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Sent: Wednesday, November 25, 2009 5:37 PM
To: Ombudsman Program
Cc: Susman, Thomas; Ryan, Becca; Gregory, Hayden
Subject: American Bar Association Comments on USPTO's Proposed "Patents Ombudsman Pilot Program"
Importance: High

November 25, 2009

Mail Stop Comments
(Attention: Patents Ombudsman Pilot Program)
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Re: Comments on the Proposed "Patents Ombudsman Pilot Program," 74 Fed. Reg. 55212 (October 27, 2009)

Dear Sir/Madam:

Attached are the American Bar Association's comments regarding the USPTO's proposed "Patents Ombudsman Pilot Program" that we are submitting in response to the USPTO's request for comments as published in the Federal Register on Tuesday, October 27, 2009.

If you have any questions regarding the ABA's views on these important matters, please contact our Director, Thomas Susman, at (202) 662-1765, or me at (202) 662-1098.

Sincerely,

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November 25, 2009

The Honorable David J. Kappos
Undersecretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office
Mail Stop Comments
[Attention: Patents Ombudsman Pilot Program]
Commissioner for Patents
P.O. Box 1450
Alexandria VA 22313-1450

Re: Comments on the Proposed "Patents Ombudsman Pilot Program," 74
Fed. Reg. 55212 (October 27, 2009)

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Dear Mr. Undersecretary:

On behalf of the American Bar Association ("ABA"), which has nearly 400,000 members throughout the country, I write to express our support for the greater use of ombuds¹ to receive, review, and resolve complaints involving public and private entities and of your agency's efforts to create a Patents Ombudsman Pilot Program. Accordingly, we are pleased to submit these comments regarding this proposed program in response to the request for comments published in the Federal Register on Tuesday, October 27, 2009.

The Federal Register notice proposes to establish a Patents Ombudsman Pilot Program in the United States Patent and Trademark Office (USPTO) and then defines certain duties, powers, and responsibilities of the ombudsman. The Notice states that the Patents Ombudsman Pilot Program "is intended to provide patent applicants, attorneys and agents with assistance with application-specific issues including prosecution advancement concerns." As the ABA examined the establishment of ombuds in federal, state, and local governments, academic institutions, and private organizations, it found that the role of the ombuds in these entities, how they function, and the issues they address vary widely and significantly. Individuals who come to ombuds for help cannot know what to expect, and the offices may be established in ways that compromise their effectiveness. In February 2004, the ABA House of Delegates adopted a formal policy endorsing the revised Standards for the Establishment and Operation of Ombuds Offices dated February 2004 (ABA Standards). Attached for your consideration is a copy of the ABA's resolution and report. The resolution expresses the ABA's official policy; the accompanying report is included for informational purposes only.

¹ The term ombuds in this letter is intended to encompass all other forms of the word such as ombudsperson, ombuds officers, and ombudsman.

The ABA adopted this policy to provide advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. All ombuds must operate with certain basic authorities and essential characteristics. The Standards clarify that independence, impartiality in conducting inquiries and investigations, and confidentiality are essential characteristics of all ombuds.

The Role of the Ombudsman

An ombuds is a person who is authorized to receive complaints or questions confidentially about alleged acts, omissions, improprieties, and broader, systemic problems within the ombuds' defined jurisdiction and to address, investigate or otherwise examine these issues independently and impartially. The ABA believes that, to properly fulfill its important functions, the ombuds must be given the appropriate power and authority.

The Federal Register notice provides a brief outline of certain key duties, responsibilities, and authorities of the proposed Patents Ombudsman. It is difficult from this brief description for the ABA to determine at this time whether the Patents Ombudsman Office will operate according to the ABA Standards. We submit these comments, therefore, to identify areas that should be addressed by USPTO to create a strong and effective Patents Ombudsman Pilot Program.

The ABA Standards state that an ombuds office should be established by a legislative enactment or publicly available written document "which clearly sets forth the role and jurisdiction of the ombuds" and which authorizes the ombuds to engage in a variety of enumerated activities. To clearly set forth the role of the ombudsman, the ABA also recommends that USPTO publish a charter establishing the Patents Ombudsman Office that states whether the Patents Ombudsman is an "executive" or "advocate" ombuds. An executive ombuds operates in either the public or private sector addressing issues raised by the general public or internally, usually concerning the actions or policies of government entities or individuals. An advocate ombuds, like an executive, evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved and may issue reports to the legislature or a specific agency. In addition to stating whether the Patents Ombudsman is an executive or advocate ombuds, the charter should also clearly enumerate the activities that the ombudsman is expected to perform.

Although an ombuds should be granted clear and appropriate powers, the ABA also believes that to ensure the ombuds' independence, impartiality, and confidentiality, it is necessary to establish certain limitations on the ombuds' authority. An ombuds works outside of line management structures and has no direct power to compel any decision. An ombuds should not, nor should an entity expect or authorize an ombuds to, make, change, or set aside a law, policy, or administrative/managerial decision nor to directly compel an entity or any person to make those changes. While an ombuds may expedite and facilitate the resolution of a complaint and recommend individual and systemic changes, an ombuds cannot compel an entity to implement the recommendations.

The ABA also believes that when defining the powers of an ombuds, care must be taken to protect the rights of those who may be affected by the actions of the ombuds. Furthermore, since due process rights could well be implicated, it would not be appropriate for the ombuds' review to serve

as the final determination for any disciplinary activity or civil action, nor as a determination of a violation of law or policy. An ombuds' inquiry or investigation is not a substitute for an administrative or judicial proceeding, and in such proceedings, the deciding official should not consider the ombuds' review or recommendations to be controlling. Instead, the deciding official must conduct a de novo examination of the matter.

The ABA supports those provisions in the Federal Register Notice that seek to protect the existing due process rights of claimants, including the provisions stating that the pilot program is not intended as an alternative forum for resolution of disagreements between the applicant and the examiner that are currently resolved via appeal or petition. To further protect the due process rights of the parties, however, the ABA recommends that the charter expressly state that the ombuds' review shall not make, change, or set aside a law, policy or administrative decision, make binding decisions or determine rights, or directly compel an entity or any person to implement the ombuds' recommendations. In addition, the charter should expressly state that the ombuds should not accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent, and it should state that an ombuds' inquiry or investigation does not substitute for an administrative or judicial proceeding.

Essential Characteristics

The ABA believes that to permit an ombuds to properly discharge his or her duties, an ombuds program must promote the core qualities of independence, impartiality, and confidentiality. The ABA encourages your office to draft the Patents Ombudsman Pilot Program's charter to reflect these characteristics more fully. Great care has to be exercised in establishing the structure of the ombuds to ensure that the independence, impartiality, and confidentiality essential to the ombuds are, in fact, achieved.

(1) Independence

To be credible and effective, the office of the ombuds must be independent in its structure, function, and appearance. Independence means that the ombuds must be free from interference in the legitimate performance of duties. In assessing whether an ombuds is independent, one key factor to consider is whether anyone subject to the ombuds' jurisdiction or anyone directly responsible for a person under the ombuds' jurisdiction can control or limit the ombuds' performance of duties. In addition, other key factors are whether such a person can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the office's budget or resources.

We are not able to ascertain from the Federal Register Notice whether the Patents Ombudsman Pilot Program will adopt protections aimed at promoting the independence of the Patents Ombudsman. The ABA encourages you to consider including in the Patents Office Pilot Program charter provisions that that would contribute to the ombuds' independence, including a description of the appointment process and reporting structure for the ombuds, a prohibition of disciplinary actions against the ombuds for performing the duties of the office, and a provision permitting removal only for cause. We believe the charter should also explicitly state the budget of the office and provide for the ombuds' ability to access or retain independent counsel. The charter should also clarify that the ombuds will be able to maintain contact information and communications different and separate from other USPTO offices.

(2) Impartiality

The ABA also believes that in order to be effective, an ombuds must be impartial. The ombuds' structural independence is the foundation upon which the ombuds' impartiality is built. If the ombuds is independent from line management and does not have administrative or other obligations or functions, the ombuds can act in an impartial manner. Acting in an impartial manner, as a threshold matter, means that the ombuds is free from initial bias and conflicts of interest in conducting inquiries and investigations. Impartiality does not, however, preclude the ombuds from developing an interest in securing the changes that are deemed necessary where the process demonstrates a need for change or from otherwise being an advocate on behalf of a designated constituency when the ombuds position is created as an "advocate" ombuds. The ombuds, therefore, has the authority to become an advocate for change where the results of the inquiry or investigation demonstrate the need for such change.

From the information provided, it appears that the proposed Patents Ombudsman will receive complaints, forward the complaint to the appropriate USPTO organizational area or unit, and follow up with that area or unit to assure that the complaint is being addressed. It does not appear that the ombuds would have the ability to investigate the complaint independently or to make recommendations to the USPTO area or unit as to the correct resolution of the issue based on the facts of the case and the relevant law or procedures. Although the Federal Register notice calls for the tracking of issues to determine the need for targeted training and better customer service, it does not state whether the Patents Ombudsman would be assessing these complaints to make such determinations, nor is it clear whether the ombuds can advocate for systemic changes identified by analysis of issues raised in its cases.

The Federal Register notice is silent with regard to the type of ombuds being created. Thus, in addition to the recommendations for structural independence, as noted above, the ABA encourages the clarification of the intended ombuds role by specifying whether the Patents Ombudsman is to be an executive or an advocate ombuds, and hence, whether the Patents Ombudsman is to be totally impartial or is to serve as an advocate for the designated constituency.

(3) Confidentiality

The American Bar Association also believes that confidentiality is an essential characteristic of ombuds that permits the process to work effectively. Confidentiality promotes disclosure from reluctant complainants, elicits candid discussions by all parties, and provides an increased level of protection against retaliation to or by any party.

Confidentiality must extend to all communications with the ombuds and all notes and records maintained by the ombuds in the performance of assigned duties. It begins when a communication is initiated with the ombuds to schedule an appointment or make a complaint or inquiry. Confidentiality may apply to the source of the communications and to the content of the communications. Individuals may not want the ombuds to disclose their identity, but may want the ombuds to act on the information presented. An ombuds should discuss confidentiality and any exceptions with individuals who communicate with the office.

In creating a confidentiality section in the Administrative Dispute Resolution Act² (ADRA) that is the most detailed of any federal or state ADR statute, Congress explicitly stated its intent to give parties in federally related ADR proceedings assurance that their dispute resolution communications would generally be immune from discovery. Congress went on to define these protections in detail. ADRA forbids neutrals from disclosing such communications, and also states that the neutrals shall not “be compelled to disclose” the communications. The existing statute also guarantees certain due process protections, including prior notice to parties in any case where protected data are sought, an opportunity for the parties to contest disclosure before a federal court, and a decision by the court reached under a balancing test based on specific statutory criteria. ADRA goes on to say that a dispute resolution communication which is between a neutral and a party and which may not be disclosed under the confidentiality provisions of ADRA shall also be exempt from disclosure under the Freedom of Information Act.

We encourage you to incorporate by reference in the charter establishing the Patents Ombudsman Pilot Program the confidentiality provisions of ADRA. ADRA represents a careful balance between open government, oversight, and confidentiality, in which Congress makes clear the standards and procedures that should govern whenever disputed issues of confidentiality arise in agency-related ADR, which includes the activities of an agency ombuds. ADRA’s stated intent is clear: to assure parties to ADR proceedings involving federal programs that communications they make in those proceedings will not later be used against them. Its language precluding voluntary and compulsory disclosure is explicit, its coverage broad, its exceptions narrowly drawn, and its procedures spelled out in detail.

Your Office is proposing to establish the Patents Ombudsman Pilot Program in response to concerns from patent applicants, attorneys, and agents that their applications have not proceeded in accordance established procedure. Because an ombuds works for the resolution of an individual issue and, where necessary, makes recommendations for the improvement of the general administration of the entity, establishing an ombuds is appropriate. To be credible and effective, the ABA believes that the Patents Ombudsman Pilot Program must be truly independent in structure, form, and appearance; must be impartial; and must promote and protect confidentiality consistent with the ADRA. We urge you to adopt the amendments outlined above, to ensure the effectiveness of the Patents Ombudsman.

Other Process Recommendations

In addition to the substantive comments discussed above, the ABA also recommends that you consider the following process oriented recommendations in the creation of your Pilot Program:

- (1) Set a specific period during which the pilot program will run (the “pilot period”);
- (2) During the pilot period, issue periodic updates to the user community detailing the progress of the pilot program; and
- (3) At the end of the pilot period, issue a report that sets forth: (A) the results achieved by the pilot program and (B) any recommendations for implementing such a program on a continuing basis.

² 5 U.S.C. § 574.

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Further, we propose that the USPTO allow the user community to comment and make recommendations on any implementation of a permanent program before its implementation, and to allow the user community sufficient time to provide real input on such proposed permanent program.

Thank you for considering the views of the ABA on these important matters. If you would like more information regarding the ABA's positions on these issues, please contact me at (202) 662-1765 or our senior legislative counsel for dispute resolution and administrative law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

A handwritten signature in black ink that reads "Thomas M. Susman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Thomas M. Susman

Enclosure

AMERICAN BAR ASSOCIATION

SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

SECTION OF BUSINESS LAW

SECTION OF DISPUTE RESOLUTION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association endorses the revised Standards for the Establishment and Operation of Ombuds Offices dated February, 2004.

STANDARDS¹ FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES

REVISED FEBRUARY, 2004

PREAMBLE

Ombuds² receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations.

Federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities have established ombuds offices, but with enormous variation in their duties and structures. Ombuds offices so established may be placed in several categories: A Legislative Ombuds is a part of the legislative branch of government and addresses issues raised by the general public or internally, usually concerning the actions or policies of government entities, individuals or contractors with respect to holding agencies accountable to the public. An Executive Ombuds may be located in either the public or private sector and receives complaints concerning actions and failures to act of the entity, its officials, employees and contractors; an Executive Ombuds may either work to hold the entity or one of its programs accountable or work with entity officials to improve the performance of a program. An Organizational Ombuds may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies. An Advocate Ombuds may be located in either the public or private sector and like the others evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombuds office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. These

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1. The ABA adopted a resolution in August, 2001, that supported “the greater use of ‘ombuds’ to receive, review, and resolve complaints involving public and private entities” and endorsed Standards for the Establishment and Operation of Ombuds Offices. These standards modify those Standards in four regards. First, they clarify the issue of notice in Paragraph F; secondly, they modify the limitations on the ombud’s authority; third, they provide for a new category of executive ombuds that is described in Paragraph H; and, fourth, they modify the definition of legislative ombuds and the standards applicable to them to make them conform to the new category of executive ombuds. The 2001 Standards, in turn, expanded on a 1969 ABA resolution to address independence, impartiality, and confidentiality as essential characteristics of ombuds who serve internal constituents, ombuds in the private sector, and ombuds who also serve as advocates for designated populations.
 2. The term ombuds in this report is intended to encompass all other forms of the word, such as ombudsperson, ombuds officer, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage others from using other terms.

standards were developed to provide advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

The essential characteristics of an ombuds are:

- independence
- impartiality in conducting inquiries and investigations, and
- confidentiality.

ESTABLISHMENT AND OPERATIONS

- A. An entity undertaking to establish an ombuds should do so pursuant to a legislative enactment or a publicly available written policy (the “charter”) which clearly sets forth the role and jurisdiction of the ombuds and which authorizes the ombuds to:
- (1) receive complaints and questions about alleged acts, omissions, improprieties, and systemic problems within the ombuds’s jurisdiction as defined in the charter establishing the office
 - (2) exercise discretion to accept or decline to act on a complaint or question
 - (3) act on the ombuds’s own initiative to address issues within the ombuds’s prescribed jurisdiction
 - (4) operate by fair and timely procedures to aid in the just resolution of a complaint or problem
 - (5) gather relevant information and require the full cooperation of the program over which the ombuds has jurisdiction
 - (6) resolve issues at the most appropriate level of the entity
 - (7) function by such means as:
 - (a) conducting an inquiry
 - (b) investigating and reporting findings
 - (c) developing, evaluating, and discussing options available to affected individuals
 - (d) facilitating, negotiating, and mediating

- (e) making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have the authority to act upon them
 - (f) identifying complaint patterns and trends
 - (g) educating
 - (h) issuing periodic reports, and
 - (i) advocating on behalf of affected individuals or groups when specifically authorized by the charter
- (8) initiate litigation to enforce or protect the authority of the office as defined by the charter, as otherwise provided by these standards, or as required by law.

QUALIFICATIONS

- B. An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombuds with relevant education and the periodic updating of the ombuds's qualifications.

INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY

- C. To ensure the effective operation of an ombuds, an entity should authorize the ombuds to operate consistently with the following essential characteristics. Entities that have established ombuds offices that lack appropriate safeguards to maintain these characteristics should take prompt steps to remedy any such deficiency.

- (1) Independence. The ombuds is and appears to be free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry.

In assessing whether an ombuds is independent in structure, function, and appearance, the following factors are important: whether anyone subject to the ombuds's jurisdiction or anyone directly responsible for a person under the ombuds's jurisdiction (a) can control or limit the ombuds's performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the budget or resources of the office.

- (2) Impartiality in Conducting Inquiries and Investigations. The ombuds conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the ombuds from developing an interest in securing changes that are deemed necessary as a result of the process, nor from otherwise being an advocate on behalf of a designated constituency. The ombuds may

become an advocate within the entity for change where the process demonstrates a need for it.

- (3) Confidentiality. An ombuds does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm. Records pertaining to a complaint, inquiry, or investigation are confidential and not subject to disclosure outside the ombuds's office. An ombuds does not reveal the identity of a complainant without that person's express consent. An ombuds may, however, at the ombuds's discretion disclose non-confidential information and may disclose confidential information so long as doing so does not reveal its source. An ombuds should discuss any exceptions to the ombuds's maintaining confidentiality with the source of the information.³

LIMITATIONS ON THE OMBUDS'S AUTHORITY

D. An ombuds should not, nor should an entity expect or authorize an ombuds to:

- (1) make, change or set aside a law, policy, or administrative decision
- (2) make binding decisions or determine rights
- (3) directly compel an entity or any person to implement the ombuds's recommendations
- (4) conduct an investigation that substitutes for administrative or judicial proceedings
- (5) accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent
- (6) address any issue arising under a collective bargaining agreement or which falls within the purview of any federal, state, or local labor or employment law, rule, or regulation, unless there is no collective bargaining representative and the employer specifically authorizes the ombuds to do so,⁴ or
- (7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.

3. A legislative ombuds should not be required to discuss confidentiality with government officials and employees when applying this paragraph to the extent that an applicable statute makes clear that such an individual may not withhold information from the ombuds and that such a person has no reasonable expectation of confidentiality with respect to anything that person provides to the ombuds.

4. Under these Standards, the employer may authorize an ombuds to address issues of labor or employment law only if the entity has expressly provided the ombuds with the confidentiality specified in Paragraph C(3).

REMOVAL FROM OFFICE

- E. The charter that establishes the office of the ombuds should also provide for the discipline or removal of the ombuds from office for good cause by means of a fair procedure.

NOTICE

- F. An ombuds is intended to supplement, not replace, formal procedures. Therefore:
- (1) An ombuds should provide the following information in a general and publicly available manner and inform people who contact the ombuds for help or advice that –
 - (a) the ombuds will not voluntarily disclose to anyone outside the ombuds office, including the entity in which the ombuds acts, any information the person provides in confidence or the person's identity unless necessary to address an imminent risk of serious harm or with the person's express consent
 - (b) important rights may be affected by when formal action is initiated and by whether notice is given to the entity
 - (c) communications to the ombuds may not constitute notice to the entity unless the ombuds communicates with representatives of the entity as described in Paragraph 2
 - (d) working with the ombuds may address the problem or concern effectively, but may not protect the rights of either the person contacting the office or the entity in which the ombuds operates
 - (e) the ombuds is not, and is not a substitute for, anyone's lawyer, representative or counselor, and
 - (f) the person may wish to consult a lawyer or other appropriate resource with respect to those rights.
 - (2) If the ombuds communicates⁵ with representatives of the entity concerning an allegation of a violation, then —
 - (a) a communication that reveals the facts of
 - (i) a specific allegation and the identity of the complainant or
 - (ii) allegations by multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful

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

should be regarded as providing notice to the entity of the alleged violation and the complainants should be advised that the ombuds communicated their allegations to the entity; but otherwise,

- (b) whether or not the communication constitutes notice to the entity is a question that should be determined by the facts of the communication.
- (3) If an ombuds functions in accordance with Paragraph C, “Independence, Impartiality, and Confidentiality,” of these standards, then —
- (a) no one, including the entity in which the ombuds operates, should deem the ombuds to be an agent of any person or entity, other than the office of the ombuds, for purposes of receiving notice of alleged violations, and
 - (b) communications made to the ombuds should not be imputed to anyone else, including the entity in which the ombuds acts unless the ombuds communicates with representatives of the entity in which case Paragraph 2 applies.

LEGISLATIVE OMBUDS

- G. A legislative ombuds is established by the legislature as part of the legislative branch who receives complaints from the general public or internally and addresses actions and failures to act of a government agency, official, public employee, or contractor. In addition to and in clarification of the standards contained in Paragraphs A-F, a legislative ombuds should:
- (1) be appointed by the legislative body or by the executive with confirmation by the legislative body⁶
 - (2) be authorized to work to hold agencies within the jurisdiction of the office accountable to the public and to assist in legislative oversight of those agencies
 - (3) be authorized to conduct independent and impartial investigations into matters within the prescribed jurisdiction of the office
 - (4) have the power to issue subpoenas for testimony and evidence with respect to investigating allegations within the jurisdiction of the office
 - (5) be authorized to issue public reports, and
 - (6) be authorized to advocate for change both within the entity and publicly.

6. This restates the 1969 ABA Resolution, which remains ABA policy, that a legislative ombuds should be “appoint[ed] by the legislative body or . . . by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority, such as two thirds.”

EXECUTIVE OMBUDS

- H. An executive ombuds may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions and failures to act of the entity, its officials, employees, and contractors. An executive ombuds may either work to hold the entity or specific programs accountable or work with officials to improve the performance of a program. In addition to and in clarification of the standards contained in Paragraphs A-F, an executive ombuds:
- (1) should be authorized to conduct investigations and inquiries
 - (2) should be authorized to issue reports on the results of the investigations and inquires, and
 - (3) if located in government, should not have general jurisdiction over more than one agency, but may have jurisdiction over a subject matter that involves multiple agencies.

ORGANIZATIONAL OMBUDS

- I. An organizational ombuds facilitates fair and equitable resolutions of concerns that arise within the entity. In addition to and in clarification of the standards contained in Paragraphs A-F, an organizational ombuds should:
- (1) be authorized to undertake inquiries and function by informal processes as specified by the charter
 - (2) be authorized to conduct independent and impartial inquiries into matters within the prescribed jurisdiction of the office
 - (3) be authorized to issue reports, and
 - (4) be authorized to advocate for change within the entity.

ADVOCATE OMBUDS

- J. An advocate ombuds serves as an advocate on behalf of a population that is designated in the charter. In addition to and in clarification of the standards described in Paragraphs A-F, an advocate ombuds should:
- (1) have a basic understanding of the nature and role of advocacy
 - (2) provide information, advice, and assistance to members of the constituency

- (3) evaluate the complainant's claim objectively and advocate for change or relief when the facts support the claim
- (4) be authorized to represent the interests of the designated population with respect to policies implemented or adopted by the establishing entity, government agencies, or other organizations as defined by the charter
- (5) be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant, and
- (6) the notice requirements of Paragraph F do not supersede or change the advocacy responsibilities of an Advocate Ombuds.

REPORT

The American Bar Association (ABA) adopted a resolution in 1969 recommending that state and local governments consider establishing ombudsmen who would be authorized to inquire into administrative action and to make public criticism. That policy also recommended that the statute or ordinance creating the ombudsmen contain twelve essential points. The ABA then adopted a resolution in 1971 recommending that the Federal government experiment with the establishment of ombudsmen for certain geographical areas, specific agencies, or for limited phases of Federal activities. In 2001, ABA the adopted a resolution supporting the greater use of "ombuds⁷" to receive, review, and resolve complaints involving public and private entities. That policy also endorsed Standards for the Establishment and Operations of Ombuds Offices (Standards). The 2001 Resolution and Standards broadened the ABA's existing policy to address ombuds who are appointed within government, academia, and the private sector, and who respond to complaints from individuals from within and outside the entity. The 2001 Resolution and the Standards also clarified that independence, impartiality in conducting inquiries and investigations, and confidentiality are essential characteristics of all ombuds. Ombuds must operate consistently with these essential characteristics to discharge the duties of the office effectively.

This Resolution recognizes that entities that create ombuds offices should adhere to the Standards for the Establishment and Operations of Ombuds Offices, dated February, 2004. The fundamental underlying premise of this resolution is that all ombuds must operate with certain basic authorities and essential characteristics. The effort here is to provide practical advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. These Standards modify the Standards for the Establishment and Operation of Ombuds Offices that were adopted by the ABA in August, 2001, in four regards. First, they clarify the issue of notice in Paragraph F; secondly, they modify the limitations on the ombud's authority in Paragraph D; third, they provide for a new category of executive ombuds that is described in Paragraph H; and, fourth, they modify the definition of legislative ombuds and the standards applicable to them to make them conform to the new category of executive ombuds.

⁷ The term ombuds in this report is intended to encompass all other forms of the word such as ombudsperson, ombuds officers, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage others from using other terms.

INTRODUCTION

Over the past three decades, and particularly recently, an extraordinary growth in the number and type of ombuds has taken place. Congress has established several ombuds in various programs. In addition to specific legislation concerning ombuds, the Administrative Dispute Resolution Act authorizes Federal agencies to use “ombuds.” As a protector of individual rights against the excesses of public and private bureaucracies, an ombuds receives complaints and questions from individuals concerning the functioning of an entity, works for the resolution of particular issues, and where necessary, makes recommendations for the improvement of the general administration of the entity. As an independent, impartial, and confidential complaint handler, an ombuds serves as an alternative means of dispute resolution – a means by which issues may be raised, considered, and resolved.

Federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities have established ombuds offices, but with enormous variation in their duties and structures. Ombuds offices so established may be placed in several categories. A Legislative Ombuds is established by the legislature as part of the legislative branch and addresses issues raised by the general public or internally, usually concerning the actions or policies of a government agency, official, public employee, or contractor. An Executive Ombuds may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions or failures to act of the entity, its officials, employees, or contractors; an Executive Ombuds may either work to hold the entity or specific programs accountable or work with officials to improve the performance of a program. An Organizational Ombuds may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies. An Advocate Ombuds may be located in either the public or private sector, and like the others evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombuds’ office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. The ABA endorsed Standards that were developed to provide advice and guidance on the structure and operation of ombuds offices to the end that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. The ABA action was based on the collaborative efforts of the Sections of Administrative Law and Regulatory Practice and of Dispute Resolution who worked together and appointed a steering committee consisting of representatives from the Coalition of Federal Ombudsmen, the National Association of State Ombudsman Programs, the International Ombudsman Institute (IOI subsequently withdrew), The Ombudsman Association, the United States Ombudsman Association, and the University and College Ombuds Association, as well as other experts in the field. The committee consulted with numerous ombuds from Federal, state, and local agencies, academic institutions, companies, and non-profit organizations. Further, it solicited, received, and considered comments from the international community of ombuds. Within the ABA, the Commission on Law and Aging, based on its experience with advocate ombuds, was instrumental in distinguishing among the types of ombuds. The Section of Business Law collaborated extensively with the committee to further the understanding and appreciation of the role of the ombuds in the business environment. Consultations with the Section of Labor and Employment Law resulted in refining the limitations on the ombuds’ jurisdiction.

The Standards for the Establishment and Operation of Ombuds Offices dated August 2001 have been widely distributed and utilized by Federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities. For example, Congress is currently considering legislation to reauthorize an ombuds at the U.S. Environmental Protection Agency and has relied upon the ABA's Standards in defining the position.

To ensure that ombuds can protect individual rights against the excesses of public and private bureaucracies, now, again, the Sections of Administrative Law and Regulatory Practice, Business Law, Dispute Resolution, and Individual Rights and Responsibilities have worked together and with the ombuds community and other ABA entities to develop a resolution to support amendments to the Standards for the Establishment and Operations of Ombuds Offices.

STANDARDS

Section A. Establishment and Operations

An ombuds is a person who is authorized to receive complaints or questions confidentially about alleged acts, omissions, improprieties, and broader, systemic problems within the ombuds's defined jurisdiction and to address, investigate, or otherwise examine these issues independently and impartially.

Importantly, the ombuds' jurisdiction – who complains and who or what are complained about – needs to be defined in advance, setting out the scope of the duties and authority. The ombuds's jurisdiction must be defined in an official act that establishes the office, which is appropriately called the "charter" in the Standards. The charter may be a legislative enactment or a publicly available written policy. The jurisdiction may be limited to a defined constituency or population. For example, a state ombuds may receive complaints or questions from any person, while a university student ombuds may receive complaints or questions only from students at that university, and a long-term care ombuds has jurisdiction only to resolve complaints initiated by or on behalf of residents receiving long-term care.

The ombuds determines whether to accept or to act on a particular complaint or question. The ombuds also has the discretion to initiate action without receiving a complaint or question. An ombuds may determine that the complaint is without merit. Or, an ombuds may receive a complaint or question on a specific topic and conduct an inquiry on a broader or different scope.

Appropriate subjects for an ombuds to review include allegations of unfairness, maladministration, abuse of power, abuse of discretion, discourteous behavior or incivility, inappropriate application of law or policy, inefficiency, decision unsupported by fact, and illegal or inappropriate behavior. It is essential that the ombuds operate by fair procedures to aid in the just resolution of the matter. Ombuds need access to all information relevant to a complaint or a question so that the review is fair and credible, and the charter should authorize access to all relevant information and require the full cooperation of the program over which the ombuds has jurisdiction. The entity must be responsible for protecting those seeking assistance from or providing information to the ombuds from personal, professional, or economic retaliation, loss of privacy, or loss of relationships.

An ombuds may make a formal or informal report of results and recommendations stemming from a review or investigation. If such a report is issued, the ombuds should generally consult with

an individual or group prior to issuing a report critical of that individual or group, and include their comments with the report. Moreover, the ombuds should communicate the outcome, conclusion or resolution of a complaint or an inquiry to the complainant and may also communicate with other concerned entities or individuals.

In addition, to ensure the office's accountability, an ombuds should issue and publish periodic reports summarizing the ombuds's findings and activities. This may include statistical information about the number of contacts with the ombuds, subjects that the ombuds addressed evaluation by complainants, etc. These reports may be done annually, biannually, or more frequently.

In receiving complaints or questions and examining problems, the ombuds may use a variety of dispute resolution and other techniques. These processes include: conducting an inquiry; investigating and reporting findings; developing, evaluating, and discussing the options which may be available for remedies or redress; facilitating, negotiating, and mediating; making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have authority to act on them; identifying complaint patterns and trends; and educating.

As necessary, the ombuds may advocate on behalf of affected individuals or groups when authorized by the charter and the situation warrants that action. An ombuds may initiate litigation to enforce or protect the authority of the office. For example, if an ombuds issues a subpoena and the subpoena is ignored, the ombuds should be able to initiate litigation to compel a response. In addition, an ombuds may initiate litigation as otherwise provided by these standards or as required by law. For example, an advocate ombuds should be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant.

An ombuds uses the powers of reason and persuasion to help resolve matters. The goal of the ombuds's efforts is to provide a path to fairness and justice. Therefore, the ombuds' quest is to seek the fair and just resolution of the matter.

Section B. Qualifications

An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombuds with relevant education and the periodic updating of the ombuds's qualifications.

Section C. The Essential Characteristics

The original 1969 resolution contained twelve essentials for the ombuds described in it. These have been distilled and expanded in the Standards. The core qualities are independence, impartiality in conducting inquiries and investigations, and confidentiality. Without them, an ombuds cannot discharge the duties of the office effectively. The Standards therefore provide that an entity should authorize an ombuds it establishes to operate consistently with these essential characteristics to ensure the effective operation of the duties of the office. The Standards also recognize, however, that some entities may have already established offices that lack appropriate safeguards to comply fully with the characteristics. The Standards then provide that such entities should take prompt steps to remedy any such deficiency.

1. Independence in structure, function, and appearance

To be credible and effective, the office of the ombuds is independent in its structure, function, and appearance. Independence means that the ombuds is free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry. In assessing whether an ombuds is independent, the following factors are important: whether anyone subject to the ombuds's jurisdiction or anyone directly responsible for a person under the ombuds's jurisdiction (a) can control or limit the ombuds's performance of duties, or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the office's budget or resources.

Historically, ombuds were created in parliamentary systems and were established in the constitution or by statute, appointed by the legislative body, and had a guarantee of independence from the control of any other officer, except for responsibility to the legislative body. This structure remains a model for ensuring independence for Legislative Ombuds, and a number of states have followed it. In more recent times, however, Executive Ombuds have been created by public officials without legislation, by regulation or decree, and by private entities. Ensuring the independence of the ombuds is equally important in these instances, but will require other measures.⁸

Great care has to be exercised in establishing the ombuds structure to ensure that the independence described in the resolution is, in fact, achieved. Choosing which of these approaches are appropriate will depend on the environment. The instrument used to establish independence should be the strongest available and should guarantee the independence of the ombuds from control by any other person.

The twelve essential characteristics of the 1969 ABA Resolution continue to serve as the model for an ombuds reporting to the legislative branch of government who is authorized to investigate administrative action, help provide legislative oversight, and offer criticism of agencies from an external perspective. While there are a number of potential avenues of achieving independence, experience on the state and local level has demonstrated rather consistently that unless

⁸ In the United States since the late 1960s, a number of other ways have been developed to ensure independence. Examples of approaches that contribute to an ombuds's independence include: establishment of the office through a formal act of a legislature or official governing body of an organization; establishment outside the entity over which the ombuds has jurisdiction; a direct reporting relationship to a legislative body, the official governing body of an organization or the chief executive; designation as a neutral who is unaligned and objective; a broadly defined jurisdiction not limited to one part of the entity or one subject matter; appointment or removal of the ombuds free of influence from potential subjects of a complaint or inquiry; a set term of office; no reporting relationship to someone with assigned duties that conflict with the ombuds's role; no assignment of duties other than that of the ombuds function; specifically allocated budget and sufficient resources to perform the function; freedom to appoint, direct, and remove staff; sufficient stature in the organization to be taken seriously by senior officials; placement in an organization at the highest possible level and at least above the heads of units likely to generate the most complaints; discretion to initiate and pursue complaints and inquiries; access to and resources for independent legal advice and counsel; prohibition of disciplinary actions against the ombuds for performing the duties of the office; removal only for cause; provision of an employment contract that the ombuds will receive a significant severance provision if terminated without good cause.

there is a structural independence for these ombuds akin to the 1969 ABA Resolution that independence will not be accomplished and the office will not be able to function as envisioned in this resolution and the accompanying standards.

Structuring independence for ombuds who serve inside organizations require similar care. These elements should be in the charter. The ombuds position should be explicitly defined and established as a matter of organizational policy, authorized at the highest levels of the organization; the ombuds should have access to the chief executive officer, senior officers and the oversight body or board of directors of the organization; the ombuds should also have access to all information within the organization, except as restricted by law; and the ombuds should have access to resources for independent legal advice and counsel.

The Standards recognize that at this time there are ombuds who have not achieved this goal. The Standards urge and anticipate that these variations will be eliminated over time.

2. Impartiality in conducting inquiries and investigations

The ombuds' structural independence is the foundation upon which the ombuds' impartiality is built. If the ombuds is independent from line management and does not have administrative or other obligations or functions, the ombuds can act in an impartial manner.

Acting in an impartial manner, as a threshold matter, means that the ombuds is free from initial bias and conflicts of interest in conducting inquiries and investigations. Acting in an impartial manner also requires that the ombuds be authorized to gather facts from relevant sources and apply relevant policies, guidelines, and laws, considering the rights and interests of all affected parties within the jurisdiction, to identify appropriate actions to address or resolve the issue.

The ombuds conducts inquiries and investigations in an impartial manner. An ombuds may determine that a complaint is without merit and close the inquiry or investigation without further action. If the ombuds finds that the complaint has merit, the ombuds makes recommendations to the entity and/or seeks resolution for a fair outcome. Impartiality does not, however, preclude the ombuds from developing an interest in securing the changes that are deemed necessary where the process demonstrates a need for change nor from otherwise being an advocate on behalf of a designated constituency. The ombuds therefore has the authority to become an advocate for change where the results of the inquiry or investigation demonstrate the need for such change. For example, when an ombuds identifies a systemic problem, it would be appropriate for the ombuds to advocate for changes to correct the problem. An advocate ombuds may initiate action and therefore serve as an advocate on behalf of a designated population with respect to a broad range of issues and on specific matters when the individual or group is found to be aggrieved. But, when determining the facts, the ombuds must act impartially.

3. Confidentiality

Confidentiality is an essential characteristic of ombuds that permits the process to work effectively. Confidentiality promotes disclosure from reluctant complainants, elicits candid discussions by all parties, and provides an increased level of protection against retaliation to or by any party. Confidentiality is a further factor that distinguishes ombuds from others who receive and

consider complaints such as elected officials, human resource personnel, government officials, and ethics officers.

Confidentiality extends to all communications with the ombuds and to all notes and records maintained by the ombuds in the performance of assigned duties. It begins when a communication is initiated with the ombuds to schedule an appointment or make a complaint or inquiry. Confidentiality may apply to the source of the communications and to the content of the communications. Individuals may not want the ombuds to disclose their identity but may want the ombuds to act on the information presented. Therefore, an ombuds does not reveal the identity of a complainant without that person's consent. The ombuds may, however, disclose confidential information so long as doing so does not compromise the identity of the person who supplied it. It should be emphasized that the decision whether or not to disclose this information belongs to the ombuds, and it would not be appropriate for anyone to demand that the ombuds disclose such information, except as required by statute. To the extent that an ombuds may not maintain confidentiality, the ombuds should discuss those exceptions with individuals who communicate with the office.

The authorizing entity should allow the ombuds to provide confidentiality of the identity of persons who communicate with the ombuds and of information provided in confidence. The authorizing entity should not seek information relating to the identity of complainants nor seek access to the ombuds's notes and records.

Providing for confidentiality and protection from subpoena in a statute is particularly important because, where statutes have not provided confidentiality, state courts have not consistently recognized an ombuds privilege nor granted protective orders to preserve the confidentiality of communication made to ombuds. One Federal district court, *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987), recognized a limited privilege under Federal law for an ombuds with a state statutory privilege. The only Federal circuit court to have addressed the issue, *Carman v. McDonnell Douglas Corp.*, 114 F. 3d 790 (8th Cir. 1997), failed to recognize an ombuds privilege.

Short of explicit statutory authority, ombuds offices should adopt written policies that provide the fullest confidentiality within the law, and the entities that establish ombuds offices should expressly provide the ombuds with fullest confidentiality specified in the standards. These policies should be publicly available, broadly disseminated, and widely publicized. Several existing model ombuds acts and policies of ombuds organizations address confidentiality.

An ombuds will rarely, if ever, be privy to something that no one else knows. Therefore, providing confidentiality protection to the ombuds allows the ombuds to perform assigned duties while at the same time, society continues to have access to the underlying facts. As evidenced by the statutes and policies that have been developed, there may be instances in which other, competing societal interests dictate that the ombuds must disclose some information. If an individual speaks about intending harm to himself or herself or others, an entity may require an ombuds to disclose this information. Moreover, an ombuds may be compelled by protective service laws or professional reporting requirements to report suspected abuse.

Section D. Limitations on the ombuds' authority

An ombuds works outside of line management structures and has no direct power to compel any decision. The office is established by the charter with the stature to engender trust and to help

resolve complaints at the most appropriate level of the entity. To ensure the ombuds's independence, impartiality, and confidentiality, it is necessary to establish certain limitations on the ombuds's authority.

An ombuds should not, nor should an entity expect or authorize an ombuds to make, change, or set aside a law, policy or administrative/managerial decision, nor to directly compel an entity or any person to make those changes. While an ombuds may expedite and facilitate the resolution of a complaint and recommend individual and systemic changes, an ombuds cannot compel an entity to implement the recommendations.

It is essential that an ombuds operate by fair procedures which means that the actions taken will likely vary with the nature of the concern, and that care must be taken to protect the rights of those who may be affected by the actions of an ombuds. Furthermore, since due process rights could well be implicated, it would not be appropriate for the ombuds's review to serve as the final determination for any disciplinary activity or civil action, nor as a determination of a violation of law or policy. An ombuds's inquiry or investigation does not substitute for an administrative or judicial proceeding. In an administrative or judicial proceeding, the deciding official should not consider the ombuds's review or recommendations to be controlling. Rather, the deciding official must conduct a de novo examination of the matter.

Moreover, it would not be appropriate for the ombuds to act as an appellate forum when a complainant is dissatisfied with the results in a formal adjudicatory or administrative proceeding. Thus, an ombuds should not take up a specific issue that is pending in a legal forum without the concurrence of the parties and the presiding officer. It may, however, be fully appropriate for an ombuds to inquire into matters that are related to a controversy that is in litigation so long as they are not the subject of the suit.

Further, an ombuds should not address, nor should an entity expect or authorize an ombuds to address, any issue that is the subject of a collective bargaining agreement or that arises under labor or employment law. Even where an employee is not covered by a collective bargaining agreement, the involvement of an ombuds in matters that fall within the purview of labor or employment laws raises sensitive issues that may implicate the rights and liabilities of the parties under those laws, such as the issue of notice mentioned in Section F of the Standards. Accordingly, the Standards contemplate that an employer, in establishing an ombuds office, should consider its overall policies for maintaining compliance with those laws, and determine in that light whether to authorize the ombuds to address those matters. The entity should do so only if the ombuds office meets the three essential characteristics of Independence, Impartiality, and Confidentiality. This recommendation is in no way intended to suggest, however, that a policy of authorizing an ombuds to address labor or employment-related matters should be a suspect or disfavored practice. Involvement in such matters is a role typically performed by Organizational Ombuds, and the growing reliance on ombuds at institutions across the country is largely attributable to the broad satisfaction with ombuds' fulfillment of that role on the part of both management and the affected employees. Thus, the language in the Standards indicating that an employer should specifically authorize an ombuds to address labor or employment related matters does not require any detailed or ponderous recitals. Rather, it should be read as simply a particularized application of the generalized expectation in Section A of the Standards that the jurisdiction of an ombuds office should be identified in its charter.

Finally, an ombuds should not act in a manner inconsistent with the grant and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.

Section E. Removal from office

Entities which establish ombuds offices need to ensure their accountability. Therefore, the charter that establishes the office of ombuds should also provide for the discipline or removal of the ombuds for good cause by means of a fair procedure.

Section F. Notice

When meeting with an ombuds, people discuss allegations of unfairness, maladministration, abuse of power, and other sensitive subjects. They may fear personal, professional, or economic retaliation, loss of privacy, and loss of relationships. Faced with sexual or racial harassment, for example, many will quit, get sick, or suffer in silence. People often need help in developing ways to report or act so that these matters will be considered and resolved. Because an ombuds is intended to supplement, not replace, formal procedures, the Standards recognize that the person contacting the ombuds for assistance needs to understand the difference between working with an ombuds and seeking formal redress. It may be that the ombuds informs people coming to the ombuds office of the issues identified in the Standards; it may be that the ombuds office has a brochure or web page that explains the functioning of the office, working with the ombuds office, and the items listed in Section F(1); or, it may be that the entity itself includes similar information in a manual, other information provided to affected people, or as part of the charter for the ombuds office. But the standards recognize that responsibility needs to be allocated in a way that ensures the communication will actually be made in the relevant circumstances, so it places it at the point of contact with the individual: the ombuds office.

Communications must be protected if people are to be willing to visit and speak candidly with the ombuds. As noted above, some ombuds have confidentiality protected by law. Under these Standards, entities that establish an ombuds should authorize the ombuds to operate with confidentiality and independence, and an ombuds should inform anyone who contacts the ombuds offices, that the ombuds will not voluntarily disclose to anyone outside the ombuds office, including the entity in which the ombuds operates, any information the person provides in confidence or the person's identity, unless necessary to address the imminent risk of serious harm or with the person's express consent. The standards recognize, however, that in some limited circumstances an ombuds may be compelled by a court to divulge confidential information.

The standards are designed to make sure that a person coming to the ombuds will be aware that legal rights might well be at stake and that the person may have to take action beyond working with the ombuds to protect those rights. This is to ensure that the person approaching the ombuds office to redress some particular problem understands that protecting rights may depend on just when formal action is initiated and whether notice is given to the entity. Working with the ombuds does not change that requirement or the specific time when the action must be started. In addition, the ombuds should advise persons that communications to the ombuds may not constitute notice to the entity unless the ombuds contacts the entity.

Further, the ombuds should describe to visitors that working with the ombuds is an informal process that may well address the person's concern effectively, but doing so may not protect that

person's legal right or indeed, those of the entity for whom the ombuds functions. Moreover, the ombuds needs to make clear that the ombuds is not serving as anyone's lawyer, representative or counselor — not for the complainant nor for the entity. Thus, the ombuds is not the person's lawyer or labor representative nor a human resources or social work counselor. So that the person is not lulled into putting off checking what legal rights may be affected, the Standards provide that the ombuds should inform the person that he or she may wish to consult a lawyer or other appropriate resource with respect to preserving and protecting those rights. The standards do not contemplate the ombuds providing any sort of legal advice as to what the legal rights and procedures are, only that they may exist and that the person coming to the office may wish to consult with a lawyer or other resource to determine them.

If an ombuds functions in accordance with these Standards by operating with confidentiality and independence, the details of what is told to the ombuds will not be told to anyone in the entity itself, and hence it would not be appropriate or accurate to impute it to the entity — that is, holding the entity responsible for knowing something it cannot know. Further, the Standards provide that the ombuds should not be deemed an agent of any person or entity, other than the Office of the Ombuds, for purposes of receiving notice of alleged violations. Rather, the ombuds would be deemed independent of the entity itself for these purposes. Thus, it would not be appropriate for the ombuds to accept notice on the entity's behalf with respect to any alleged grievance.

When an ombuds works to address an issue, he or she may need to work with those in the entity. An ombuds may therefore communicate with representatives of an entity which, under the standards, the ombuds has the discretion but not the requirement to do. Any such communication would be subject to the confidentiality provisions of Paragraph C(3). If the communication reveals the facts of a specific allegation and the identity of the complainant, then the entity should be regarded as having notice of the alleged violation. Similarly, if the ombuds communicates allegations of multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful then here too the entity should be regarded as having notice of the alleged violation since the multiple complainants makes up for the lack of specific identity. In these cases, the complainants should be informed that the ombuds has communicated their allegations to the entity so they may decide whether or not to take formal action. In both instances, the information provided would need to be sufficiently detailed that the entity could conduct its own investigation with respect to the allegations. Furthermore, the ombuds may provide enough information — even though confidentiality is maintained — that the entity in fact is on notice that a potential offense has occurred. The Standards provide, therefore, that when an ombuds communicates with representatives of the entity concerning an allegation by an individual, whether or not that communication constitutes “notice” to the entity is a question that should be determined by the facts of the communication.

Thus, the Standards draw a clear distinction between communications to an ombuds when the ombuds makes no further communication to the entity and those situations where the ombuds communicates with agents of the entity. In the former case, the Standards would provide that it is not appropriate to impute the communication to the entity in the form of notice since it has no way of learning what was communicated. But in the second instance, whether or not the entity has notice depends on the facts relayed and the applicable law.

Section G. Legislative Ombuds

A Legislative Ombuds is established by the legislature as part of the legislative branch and receives complaints from the general public or internally and addresses actions and failures to act of a government agency, official, public employee, or contractor. For Federal, state, and local governments that want to create a Legislative ombuds who would be authorized to address, investigate or inquire into administrative action and to criticize agencies, officials, and public employees, the ABA's 1969 policy continue to serve as a model.⁹ A Legislative Ombuds should be appointed by the legislative body or by the executive with confirmation by the legislative body.¹⁰ A Legislative Ombuds should be authorized to work to hold agencies within the jurisdiction of the office accountable to the public and to assist in legislative oversight of those agencies. A Legislative Ombuds may conduct inquiries or investigations and suggest modifications in policies or procedures. To ensure access to all pertinent facts, a Legislative Ombuds should be granted subpoena power for testimony and evidence relevant to an investigation. In addition, a Legislative Ombuds should be authorized to issues public reports and to advocate for change both within the entity and publicly.

Section H. Executive Ombuds

An Executive Ombuds may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions and failures to act of the entity, its officials, employees, and contractors. An Executive Ombuds may either work to hold the entity or specific programs accountable or work with officials to improve the performance of a program. In addition, an Executive Ombuds should be authorized to conduct investigations and inquiries. An Executive Ombuds should also be authorized to require the full cooperation of the program over which the ombuds has jurisdiction, including, where appropriate, subpoena power. It may not be appropriate, however, to authorize subpoena power where an Executive Ombuds has been established to receive complaints from regulated entities with regard to an agency's regulatory or enforcement activities. An Executive Ombuds should be authorized to issue reports on the results of the investigations and inquiries. Finally, if located in government, an Executive Ombuds should

⁹ The twelve essential characteristics that were identified in the original ABA resolution continue to have vitality and remain ABA policy. They are: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority of the legislative body, such as two thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restrictions of civil service and classifications acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; and, (12) immunity of the ombudsman and his staff from civil liability on account of official action.

¹⁰ This restates the 1969 ABA Resolution, which remains ABA policy, that a legislative ombuds should be "appoint[ed] by the legislative body or . . . by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority, such as two thirds."

not have general jurisdiction over more than one agency, but may have jurisdiction over a subject matter that involves multiple agencies. For example, an Executive Ombuds may oversee a variety of governmental agencies having jurisdiction over child welfare, crime victims, or mental health issues.

Section I. Organizational Ombuds

An Organizational Ombuds ordinarily addresses problems presented by members, employees or contractors of an entity concerning its actions or policies. An Organizational Ombuds may undertake inquiries and advocate for modifications in policies or procedures.

Section J. Advocate Ombuds

The Advocate Ombuds may be located in either the public or private sectors, and like the Legislative and Organizational Ombuds, also evaluates claims objectively. However, unlike other ombuds, the Advocate Ombuds is authorized or required to advocate on behalf of individuals or groups found to be aggrieved. Because of the unique role, the Advocate Ombuds must have a basic understanding of the nature and role of advocacy. In addition, the Advocate Ombuds should provide information, advice, and assistance to members of the population identified in the law or publicly available written policy. Further, the Advocate Ombuds represents the interests of a designated population with respect to policies implemented or adopted by the establishing entity and government agencies. The notice requirements of Paragraph F do not supersede or change the advocacy responsibilities of an Advocate Ombuds.

CONCLUSION

Government, academia, and the private sector are answering demands for fairness and responsiveness by establishing ombuds. Ombuds receive complaints and questions concerning the administration of the establishing entity. However, the basic authorities of these persons called ombuds and the independence, impartiality, and confidentiality with which they operate vary markedly. An ombuds works for the resolution of a particular issue, and where necessary, makes recommendations for the improvement of the general administration of the entity. To be credible and effective, the office of the ombuds must be independent in structure, form, and appearance. The ombuds's structural independence is the foundation upon which the ombuds's impartiality is built. The ombuds must conduct investigations and inquiries in an impartial manner, free from initial bias and conflicts of interest. Confidentiality is a widely accepted characteristic of ombuds, which helps ombuds perform the functions of the office. Without these Standards, individuals may be reluctant to seek the ombuds's assistance because of fear of personal, professional, or economic retaliation, loss of privacy, and loss of relationships. This Resolution and the Standards for the Establishment and Operation of Ombuds Offices are appropriate now to ensure that ombuds can protect individual rights against the excesses of public and private bureaucracies. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

Respectfully submitted,

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