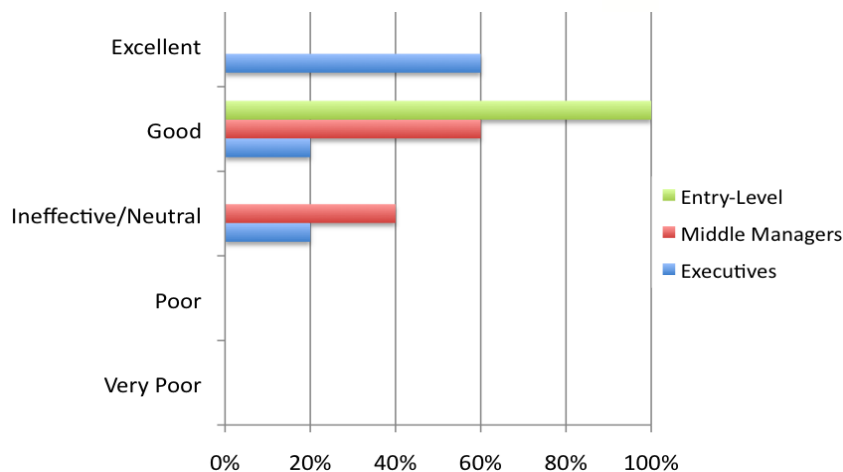


Figure 2. Cross-Strata Analysis: **Non-Crisis Adopter** Views of Overall CMS

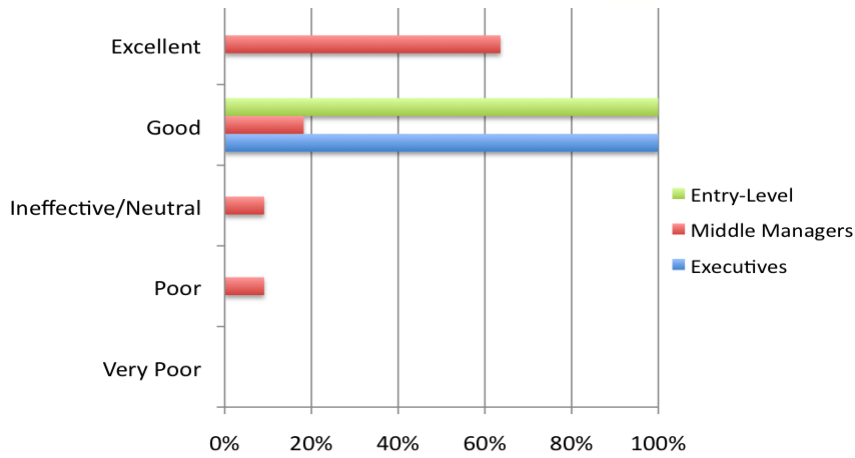


Figure 3. Cross-Strata Analysis: **Crisis Adopter** Views of Overall Ombuds Efficacy

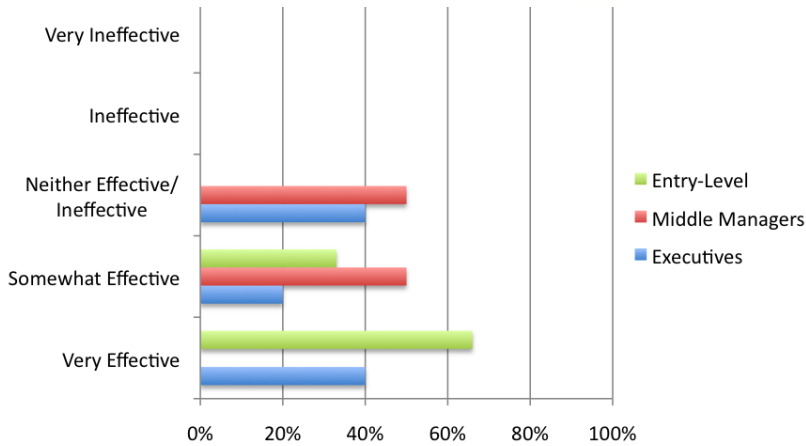


Figure 4. Cross-Strata Analysis: **Non-Crisis Adopter** Views of Overall Ombuds Efficacy

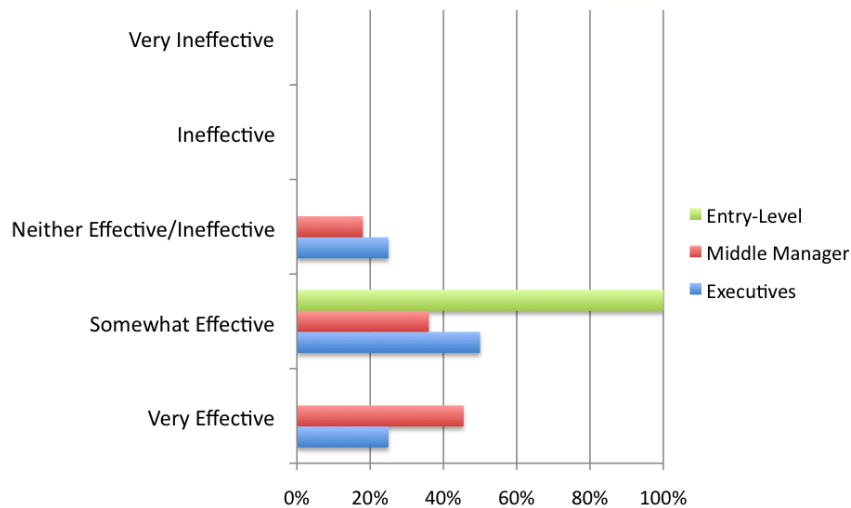


Figure 5. Cross-Strata Analysis: **Crisis-Adopter's** Perception of Financial Value

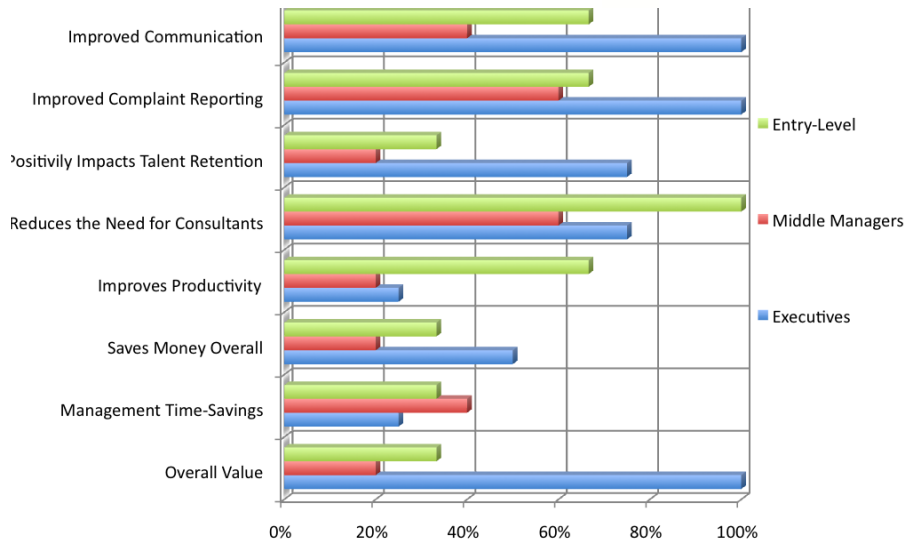
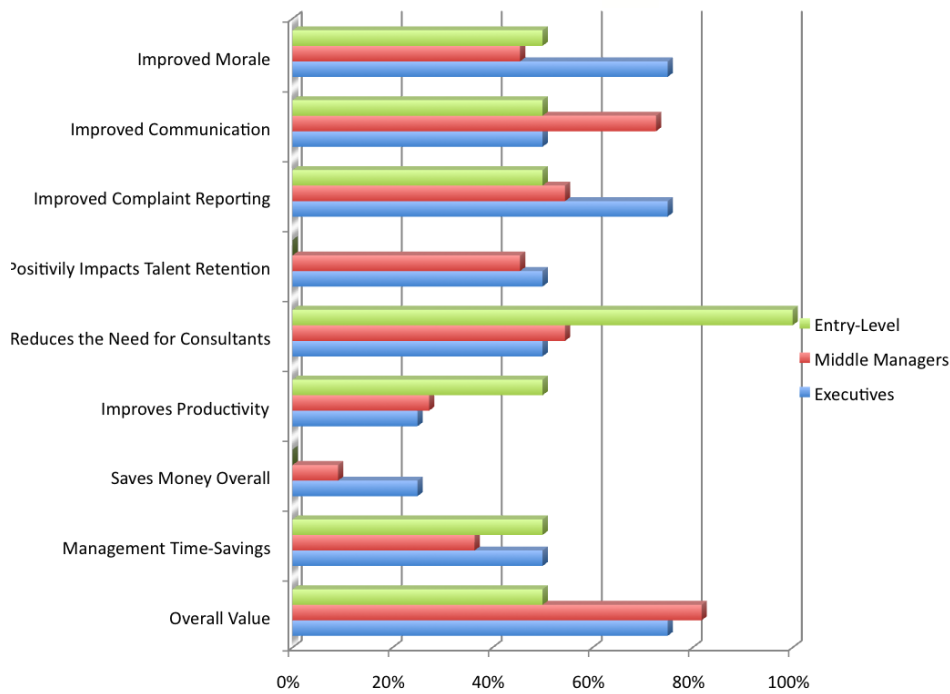


Figure 6. Cross-Strata Analysis: **Non-Crisis-Adopter's** Perception of Financial Value



In fact, only 25.9% of the sample population as a whole believed that the ombuds program saved money overall, thereby denoting the lowest value metric indicated within this study. Although this is counterintuitive, it could be argued that this perception is a byproduct of the failure in the ombuds paradigm to even attempt, heretofore, to quantify its value in monetary terms. It is also important to note that the inverse argument is not applicable. That is to say, it is not accurate to conclude that 74.1% indicated that the ombuds program did not save money simply because 25.9% indicated that it did. In all, it is simply illogical to believe that the ombudsperson aids in reducing the need for outside consultants, for example, without contributing to comprehensive costs savings.

It is also worthy to note that sentiment regarding the ombudsperson's capacity to represent a fiscally relevant office was stronger in the crisis adopter segment. It can be deduced, then, that the rationale behind this originates in the very motivation for the establishment of the ombuds office in the first place. While the non-crisis programs were implemented voluntarily, the crisis adopter's ombuds were born out of SEC mandates. Consequently, respondents in the crisis group may well sense an additional urgency, even legitimacy underpinning their ombuds program. They may justifiably perceive that, not only was their program dictated by a higher authority but that, perhaps, it is being monitored by that authority as well.

## Needs Assessment Summary

Although numerous patterns emerged from the data, certain aspects of the responses raise concerns. First, it became quite evident, especially from the optional written questions that a vast majority of the sample population was ill informed regarding the specific roles, duties, and responsibilities of the ombuds, on the one hand, and the characteristics, precepts and foundational elements of the ombuds practice itself, on the other. Consequently, establishing a clear definition and widespread understanding of the ombudsperson is vital to its sustained success, notwithstanding the apparent lack of universal acceptance of this notion. Second, although the principal responsibility of the ombuds function is not to contribute economically, the possibility of financial benefits is an organic byproduct of these practices. It is arguable, then, that the paradigm characterizing corporate ombuds of-

fices begin to include an organizational effectiveness taxonomy, a metric nomenclature and an emphasis in appropriate evaluation, assessment and measurement, in an effort to rationalize its financial effectiveness empirically, while, at the same time, maintaining confidentiality, neutrality, and independence.

### Need 1: Whole Systems Approach: Addressing Misconceptions of the Ombuds Function

Many of the responses by the sample population indicate a serious misunderstanding in respect of the ombuds' capacities, responsibilities, function and standing within the organization. Though almost the entire sample population was aware of the ombuds (100% in the crisis segment and 94.4% in the non-crisis segment), numerous facets of the survey revealed that the ombudsperson, and the organization as a whole, must undertake initiatives to better educate the various actors.

Less than two-thirds (64.3%) of the crisis population, for instance, believed that the ombudsperson should theoretically remain neutral/impartial, while even fewer thought that the ombuds actually operates with neutrality/impartiality in practice. Moreover, the non-crisis segment was, evidently, unaware of the ombudsperson's capacity as a change agent. Less than 60% of non-crisis respondents indicated that their ombudsperson addressed systemic problems. Indeed, 33.3% of this population did not even believe that the ombuds should address systemic issues.

Several anecdotal comments provided by both sample populations, are perhaps, even more illuminating than the raw data in documenting these misapprehensions. Notwithstanding the relative informality of the ombuds concept, it is apparent that it is not viewed as such. In fact, a statistically relevant number of respondents (in both segments) remarked that there were several other options to pursue prior to acquiescing in utilizing the ombudsperson. More specifically, one respondent stated that using the ombuds office was the "last resort", while another commented that it was "a bureaucratic nightmare". To further complicate matters, a non-crisis respondent stated that he/she was "afraid of retaliation" if he/she chose to visit the ombuds office. Others said that they were not convinced that the ombuds "is utilized by the organization, or works closely with senior management" and that they "know very little about the ombuds program".

The simple fact that 93.4% of the sample population has never visited the ombuds office ensures that these comments and concerns are, most likely, not from those who have utilized the services and been disappointed but, in fact, emanate from those that are skeptical in the first instance, predicated again on a poorly articulated ombuds pedagogy.

Addressing these needs is a simple task in theory, but complex in practical application. It is evident that the ombuds programs in all corporations have made some attempt to educate on the nature of their profession. Websites, broadcast e-mails, presentations and word of mouth were all identified as ways in which the population became aware of this office. These efforts, as indicated by the survey data have, nevertheless, proven to be insufficient in providing a clear understanding of even some of the most elemental underpinnings of the practice. It is apparent that additional effort is required in this regard.

The *whole systems approach*, which is a framework utilized to effectively amalgamate multiple organizational change strategies through transformation with buy-in from all stakeholders by evaluating and redesigning each individual system is particularly useful in implementing a strategy to broach this shortfall (Adams & Adams, 2007). In order to produce effective transformation, it must be clear that executive management is committed to the shift. Although the ombudsperson must ultimately articulate his/her roles, functions and distinctive features, top-level interest must be perceived to align with these attributes, and all other relevant stakeholders including entry-level employees and middle managers, must be included in the process. By doing so, the population's knowledge of the ombuds program should shift from simple recognition to a more in-depth understanding of this practice. Executives' established commitment to this transformation and to the ombuds practice generally, will lend legitimacy to the progression, thereby providing a greater probability for sustained success.

In order to achieve this objective, it is recommended that the ombuds office undertake an initiative whereby it actively educates the entire workplace. This is known as *awareness education*, where methods are operationalized to demonstrate the purpose and use of an ombuds office in a particular organization (Costantino & Merchant, 1996). Despite the value of presentations or e-mails, intensive workshops will

most likely bring about the most meaningful change together with the appropriate level of understanding. This would, of course, require a significant time commitment from the ombuds office. Similar workshops employed with alternative dispute resolution systems have been found to function best during half-day sessions that are interactive in nature (Costantino & Merchant, 1996). Role-plays, for example, that simulate a visit to an ombuds office can be helpful in illuminating the process, thereby effectively ameliorating misconceptions. These workshops should be held bi-annually.

It is recognized, however, that this type of interaction may be problematic, especially as it relates to the neutrality dimension of the ombuds function. Consequently, establishing a rotating corporate ombuds panel or consortium, where a group of ombudspersons from various corporations collaborates to help educate the workforce in other respective companies is an ideal solution. In fact, including an ombudsperson from outside the organization itself to lead such a workshop may well prove to be a more suitable approach for it accomplishes three principal goals. One, by utilizing an outside ombudsperson, the neutrality, confidentiality and independence of the ombuds at the company in question is not jeopardized. Two, it allows the company holding the workshop to circumvent the costs associated with outside consultants as this is a shared process. Three, those at the company are then in a better position to make educated decisions regarding the ombudsperson, and whether or not to choose to pursue this avenue in the event of a workplace conflict.

Hosting these workshops requires commitment from the company, employees and the ombudsperson. It necessitates genuine top-level support in order to succeed. The nature of these workshops would require the ombuds to be trained in conflict coaching, mediation and negotiation skills. Effective conflict coaching is discussed in *Conflict Coaching: Conflict Management Strategies and Skills for the Individual* by Jones and Brinkert (2008). Many corporate ombudspersons currently hold such credentials. In any event, skill building will be an integral component of the workshop, and a primary resource that must be available.

It is important to consistently monitor and evaluate the effects of the workshops to ensure that they are improving the environment. Monitoring the impact

of this change can be done in a multitude of ways. It is apparent that the most efficient manner in which to obtain unbiased, confidential and anonymous feedback is through survey data. In fact, the data proffered herein may provide useful benchmarks.

A similar survey conducted within a year of the first workshop should indicate that employees (at all levels) possess a deeper understanding of the ombuds program. More specifically, at the six (6) month mark, at least 80% of the crisis population should indicate that the ombuds operates with neutrality (up from 57.1%), and 80% of the non-crisis segment should also report that they believe the office does address systemic problems (up from 56.3%). These would represent marked improvements over the current situation. Overall, increased awareness of the operational principles of the ombudsperson should be palpable. It is essential, then, that this training be viewed as a valuable use of limited resources.

## Need 2: Creating an Assessment-Driven Organizational Effectiveness Taxonomy

The existing research, or lack thereof, as well as the data and the data collection process itself dictates the overwhelming need to establish assessment methods to evaluate the financial contributions of the ombuds practice. While many practitioners have professed concern regarding confidentiality, and in particular, as it pertains to financial-based evaluation, accurate assessment procedures can be established to extract salient financial data in a confidential, neutral and anonymous manner (Gadlin, 2010).

One can deduce that the absence of effective evaluation has served as an impediment to the growth of this field. It is difficult for a company to justify implementing any program that is competing for limited resources without seeing results. Although the primary function of the ombuds concept should not center on the financial benefits, quantifying the economic contributions of an ombudsperson, while maintaining core principles would, no doubt, serve as an impetus for significant expansion. In other words, implementing these programs based solely on conventional wisdom from the ombuds field, without empirical evidence, is not an altogether convincing argument for most businesses that operate from a profit perspective. Rather, an ombuds program that is available to all managers and employees for any conflict related needs, that can also contribute to the financial bottom-line of the organization in which it operates is certainly more conducive to the corporate mindset.

The data presented suggests that the vast majority of respondents perceive the ombudsperson in his/her respective firm to positively impact organizational effectiveness according to a multitude of financially related benchmarks. In fact, every single respondent within both the crisis and non-crisis adopter segments indicated that they perceived the ombudsperson to have fiscal relevance according to at least one (1) of the nine (9) metrics. Moreover, on average, the crisis segment indicated that the ombudsperson created value in 4.7 of the nine (9) benchmark categories, while the non-crisis group indicated value creation in 4.4 of the nine (9). From this perspective then, it is apparent that creating measurement and evaluation tools is a worthwhile, even essential investment. Favorable results may produce added support from all relevant stakeholders. This data could also be utilized to dictate the allocation of resources within an ombuds program.

Continuing to monitor stakeholder perception is a key element. Creating an atmosphere in which all stakeholders believe in the value of the ombudsperson is critical. In order to promulgate continued confidentiality and neutrality, anonymous surveys represent an effective collection method. Disseminating surveys to all three levels of the strata is recommended. Utilizing a metric taxonomy similar to the one offered in this paper is also suggested.

Extracting and reporting quantifiable data from the ombudsperson relating to realized monetary savings in operation is a complex and difficult, yet important undertaking. In many instances, the ombudsperson may be unable to quantify specific dollar amounts. It is evident, however, that there are many other examples of clearly defined cases where the ombuds office is keenly aware of the impact of its practices. For example, one corporate ombudsperson argues that his/her efforts have resulted in numerous employees opting to remain with the company, in addition to various legal savings (Anonymous Corporate Ombudsperson, personal communication, March 17, 2010). This can be documented without breaching the confidentiality paradigm.

Using conventional norms allows for rudimentary calculations, which aid in the development of this specific sustainability. It is widely accepted that the cost of turnover can exceed 150% of the departing employee's annual salary (Slaikeu & Hasson, 1998). Without even knowing an employee's name, depart-

ment or precise salary, the mean salary can be utilized as a proxy. If, for example, the ombudsperson is aware that he/she was able to retain two (2) employees, who would otherwise have left the firm, the approximate savings can be determined as follows: using a mean salary of \$60,000, multiplied by two (2) employees retained, multiplied by a factor of 150% to represent the cost saving associated with the avoided turnover, equals a total saving of \$180,000. This calculation is indicative only of cost savings associated with one benchmark (turnover) out of many, and is generated using relatively conservative and simple estimates. This is an elementary, albeit illuminating manner in which to conduct the type of assessment required to monetize the economic impact as it relates to this protracted change.

Accordingly, while it is difficult to calculate cost savings at a comprehensive level, certain cases that are brought to the ombuds office lend themselves to this type of measurement and assessment. Utilizing the metrics for economic impact presented in this paper is but one method against which to measure. The metric categorizations provided by Newcomb (2010) in her piece entitled *Assessing the Cost-Effectiveness of an Ombudsman* and Fowlie and Zinsser (2008) in their work *Evaluating Ombudsman Offices* are also beneficial frameworks. Interestingly, Zinsser (2004) offers an ombuds *Cost/Benefit Indicator*, where formulas are issued to calculate overall cost savings taking into account several metrics discussed herein. It is also vital to include qualitative assessments of elements such as improved morale, communication and trust for a more inclusive representation. In effect, by employing this strategy and these standards in particular, the ombuds program can articulate the need for its existence as a fundamental business function over the long-term by submitting comprehensive economic data.

There are several overarching goals of implementing appropriate evaluation methods. One, it serves the educational needs of all stakeholders. Although the econometrics are not the manifest rationale of the ombuds office, they are certainly a beneficial byproduct. Two, it serves as a catalyst, garnering increased support from all stakeholders. Three, it solidifies the ombudsperson's place within the network and obviates the skepticism surrounding this field.

It is essential to continually monitor the impact of this type of assessment to determine if the aforemen-

tioned goals are being met. This article proffers that several surveys disseminated over 18 month increments will measure improved sentiment. In addition, in order to satisfy the evaluation of the ombuds program's operational economic impact, assessment measures should also be employed. It is conventional wisdom that most ombuds offices recover their costs many times over (Fowlie & Zinsser, 2008). Consequently, despite the inability to ascertain all cost savings, it is expected that the extracted benefits meet or exceed that suggested by the literature, which expounds an approximate 6:1 return ratio. This represents a long-term goal, however, and is predicated on the success of the initial interventions, which will likely cause an increase in visits to the ombuds office, thereby allowing this practice to recover costs at a greater pace. This would satisfy the precepts of the *whole systems approach*, which dictates that all stakeholders must fully and openly commit to this endeavor. It is manifest, therefore, that integrating assessment frameworks as a sustainability tool should only be accomplished once the preceding interventions have been realized.

Furthermore, the confidential and anonymous nature of the surveys must ensure, both in reality and in perception, that no individual can be targeted for their responses or lack of same. Participation from the entire corporate strata is a requisite for success. Other resources include the technology to disseminate, collect and analyze these surveys, again all in a confidential manner within the organization. These recourses must then be appropriately mobilized according to the strategies.

Further capacity is required, however, for the ombudsperson to undertake the task of assessing and evaluating the monetary impact of his/her operations. From a pragmatic viewpoint, this may be beyond the scope and expertise of an ombudsperson. It may also detract from the other important duties that are more closely related to the origins of this function. Moreover, the ombudsperson's direct participation in this process may pose neutrality issues, where employees perceive these actions to be solely for the benefit of top-level executives or shareholders. Accordingly, it may be advantageous to have an outside auditor, independent of the ombudsperson, analyze and disseminate this information. This should obviate any neutrality issues, as well as remove the ombuds office from even the perception of assessing its own impact.

## Conclusions

The data presented herein revealed trends that are particularly noteworthy and illuminating. The results were categorized into three distinct clusters: overall perceptions regarding CMS; the efficacy of the corporate ombudsperson; and, the fiscal relevance of the corporate ombuds practice analyzed through the lens of the entire sample population, both crisis and non-crisis adopter companies and all three levels of the corporate strata.

The paramount component of this research, however, concerns assessing the perceived economic value of the corporate ombuds office. In all, nine effectiveness benchmarks were included for study.

The data proffered herein revealed areas that necessitated attention by effective intervention. Two aspects were selected for examination and analysis: the various misapprehensions and misinformation associated with the ombuds epistemology and the ostensible absence of financial and economic measurement and assessment from the ombuds paradigm.

Two corresponding intervention strategies were formulated to address these needs, including intensive workshops featuring corporate ombuds consortiums geared to improving awareness of the ombuds pedagogy and the concept of assessment-driven frameworks to evaluate the economic impact of the corporate office.

## Closing Comments

From the outset, it is readily apparent that many of the arguments presented throughout this paper represent a clear divergence from the sentiments, opinions and attitudes of many practicing corporate ombudspeople. This work has attempted to shift the paradigm characterizing the contemporary landscape toward an assessment-driven environment, while maintaining the fundamental pedagogy of the practice. The various arguments, recommendations and conclusions are posited in consideration of the foundational elements underpinning this function, in an effort to broaden its use where applicable, and to ensure that effective financial assessment contributes to, rather than detracts from its legitimacy. It is counterintuitive that evaluation conducted in a sensitive manner would somehow jeopardize this function.

It has been submitted by some that quantifying this type of information is inappropriate, and demonstrates a departure from the neutrality and independence pillars. While this concern is legitimate and seems rational on the surface, it is not insurmountable as shown, and it is crippling the growth within a field that should be expanding exponentially. Moreover, this article in no way posits that financial benefit should be the manifest objective or the primary responsibility of an ombudsperson.

Although monetary impact evaluation would validate the inherent value of this office to boards of directors and executives, it would also verify to other stakeholders, including entry-level and middle management, that the corporate ombuds function advocates effectively for all actors. If the ombuds can quantify, for example, that it has retained 10 employees and 90% of visitors experience improved morale, all individuals, regardless of their place within the strata, will gravitate toward this program in the event of interpersonal friction or workplace conflict. Moreover, effective assessment will demonstrate to all users and middle management especially, that ombuds assists its users, compliments rather than competes with other organizational functions and reduces a myriad of costs in the process. More importantly, perhaps, the establishment of fiscal assessment frameworks could be an advocacy platform for corporate ombuds offices and the broader organizational ombuds field to substantiate the claim that it is a vital operational component from both a conflict mitigation and cost perspective.

It is also submitted that the ombudsperson cannot affect comprehensive cost savings without operating in a manner that is consistent with confidentiality, neutrality and independence. The capacity to sustain fiscal significance, educate the workforce, mitigate dissonance and, function within the confines of the ombuds precepts, therefore, is all mutually inclusive. This becomes a symbiotic relationship. If individuals seeking assistance do not trust the ombudsperson, for example, that person will not use this service and the office is, then, unable to demonstrate savings. It is self-evident that results will occur whether they are measured or not. Assessing this economic impact, however, can substantiate the frequency in use of the ombuds office, the belief in the fundamental underpinnings of the practice and, at the very least, a proxy for outcome satisfaction. It will be interesting to monitor the progression of evaluation frameworks in the ombuds arena in the years to come.



## ENDNOTES

<sup>1</sup>This article contains only portions of a comprehensive research work. A complete copy is available from the author.

<sup>2</sup>A company whose ombuds program was created as a direct consequence of an SEC mandate.

<sup>3</sup>A company whose ombuds program was implemented voluntarily or through means other than an SEC mandate.

<sup>4</sup>Some surveys were not fully completed, but were deemed sufficiently appropriate to include, which may result in adjusted totals for certain sections.

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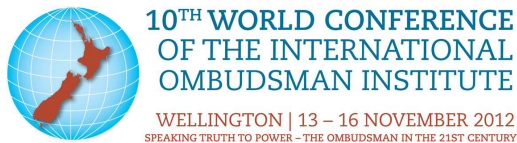
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## Announcing

### The 10th World Conference of the International Ombudsman Institute 13 – 16 November 2012

The conference programme will take place in Wellington, New Zealand from Tuesday 13th – Friday 16th November. Friday will be for members only with regional meetings and the General Assembly.

Under the umbrella title “Speaking Truth to Power — The Role of the Ombudsman in the 21st Century” the programme will include presentations in 3 areas of interest — Good Governance (including challenges to Ombudsman practice and improving public administration); Access to Justice (with an emphasis on Human Rights) and Transparency and Accountability (with a focus on freedom of information).

#### The Conference Agenda

The IOI World Conference is a forum for Ombudsmen, or their equivalent, from around the world to meet to share their experience and expertise. This is particularly important at this time when public entities’ governance and administration arrangements worldwide are undergoing fundamental change, and where challenges to the Ombudsman’s role — political, social, economic and technological — mean that we have to review the way we do our work and how we may best ensure procedural fairness and administrative justice for all citizens and access to information to enable greater participation in the democratic process.

#### Reaching out to the wider Ombudsman community

The IOI Board has expressed the desire to renew and revitalise links with other Ombudsman institutions and groups and, in that spirit, I offer a warm welcome and invitation to you to join us for the Conference. Our aims and aspirations are essentially the same and although we may operate in different fields — parliamentary, industry, organisational, university and others — our fundamental practice and values are the same. I believe we have much in common and much to learn from each other.

The conference website (a “work in progress”) is [www.confer.co.nz/wcioi](http://www.confer.co.nz/wcioi). Check the programme and speakers pages. For further information email Amy Abel [amy@confer.co.nz](mailto:amy@confer.co.nz).

Pre-registration is available now, and full registration and the programme outline will be available in late December, 2011. I look forward to hearing from you.

With warm good wishes,

Beverley A Wakem CBE  
Chief Ombudsman, New Zealand &  
President of the IOI

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The Journal of the International Ombudsman Association (JIOA) is a peer-reviewed online journal for scholarly articles and information relevant to the ombudsman profession. As members of a relatively new profession, we continually strive to understand, define and clarify the role and function of the professional organizational ombudsman. JIOA will help foster recognition that what we do for our agencies, corporations, colleges and universities is worthy of study. While we must vigorously protect the confidentiality of our interactions, we can still study and be studied to understand what we do and how we do it; what works well and what doesn't work; what our options are; how social, technical and legal changes may impact us; what the profile and career development of ombudsman professionals might be, and other matters of interest. The JIOA can facilitate a greater interest in ombudsing, enhance our professional standing, and serve to give us a better understanding of our dynamic roles and the impact on our institutions and agencies. The journal also will allow IOA members, other ombudsmen, and other professionals to reach out to their colleagues with their ideas, research findings, theories, and recommendations for best practices and to engage in ongoing discussions of critical issues.

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## ELIGIBLE CONTRIBUTORS

Submissions are encouraged from all responsible contributors regardless of affiliation with the International Ombudsman Association. JIOA encourages contributions relevant to the work of ombudsmen in any setting. JIOA is a peer-refereed journal and articles are accepted without remuneration. Authors wishing to discuss submission ideas are encouraged to contact the Editor or a member of JIOA's editorial board.

## LANGUAGE OF MANUSCRIPTS

JIOA will accept manuscripts in all major languages for review for publication. Where manuscripts are submitted in languages other than English, an English 'Abstract' must be supplied. Subject to the paper being published in JIOA, this English 'Abstract' will be published alongside the 'Abstract' in the author's original language. Occasionally, at the discretion of the Editor, the paper will be published with a full-English translation. As with all submissions, authors wishing to discuss potential submissions in languages other than English are encouraged to contact the Editor or members of JIOA's editorial board.

## GUIDELINES FOR SUBMITTING AN ARTICLE

Please send an electronic copy of your article as an attachment to [info@ombudsassociation.org](mailto:info@ombudsassociation.org). JIOA's editor will send a reply when the email has been received and the attachment(s) are opened successfully. Submissions should conform to the following guidelines.

### Originality

A cover letter should be submitted with your submission and must include a statement that neither the paper nor its essential content has been published or is under consideration for publication elsewhere. It will be presumed that all listed authors of a manuscript have agreed to the listing and have seen and approved the manuscript.

### Authorship

All persons designated as authors should qualify for authorship. Each author should have participated significantly to the concept and design of the work and writing the manuscript to take public responsibility for it. The editor may request justification of assignment of authorship. Names of those who contributed general support or technical help may be listed in an acknowledgment.

## TYPE OF SUBMISSION

We accept submissions in the form of articles, commentaries, book reviews, essays, short reports, and letters to the editor.

**Articles** of any length will be considered, although JIOA is particularly interested in publishing concise scholarship generally between 1,500 and 5,000 words. Commentaries and book reviews should be no longer than 1000 words.

**Essays** and short reports that advance an idea, summarize a development, or initiate or engage in a discussion are solicited.

**Letters** to the editor are encouraged, but may be edited for length.

## FORMAT

Manuscripts should be double spaced, with ample margins of at least one inch. Pages should be numbered. All identifying information should be removed from the manuscript files themselves prior to submission. Proofs for checking will normally be sent to the first author named to whom any correspondence and reprints will also be addressed. Footnotes to the text should be avoided wherever this is reasonably possible.

All manuscripts should be made anonymous by the principal submitting author. This involves the following:

1. Removing all identifiable properties from the Word file "Properties" (particularly the author name and organisation) – this can be done as a single operation in Vista, and manually in Word.
2. Ensure the manuscript contains no mention of the authors' organisations, names, or the names of key colleagues. Substitute real names with "X" throughout – they can be placed in the article after review.
3. Similarly, all those who are being acknowledged as informal reviewers, discussants or inspirations for the submitted article should be anonymised in the manuscript. Where acknowledgements are being made, a separate section for this should appear on the front page of the manuscript, along with the key words, author's name and affiliation, a brief author biography and an abstract of not more than 150 words.
4. Where author names and organisation names cannot be avoided, then authors must accept that their article will not be anonymous. This is not preferred by the JIOA but, where inevitable, authors are required to state that they waive the right of an anonymous review.

JIOA prefers submissions prepared in Microsoft Word. Word Perfect, ASCII and RTF are also acceptable.

## TITLE PAGE, KEY WORDS AND AUTHOR INFORMATION:

The name(s) of the author(s) should appear only on a separate title page which should also include the author(s) affiliation and mailing address. The title page should also include a biographical note of no more than 100 words. Contact information, including telephone numbers and mailing addresses, should be provided for each author. Additionally, the Title page should include up to six key words, includ-

ing the word "Ombudsman" (or whichever variant of this the author has employed in the article). A sample title page is attached.

Author(s) should also submit a statement indicating all affiliations, financial or otherwise, that may compromise or appear to compromise the objectivity or unbiased nature of their submission. Such conflicts of interest may arise out of commitments involving honoraria, consultant relationships, participation in a speakers' bureau, stock holdings or options, royalties, ownership of a company or patent, research contracts or grants, and, in some instances, being an official representative of another organization. Any conflict of interest will be included as a footnote in the published manuscript.

**ABSTRACT:** Please supply an abstract of 100 or fewer words with your submission. The abstract should also include a word count of the article, excluding references.

## GRAPHICS

Please convert all graphics to TIFF or EPS format. Line art should be a minimum of 600 dpi, and halftones a minimum of 266 dpi in resolution.

**Illustrations** should not be inserted in the text but each provided as separate files and given figure numbers and title of paper and name. All photographs, graphs and diagrams should be referred to as Figures and should be numbered consecutively in the text in Arabic numerals (e.g. Fig. 3). Captions for the figures should be provided and should make interpretation possible without reference to the text. Captions should include keys to symbols.

**Tables** should be submitted as separate files and should be given Arabic numbers (e.g. Table 3). Their approximate position in the text should be indicated. Units should appear in parentheses in the column heading but not in the body of the table. Words or numerals should be repeated on successive lines; 'ditto' or 'do' should not be used.

## STYLE

Authors should conform to the Chicago Manual of Style. Authors will be consulted during the editing process, but are expected to permit minor standardizations and corrections (i.e., headings, alignments, citation formatting, standard American English spell-



ing, and minor punctuation). JIOA encourages and promotes the use of gender-neutral language.

Please note that the Journal publishes manuscripts in accordance with the linguistic and grammatical conventions of the author's country of writing. This means that spelling ('colour' or 'color'; 'organization' or 'organisation') may vary, and Editorial and grammatical conventions may also vary (e.g., placement of citations). While the Journal will normally publish accepted manuscripts in the linguistic style and grammatical conventions of the author, the final say on this rests with the Editor.

**CITATIONS:** The author(s) are responsible for the accuracy and thoroughness of citations. Footnotes should be consecutively numbered and collected at the end of the article. References should be listed on a separate page at the end of the manuscript. Citations should follow the Chicago Manual of Style format. If the submission is accepted for publication, the author should be prepared to provide access to copies of all materials cited.

#### **Examples of citations:**

Kosakowski, T., & Miller, D. (2007). Why we get no sleep at night. *Journal of the International Ombudsman Association*, 1, 100-101.

Rowe, M.P. (1977). Go Find Yourself a Mentor. In P. Bourne & V. Parness (Eds), *Proceedings of the NSF Conference on Women's Leadership and Authority, University of California, Santa Cruz, California, 1977* (pp 120-140). Santa Cruz: University of California Press.

Miller, D. (2000). *Dying to care? Work, stress and burn-out in HIV/AIDS carers*. London: Taylor & Francis.

Titles of journals should not be abbreviated.

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Authors will be required to sign a Publication Agreement form for all papers accepted for publication.

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## **CONSIDERATION OF SUBMISSIONS**

### **Blind Evaluations**

Submissions are reviewed by at least two editors without consideration of the author's identity. Please ensure that the manuscript is anonymous by removing any link to the author. Remove reference material in any footnote that references the author of the piece for review and replace information with "Author." Note the instructions on making the manuscript anonymous in the section entitled "Format."

### **Timeline for Acceptance**

JIOA accepts submissions on a rolling basis throughout the calendar year. The review process starts on the first day of every month. It is intended that decisions on publication will be made within three months of receipt of a submitted manuscript.

### **Expedited Review**

JIOA will attempt to honor reasonable requests for an expedited review of submissions. However, if we are unable to give an expedited review by the date requested, you will be notified that the article has been withdrawn from consideration. To request an expedited review, please contact the JIOA Editor and provide: your name, phone number, and e-mail address; the title of the article; your deadline for a decision.

### **Publication Dates**

JIOA is published biannually. Articles are finalized for publication in September and March.

### **Antidiscrimination Policy**

It is the policy of JIOA not to discriminate on the basis of race, gender, age, religion, ethnic background, marital status, disability, or sexual orientation.

## SAMPLE FRONT PAGE

### THE WAY THINGS ARE, HAVE BEEN AND WILL BE

John Doe  
Organizational Ombudsman  
ABC Inc.

#### Contact details:

ABC Inc.  
1122 Washington Square  
Washington, DC 12345  
Tel: 012 345 6789  
Email: abcomb@abc.com

**Key Words:** Ombudsman, history, dispute resolution, nirvana

**Word Count (including Abstract):** 2500

#### Abstract:

It was the best of times, it was the worst of times, and Ombudsmen saved the day by offering ethically based, neutral, independent and confidential services to their organization ("X") and staff. This paper dissects how Ombudsmen worked in the circumstances of concern and how they might systematise future interventions, using validated procedures described in detail in the article. The outcomes are identified, quantified, and a conceptual structure for applying the lessons learned is presented.

#### John Doe:

John Doe is a native of Equanimity and Hard Work, and has post-graduate degrees in thinking and doing from the School of Hard Knocks in the University of Life. He has worked as an organisational Ombudsman for 30 years and in his present position (at "X") for ten.

#### Acknowledgements:

The author is particularly grateful to A, B, and C for their stimulating discussion and ideas that led to the development of this article, and to D, E and F for reviewing earlier drafts of the manuscript.

# REVIEW PROCEDURES

## RESPONSIBILITIES OF EDITORS AND EDITORIAL BOARD MEMBERS

JIOA editors are designated as the Editor and up to four Associate Editors. The editors collaborate with an editorial board comprised of approximately twenty participants with IOA membership. The editorial board is intended to reflect the diversity of the association as best we can.

The primary contact for JIOA is the Editor who is responsible for the journal publication process and the journal website. The Editor directs the processing of manuscripts and maintains communication with the IOA Board of Directors, the Associate Editors, editorial board members/reviewers, and authors.

Editorial board members, and other IOA members designated by the Editor in special cases, are responsible for the peer reviews of the submitted manuscripts.

## REVIEW PROCESS

JIOA uses a blind review process and all references to the author(s) and author's workplace are removed prior to the manuscript being distributed to reviewers.

The Editor and/or Associate Editors will review each submitted manuscript to determine if the topic is appropriate for publication in JIOA. Acceptable manuscripts will be distributed electronically to three editorial board members selected by the Editor for peer review.

Manuscripts judged by the Editor and/or Associate Editors as inconsistent with the general mission of JIOA or the recognized Standards of Practice will be returned to the primary author with comments and possible suggestions for revision.

Reviewers will use a consistent and systematic set of criteria to evaluate the quality and potential of a manuscript. These criteria include items related to content, organization, style, and relevance. Review forms and comments will be returned to the Editor.

Each reviewer will recommend one of the following:

- Accept for publication as is
- Accept for publication with minor revisions as indicated
- Accept for publication after major revisions by author(s)
- Revision and resubmission for subsequent review
- Reject manuscript

The final decision on whether to publish a manuscript is made by the Editor and is based upon recommendations from the peer reviewers. If there is significant variation among the reviewers regarding the status of a manuscript the Editor may:

- Seek additional input from the reviewers
- Request an additional review
- Seek additional input from the Associate Editors

Reviewers' comments will be provided to the primary author. However, the reviewers of a specific manuscript will remain anonymous. It is the policy of JIOA to work with authors to facilitate quality publications. The Editor may suggest or an author may request that a member of the editorial board be available to provide assistance at various stages of the preparation and publication process.

## NOTES FOR JIOA REVIEWERS

Reviewing manuscripts for JIOA must be undertaken in accordance with the principles of the IOA — by demonstrating independence, neutrality and confidentiality. This requires that manuscripts be accorded the status of office visitors. The content of reviewed manuscripts and of reviews should not be shared with anyone other than the Editor of the JIOA.

It is important for reviews to have a forward-looking, beneficial intent — this is an opportunity to give feedback that will help nurture, guide and develop authorship. It is not an exercise in showing you know more, are wiser or more clever and literate in the subject matter! Authors should learn from reviews and take away from the review a sense of future direction and beneficial development for their paper.

The aim of the review is to strengthen contributions to the JIOA, and thereby strengthen the ombudsman profession. In this sense, a review is as much a critique of the reviewer as of the manuscript. Accordingly, it is a requirement that all reviews offer information that can help guide the author. Although reviews

are confidential (i.e., the manuscript author does not know who the reviewers are), they are best written as though the author is in the room. Accordingly, a useful test of the reviewers' assertions is the "Old Bailey" test: If they were standing in the dock at the Old Bailey, would they be able to justify their assertions to the author? Are they making statements that are justifiable, verifiable and credible, or just say-so? Does the tone of their review convey the IOA Standards of Practice in practice?

Where criticism is appropriate, it should ideally be constructive and be contextualised within a set of options given by the reviewer for modification of the text. Where there are clear mistakes, inaccuracies or errors, these should be indicated and corrections or options for alternative expression suggested. Personal criticism — whether of content, ideology, style or tone — is unacceptable.

Please note, suggestions for modification should be itemised and returned to the Editor using the "Comments to the Authors" section of the JIOA Referee Review Form, which is sent to reviewers together with the manuscript to be reviewed. Suggestions for modification should **not** be returned to the Editor in the form of "Track Changes" in the original manuscript. This would identify the reviewer to the author and, even if this does not concern the reviewer, it might concern or prejudice the author in their consideration of the reviewer's comments. Reviewing is a form of power relationship. That is why anonymity is required on both sides.

Manuscripts may come in a variety of styles — from the determinedly academic (with numerous citations and references) to the determinedly idiosyncratic and personal. All styles may be acceptable, and need to be reviewed within their own context. Opinion pieces may have been commissioned by the Editor and, where this is the case, this will be indicated by the Editor.

Please note that the Journal also publishes manuscripts that acknowledge the linguistic and grammatical conventions of the author's country of writing. This means that spelling ('colour' or 'color'; 'organization' or 'organisation') may vary, and Editorial and grammatical conventions may also vary (e.g., placement of citations). While the Journal will normally publish accepted manuscripts in the linguistic style and grammatical conventions of the author, the final say on this rests with the Editor.

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## IN CONCLUSION

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Author's Signature: \_\_\_\_\_

Name (please print): \_\_\_\_\_

Date: \_\_\_\_\_

Joint Authorship: If the Work has more than one Author, each author must sign this agreement or a separate counterpart to this agreement. All such counterparts shall be considered collectively to be one and the same agreement.

Please keep one copy of this agreement for your files and return a signed copy to:

**Editor, JIOA**  
**David Miller, Ph.D.**  
**384 Decanter Bay Road**  
**RD3 Akaroa 7583**  
**New Zealand**  
**+64 3 304 7567**  
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# IOA STANDARDS OF PRACTICE

## PREAMBLE

The IOA Standards of Practice are based upon and derived from the ethical principles stated in the IOA Code of Ethics.

Each Ombudsman office should have an organizational Charter or Terms of Reference, approved by senior management, articulating the principles of the Ombudsman function in that organization and their consistency with the IOA Standards of Practice.

## STANDARDS OF PRACTICE

### INDEPENDENCE

**1.1** The Ombudsman Office and the Ombudsman are independent from other organizational entities.

**1.2** The Ombudsman holds no other position within the organization which might compromise independence.

**1.3** The Ombudsman exercises sole discretion over whether or how to act regarding an individual's concern, a trend or concerns of multiple individuals over time. The Ombudsman may also initiate action on a concern identified through the Ombudsman's direct observation.

**1.4** The Ombudsman has access to all information and all individuals in the organization, as permitted by law.

**1.5** The Ombudsman has authority to select Ombudsman Office staff and manage Ombudsman Office budget and operations.

### NEUTRALITY AND IMPARTIALITY

**2.1** The Ombudsman is neutral, impartial, and unaligned.

**2.2** 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.

**2.3** The Ombudsman is a designated neutral reporting to the highest possible level of the organization and operating independent of ordinary line and staff structures. The Ombudsman should not report to nor be structurally affiliated with any compliance function of the organization.

**2.4** The Ombudsman serves in no additional role within the organization which would compromise the Ombudsman's neutrality. The Ombudsman should not be aligned with any formal or informal associations within the organization in a way that might create actual or perceived conflicts of interest for the Ombudsman. The Ombudsman should have no personal interest or stake in, and incur no gain or loss from, the outcome of an issue.

**2.5** The Ombudsman has a responsibility to consider the legitimate concerns and interests of all individuals affected by the matter under consideration.

**2.6** The Ombudsman helps develop a range of responsible options to resolve problems and facilitate discussion to identify the best options.

### CONFIDENTIALITY

**3.1** The Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following:

The Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman Office, nor does the Ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman Office, without that individual's express permission, given in the course of informal discussions with the Ombudsman; the Ombudsman takes specific action related to an individual's issue only with the individual's express permission and only to the extent permitted, and even

then at the sole discretion of the Ombudsman, unless such action can be taken in a way that safeguards the identity of the individual contacting the Ombudsman Office. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the Ombudsman.

**3.2** Communications between the Ombudsman and others (made while the Ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the Ombudsman and the Ombudsman Office, rather than to any party to an issue. Others cannot waive this privilege.

**3.3** The Ombudsman does not testify in any formal process inside the organization and resists testifying in any formal process outside of the organization regarding a visitor's contact with the Ombudsman or confidential information communicated to the Ombudsman, even if given permission or requested to do so. The Ombudsman may, however, provide general, non-confidential information about the Ombudsman Office or the Ombudsman profession.

**3.4** If the Ombudsman pursues an issue systemically (e.g., provides feedback on trends, issues, policies and practices) the Ombudsman does so in a way that safeguards the identity of individuals.

**3.5** The Ombudsman keeps no records containing identifying information on behalf of the organization.

**3.6** The Ombudsman maintains information (e.g., notes, phone messages, appointment calendars) in a secure location and manner, protected from inspection by others (including management), and has a consistent and standard practice for the destruction of such information.

**3.7** The Ombudsman prepares any data and/or reports in a manner that protects confidentiality.

**3.8** Communications made to the ombudsman are not notice to the organization. The ombudsman neither acts as agent for, nor accepts notice on behalf of, the organization and shall not serve in a position or role that is designated by the organization as a place to receive notice on behalf of the organization. However, the ombudsman may refer individuals to the appropriate place where formal notice can be made.

## INFORMALITY AND OTHER STANDARDS

**4.1** The Ombudsman functions on an informal basis by such means as: listening, providing and receiving information, identifying and reframing issues, developing a range of responsible options, and – with permission and at Ombudsman discretion – engaging in informal third-party intervention. When possible, the Ombudsman helps people develop new ways to solve problems themselves.

**4.2** The Ombudsman as an informal and off-the-record resource pursues resolution of concerns and looks into procedural irregularities and/or broader systemic problems when appropriate.

**4.3** The Ombudsman does not make binding decisions, mandate policies, or formally adjudicate issues for the organization.

**4.4** The Ombudsman supplements, but does not replace, any formal channels. Use of the Ombudsman Office is voluntary, and is not a required step in any grievance process or organizational policy.

**4.5** The Ombudsman does not participate in any formal investigative or adjudicative procedures. Formal investigations should be conducted by others. When a formal investigation is requested, the Ombudsman refers individuals to the appropriate offices or individual.

**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.

**4.7** The Ombudsman acts in accordance with the IOA Code of Ethics and Standards of Practice, keeps professionally current by pursuing continuing education, and provides opportunities for staff to pursue professional training.

**4.8** The Ombudsman endeavors to be worthy of the trust placed in the Ombudsman Office.