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Comment

UNIVERSITIES, CORPORATIONS, AND STATES USE THEM--NOW IT'S TIME TO PROTECT THEM: AN ANALYSIS OF THE PUBLIC AND PRIVATE SECTOR OMBUDSMAN AND THE CONTINUED NEED FOR A PRIVILEGED RELATIONSHIP

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I. INTRODUCTION

"[A] victimized employee who elects to file suit can expect to wait at least two to three years from the time of the discrimination until a verdict is rendered on his or her claim." [1] This Equal Employment Opportunity Statistic is a sobering example of the reality currently facing the American legal system. [2] Crowded court dockets are almost as synonymous with the justice system as judges and lawyers. Often, those who seek justice must wait months, if not years, to have their "day in court." With the increase in waiting time for justice, the judicial system, attorneys, and those working in the legal system have increasingly turned to alternate forms of decision-making. Nowhere is this more evident then in the explosion of Alternative Dispute Resolution ("ADR") models across the country. Options in lieu of going to court now include mediation, arbitration, and, in both public and private sectors, Ombudsman's services.

Ombudsman is a Swedish term that translates literally into "go-between." [3] However, Ombudsman's duties and work-settings go beyond that of the literal translation. An Ombudsman can work in a variety of settings, including corporations, government offices, hospitals, universities, and institutions. Equally as diverse as the myriad of settings Ombudsmen practice within is the level of confidentiality and privilege their services and records are afforded. These privileges and confidences are crucial to the effective use ***390** of Ombudsman services. Without an Ombudsman privilege, who could confidently use the service? Would a woman who is a victim of sexual harassment at work seek assistance from her employer's Ombudsman knowing there is no guarantee her records will be kept private? Would a child who is concerned about her mother's care at a nursing home be willing to speak with a state nursing home Ombudsman without a guarantee her complaints will be kept confidential and not impede her mother's current care? These are just a sampling of the questions raised when debating the merits of an Ombudsman privilege.

This Comment will debate the merits of an Ombudsman privilege and will further address the critical need for a universal Ombudsman privilege. This Comment will focus first on what exactly is an Ombudsman. Second, will be a discussion of the various ways Ombudsmen are employed throughout the United States and the privileges their communications are currently afforded. Third, this Comment will analyze the case law surrounding the Ombudsman privilege controversy, focusing on the split of authority as to whether an Ombudsman privilege exists. The last portion of this Comment will address a proposed resolution to the problems surrounding the lack of a uniform, Ombudsman privilege. More specifically, every state should establish a statutory definition of who constitutes an Ombudsman with evidentiary privilege for their communications. This privilege would then extend to all persons whose work meets the statutory Ombudsman definition.

II. BACKGROUND

A. What is an Ombudsman?

It is difficult to provide a short, concise definition of Ombudsman. While the concept is as old as it is varied, many incarnations of the office have emerged over the years, and people do not often understand the concept of Ombudsman or the purposes they serve. Larry B. Hill, Professor of Political Science at the University of Oklahoma, has researched the Ombudsman profession for over thirty years. [4] As a notable scholar in the field, Professor Hill views the Ombudsman's mission as "to generate complaints against government administration, to use its extensive powers of investigation in performing a post-decision administrative audit, to form ***391** judgments which criticize or vindicate administrators, and to report publicly its findings and recommendations but not to change administrative decisions." [5]

Interest in ADR techniques over the past two decades has brought with it the establishment of professional organizations related to the Ombudsman practice. [6] Many organizations have developed their own definition of what constitutes Ombudsman practice. [7] The Ombudsman Association, for example, states an Ombudsman's mission is "to provide a confidential, neutral and informal process which facilitates fair and equitable resolutions to concerns that arise in the organization. In performing this mission, the Ombudsman serves as an information and communication resource, upward feedback channel, advisor, dispute resolution expert and change agent." [8]

In its very basic sense, an Ombudsman provides assistance to individuals with problems or concerns in a neutral, non-biased manner. [9] Those who call themselves "Ombudsmen" work in a variety of settings and institutions. Internationally, Ombudsmen work for the government to ensure policies and procedures are adequately carried out. [10] In the United States, Ombudsman often work for private corporations, colleges and universities, hospitals, federal agencies, and local and state government. [11]

Within those institutions, an Ombudsman may provide a variety of services. For example, residents in an extended care facility may contact the Ombudsman regarding concerns that a nursing home is negligent in its care of residents. [12] In the prison setting, an Ombudsman may advocate for review of a videotape showing an inmate was mistreated in order to assist that inmate with his complaint. [13] A corporate Ombudsman may investigate claims of ***392** sexual harassment in the workplace and propose policy changes to address the issue. [14] As varied as the settings and practices Ombudsmen address, so, too, are the rules and regulations pertaining to those practices.

B. American Bar Association Proposed Ombudsman Regulations

Recognizing the important role Ombudsmen play in both the private and public sector, the American Bar Association ("ABA") proposed regulations to increase the use of public and private Ombudsmen. [15] This resolutions were approved by the ABA as a model for both states and the federal government to adopt whole, or in part, depending on the jurisdictions goals. The ABA committee resolution proposed that Ombudsman communications enjoy both confidentiality and privilege. [16] These guidelines encouraged the establishment of Ombudsman offices, coupled with the creation of uniform operation and jurisdiction rules, standard characteristics of an Ombudsman office, and limits on authority. [17]

The resolution divided the Ombudsman profession into three different categories. First, the "Classical" Ombudsman typically operates in the public sector and addresses problems and concerns with legislation and government practice. [18] This is the most

traditional form of Ombudsman work. The second category is the "Organization" Ombudsman, who works in either the private or public sector and limits her duties to issues related to a specific entity, such as a corporation or a government agency. [19] The third and final Ombudsman recognized by the ABA is the "Advocate" Ombudsman. [20] Similar to the "Classical" and "Organizational" categories, the "Advocate" Ombudsman maintains neutrality and has a limited right to advocate for individuals seeking assistance. [21] The "Advocate" Ombudsman is often created by statute and represents a shift from the more traditional Ombudsman role.

***393** The ABA defines Ombudsman as "a person who is authorized to receive complaints or questions confidentially about alleged acts, omissions, improprieties, and broader, systemic problems within the Ombuds[man's] defined jurisdiction to address, investigate, or otherwise examine these issues independently and impartially." [22] Accordingly, the ABA drafted twelve essential characteristics of the "Classical" Ombudsman. [23] Those characteristics are:

> (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel. . .; (2) independence of the ombudsman from control by any other officer. . .; (3) appointment by the legislative body or executive authority. . .; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause. . .; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restrictions of civil service and classifications acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or publicize; (11) opportunity for any public official criticized by the ombudsman to know of it in advance; (12) immunity of the ombudsman and his staff from civil liability on account of official action. [24]

The resolution further discussed the importance of jurisdiction (categories of concerns an Ombudsman may address) to an effective Ombudsman. [25] Jurisdiction must be clearly defined and publicly available to ensure the Ombudsman does not broaden his jurisdiction. [26] Within their jurisdiction, Ombudsmen can review such issues as "allegations of unfairness, maladministration, abuse of power, abuse of discretion, discourteous behavior or incivility, inappropriate application of law or policy, inefficiency, decision ***394** unsupported by fact, and illegal or inappropriate behavior." [27] To address these concerns, the Ombudsman should be given full access to all pertinent records and individuals. [28]

The ABA further addressed three essential characteristics of Ombudsman practice. First, the Ombudsman must have an independent structure, function, and appearance. [29] To achieve this, no one should be able to control or limit the Ombudsman's duties after creation and establishment of the office, to eliminate the office or remove the Ombudsman for retaliatory purposes or reduce the office's budget or resources as a means of achieving the same result. [30] Ombudsman impartiality requires this independence. [31] An Ombudsman should not be responsible to her employer or public creator. [32] In order for an Ombudsmen to be truly impartial, they must be free from bias and the appearance of bias. [33]

The last major issue discussed in the resolution was the issue of confidentiality. [34] The report proposed that Ombudsman confidentiality extend to all communications, including all their notes and written communication records pertinent to their

role. [35] The Ombudsman, in turn, can not reveal any information related to the person requesting assistance or any information that may identify such person without their express permission. [36] It is under the purview of the Ombudsman's office, together with those requesting assistance, whether or not to reveal client identity and client confidences; therefore, no authority shall require the Ombudsman to disclose such records absent a statutory requirement. [37] The ABA noted that without statutory protection from required disclosure, courts have often found no Ombudsman privilege exists through interpretation of federal evidence rules. [38] Viewing the existence of an Ombudsman privilege as a fundamental concept, the ABA's proposed resolution encourages both statute and written employment policies ***395** defining the scope of the privilege. [39] The hope is that these written policies, coupled with a statutory mandate, will lessen court confusion regarding the Ombudsman privilege and allow the Ombudsman to more effectively carry out her work.

The aforementioned model regulations provide a working framework for both state and federal governments to understand the need for an Ombudsman privilege and, in turn, extrapolate ideas and proposals necessary to begin forming a privilege by statute. They are relevant for jurisdictions wanting to establish a statutory privilege because they are supported and adopted by an administrative body (the ABA) noted for its commitment to sound judicial policy and legislative efforts.

C. State Ombudsmen

As the ABA committee discovered when researching policy considerations regarding an Ombudsman's privilege, the majority of courts have historically not recognized a communications privilege related to the Ombudsman. In response, many states have created statutory authorization for certain Ombudsman offices. [40] Hawaii was the first state to establish a state-wide public Ombudsman. [41] Hawaii's statute allows for investigation into "any permanent governmental entity, department, organization, or institution, and any officer, employee, or member thereof acting or purporting to act in the exercise of the officer's, employee's, or member's official duties . . . ." [42] With regard to communications privilege, the Hawaii statute provides, "[t]he Ombudsman and the Ombudsman's staff shall not testify in any court with respect to matters coming to their attention in the exercise or purported exercise of their official duties." [43] Similarly, Alaska's statute allows for the Ombudsman to investigate claims related to government practice, hold hearings, investigate agency premises, and subpoena confidential records. [44]

***396** Iowa and Nebraska both have statutes creating a public sector Ombudsman responsible for reviewing the conduct of government agencies and investigating complaints. [45] These statutes allow for those communications to be privileged. [46] Iowa's statute provides, "nor shall the citizens' aide or any member of the staff be compelled to testify in any court with respect to any matter involving the exercise of the citizens' aide's official duties." [47] The Nebraska provision is similar, in pertinent part, "[n]either the Public Counsel nor any member of his staff shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance." [48]

While few states have statutorily established an Ombudsman in the classical sense, other states have established Ombudsman for limited, public purposes. [49] Washington state created an Ombudsman for the purpose of ensuring fair and ethical practices within its agency on family and children's services. [50] Addressing privilege, the statute provides, "[n]either the Ombudsman nor the Ombudsman's staff may be compelled, in any judicial or administrative proceeding, to testify or to produce evidence regarding the exercise of the official duties of the Ombudsman or of the Ombudsman's staff." [51]

Indiana and Montana developed Ombudsman's offices to protect the rights of individuals who are being treated for mental illness or developmental disabilities. [52] In Indiana, the mental health Ombudsman works with public mental health facilities

and her records and communications related to such work are "confidential and may not become public records or be subject to a subpoena or discovery proceedings." [53] Montana prohibits disclosure of an Ombudsman's records unless "a court has determined that certain information is subject to compulsory legal process or discovery because the party seeking the information has demonstrated that there is a compelling state interest that outweighs the individual's privacy interest." [54]

***397** Other states have passed statutes establishing Ombudsmen within health care facilities. [55] Delaware created an Ombudsman's office to address problems within long-term care facilities. [56] This statute, however, is not as clear as to whether there is a blanket privilege stating "the Ombudsman shall not disclose the identity of any complainant or resident unless a court orders such disclosure." [57] Illinois has an established Long Term Care Ombudsman Program. [58] Similar to Delaware, Illinois does not allow Ombudsmen to disclose their confidential records or testify in court. [59] A further similarity is that Illinois will allow the disclosure of records if compelled by a court order. [60] There is, however, no standard in the statute stating when a court should compel an Ombudsman to produce their records. [61]

D. Federal Ombudsmen

The states are not alone in establishing uses for Ombudsman services. At the federal level, the Alternative Dispute Resolution Act ("ADRA"), [62] allows an agency to "use dispute resolution proceeding[s] for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." [63] The Act was created in order to encourage the use of ADR techniques in federal agencies. [64] Several agencies, such as the Internal Revenue Service, Environmental Protection Agency, and the Commerce Department, have been successfully using Ombudsman services for a number of years. [65] Ombudsman services at the federal agency level include employee concerns, monitoring regulations, and providing the public with an opportunity to address their questions, comments, or concerns. While the ADRA allows for the creation of Ombudsman offices within the federal agency, it does not provide a blanket privilege to Ombudsman services. [66] A court can access the information if it believes it is necessary to "prevent a ***398** manifest injustice, help establish a violation of law, or prevent harm to the public health or safety." [67] Courts have interpreted this provision as not providing a blanket privilege. [68]

Various open records acts also make it difficult to keep Ombudsman's communications privileged. Both the Federal Records Act [69] ("FRA") and the Freedom of Information Act [70] ("FOIA") allow for disclosure of Ombudsman records. The FRA was created to ensure uniform records management, standards, and procedures regarding storage, disposal, and maintenance. [71] Under the FRA, records are made available for public access pertaining to "the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the government and of persons directly affected by the agency's activities." [72] Because Ombudsmen are a function of the agency involved in decisions and procedures of such agency, their work falls directly under the FRA. [73] Consequently, Ombudsmen records are available under the FRA to federal agencies or the public. [74]

FOIA also provides an avenue to obtain Ombudsman records. FOIA allows for public access to specific government records, and Ombudsman's records are not exempt. [75] Under FOIA, a citizen, after a waiting period, may obtain agency records absent a compelling reason for disclosure. [76] There are a few exceptions contained in FOIA which may help to shield some Ombudsman activities. Personnel and medical files, information that would not be available to a party if they were in litigation with an agency, and information exempt by statute are not required to be disclosed under FOIA. [77] However, these exemptions represent only a fraction of Ombudsman services.

*399 E. Privilege Under Federal Rule of Evidence 501

Establishing a privilege through statute is the most effective means of ensuring courts will enforce such a privilege. Absent statute, however, the Federal Rules of Evidence provide a guide for when a court may consider a particular communication as privileged. Federal Rule of Evidence 501 states, in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. [78]

Prior to adopting Rule 501, both chambers of Congress held hearings to discuss the scope of federal privilege. [79] Supreme Court Article V regarding privileged information was submitted to the corresponding House committee. [80] The committee detailed nine non-constitutional privileges that federal courts must recognize. [81] Those privileges included required reports, those between a lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and the identity of informers. [82]

The House was asked to adopt only these nine privileges as recognizable by federal law. [83] The House rejected that proposal and instead adopted the current incarnation of Federal Rule of Evidence 501. [84] The committee decided not to arbitrarily limit the number and type of federally recognizable privileges to encourage courts to continue to develop privileges as necessary to the functioning of the judicial system. [85] Additionally, the rules afford an opportunity for state privilege law to be controlling in cases where state substantive law provides the rule of decision. [86]

The Senate also held committee hearings on Rule 501 as well. Similar to the House, the Senate was asked to limit the scope of federal privilege to the ***400** nine relationships and situations outlined by Supreme Court Article V. [87] The Senate agreed with the House's decision to eliminate a detailed statement of specific privileges and to allow courts to determine what constitutes federal privileged information in light of "reason and experience." [88] The Senate hearings also specifically found that the elimination of detailed, specific privileges did not indicate Congress felt those privileges no longer existed or that they were afforded less protection. [89]

What can be gleaned from both the House and Senate reports is that a Rule 501 privilege is not limited to specifically enumerated relationships. As is stated in both Rule 501 and its legislative history, it is the purview of courts to decide "in light of reason and experience" what shall be a privileged communication. [90]

III. ANALYSIS

While the Federal Rules of Evidence provide for when a court may determine whether or not a federal privilege exists, [91] courts often do not have clear guidance on how that rule should be applied to a particular case. However, federal privilege was addressed in two particular cases involving McDonnell Douglas Corporation, both of which exemplify the controversy among courts as to whether there is an Ombudsman's privilege. [92] In one instance, the Eastern District of Missouri found that

an Ombudsman's privilege did, in fact, exist in Kientzy v. McDonnell Douglas. [93] However, when McDonnell Douglas was sued in a second instance, the Eighth Circuit disagreed, finding no Ombudsman privilege. [94]

***401 A. Lower Courts Are Divided As To Whether To Recognize An Ombudsman Privilege**

In Kientzy v. McDonnell Douglas, [95] the plaintiff sued McDonnell Douglas for terminating her employment on the basis of her gender, in violation of Title VII of the Civil Rights Act of 1964. [96] Plaintiff sought to depose both the Ombudsman and other individuals about their conversations to the Ombudsman. [97] The McDonnell Douglas Ombudsman requested that the communications the Ombudsman's office received be removed from the list of discoverable evidence. [98] The plaintiff countered, arguing that a privilege did not exist for the information sought. [99] Plaintiff believed she was entitled to obtain this information, as she used the Ombudsman program merely to appeal her dismissal, and, as such, she believed the Ombudsman may have contributed to the decision to terminate her employment. [100]

The court examined the defendant's request to protect disclosure in light of Federal Rule of Evidence 501. In doing so, the court noted four "cardinal factors" to discern what is meant by "in light of reason and experience" within Rule 501. [101] The factors are:

> (1) the communication must be one made in the belief that it will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship should be one that society considers worthy of being fostered; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation. [102]

After examining the factors, the court found all four factors present and held a privilege existed. [103] There was an expectation of privacy on the part of ***402** the plaintiff, as the Ombudsman informed persons requesting assistance of the confidentiality of the records. [104] In addition, the Ombudsman was a neutral office within the corporation. [105] Further, the McDonnell Douglas Ombudsman was bound by the confidentiality tenets of the Corporate Ombudsman Association and the procedures of confidentiality adopted by the corporation and known to all employees. [106]

The court found confidentiality essential to the relationship between the Ombudsman and the person requesting assistance. [107] The court's recognition of the Ombudsman privilege is critical to the tenets of Ombudsman practice as a neutral, independent office providing assistance without fear of retribution or embarrassing disclosures. The goal of any Ombudsman's office is to provide a confidential place to discuss problems and concerns free from retaliation. Without confidentiality as an essential component, employees would not utilize the Ombudsman's services as a valuable resource to clarify and rectify corporate problems.

Society, according to the court, should support an Ombudsman privilege. [108] Given that McDonnell Douglas is a large corporation, [109] the court emphasized employees should have an office to go to for "confidential guidance, information, and aid to remedy workplace problems to benefit themselves and possibly the nation." [110] If employees do not have an outlet to discuss their concerns free from the fear of retribution from their employer, many easily resolved problems will not find timely or appropriate solutions.

Finally, the court held the injury to the relationship between the Ombudsman's office and persons requesting assistance would be much greater than any injury stemming from prohibiting the plaintiff from requesting the Ombudsman's confidential

communications. [111] The court analogized the use of the Ombudsman to that of settlement conferences in litigation; both allow an opportunity for fair and quick settlement without the time consuming, formal procedures of a trial. [112]

***403** Finding the requirements of Federal Rule of Evidence 501 satisfied, the court then noted the plaintiff's case would not be thwarted by its inability to discover the Ombudsman's communications. [113] Deposing witnesses regarding the facts of her case would afford the plaintiff as much information and opportunity as necessary for trial and would not come by way of trammeling the Ombudsman privilege. [114] This point is well-noted, as any facts pertinent to trial would be available to either litigant via discovery tools, such as interrogatories, depositions, and witness examinations. Clearly, an Ombudsman privilege would not inhibit a litigant's access to information.

McDonnell Douglas was later sued by another plaintiff based upon facts similar to those in Kientzy. This again raised the issue of an Ombudsman privilege. In Carman v. McDonnell Douglas, [115] the plaintiff was terminated from his employment at McDonnell Douglas based upon a reduction in management staff. [116] Plaintiff commenced suit, alleging he was fired because of his age in violation of the Age Discrimination in Employment Act, [117] the Missouri Human Rights Act, [118] and the Employee Retirement Income Security Act of 1974. [119] In preparing for trial, the plaintiff requested all documentation from the corporation's Ombudsman regarding the plaintiff. [120] The defendant refused to comply, stating the Ombudsman's communications were privileged and critical to the nature of Ombudsman services. [121]

The district court held that the Ombudsman's communications were privileged and the defendant could not be required to disclose such privileged information to the plaintiff. [122] On appeal, the Eighth Circuit examined whether the Ombudsman's communications were privileged. [123] Like the court in Kientzy, the Carman court looked to Federal Rule of Evidence 501 to begin ***404** the privilege analysis. [124] This court did not, however, adhere to the four "cardinal principles" recognized in Kientzy. [125] The court focused on the adage "the public has a right to every man's evidence" as a basis for its analysis. [126] As such, the court noted a federal privilege is difficult to obtain, and, in order to be created, it must be shown that denying access to information transcends the need to utilize all means in which to discover the truth. [127] The Carman court approached its analysis from the perspective that Ombudsman's communications should be open and available to all people, irrespective of its contents.

In assessing a new evidentiary privilege, the first factor is the importance of the relationship the privilege will entail. [128] The court noted the importance of the Ombudsman in fairly and swiftly dealing with personnel complaints; however, it stated that, alone, fell short of the creation of a privilege. [129] Additionally, the court placed great importance on the fact that McDonnell Douglas could not provide evidence establishing that the Ombudsman was superior to other forms of ADR in dissolving workplace problems. [130] Ironically, though, it is the court's approach that is troubling in that it relied on the fact that because the defendant could not show the superiority of Ombudsman services to other forms of ADR, the process would not be protected. This is a glaring contradiction, as the effectiveness of an Ombudsman's services are altered by a lack of privilege. Absent a recognized privilege, Ombudsman's services will not be as effective because those people requesting assistance cannot be assured of the confidentiality of their records. Arguably, it is unrealistic for a court to require an Ombudsman to prove the success of their services, while not affording a privilege to those services until they do so.

The court next looked at whether the important objectives of the Ombudsman's office would be undermined by not applying a privilege. [131] The court stated the focus should not be on whether the information will be disclosed should there be a lawsuit, but rather, on the fact that the ***405** Ombudsman is a neutral decision maker, free from company bias. [132] The court posited that if the Ombudsman is a neutral decision maker, the disclosure of Ombudsmen communications will not affect the use of

the office. [133] What the court failed to address, however, is that while neutrality in the Ombudsman's role will ease concerns regarding Ombudsman bias, the lack of a recognized privilege will undermine the role of neutrality. It is difficult to imagine an employee will feel secure in the Ombudsman's role as a neutral decision-maker and not question that neutrality if their communications are available through public records and discovery procedures. It would not be untoward for this employee to believe neutrality was compromised.

Rejecting Kientzy, the court appeared unconvinced by the argument that a lack of privilege would chill the Ombudsman's effectiveness and relationship with management. [134] The court stated that to be persuasive, McDonnell Douglas needed to establish that society would benefit in a significant way from the Ombudsman's privilege. [135] Only if the defendant could make that showing would the court weigh the advantages of the proposed privilege against the presumption of open disclosure. [136] McDonnell Douglas did not make such a showing; therefore, the court declined to recognize Ombudsman's services as privileged. [137]

Prior to Carman, other courts found there was a limited federal privilege for Ombudsman's services, holding similar to that of Kientzy. Shabazz v. Scurr [138] dealt with a prison Ombudsman created by Iowa statute. [139] The plaintiffs, the current members of the Ombudsman office, sought to prohibit the former prison Ombudsman from testifying in court regarding his work as an Ombudsman. [140] The Iowa statute provided that "the Citizen's Aide or any member of the staff [shall not] be compelled to testify in any court with ***406** respect to any matter involving the exercise of the Citizen's Aide's official duties . . . ." [141]

As in Kientzy, the court noted the importance of federal privileges and that the drafters of the most recent version of Federal Rule of Evidence 501 left it to the courts to determine what communications should be privileged. [142] The court further noted a willingness to focus on the expectations of individuals who use Ombudsman services. [143] A fundamental tenet of Ombudsman's service is that information will not be disclosed so that one may speak freely in order to receive the greatest benefit from the services. Courts recognize that to prohibit a privilege would surely limit the use of the Ombudsman's services and the faith of the people who use them. [144] The Southern District of Iowa ultimately concluded that Ombudsman's services should be privileged because to hold otherwise would ensure "that complaints [would not] be made." [145]

The critical reasoning the courts in both Kientzy and Shabazz used to decide a privilege existed was focusing on the reason for the privilege in the first place. Privilege exists so that people requesting assistance will feel comfortable speaking freely about their situation. If the privilege did not exist, then many individuals may not seek out Ombudsman's services for fear the information may later be used against them. This need for privilege, in order to make Ombudsman's services effective and accessible, is the element the court in Carman did not focus on in determining that Ombudsman's services did not enjoy a privilege under Rule 501.

In Kientzy, the court made its determination based, in part, on public policy considerations. A focus on the public policy aspects surrounding an Ombudsman privilege is necessary for a court to adequately address the issue. Realistically, those requiring assistance from an Ombudsman will not be comfortable accessing those services if they are readily discoverable, either as a matter of public record or through civil procedure rules. A basic foundation of ADR programs is to encourage individuals to avail themselves of alternatives to the legal system to have their concerns addressed in a more efficient manner. Efficiency will not be achieved if Ombudsman communications are required to be kept as a matter of record and available in litigation or upon request. The results of a decisions such as Carman project ***407** not only an unwillingness to recognize a privilege for Ombudsman communications, but can also be construed as a lack of confidence in ADR techniques. If courts truly recognized the advantages of ADR services, then protecting the efficiency and integrity of those services would be paramount.

IV. PROPOSED RESOLUTION

Statutory definition and reform is necessary to preserve the integrity of the Ombudsman profession and encourage the use of Ombudsman services to efficiently and accurately address both private and public concerns. A statutory definition of what constitutes an Ombudsman will help ensure extension of a communications privilege will not be abused by those whose services are not within the scope of a privilege extension. In addition, both federal and state lawmakers should adopt legislation providing for a privilege for both written and oral communications with a defined Ombudsman.

A. Uniformly Define What Constitutes An Ombudsman

While it is easy enough for one to say they are an Ombudsman, if privilege is to extend to Ombudsman communications, it is critical there exists a definite scope to the office and what constitutes a valid communication. As is fundamental to a regulated profession, standards must be enacted to ensure only genuine Ombudsmen are able to assert a privilege. If there is not standardization in the Ombudsman profession, the results will be dramatic. Potentially, someone who functions in a setting typical to that of a traditional Ombudsman could elect to have their records privileged simply as part and parcel to their job title. This result would be contrary to the intended limited scope of provisions allowing a privilege. Additionally, such a scenario would give rise to arguments by those opposed to recognizing a broad Ombudsman's privilege out of concern the privilege will be abused.

The Ombudsman definition should be based on the classical and organizational models set forth by the ABA and should exclude the advocate model. While the “Advocate” Ombudsman is recognized in some statutory provisions, their ability to advocate for certain groups and individuals will limit their recognized neutrality. As suggested in the ABA committee report, an Ombudsman's ability to remain and be perceived as neutral is an essential characteristic of both the “Classical” Ombudsman and “Organizational” ***408** Ombudsman. [146] To maintain a non-neutral focus would mimic the traditional, adversarial litigation system. Thus, it would be inequitable for an Ombudsman to be allowed to advocate on behalf of a client and shield the information used for that advocacy. This would be using an adversarial technique but not conforming to the rules of an adversarial process.

A standard definition of Ombudsman can be established from the twelve essential characteristics drafted by the ABA. [147] These twelve characteristics encompass the essence of Ombudsman practice and provide a standardized guideline to determine if an actor is really an Ombudsman or a professional in another form of ADR. This definition should be adopted by all states, and federal courts should also recognize the definition by looking to the state definition.

One can argue that a state statutory definition is undesirable by not providing a desired uniform standard across all states. The definition of Ombudsman is critical as it provides a guide for courts to discern who privilege should be extended to. In this sense, different statutory definitions will not pose courts significant problems in applying the privilege. Federal courts can look to the state definition, as they often do for similar privileges, to glean the scope of the position and appropriately provide for a communications privilege. Subsequently, there is no need to deviate from the state's traditional power to regulate professions within its boundaries.

Additionally, this definition should apply in both the private and public sector. The concept of establishing a position in both the private and public sector by statute is not new. Professions such as physicians, attorneys and therapists are all regulated by state statutes and must meet certain criteria to be engaged in their respective professions and enjoy the privileges available to such professionals. The same should be true with Ombudsmen and states should adopt a standard definition and officially establish the Ombudsman position by statute.

The benefits of establishing the position by statute are two-fold. First, courts will have a standardized and codified guide by which to judge whether or not someone is acting in a capacity as an Ombudsman. This will help alleviate differences in judicial interpretation and aid in the correct application of precedent. Second, both public and private employers seeking to employ an Ombudsman will be given constructive notice of the requirements to establish a true Ombudsman's position and obtain the benefits of both state and federal privilege.

***409** Regarding an employer's notice, one may be tempted to conclude codification of the requirements of an Ombudsman will inhibit employers from creating such positions for fear of legal action or reprimand if the position is not established correctly. While this may be a concern for some employers, the benefits of establishing a standardized office will outweigh employer burdens. Employers will have initial assurance that their Ombudsman's records will remain privileged, will enjoy support by the courts, and will not be subject to expensive litigation after a demand is made for an Ombudsman's records. This need to eliminate confusion in courts and provide a standard guideline for courts demonstrates the compelling need to establish an Ombudsman position by statute. As evident in the McDonnell-Douglas cases, courts are not well-versed on the Ombudsman position or tenets of the profession. [148] If there is a statutory guide, courts will be more informed as to what constitutes an Ombudsman and better equipped to rule on Ombudsman issues.

B. Establish Both State and Federal Statutory Privilege

There is also a need for Ombudsman services to be privileged in order to be effective. Because neutrality is a focus of the Ombudsman position, it is essential that an Ombudsman's records not be used for an adversarial purpose, such as a court proceeding. If persons requesting assistance knew what they disclosed to an Ombudsman would, in turn, be readily available through discovery practices, many would not feel comfortable using the process. This would inhibit the purpose of the Alternative Dispute Resolution Act to encourage use of ADR techniques. [149]

The ABA produced a memorandum in support of an Ombudsman privilege. [150] The ABA noted a traditional Ombudsman, one that would be defined based upon the twelve ABA-recognized characteristics, fulfills all four of the traditional criteria for a privilege. [151] First, the communication is offered in the belief it will not be disclosed. [152] Ombudsman's services are built upon the maintenance of confidentiality. Second, the confidence is ***410** essential to achieve the Ombudsman's purpose. [153] This criteria is again met, as may people may not elect to use an Ombudsman's services knowing the statements may be disclosed. Third, the relationship is one that society should foster. [154] It is evident by both the federal ADR statute and the many state statutes regarding Ombudsman services that legislators perceive an Ombudsman's services to be valuable. Additionally, society will benefit from the use of Ombudsman's services to assist in problems and disputes at the level where they arise, as opposed to bringing a dispute through the judicial system or to a higher tribunal already experiencing crowded dockets.

The last criteria is that the expected injury through later disclosures is greater than the expected benefit to justice in obtaining the evidence. [155] The ABA specifically addressed this point further, stating "[a]n Ombuds[man] will rarely, if ever, be privy to something that no one else knows. Therefore, providing confidentiality protection to the Ombuds [man] allows the Ombuds[man] to perform assigned duties while at the same time, society continues to have access to the underlying facts." [156] Generally, other discovery procedures and rules of Civil Procedure will require disclosure of information from other sources not connected with the Ombudsman. Therefore, allowing a privilege would not work a hardship on either plaintiffs or defendants during the discovery process.

The ABA provided further evidence for the declaration of a privilege. The committee noted the recognized confidentiality rules regarding settlement negotiations. [157] Much like settlement negotiations, Ombudsman services typically involve the confidences of both sides of a dispute, and, therefore, are analogous to the settlement negotiation exception. Additionally, the ABA noted the Ombudsman is not a direct participant in the issue, and their participation is not necessary to the interest of justice. [158] Realistically, the Ombudsman is not a party at issue; therefore, any information necessary can be obtained from either of the direct participants through discovery and court proceedings.

While providing a rationale for creating an Ombudsman privilege, the ABA also proposed a model shield law to be used by states. [159] Each state ***411** Federal courts should follow the law in the state where the Ombudsman is employed. In order to provide the most inclusive provision for an Ombudsman privilege, the following language, which comes from the ABA model shield law, should be used:

> Neither the Ombudsman nor a member of his/her staff shall be compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties. All related memoranda, work product, notes or case files of an ombudsman are confidential and are not subject to discovery, subpoena, or other means of legal compulsion, and are not admissible in evidence in a judicial or administrative proceeding. [160]

This privilege should not, however, be without exception. Like other professional privileges, exceptions for the public welfare should be acknowledged. Ombudsman should be allowed to notify authorities when there is a substantial risk of bodily harm to another, abuse to a child, or the apparent commission of a felony. They should not, however, be allowed to disclose such information beyond what is necessary to provide the authorities with information to prevent the harm, as is the case with other recognized privileges.

Another exception that should be afforded Ombudsman records is freedom from state and federal records disclosure. The purpose of a privilege should not be defeated by the ability to access the record through another statutory provision. Within the legislation enacting a privilege, a provision should also be included exempting Ombudsman records and communication from disclosure under any state or federal disclosure statutes. This provision will further ensure the confidentiality of Ombudsman records and prohibit disclosures that will injure the credibility of Ombusman services.

An Ombudsman privilege, with limited exception, will further the rationale behind its services. Additionally, it will afford an opportunity for dispute resolution and the gathering of information for those who may not be able to afford litigation but who still require assistance. Those individuals can access such services free from the fear of retribution or retaliatory tactics by their employers, government officials, or co-workers. Furthermore, any party to a proceeding with an Ombudsman would be free to reveal information related to their dealings with the Ombudsman if they voluntarily chose to do so. Subsequently, attempts to enter into other forms of judicial proceedings or litigation will not be thwarted based on a lack of evidence from the Ombudsman. Without a privilege, however, what will be thwarted is the ***412** ability of Ombudsmen to appropriately fulfill their positions in the most effective and appropriate manner and individual confidence and trust in Ombudsmen's services.

V. CONCLUSION

As has become evident in the past several decades, alternatives to traditional litigation models are becoming a broad reality. ADR techniques are being utilized in both private and public settings with much success. The Ombudsman is no exception. Currently, the time is ripe to encourage the use of ADR and Ombudsman techniques as a way to more efficiently settle disputes, address concerns, and raise awareness to institutional issues, both public and private. The establishment of uniform Ombudsman

provisions, the enactment of statues mandating Ombudsman's communications as privileged, and exemption from traditional records disclosure requirements, together, will help facilitate effective and efficient Ombudsman services.

In reality, traditional litigation techniques can be as costly and time-consuming as Ombudsman services are effective and efficient. The legal community needs to embrace the expansion of Ombudsman services and encourage its development and connection within a more traditional legal model. An attorney's ultimate goal is to provide a measure of justice, be it for an individual client or for the system in general. Justice can come in all forms and strategies. Justice is not limited to the "I'll see you in court" mentality. Justice comes from an exchange of ideas, support for one's concerns, assurance to speak freely without the fear of retribution, and the assistance of someone with neutral loyalties to facilitate the process. This is what an Ombudsman does, and this is why a communications privilege is critical. If the use of Ombudsman's services is not facilitated and encouraged, then also critical will be the inability to correctly address concerns in both the private and public sector. The best defense is a good offense; a recognized privilege will defend against the inability to adequately address certain issues and further expand the range of non-litigation techniques.

Footnotes

a1 Ms. Kuta will graduate from Southern Illinois University School of Law in May 2003. She wishes to thank the Southern Illinois University Ombudsman Office for the inspiration and her parents for their support and encouragement.

1 Michael Mankes, Combating Individual Employment Discrimination In The United States and Great Britain: A Novel Remedial Approach, 16 Comp. Lab. L.J. 67, 83 (1994).

2 Id.

3 Mark Green & Laurel W. Eisner, The Public Advocate For New York City: An Analysis of the Country's Only Elected Ombudsman, 42 N.Y.L. Sch. L. Rev. 1093, 1104 (1998).

4 Larry B. Hill, Address at the Spring Meeting of the American Bar Association Section of Administrative Law and Regulatory Practice (Apr. 18, 1997).

5 Id.

6 These organizations include, the Ombudsman Association, the United States Ombudsman Association, the International Ombudsman Association, the Association of College and University Ombudsman, and the Association of Canadian Ombudsman.

7 See ABA Model Shield Law Comm., Model Shield Law for Ombudsman, at http://www.abanet.org/adminlaw/approvedreport.doc (last visited Jan 26, 2003); The Ombudsman's Assn., Standards of Practice, at http://www.ombuds-toa.org/code_of_ethics.htm (last visited Jan. 26, 2003); U.S. Ombudsman's Assoc., Bylaws, at http://www.usombudsman.orgAboutUSOA/BYLAWS7_9_01.PDF (last visited Jan. 26, 2003).

8 Larry B. Hill, Address at the Spring Meeting of the American Bar Association Section of Administrative Law and Regulatory Practice (Apr. 18, 1997).

9 Stig Jagerskiold, The Swedish Ombudsman, 109 U. Pa. L. Rev. 1077, 1077 (1961).

10 Id.

11 Kevin L. Wibbenmeyer, Privileged Communication Extended to the Corporate Ombudsman-Employee Relationship Via Federal Rule of Evidence 501, 1991 J. Disp. Resol. 367, 370 (1991).

12 See Coastal Health Serv., Inc. v. Rozier, 335 S.E.2d. 712 (Ga. Ct. App. 1985).

13 See Citizens' Aide/Ombudsman v. Grossheim, 498 N.W.2d 405 (Iowa 1993) (holding the Ombudsman was entitled to enforcement of the subpoena for a copy of the videotape).

14 See Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570 (E.D. Mo. 1991).

15 ABA Model Shield Law Comm., Model Shield Law for Ombudsman, at http://www.abanet.org/adminlaw/approvedreport.doc (last visited Jan 26, 2003).

16 Id. The ABA committee was comprised of members of the A.B.A. section of Administrative Law and Regulatory Practice, the Coalition of Federal Ombudsmen, the National Association of State Ombudsman Programs, the International Ombudsman Institute (subsequently withdrew), the Ombudsman Association, and various experts in the field of Ombudsman practice. Id.

17 Id.

18 Id.

19 Id.

20 Id.

21 Id.

22 Id.

23 Id.

24 Id. These 12 characteristics are no longer stated in their entirety in subsequent amendments to the original 1969 resolution; however, the ABA noted these characteristics are still viable and a guiding principle in the resolution. Id.

25 Id.

26 Id. For the purposes of the ABA regulations, the Ombudsman's jurisdiction is defined as “who complains and who or what are complained about.” Id.

27 Id.

28 Id.

29 Id.

30 Id. The factors for assessing an Ombusman's independence are historically rooted in the creation of the office in the parliamentary system. Id.

31 Id.

32 Id. In order to achieve this result, it is advantageous that an Ombudsman have a position either equal to or greater than that of the unit head. Id.

33 Id.

34 Id.

35 Id. (“Confidentiality is a further factor that distinguishes Ombuds[men] from others who receive and consider complaints such as elected officials, human resource personnel, government officials, and ethics officers.”).

36 Id.

37 Id.

38 Id.

39 Id.

40 Alaska, Hawaii, Iowa, Washington, Indiana, Montana, Delaware, and Illinois all have public Ombudsman's offices established by statute. See generally Alaska Stat. § 24 (Michie 2001); Haw. Rev. Stat. § 96 (2001); Iowa Code § 2c.20 (2001); Wash. Rev. Code. § 43.06a.050 (2001); Ind. Code § 12-27-9-2 (2001); Mont. Code Ann. § 2-15-210 (2001); Del. Code Ann. tit. 16 § 1153 (2001); 20 Ill. Comp. Stat. 105/4.04 (2001).

41 Haw. Rev. Stat. § 96.

42 § 96-1.

43 § 96-17.

44 Alaska Stat. § 24.

45 See generally Iowa Code § 2c.20; Neb. Rev. Stat. § 81-2250.

46 Id.

47 Iowa Code § 2c.20. The Citizen's Aide is equivalent to an Ombudsman.

48 Neb. Rev. Stat. § 81-2250. The Public Counsel is equivalent to an Ombudsman.

49 See Wash. Rev. Code. § 43.06a.050 (2001); Ind. Code § 12-27-9-2 (2001); Mont. Code Ann. § 2-15-210 (2001); Del. Code Ann. tit. 16 § 1153 (2001); 20 Ill. Comp. Stat. § 105/4.04 (2001).

50 Wash. Rev. Code § 43.06A.050.

51 Id.

52 See generally Ind. Code. § 12-27-9-2; Mont. Code Ann. § 2-15-210.

53 Ind. Code § 12-27-9-2.

54 Mont. Code Ann. § 2-15-210.

55 See generally Del. Code Ann. tit. 16 § 1153 (2001); 20 Ill. Comp. Stat. § 105/4.04 (2001).

56 Del. Code Ann. tit. 16 § 1153. This statute also allows for Ombudsman services related to home healthcare agencies. Id.

57 Id.

58 20 Ill. Comp. Stat. 105/4.04.

59 Id.

60 Id.

61 See id.

62 5 U.S.C. § 571 (2001).

63 § 572.

64 § 571.

65 Harold J. Krent, Federal Agency Ombuds: The Costs, Benefits, and Countenance of Confidentiality, 52 Admin. L. Rev. 17, 21 (2000).

66 Id.

67 5 U.S.C. § 574 (2001).

68 Fed. Deposit Ins. Corp. v. White, No. 3-96-CV-0560-BD, 1999 WL 1201793, at *2 (N.D. Tex. Dec. 14, 1999) ("The legislative history contains only a passing reference to the confidentiality provisions of the ADRA."). See generally D'Arpino v. Rest. Assoc., 39 F. Supp. 2d 412 (S.D.N.Y. 1999).

69 44 U.S.C. § 2901 (2001).

70 5 U.S.C. § 552 (2001).

71 44 U.S.C. § 2901 (2001).

72 Id.

73 Krent, supra note 65.

74 44. U.S.C. § 2901 (2001).

75 5 U.S.C. § 552 (2001).

76 Id.

77 Id.

78 Fed. R. Evid. 501.

79 H.R. Rep. No. 650, at 8 (1973); S. Rep. No. 1277, at 11 (1974).

80 H.R. Rep. No. 650, at 8 (1973).

81 Id.

82 Id.

83 Id.

84 Id; see also supra, note 78, at 8 for current version of Federal Rule 501.

85 Id.

86 Id.

87 S. Rep. No. 1277, at 11 (1974).

88 Id.

89 Id.

90 Fed. R. Evid. 501; H.R. Rep. No. 650, at 8 (1973); S. Rep. No. 1277, at 11 (1974).

91 FED. R. Evid. 501.

92 Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570 (E.D. Mo. 1991); Carman v. McDonnell Douglas Corp., 114 F.3d 790 (8th Cir. 1997).

93 Kientzy, 133 F.R.D. at 570.

94 Carman, 114 F.3d at 790.

95 133 F.R.D. 570 (E.D. Mo. 1991). See generally Kevin L. Wibbenmeyer, Privileged Communication Extended to the Corporate Ombudsman-Employee Relationship Via Federal Rule of Evidence 501: Kientzy v. McDonnell Douglas Corp., 1991 J. Disp. Resol. 367 (1991).

96 Kientzy, 133 F.R.D. at 570. (It is unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of their sex.).

97 Id.

98 Id. at 571. McDonnell Douglas supported the Ombudsman in her request to have such information barred from discovery. Id.

99 Id.

100 Id.

101 Id.

102 Id; see also In re Doe, 711 F.2d 1187, 1193 (2d Cir. 1983); Mattson v. Cuyuna Ore. Co., 178 F. Supp. 653, 654 n.2 (D. Minn. 1959).

103 Kientzy, 133 F.R.D. at 571.

104 Id. at 572.

105 Id. The Ombudsman office had no authority to make policy, reported to a department head with no connection to human resources or personnel, and had direct access to the company president. Id.

106 Id. McDonnell Douglas itself tried to obtain the Ombudsman's records pertaining to this situation, but was denied the request. It informed the court it would not ask for such records in the future. Id.

107 Id.

108 Id.

109 McDonnell Douglas is a large government contractor responsible for a large portion of work for the government in the aircraft and space industry.

110 Id.

111 Id.

112 Id. Fed. R. Evid. 408 recognizes confidentiality in settlement negotiation conferences. Id.

113 Id. at 573.

114 Id. The plaintiff, however, could not ask questions pertaining to witnesses' statements to the Ombudsman or the Ombudsman's response. Id.

115 Carman v. McDonnell Douglas Corp., 114 F.3d 790 (8th Cir. 1997). See generally Corie Marty, Carman v. McDonnell Douglas Corp., 13 Ohio St. J. On Disp. Resol. 275 (1997).

116 Carman, 114 F.3d at 791.

117 29 U.S.C. § 623 (2001) ("It shall be unlawful to: fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.").

118 Mo. Rev. Stat. § 213.010 (2001) (providing employers are liable for sexual harassment they had actual knowledge of or should have known of).

119 29 U.S.C. § 1001 (2001) (stating standards of conduct created by the government to protect employees benefits and retirement).

120 Carman, 114 F.3d at 791. The Ombudsman in Carman v. McDonnell Douglas is the same Ombudsman whose communications were held confidential in Kientzy v. McDonnell Douglas.

121 Id.

122 Id. at 792.

123 Id. at 793.

124 Id.

125 Id.; see Kientzy v. McDonnell Douglas Corp., 113 F.R.D. 570, 571 (E.D. Mo. 1991).

126 Carman, 114 F.3d at 793.

127 Id.

128 Id.

129 Id.

130 Id. ("Nor has [McDonnell Douglas] even pointed to any evidence establishing that its own ombudsman is especially successful at resolving workplace disputes prior to the commencement of litigation.").

131 Id.

132 Id. at 794.

133 Id. ("The denial of an Ombudsman privilege will not affect the Ombudsman's ability to convince an employee that the Ombudsman is neutral, and the creation of an Ombudsman privilege will not help alleviate the fear that she is not.").

134 Id. ("We are especially unconvinced that no present or future [McDonnell Douglas] employee could feel comfortable in airing his or her disputes with the Ombudsman because of the specter of discovery.").

135 Id.

136 Id.

137 Id.

138 662 F. Supp. 90 (S.D. Iowa 1987).

139 Id. at 91; see Iowa Code § 601G.8 (1985) ("The prison Ombudsman shall investigate complaints regarding the prison system and have significant investigatory and subpoena powers.").

140 Shabazz, 662 F. Supp. at 90.

141 Id. at 91.

142 Id.

143 Id. at 92 ("[C]itizens have an expectation that their complaints to the office will only be disclosed to the Governor or the General Assembly, if they are disclosed at all.").

144 Id. ("[A]nything which chills a citizen's willingness to come forward limits the office's effectiveness in the long run and may restrict the spectrum of available information.").

145 Id.

146 ABA Model Shield Law Comm., Model Shield Law for Ombudsman, at http://www.abanet.org/adminlaw/approvedreport.doc (last visited Jan. 26, 2003).

147 Id.

148 Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570 (E.D. Mo. 1991); Carman v. McDonnell Douglas Corp., 114 F.3d 790 (8th Cir. 1997).

149 5 U.S.C. § 571 (2001).

150 ABA, Rationale in Support of an Ombudsman Privilege, at http:// www.abanet.org/adminlaw/ombuds/modellaw.html (last visited Jan. 26, 2003).

151 Id.

152 Id.

153 Id.

154 Id.

155 Id.

156 Id.

157 Id.

158 Id.

159 ABA . Model Shield Law Comm., Model Shield Law for Ombudsman, at http://www.abanet.org/adminlaw/approvedreport.doc (last visited Jan. 26, 2003).

160 Id.

27 SILULJ 389